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IN THE SUPREME COURT OF FLORIDA

TERRELL M. JOHNSON,

Appellant,

v. CASE NO. 74,662

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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Appellee does not accept Appellant's Statement of the Case and Facts and submits the following[1]:

STATEMENT OF THE CASE

Johnson was indicted on two counts of first degree murder on May 23, 1980 (R 625)[2]. On September 26, 1980, he was convicted of first degree murder on one count and second degree murder on the other (R 738-40). The jury recommended a death sentence for the first degree murder (R 744). Johnson was sentenced to death on October 3, 1980 (R 804-08). The trial court found five aggravating factors:

> (1) under sentence of imprisonment;
>
> (2) prior violent felony;
>
> (3) during commission of robbery/pecuniary gain;
>
> (4) avoid arrest;
>
> (5) cold, calculated and premeditated.

The trial court considered the mitigating circumstances as follows:

> (1) the defendant has a significant prior history of criminal activity;
>
> (2) although the defendant told one or more of the officers he was angry with the victim bar owner he was not under the

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[1] Rule of Appellate Procedure 9.210(b)(3) provides that the statement of the case and facts shall contain references to the appropriate pages of the record or transcript. Appellee's Statement of the Case and Facts contains few record cites. His statement contains argument which should be within the appropriate issue. The individual issues contain facts which should be contained in the Statement of Case and Facts according to the Committee Note to Rule 9.210 which encourages parties to place every fact utilized in the argument section of the brief in the statement of facts. Rather than moving to strike any portion of the Initial Brief which would only cause further delay, Appellee has provided the court with a comprehensive statement of the facts.

[2] Record cites correspond to those used by Appellant: "R" for record on direct appeal and "M" for record on appeal of motion to vacate.

influence of extreme mental or emotional disturbance;

(3) the victim was not a participant;

(4) the defendant was the sole perpetrator;

(5) the defendant did not act under extreme duress;

(6) although the defendant told one of the officers he "had been drinking" at the time of the murder, and he had been diagnosed by a psychologist as an "impulsive personality with depressive features" (a personality disorder) with a secondary diagnosis of alcoholism and drug abuse, the evidence affirmatively showed that the defendant had capacity to appreciate the criminality of his conduct. The evidence did not show that his capacity to conform his conduct to the requirements of law was substantially impaired;

(7) the defendant was 33 years of age at the time of the murder;

(8) other evidence relating to the character of the defendant was offered as a mitigating circumstance: his traumatic childhood; his periodic separation from and neglect by his alcoholic parents; the somewhat recent loss of his mother and brother over which he had feelings of guilt and depression; his recognition of need for treatment; his completion of a treatment program and return for aftercare; his gentle, considerate nature when not drinking or when he was not reacting to being "put down" by other persons.

The trial court found that the aggravating circumstances outweighed the matters offered as a mitigating circumstance in (8) above (R 804-07).

The case was first appealed to the Supreme Court of Florida in 1980. The court relinquished jurisdiction to the trial court to reconstruct the record because of omissions, misspellings and inaccuracies in either the recording or the transcription of the trial. The court reporter revisited her

stenographic notes and met with the trial judge and trial counsel. The corrected and supplemented transcript was the subject of extensive hearings into its accuracy and reliability. At the evidentiary hearing the trial judge, the court reporter and both trial attorneys testified to the substantial accuracy and completeness of the record in all material regards. The Supreme Court of Florida relied upon the corrected transcripts in making its review of the record. On November 23, 1983, the Supreme Court of Florida affirmed the convictions and sentences. Johnson v. State, 442 So.2d 193 (Fla. 1983)[3]. The United State Supreme Court denied certiorari. Johnson v. Florida, 446 U.S. 963 (1984). On May 31, 1985, the Governor of Florida denied clemency and signed a death warrant. Execution was scheduled for June 24, 1985. On June 19, 1985, a stay of execution was issued in the Circuit Court for the Ninth Judicial Circuit, Orange County, Florida (M 454-56). Judge Komanski conducted an evidentiary hearing on the motion to vacate on December 22, 1986 (M 1-332). Post conviction relief was denied by an order filed June 12, 1989 (M 1761-70)[4]. Rehearing was denied July 25, 1989 (M 1782). This appeal follows.

STATEMENT OF THE FACTS

The factual findings of this court on direct appeal are as follows:

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[3] The issues raised on direct appeal were: (1) transcript was not reliable or complete; (2) the trial court erred in admitting the results of a ballistics test; (3) the trial court erred in excusing two jurors for cause; (4) the trial court erred in failing to dismiss the indictment because the state violated the Interstate Agreement on Detainers; (5) the trial court erred by admitting involuntary statements; (6) the trial court erred in finding the murder was cold, calculated and premeditated and was committed to avoid arrest; (7) the trial court erred in applying the death penalty as if it was mandatory; (8) the trial court erred in finding prior violent felony and in instructing the jury attempted murder and attempted robbery were violent felonies; (9) the trial court erred in allowing the jury to consider nonstatutory aggravating circumstances; (10) the Florida capital sentencing statute is unconstitutional.

[4] A copy of the order denying post conviction relief is attached.

> On December 4, 1979, Terrell Johnson went to Lola's Tavern in Orange County to redeem a pistol he had pawned to James Dodson, the bartender/owner of the tavern. Although Dodson had given Johnson fifty dollars when the gun was pawned, he demanded one hundred dollars to return it. Before paying for the gun, Johnson asked to be allowed to test fire it and took the gun to an open field across the road from the bar where he fired several shots. While returning to the bar, Johnson, irate at what he considered to be Dodson's unreasonable demand, decided to rob the tavern. Johnson told police that he took Dodson and a customer, Charles Himes, into the men's room at the end of the bar, intending to tie them up with electrical cord. The customer lunged at Johnson and he began firing wildly, shooting both men. He then returned to the bar and cleaned out the cash drawer, also taking Dodson's gun, which was kept under the bar. As he was wiping the bar surfaces to remove fingerprints, Johnson heard movement from the back room and returned to find the customer still alive. Johnson shot him again, not, according to Johnson, "to see him dead," but to "stop his suffering."
>
> Several weeks later Johnson was arrested in Oregon for an unrelated crime. He still had Dodson's gun. He had sold the murder weapon to an acquaintance in Florida and thus was linked to the Florida murders based on information from the National Crime Information Center.

Johnson v. State, 442 So.2d 193, 194-95 (Fla. 1983).

On December 4, Officer Wedeking, Florida Highway Patrol trooper, investigated an accident involving Johnson at about 6:15 p.m. (R 113). He could smell an odor of alcohol and Johnson appeared to be disoriented but not under the influence of alcohol (R 114). He had a minor injury and seemed like he was in minor shock, but it was nothing that required hospitalization (R 114). Johnson was about 80 miles from Orlando (R 115). Johnson told the officer he had a couple drinks in Leesburg (R 115). He seemed upset about the

truck which was borrowed (R 116). Johnson's being dazed was not unusual for this type accident situation (R 116). Nancy Porter went out with Johnson the night before the murders. Johnson was talking about going to get a gun and selling it to Ollie Bracken (R 121). She went to pick him up the next night after he had an accident with another vehicle (R 122). When she got there, Johnson was asleep in his truck. He did not appear intoxicated. He said he was sick because he had eaten something at the restaurant and had felt sick. He said he threw up (R 125). The man who repaired the truck said Johnson was not drunk when the truck was towed in (R 154). The next morning Johnson sold the gun to Mr. Bracken (R 123).

Johnson was arrested in Oregon around 2:00 a.m. on January 6[5] (R 196). He was given his Miranda[6] rights at least three times (R 198, Exhibits 19A, 19B, 19C on direct appeal). On January 7 at about 1:36 p.m., Johnson said he wanted to give a detailed statement (R 200, 209, 210-212). After he had test fired the weapon several times, he was upset over being charged more money than he had pawned the gun for, so he decided, since he still had the gun in his possession, he was going to rob the bar (R 210). He took the two victims into the men's restroom where he forced them to lay down on their stomachs (R 211). The patron got up and he decided to start shooting. He then went out into the bar area and wiped down what he thought he had touched in order to remove fingerprints (R 211). He took the cash drawer with $100 and a .38 pistol. He went to Hollywood, Florida and sold the murder weapon (a .357 magnum) to the father of Richard Bracken (R 212). He also gave a taped statement and a written statement (R 213-15, State Exhibit 16 on direct

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[5] Johnson was arrested for armed robbery and attempted murder for which he was convicted. (Index to Exhibits on direct appeal, State Exhibit #1.)

[6] Miranda v. Arizona, 384 U.S. 436 (1966).

appeal). In the written statement, Johnson said "I was still mad and decided to rob the bar owner". He also said he did remember more details because he was "a little drunk" (Exhibit 16). On January 8 at about 2:45 p.m. Johnson gave another handwritten statement (R 220-23, Exhibit 17). Johnson prepared and explained a diagram of the crime scene (R 227-29, Exhibit 18). On February 7 Johnson discussed the murders with a law enforcement officer while en route to a different jail (R 256-59). Johnson told this officer that "after shooting the customer, he deliberated a moment, and then shot the bartender who was lying on the floor" (R 259). He returned to the bar knowing he had handled several beer cans earlier, with the intention of removing whatever fingerprints may have been there (R 259).

Trial was set for August 12, 1980 (R 626). The prosecutor wrote defense counsel, Gerald Jones, to advise he would oppose any continuance except for the most compelling reasons (R 636). The prosecutor later moved to reset the August 12 trial date because he would be out of the jurisdiction until August 20 (R 639). The court set the motion for hearing (R 638) and granted the motion to reset the trial after hearing argument (R 641). At the evidentiary hearing, trial counsel said he agreed to having the trial reset to September 23, 1980, so he and the state attorney could go to Oregon (M 255-56). Counsel conducted depositions of the law enforcement officers in Oregon who took Johnson's statements on August 20 (R 551-62, 563-86, 587-609). The motions to suppress were filed September 18, 1980 (R 696-97, 698-99). The motions were heard September 22 (R 338-425).

Dr. Kessler, the medical examiner for Orange and Osceola counties at the time, testified that he had performed 1800 autopsies and had been involved in about 4,000 (R 36-37). He was certified in the American Medical Association and board eligible on the American Board of Pathology and Board of Forensic

Pathology (R 37-38). There are approximately 100 pathologist in the country who could be certified by the Boards (R 38). Dr. Kessler had been involved in approximately 1,000 cases where the cause of death was gunshot wounds (R 38). Dr. Kessler was qualified as an expert in pathology and permitted to express his opinion on the cause of death and any other matters within his competency (R 39). Dr. Kessler performed autopsies on the two victims (R 40). Mr. Dodson had two gunshot wounds: one that entered and exited the head after passing through the cranial cavity and destroying the underlying brain, and the other then went through the arm (R 42). Dr. Kessler explained that stippling is produced when a gun is fired because portions of gun powder which are not completely burned come out the muzzle and strike the skin. The pieces of unburned powder cause little abrasions or stippling. The further you get from the muzzle, the wider the array of stippling. If you get far away the stippling disappears, usually six, seven inches depending on the gun (R 44). In the gunshot wound to Dodson's head, which was a 3/8 inch wound, since it was a close gunshot wound, it had a 1/16 inch black margin and purple red tattooing or stippling for up to 1/2 inch around it (R 44). Mr. Himes sustained eight wounds (R 45). There were several wounds that could have been fatal. There was no stippling on the fatal wound that went through the chest (R 46). There were some streaks associated with stippling on the cheek wound (R 47). There was purple red stippling for about 1 1/2 inches around the ear wound (R 47). The wound in the mastoid area had stippling around it for about an inch (R 48) Four bullets were recovered during the autopsies and two were found at the scene (R 56, 69-105, 184). There were bullet holes in he wall opposite the doorway to the men's room and in the door to the restroom (R 69, 91, 96, 105). The bullets were identified as having been fired from a pistol Johnson sold to Ollie Bracken (R 184, 210-212). When Johnson was arrested in

Oregon, he had the pistol he had taken from Dodson (Exhibits 4 and 5 on direct appeal).

Deputy Park, Orange County Sheriff evidence technician, processed the crime scene and took photographs (R 67-68). He retrieved bullets from the bathroom and obtained bullets and other items from the medical examiner's office, swabbed the bathroom walls for gunshot residue and took possession of a Stern Ruger .357 revolver (R 70-77). He recovered a box of .38 caliber bullets from under the bar (R 97). He performed a test with the Ruger .357 in which he fired four bullets into a piece of paper backed by a piece of cardboard to determine the size of powder burns, also called stippling (R 99). He pressed the barrel of the gun against the cardboard and fired, then fired from one inch, then from two inches (R 99). Defense counsel objected to the admissibility since there was no showing of relevancy (R 100). Counsel also objected that the witness was not qualified to render an opinion (R 102). The court overruled the objection on relevancy and said the weight the jury attaches to the exhibit will be for the jury (R 102). Since there had been some testimony about stippling wounds on the deceased, the court thought the evidence could come in, but cautioned the prosecutor to be careful to follow the evidence and draw the appropriate inference from it (R 102). When the state attorney asked Park what happened to the stippling as he moved further from the paper, defense counsel objected to the officer testifying unless he was qualified as an expert or as having specialized knowledge (R 103-04). The court sustained the objection and said Park could testify as to what he did but could not testify what would happen since he was not called as a ballistic or firearm expert (R 104).

Greg Scala, who was qualified as an expert in gunshot residue and allowed to testify to matter within his competency, analyzed swabs for the

presence of barium antimony which is an indicator of gunshot residue (R 163, 166). There were three sets of swabs: upper bathroom wall, lower bathroom wall, and blank swab set to make sure swabs not contaminated (R 167). Mr. Scala said that when primer is detonated by the firing pin of a weapon it ignites the powder which spews out around the weapon and is deposited on any surface very near the discharged weapon (R 167). It is hard to determine the distance from a discharge to a residue spot (R 168). It depends on the angle of the weapon, but at best, residue is very rarely seen within a couple feet of the discharging weapon. He had enough concentration to be associated with gunshot residue (R 168). On cross examination, Mr. Scala said he had never examined any weapon in this case to determine the amount of residue it would have given off (R 170). On redirect examination, he said a specific weapon would give off an amount of residue depending on the type of ammunition (R 170).

Jerry Rathman, expert the in field of firearm examination, test fired the gun involved and examined a shirt looking for the presence of powder residues which would indicate a close range shot (R 178, 184, 186). The shirt had three bullet entrance holes but there was no gunshot residue, indicating the shots were not close range (R 186). On cross examination, Mr. Rathman said he fired a .357 weapon which could also fire .38 caliber bullets. .357 magnum bullets and .38 special bullets look the same. The only difference between the two calibers is the length of the cartridge case (R 187). The .357 is more powerful (R 188). The amount of powder discharged and the length is longer with a .357 (R 188). He did not know the maximum distance at which powder would be deposited since it varies with each weapon, ammunition type, and ammunition manufacturer (R 188). If the bullet had been fired at close range, i.e., within a foot, he would expect to find sooting and tearing of the garment (R 188). Powder residue would be found at five feet or less (R 189).

In closing argument defense counsel reminded the jury what the prosecutor says is not evidence (R 268). He argued that the state charged premeditated murder but failed to show premeditation (R 271-72). Since Johnson only fired because the customer lunged at him, second degree murder was the appropriate verdict (R 272). Johnson could receive life imprisonment for second degree murder (R 274). Counsel attacked the officer's statement that Johnson deliberated for a moment before shooting the bar owner (R 278-79). He argued that Johnson did not reload because several of the entrance wounds could have been caused by the same bullet (R 281). On rebuttal closing argument, counsel argued that Johnson did not go to the bar with a preconceived notion of robbing the place and there was no predesigned notion to kill the victims (R 296). Johnson was "on a drunk" and became irate when he heard of being charged 100% interest for pawning the gun (R 297). It was not a cold deliberate killing because nothing was taken from the victims (R 298). The confessions were extracted by the police talking to Johnson about God and the Maker (R 299). Counsel asked for verdicts of second degree murder (R 299).

PENALTY PHASE

The defense stipulated that Johnson was convicted of attempted robbery in 1968 in Broward County, Florida; was on parole for burglary on December 4, 1979; and was convicted of armed robbery and attempted murder on February 14, 1980 (R 1435).

Johnson's father, Arthur, described his son's family background. Johnson was born in Franklin, Kentucky in 1946. The family moved to Indiana and stayed there for a period of five years, then moved to Florida where he worked in construction. Due to a shortage of money he left Terrell with his parents in North Carolina for a period of about six months when Johnson was

about twelve years old (R 438-39). He had four children, with Terrell and his twin sister in the middle (R 438). Prior to the move to Indiana he and his wife separated and Terrell and the other children spent about three months in an orphanage in Kentucky. This occurred when Terrell was ten or eleven years old (R 439). Mr. Johnson subsequently secured employment as a carpenter in Hollywood, Florida. At this point he developed a problem with weekend drinking. His wife also drank. Terrell began getting into trouble for burglarizing businesses and homes when he was about fourteen years old (R 440-41). Terrell was sixteen or seventeen years old when Mr. Johnson realized Terrell had a drinking problem. The first time Terrell went to jail was when he and another fellow ran away from home and broke into a home in Georgia (R 441). Terrell had never gotten into trouble for hurting people and, in Mr. Johnson's opinion, Terrell was not the type of person that hurt people physically. Although Terrell had fist fights, his father never knew him to use a weapon. Arthur Johnson worked on the job with his son and described him as a good worker and well-mannered. He was very temperamental, however, when he had a few drinks. Terrell's younger brother died in Vietnam in 1970 and his mother died eight months later (R 442-43). Terrell seemed to drink more after that. Mr. Johnson further testified that he loved his son (R 443).

Nancy Porter had known Johnson since she was seven years old and was with him when he sold the pistol to Ollie Bracken (R 444). She and Johnson were with each other almost twenty-four hours a day for the nine months prior to the murder (R 444-45). She had never known Johnson to be the type of person who enjoyed hurting people. In her opinion, when Johnson was sober, he was a very gentle person who would do anything for a friend. He was like a father to neighborhood kids and played ball with them and got involved with their sports. However, when he drank he became a totally different person

and underwent a complete personality change, including voice and attitude (R 445). Johnson's father had a drinking problem and would become easily irritated and upset while drinking. Johnson was similar to his father in disposition when drinking and would even change his voice to that of his father's (R 446).

Katherine deBlij, a clinical psychologist who worked in the alcohol rehabilitation program at Memorial Hospital in Hollywood, Florida, in November, 1979, met Johnson when he admitted himself to the emergency room (R 450-52). He was ill from excessive alcohol intake. Johnson completed the program satisfactorily (R 453). In her opinion, Johnson's alcoholism was secondary to a character disorder, in that he had an impulsive personality, experienced anxiety and fear, and had an excessive amount of guilt that had been present for a long period of time. As a child he was burdened with feelings that he was an evil or bad person (R 453). He was afraid of losing himself. He was moderately depressed and had a sense of hopelessness. He appeared to genuinely want to get rid of these problems. He participated actively and spontaneously in group sessions, was very considerate of other people's feelings, and took personal risks in terms of trying to change life patterns (R 454). The program, however, was not geared to help someone like Johnson because it was geared primarily toward people who were primary alcoholics as a result of social drinking but did not have major character disorders. Johnson never gave any indication of being an aggressive, vicious, vindictive type of person (R 455). She believed that the typical response of someone like Johnson to a situation where he had pawned something, then the person he had pawned it to charged him twice what the agreement was, would be to feel that he had been robbed and to feel justified in returning that act. He would feel frustration and outrage. It was her opinion that Johnson would

not deliberately set out to kill someone as his aggression was a reactive sort. She further testified that Johnson would cope very poorly in ordinary society outside a structured environment such as a jail or a hospital. (R 456-457).

On cross examination Dr. deBlij testified that Johnson was not psychotic, was capable of appreciating the criminality of his conduct, and knew the difference between right and wrong (R 459-60). During the time she knew Johnson, he did not break any laws that she knew of (R 459). Even if Johnson was placed in a treatment program for the rest of his life there would be no certainty as to rehabilitation (R 459). She was aware of the fact Johnson was examined by Cassady and had read a summary of his report (R 460). The only thing she disagreed with was she had "some reservations about the particular label" of antisocial personality disorder (R 460). But she thought Cassady pretty well covered the other circumstances: the anxiety and guilt and depression which is not characteristic of antisocial personality (R 460). She agreed with the statement that Johnson knows the difference between right or wrong (R 460). He does not regard the consequences of criminal acts and doesn't appear to learn from reward and punishment (R 461). On redirect she testified that his feelings of guilt, anxiety and frustration originated in very traumatic early years when he was placed in an orphanage and left at his grandparent's home, where he felt abused. Johnson received inconsistent parenting and punishment and, even as a child, felt that he was already a condemned, evil, and bad person. He felt responsible for the things that happened within his family, which is not typical for children to feel (R 462). When children do have such feelings it is typical for them to continue into adulthood (R 463). On recross examination Dr. deBlij admitted that childhood trauma does not invariably result in murder (R 463).

Johnson testified in his own behalf in the penalty phase (R 464). He stated that he was placed in an orphanage when he was five years old and stayed there for a little over a year. He and his siblings were split up and he seldom got to see his brothers and sisters. They were put there because of his father's drinking and because their mother wasn't able to take care of them (R 466). He quit school in the ninth grade after receiving poor marks and went to work as a laborer. He began using alcohol when he was around thirteen or fourteen years old, at the beach or lake with his school friends. They would mainly drink beer and wine (R 467). When he was sixteen years old he and a friend got drunk on wine one night and decided to hitchhike to Alabama. They had only nineteen cents between them. They were arrested when they broke into a farmhouse to get something to eat and, as a result, he served a year in prison (R 468-469). After he had served his time his parents came to pick him up and he went back to Hollywood, where he got in trouble with the law again. He subsequently served two years for breaking and entering. He described most of his childhood as being happy until his mother started drinking when he was twelve years old (R 469). His mother had been the foundation of the family and was always there. His father drank before his mother started drinking (R 470). His brother's death in Vietnam in 1970 and his mother's death in 1971 affected his own drinking (R 470-71). He blamed himself for both deaths as he had orders to go to Vietnam but went AWOL and felt that his mother may not have died if he had stayed with her (R 471). He felt that the rehabilitation program did not help him to any large degree in overcoming his difficulty with drinking (R 471).

EVIDENTIARY HEARING ON 3.850 MOTION TO VACATE

Arthur Johnson testified that both he and his wife were alcoholics (M 13). He stated that he did not admit that he was an alcoholic in the penalty

phase because he was ashamed of it and did not realize that it meant so much (M 13). Mr. Johnson learned to drink in the military (M 14). He quit school in the ninth grade and worked in a hosiery mill to help his family (M 15). Terrell was born after he returned from the service (M 16). He once went on a binge for three months, deserted the family, and went to Detroit (M 17). When he came back he found that the children had been placed in an orphanage in Kentucky (M 18). He secured a job, got the children back and moved to Indiana, where he had a job with DuPont. When the Korean War ended and DuPont couldn't manufacture more powder they moved to Florida, leaving the children with his parents in North Carolina for a period of time (M 18). After they moved to Florida everything went "pretty smooth" for a while but then he and his wife starting drinking on weekends and left the children home alone at night (M 19). He would drink almost every day when he could afford it (M 20). When his youngest son died in Vietnam his drinking got worse. A year later his wife committed suicide (M 20). He had been a recovering alcoholic for six months (M 20). He believed he was responsible for Terrell's problems as he was not a decent father. Terrell lacked the supervision he should have had when he was younger because of his absence and drinking (M 21). Terrell became a union carpenter and was the best worker he ever worked with (M 22). Mr. Johnson further testified that a few days before the penalty phase Terrell's attorney called him and said he wanted to call him in the penalty phase as a character witness, but did not go into any details about what he meant (M 23). He did not speak with Mr. Jones before he took the witness stand (M 23). Had the attorney talked with him before trial and discussed such matters he would have been willing to testify to such matters (M 24). On cross examination he admitted that he did not recall his testimony from the penalty phase and had not reviewed the same (M 25). He further admitted that

at the time of the penalty phase he didn't feel that he was an alcoholic (M 21). Only in the last six months has he come to some realization that he has a problem (M 27), although even now he still drank a beer occasionally (M 28). He further stated that never treated Terrell differently than the other kids and none of the other children were ever convicted of a crime (M 29).

Deborah Beasley met Johnson in April, 1973, when she was eighteen years old, at a lounge in Ft. Lauderdale (M 31). They dated six months and were married on October 7, 1973. She divorced him two years later (M 32). She testified that during the period of time they were dating she noticed that Johnson drank a lot. He would say that he wasn't going to drink anymore and then two or three days later he would start again. She could see a change in him after two or three drinks. He would become a completely different person, and once he started to drink he would continue. He would start to cry and thought that his family didn't love him (M 33). He would cry over his brother who was killed in the service and his mother who had committed suicide, as he felt that if he had been in the service instead of his brother it wouldn't have happened (M 34). He would talk about being in an orphanage and being left home alone, during which times he and his brothers and sisters would have to find their own food and try to get their clothes ready for school on their own. He said that both his parents were alcoholics and sometimes didn't come back for days (M 34). During the time she knew him he never hit her or demonstrated any violence toward her. She decided to end the marriage because of his drinking problem. She would leave and he would promise that if she came back he would never drink again but then he would start drinking (M 35). Just before the divorce Johnson called her and asked her to please come home; When she said that she couldn't, the phone dropped (M 35). She thought it was a joke at the time but she and her friends went over to the apartment and

found the door locked and the curtains closed. Her friend broke down the door and they found Johnson laying in the living room floor with foam coming out of his mouth. There were empty liquor bottles and different kinds of pill bottles in the bathroom sink. They put Johnson in the car and took him to the emergency room where they flushed his stomach and kept him (M 36). He went to prison in 1976 and she saw him when he was released. She was at her mother's house when he passed by, saw the car there then called to invite her to have dinner with him, which she did. He didn't drink that night and told her that he was never going to drink again (M 37). He was very good with children and always wanted children. He committed himself voluntarily to a treatment program for alcohol (M 38). She visited him several times and it seemed like he had a whole new outlook. As soon as he was released from the program, however, he started drinking. Every time she saw Johnson's father he was drinking, no matter what time it was, morning or night (M 39). When Johnson wasn't drinking he was a very kind person, a great husband. He would be willing to help clean or mow the grass and would constantly look for a reason to buy flowers or a gift. He was very good with her nephew who was very young at that time, and would baby-sit him. Johnson found his mother dead. She did not testify at the trial. She came up with Johnson's father to testify but never spoke with anyone (M 41). She never talked to the lawyers and in no way refused to testify (M 42). On recross examination, she admitted that she was asked to testify and was sitting in the hall at trial but "then I got upset" (M 47). She could not remember who asked her to testify (M 47). She also said that typically when Johnson was drinking he would not have a clear recollection (M 44).

Mary McDaniel was Johnson's former mother-in-law. She testified that he was "a real nice person when he wasn't drinking but that he did drink a

lot." (M 49). When he drank he would cry and talk about things that happened when he was a child; that they were left alone as little children and had to find their own food and prepare it and do their laundry and that they were in a home or orphanage at one time. When he wasn't drinking he was very good to her, would come to the house for dinner, was pleasant and would offer to help her with things such as cutting the grass (M 50). She never saw him hit or hurt anyone physically when he was drunk or sober. He was good with children and played with her older daughter's son (M 51). It seemed to her that Johnson wanted to drink all the time and once he started he would keep drinking. She was never contacted by anyone who represented Johnson before the trial but had she been contacted she would have testified (M 52). She cared about what happened to Johnson as he "is a real decent person when he is not drinking." (M 53).

Dr. deBlij said that she could have testified to the statutory mitigating factor of substantially impaired capacity and extreme mental or emotional disturbance. She spoke with defense counsel on the morning of the trial (M 60). They only spoke in a general way about the issues and did not discuss either of those two statutory circumstances. If he had addressed those questions she would have responded by offering an opinion that they were applicable in this case (M 61). She further testified that several experts found Johnson to have an impulsive disorder. She concluded that Johnson's frontal lobe was quite anesthetized at the time of the murders (M 62-63). Long term alcoholism causes damage to the frontal lobe. That damage would persist for many years and possibly be a chronic condition (M 63). On cross examination she admitted that if Johnson had stated that after the shooting he went to get more ammunition then went back in and shot a witness it would indicate some sort of planning (M 70).

Clinical psychologist Elizabeth McMahon testified that she evaluated Johnson at Florida State Prison on May 18, 1984 (M 79). She administered the Wechsler Adult Intelligence Scale ("WAIS"), the Minnesota Multiphasic Personality Inventory ("MMPI"), the Rorschach, the Hand Test, and Sack's Sentences Completion. An evaluation was derived from the patterns which emerged from the total battery of tests (M 85, 86). Dr. McMahon concluded that Johnson is an individual of average intelligence but has a contradictory personality pattern. The instruments reflect an individual who is very impulsive, somewhat hedonistic, who is immature, angry and acting out some poor defense mechanisms. At the same time, the projective instruments that measure underlying dynamics also indicated someone who is introspective, attempting to reflect, deal with and struggle with many of these issues. He was not aware of what sets him off emotionally and didn't have good defense mechanisms to cognitively deal with such things (M 87-88).

Johnson showed some mild cognitive deficit in abstract reasoning, higher orders of cognition, mild memory problems and some problems in his ability to employ new learning quickly. This was compatible with someone who had a history of heavy alcohol and other substance abuse and who has had some recovery of brain function (M 91). This is "brain damage" for want of a better word. From the medical records that he supplied and from the interview it was her clinical impression that Johnson suffered from both acute and chronic alcoholism for at least five years prior to the present arrest (M 91-92).

A person who has an episode of acute alcoholism frequently experiences seizures, blackouts, withdrawal symptoms and what are commonly called delirium tremors, all of which were recorded in Johnson's hospital records.

Dr. McMahon thought the fact that Johnson's father was alcoholic and that his mother abused alcohol up until her death raised the probability of the offspring also being alcoholic. She did not find any major affective or thought disorders. If she were to put a diagnostic label on that sort of pattern she would say that on the one hand there exists a personality disorder but there also exists a great deal of depression and anxiety which is not usually seen with a personality disorder. She saw a sort of dual picture with Johnson (M 93). She further opined that Johnson's upbringing would foster a personality disorder. He was abandoned for at least a year on two different occasions, which would cause a child to form the idea that his parents went away because he was bad (M 94). Being left by himself after the family moved to Florida, he ended up on the streets and began to fight and run with street gangs and to drink and to come into contact with street drugs that set a pattern and from then on that's the way he solved his problems (M 95). The lack of self discipline and inability to internalize parental values left him more vulnerable to substance abuse (M 96). Upon ceasing to drink alcohol there is recovery from brain damage, to various degrees (M 98). Johnson admitted that he had been drinking when incarcerated other times but indicated that he had not been drinking at the time she evaluated him (M 98). In her opinion, a neuropsychological evaluation should have been performed at the time of the initial interview by Mr. Cassady, the jail psychologist, in 1980. It would be mandatory to look at an individual's brain functioning in view of drug and alcohol abuse to see to what extent the brain was intact at that time, a time closer to the incident itself (M 100). In her clinical opinion Johnson did not meet the criteria of the M'Naghten Rule at the time of the offense and was not suffering from such disease or defect that he could not know or appreciate the consequences of his behavior and know that it was wrong

(M 103). But it was her opinion that his ability was appreciably impaired and he did not have the capability to form an intent to kill or premeditate. The fact that someone was doing something that Johnson viewed as taking advantage of him would feed the feelings of inadequacy, vulnerability, anger, hostility, and resentment for which he had little or no coping mechanisms (M 104). He was drinking heavily, was exhausted from lack of sleep and did not have the coping mechanism to figure out another way to handle the situation. At this point in the testimony, the trial court observed that the record reflects that Johnson checked himself out against medical advice (M 108).

Dr. McMahon admitted that she did not consider herself an expert in the treatment of alcoholism (M 114). She was familiar with the Florida capital sentencing statute and believed that the mitigating circumstance of substantially impaired capacity would apply in this case by virtue of the disability disorder conjointly with Johnson's alcoholism, both chronic and acute (M 115-116). She also felt that the mitigating factor of extreme mental or emotional disturbance applied. She was familiar with the term "nonstatutory mitigating circumstances" and stood behind her report and the affidavit attached to it which contained many things which might be considered to be nonstatutory mitigating circumstances (M 116). Had she been contacted or appointed at the penalty phase to examine Johnson and testify she would have been willing to have done so (M 117). She admitted that professionally she is against the death penalty and does not believe that it is a deterrent (M 117).

On cross examination Dr. McMahon indicated that the point at which Johnson panicked was when he was lunged at and shot the bar owner. She accepted Johnson's explanation that he couldn't explain why he killed the bar owner but it was not to eliminate a potential witness. If such statement was

contrary to his history she would have to say that it was a self-serving statement (M 120). If the history revealed that he had killed the bar owner in order to eliminate a potential witness, it was something she would need to explore to determine whether it would have reflected a much greater degree of cognizance of process, of thinking through and of reflection. She would need to rethink her ultimate opinion about his premeditated design. It would be a very significant change in the facts as she understood them (M 121). The fact that Johnson sat in a lounge for some time reflecting on what he was doing was considered by Dr. McMahon, but she was not sure how long a period of time it was. She also weighed that against the fact that this was a man who had ingested a great deal of alcohol, according to his own statement, which she assumed to be true. She admitted such fact would certainly lead one to feel that there was some degree of reflection going on but the degree was less than that of a person who was sober and did not have cognitive dysfunction as result of chronic alcoholism (M 122). She did not have any way of exactly measuring Johnson's state of mind because it was so many years before she was involved in the case and he was bound to have improved. She further admitted that it was a possibility that he was contemplating suicide at the time of the murder because he felt bad or felt that what he had done was wrong, although people commit suicide for a lot of reasons. She further stated that the diagnosis of Johnson as having a personality disorder would be a partial diagnosis now although it probably would have been an actual diagnosis several years ago (M 123). The diagnosis of Johnson as having a personality disorder with overlying depression came up repeatedly in his hospital records but at the time she saw him he was looking more neurotic, so the personality disorder diagnosis was more applicable back then than now (M 124). She was familiar with the Diagnostic and Statistical Manual of Mental Disorders ("DSM-III") (M

125). She would describe DSM-III's description of a personality disorder as accurate. From Johnson's record of alcoholism and hospitalizations she had no indication that seizures, blackouts or withdrawal symptoms occurred in connection with the homicide (M 125). The only indication of a memory deficit she perceived from the record was contained in one of the statements that he gave to the police describing the building, then stating that he could not remember the rest because he had been drinking (M 128). Her report indicates that Johnson has no record of violent crimes, despite a long criminal history of illegal behavior, for the period of time that he was consuming alcohol and becoming progressively more diseased (M 130). She further admitted that the psychologist who was involved in the actual treating of Johnson back in 1979 or 1980 may have been in a better position to render an opinion on the ability of Johnson to appreciate the criminality of his conduct than one having tested Johnson five years later (M 131). It was also her finding in May of 1984 when she did the testing that there was only a mild indication of previous neuropsychological defects (M 132). Her opinion of Johnson's condition in 1979 to 1980 would be only a clinical inference based on her knowledge of studies and testing and her experience and training (M 132).

Dr. McMahon testified on redirect examination that a master's degree in her profession would not allow one to perform tests, take background information, come to conclusions with regard to competency and insanity, and testify in court. That could result in ethical discipline (M 135). On recross examination she testified that such rule could be found within the APA Code of Ethics, which prohibits a person who is involved in the field of psychology from testifying in court or publicly stating clinical conclusions until they have received a doctoral degree. One is not qualified to do that kind of evaluation with less than doctoral training (M 138).

The next witness called by the defense at the evidentiary hearing was Dr. Daniel C. Glennon, a psychiatrist with a speciality in alcoholism and chemical dependence (M 148). Dr. Glennon studied Johnson's psychiatric history and evaluated him at Florida State Prison on September 3, 1986 (M 151-152). Dr. Glennon testified that Johnson historically is the third of four children. There is alcoholism on both sides of the family. His father, probably at the time Johnson was born, or shortly thereafter, was an active alcoholic. Johnson gave a long history of abuse from his father, citing numerous episodes where his father came home drunk and directed physical violence toward his mother and the kids. His mother also became an alcoholic. The parenting was very irregular. When Johnson was five he was sent to an orphanage for approximately one year, due to the abandonment of his parents. At age ten he was placed with his grandparents for approximately one year, again due to the inability of his parents to provide proper parenting (M 154). Given that both sides of his family were alcoholic, the doctor opined that, regardless of the environment in which Johnson grew up, there was probably a ten to fifteen times greater likelihood that Johnson would become an alcoholic later in his life, if he did drink. In his opinion Johnson was clearly alcoholic by his late teens. His behavior was out of control and he had lost the critical ability to control how much he would drink and was unable to control his behavior (M 154).

In the mid 70's Johnson was admitted to several psychiatric hospitals with a number of diagnoses including depression, personality disorder and chronic alcoholism. In November of 1979 he was in a treatment program called SHARE in Hollywood, Florida for three weeks, for the treatment of alcoholism. He was treated with several medications including antidepressants and antipsychotic medication. In Dr. Glennon's opinion, the drugs were all direct

substitutes for alcohol, produced the same type of high and affected the same areas of the brain. The other antidepressants, although not addicting, were still mood-altering drugs and, for a recovering alcoholic, treatment with a mood altering drug was really not indicated (M 157). The doctor was not sure why Johnson was treated with antipsychotic drugs as they are really only designed for individuals who are actively psychotic and he saw nothing in the reports to indicate that Johnson was ever psychotic (M 157). In his opinion this was mistreatment (M 161) and it did more harm than good by allowing the disease to progress rather than arresting it (M 162).

It seemed to Dr. Glennon that Johnson had received good treatment in the SHARE program but it was of a very brief duration, lasting only three weeks (M 162). The likelihood that three weeks in treatment would significantly alter Johnson's life was virtually nil. He was close to one hundred per cent likely to return to using drugs and alcohol (M 163). The treatment was really little more than a period of detoxification (M 164). Johnson needed long-term treatment of six months to a year (M 164). According to what Johnson told him, he had been out of the SHARE program for a week at the time of the murders. He decided that he would try to drink again and limit himself to one drink (M 164). This is typical of an individual who is still in massive denial of his illness. It was approximately 1:00 a.m. on the morning of December 4th that Johnson took his first drink and followed that up by returning to the 7-11 where he bought several six packs. Sometime in the early morning hours it occurred to Johnson that he needed to get some money so he and his girlfriend could live together and he was going to pay her bills or something. He recalled that he had pawned a gun for fifty dollars in the Eustis or Orlando area. His plan was to return to Orlando, purchase the gun back for fifty dollars, and then take the gun to another person and sell the

gun for substantially more money (M 165). He calculated how much money he had, took out fifty dollars and enough money for gas or tolls and the rest he converted into beer. He wanted to have enough beer to take him to Orlando. Johnson planned on traveling somewhere between two hundred and two hundred and fifty miles to get a gun and supposedly sell it (M 166). An alcoholic who is drinking wants money to continue drinking. According to Johnson, from one o'clock until approximately ten o'clock in the morning, he consumed approximately a case of beer in twelve ounce cans. In the average human being the liver can metabolize approximately one drink per hour. He would have had a net of something in the vicinity of fifteen drinks or cans of beer which would place his blood alcohol level in excess of .3 (M 167). In most individuals the fatal limit is around .6. In an alcoholic the brain learns to adapt to a higher blood alcohol level and an alcoholic can actually perform certain actions that a nondrinker could not, so that it is conceivable that an individual with a blood alcohol level of .3 and higher could pass a roadside sobriety test. Unless you smelled the alcohol you really wouldn't be able to tell if the individual was intoxicated (M 169). Dr. Glennon believed that Johnson would have been unable to premeditate, although he could not be certain (M 172). He also did not believe that Johnson premeditated the robbery, although he could not state this with any reasonable certainty (M 173). On questioning by the court Dr. Glennon admitted that in view of the fact that a robbery did take place, Johnson was able to follow through with purposeful behavior (M 173). The doctor further stated that because Johnson lost the ability to refrain from hostile impulses when he drank, he becomes involved in behavior he ordinarily would not become involved in. The court asked whether "recognizing your position that there is a diminution of his ability to make those decisions, is a person in that position capable of

formulating an intent to commit a specific act, a specific crime?" Dr. Glennon answered "yes" (M 175). The doctor indicated upon further questioning that he could not categorically say that such intent existed or did not exist in Johnson's mind (M 176).

The doctor's impression was that at some point Johnson realized that he didn't have the money to buy the gun. It occurred to him to take the gun, so he picked up the gun, held it on a man and said something to the effect "he was going to rob them." At that point Johnson described feeling disassociated, like stepping out of himself. The doctor believed that Johnson's feelings were numbed at that time (M 177). The court asked Dr. Glennon if that would indicate that Johnson "determined the criminal aspect of those actions" to which he replied that he believed Johnson did appreciate the criminal aspect of those actions (M 178). The doctor indicated that Johnson knew right from wrong but couldn't appreciate the consequences of wrongful behavior and was unable to consider all alternatives (M 178). He concluded that the capacity of Johnson to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and that Johnson was significantly mentally disturbed at the time.

It was also Dr. Glennon's opinion that a person who was drinking or withdrawing from alcohol would be less appreciative of the importance of the right to have an attorney present, the right to remain silent, and the right to give no statement to the police officer (M 180). He believed that Johnson was committable immediately after the robbery for treatment of alcoholism under the Meyers Act (M 181-82). When asked what Johnson's blood alcohol level would have been would have been if an officer stopped him after an accident and smelled alcohol, he answered "He could by anywhere form 0.0 to 0.3, 0.3, .5" (M 182).

In regard to nonstatutory mitigating circumstances Dr. Glennon testified that there were a number of indications in the reports that he had read that Johnson felt quite guilty over a number of things that had happened to him and a number of his irresponsible behaviors (M 183). What was troubling him most was that while he was in the service he had been using drugs and alcohol and had gone AWOL while his brother was sent to Vietnam and died there (M 184). Throughout his life he had always struggled with a sense of very low self esteem and had very little respect for himself. He was abused by each of his parents which, no doubt, prompted him to drink to get away from feeling emotional pain (M 184).

On cross examination Dr. Glennon admitted that Johnson's conduct in committing the robbery was purposeful, although whether or not it would be logical was another issue (M 184-85). It was his understanding that Johnson's decision to rob the two individuals was made after he had already been outside the area with the gun in his possession, testing it, and after he had returned to the bar. The thought occurred to him while he was holding the gun in his hand. There was nothing to prevent him from just walking away (M 185). Johnson also carried out the purpose of a robbery by taking money with him that had been in the possession of the owner of the bar or the bartender. After he shot these two individuals in the back room he spent a time reflecting on his conduct and even considered suicide (M 185). Dr. Glennon indicated that that would show a feeling of remorse or appreciation that a person had done something wrong (M 186). It was also the doctor's understanding that after Johnson had been out there reflecting on what he had done, he heard moaning and actually went back there and shot one of the two individuals again (M 186). The doctor further admitted there was no history of extreme sleep deprivation up to the point of the homicides as Johnson had

only been up one night (M 187). Upon inquiry by the court, Dr. Glennon stated that the basis of his opinion as to blood alcohol was information given to him by Johnson or the reports of what Johnson had said he consumed and there were no other independent accounts other than his own statements (M 188). Upon further questioning, the doctor indicated that Johnson's chance of recovery would have been greatly increased if he had been offered care after going through treatment coupled with Antabuse, working with his family members or friends, and active participation in AA (M 189). The court also indicated that there were some indications in the record that those opportunities were actually offered to Johnson but he stopped shortly. The doctor indicated that the prognosis would be very poor for Johnson if he stopped going to those programs (M 190). In Dr. Glennon's opinion alcoholics remain responsible for their recovery and when an alcoholic has been detoxed, there is nothing that makes them pick up that first drink or drug (M 193).

Upon further questioning by the court the doctor indicated that the medical record from Memorial Hospital signed by Dr. Fleigelman, dated November 3, 1979, described a neurological examination which showed the areas tested were normal (M 193). Dr. Greener in his letter dated November 1979, indicated that there was "no organic brain syndrome." Upon further questioning by the court, the doctor admitted that when he interviewed Johnson in September, 1986, there was no evidence of organic brain syndrome (M 198). Dr. Glennon also admitted that the recidivism rate for alcoholics who enter twenty-eight day programs and are recommended for after care is fifty percent (M 200). There is probably no significant difference in recidivism between those who go through twenty-eight day programs and those who enter domiciliary care for a long-term treatment. The recidivism rate is higher for those who enter domiciliary care but do not complete an entire year because the call to drugs

leads them to go back to use (M 201). Most recovering alcoholics have gone through more than one treatment (M 202). On cross examination Dr. Glennon stated that from what he read of the SHARE program it sounded like Johnson received appropriate treatment but the length of time was insufficient for an individual in his state of illness (M 202). The doctor had not done any real factual analysis to see if such program is more or less successful than his treatment (M 203). The doctor further admitted that he had not read the statements made by Johnson or reviewed the circumstances under which he made them (M 203).

Mildred Johnson Hefner, Johnson's aunt, testified that her brother and his wife were both alcoholics (M 206-07). Their drinking became worse after the death of Johnson's brother who was killed in the military (M 208). She further testified that as a child Johnson was sort of a loner and when his mother would shout at him he just seemed to withdraw into himself (M 210). She had seen his mother whip him with a belt when she was drinking.

Sheila Young testified that Johnson was married to her sister Debbie and was her brother-in-law for about two years (M 213). Johnson and Debbie rented a duplex from her and they would get together at her home or the park and have cookouts or barbecues. Johnson would consume quite a bit of beer and didn't know when to stop (M 214). Sometimes he would have just two or three beers and you could actually see the difference in him. Johnson was very close to her two-year old son and would play with him, bring him gifts, and ride him around on his shoulders. He was a helpful and caring individual to others. When he was drinking he would get very depressed and would sometimes cry and talk about his childhood, the death of his mother and brother and being in an orphanage (M 215). It did not appear to her that Johnson had any control over his drinking and it was almost like an inner force would take

over. She never saw him do anything violent to anyone. She would have discussed this with defense counsel if she had been asked at the time of trial (M 216). She would have testified to the same (M 217).

Attorney Gerald Woodrow Jones, Jr., graduated from Florida State law school, and was licensed in 1970. He went to work for the public defender's office in Orlando in November, 1970 (M 218). He stayed at the PD's office two and one half years and during that time had thirty felony jury trials. He then left to go into private practice in Sanford (M 219). In 1974 he returned to the public defender's office as the head of a felony division (M 220). He stayed there until 1982 at which time he left for private practice (M 220). Prior to Johnson's trial, he had tried more than one hundred felony cases and probably ten capital cases and had two or three sentencing proceedings before a capital jury. He was supervising two divisions, taking capital cases in two divisions and had sixty clients of his own (M 222).

Jones testified that he filed a motion requesting a psychological evaluation a week before Johnson's trial (M 225, 227). At that time he had the benefit of numerous psychological studies on Johnson, none of which were very favorable and some of which were very unfavorable. He was trying to get a psychological profile of Johnson (M 227). He knew John Cassady was a jail psychologist who had dealings with Johnson in the past and thought him to be a very fair, unbiased person, even though he worked for the sheriff's department, so he suggested to him that he conduct a battery of psychological tests (M 228). Jones had psychiatric or psychological reports from Memorial Hospital in Miami, a psychiatrist in Oregon, and three reports from the Miami/Fort Lauderdale/West Palm Beach area. The South Florida reports were primarily related to drinking problems (M 230). Cassady's report was consistent with the prior reports. Trial counsel had no doubts as to

Johnson's sanity (M 231). Cassady's report shows that Johnson was competent to stand trial and was sane at the time of the alleged offense (M 237). Jones could not recall whether he spoke to Cassady although he believed he would have spoken to him initially before he filed the motion to see if he was able to do this type of testing. He was sure he talked to Cassady after he performed the test (M 232). He told Johnson that he wasn't to discuss the facts of what had happened, that testing was simply to determine his personality and that he shouldn't talk about specific facts regarding the incident (M 233). Cassady's report in this case went to the judge and the state attorney (M 233). There was a recurring problem with psychiatrists at that particular time at the public defender's office. Jones had written ten or more letters to psychiatrists asking them to please not send reports of their evaluations to the state attorney's office, and usually they would write a nice letter back saying that they appreciated the problem and it wouldn't happen again (M 234).

Jones did not talk to members of Johnson's family to get information about Johnson's background to discuss with a psychologist. He did not obtain school records to take to the psychologists and did not talk to school teachers or family physicians. He talked to a former employer but doubted that he passed that on to Cassady (M 235). What he usually did was to send psychiatrists a copy of the police reports and a letter indicating why he was filing the motion, what he based his opinion on, and the fact that the defendant may have been incompetent at the time. He wasn't seeking a finding of competence in Johnson's case so he didn't do that. Since Cassady was not a psychiatrist, what he wanted was a personality profile and he really wasn't certain whether background information would be relevant in giving a personality test to someone, as that is pretty much an objective test (M 236).

He wrote several letters in the case trying to contact various family members. He wrote Dr. deBlij (M 236-237). He also wrote to a friend/employer of Johnson's. He could not recall whether he wrote Johnson's relatives or telephoned them, but was in contact with them several weeks before trial to tell them when it was going to be and to make arrangements for them to be there (M 237).

As far as preparations for the sentencing phase such as talking to Johnson, getting background from him, finding out what persons to contact and what he expected him to say; he did that from the outset. Independent of Johnson, investigation would have begun several weeks before the trial, when he would have contacted witnesses and made arrangements for them to appear (M 238).

In regard to the issue of intoxication, Jones recalled speaking to several people including Johnson's father and girlfriend outside the courtroom (M 238). One girl was crying and too upset to testify. He thought it was a girlfriend or former wife of Johnson's. He explained that to Johnson, and Johnson said that he understood that she would get too upset to testify (M 239). It was his recollection that the girlfriend refused to testify as she said, "I can't do it; I won't do it." He told Johnson of the situation and informed him that she may have some good things to say in front of the jury but that she said she is physically unable to do and Johnson excused her and said "I don't want her to do it." (M 242). Before the father testified, he talked to him and asked him questions based on what Johnson had told him. The father related that the home life wasn't nearly as bad as Johnson had indicated. Counsel was a little disappointed at that (M 240). He remembers discussing with the father the fact that his son was on trial for his life and that he had said that the father was an alcoholic and somewhat abusive and

would leave the family. He remembers the father shaking his head and saying "No, no, that wasn't right at all." If the father said that he got on the stand before he ever talked to him, he is sadly mistaken as he would never call someone without having talked to them before (M 241).

The theory of defense involved demonstrating that Johnson's state of mind was clouded with intoxicants and showing a sudden passion or excitement with no premeditation (M 274). The only real defense counsel could see was that there was no premeditated design to effect the death of either of the men. He wanted to show that Johnson went into the bar with the intent of tying the victims up and was mad because the fellow had charged him one hundred dollars to get his gun back when he had only pawned it for fifty. When the fellow lunged at him, Johnson did not know what else to do so he started shooting wildly. That was the only defense counsel could see that was available to Johnson in view of the circumstances. He was aware of the felony murder rule and believed that would pose a problem with that kind of defense (M 275). However, the jury did come back with a verdict of second degree murder as to one victim, so his strategy was successful.

Jones did not recall requesting an instruction from the court on voluntary intoxication. At that time he was familiar with the law of voluntary intoxication. He did some reading on it at that time as it seemed to be the only possible defense (M 242). His understanding was that if someone was intoxicated to the extent that they couldn't formulate the intent regarding specific intent crimes, that would be a legal defense. He didn't recall reading cases that indicated that if there was <u>any</u> evidence of intoxication that he was entitled to that defense or to that instruction. He didn't recall requesting any special instruction other than that in the standard book (M 243). When read an instruction by collateral counsel, Jones

said it appeared the element of intent was missing from the robbery instruction. Jones said he followed the instructions in his book when they're read and if there were any omissions, he would have objected before the jury retired. He was aware at the time of trial that the robbery instruction required intent (M 244).

At the time of trial and sentencing Jones knew alcohol was an addiction, but not a disease as such. Had he known that alcoholism was a disease, he might have had experts in the field of alcoholism testify at the mitigation portion of the trial (M 250-251). He was aware it was not necessary for a defendant to testify in order to establish an intoxication defense (M 251).

He decided not to use the voluntary intoxication defense in this case because the only witness to what had happened was the defendant and the two victims. The only person who had contact with Johnson earlier that day was someone who had seen him some four to five hours earlier down in south Florida (M 264). In his confessions, Johnson indicated only that he was "a little drunk" (M 264). In order to establish a predicate to lay the foundation for an intoxication defense, counsel would have had to use Johnson as a witness. In his conversation with Johnson, counsel decided that would be a very poor move as Johnson had several convictions, he was very cold, dispassionate and showed no emotion whatsoever when telling his story (M 265). He did not want to put him on the stand because of the way he related the incident and that the fact that in his confessions he was able to remember with great detail and particularity what occurred from the time he had arrived the bar until he left. He thought a jury would not be convinced that someone who was so intoxicated would be able to remember in such detail what had occurred. Part of his confession also indicated that as he sat there with the gun in front of

him, talking to the bar owner and the patron of the bar, he formed the intent to rob the place (M 266-267). Counsel did not want the jury to hear that Johnson had premeditated to the extent that when he heard the moaning he took the spent cartridges of his gun, put fresh cartridges in the gun, went in and deliberately shot the fellow through the head (M 267-268). Counsel felt that this demonstrated malice aforethought. The fact Johnson reloaded did not come out during the trial, and counsel made a great issue of the number of bullets found and that the fact that the .357 was a powerful weapon and could go through one part of the body and lodge in another part of the body. It was never established that there were more than five or six rounds fired during the episode even though Johnson did state in his confession that upon hearing moaning, he went back in and shot the fellow (M 268). Had Johnson testified as to this fact it would have been more ammunition for the state. Counsel also felt that Johnson had a bit of a temper and he considered the fact that if he tried to pose an intoxication defense, the prosecutor would hammer him for being able to remember so much and Johnson would have gotten upset and angry and he did not want the jury to see that happen (M 269). Counsel also asked Johnson "Well, did the other fellow move, the bar owner?" Johnson said, "No, he never moved." Counsel then said, "Why'd you kill him?" Johnson said, "Well, I had already killed the other fellow. The other fellow was dead, and I knew that fellow could identify me." Counsel said, "What did you do?" and Johnson said, "I put the gun over to his head and shot him once through the head." Because of the contents of what Johnson had said, plus the manner in which he said it, counsel decided it was not the wise to put him on the stand (M 270). Although counsel testified on direct examination that it isn't always necessary to call a defendant to testify in a case to establish voluntary intoxication, he felt that it would be necessary in this case as

Johnson's own statements did not indicate intoxication. Other witnesses had not seen him close to the time of the murders. Also, two or three hours after the incident Johnson came in contact with a police officer after having an accident. The officer said Johnson appeared to be in a dazed condition as though his thoughts were elsewhere. There was a smell of alcohol about him, but that he did not appear to be intoxicated or drunk (M 271).

On redirect examination, counsel testified that he had no defense to felony murder and hoped that the jury would believe that premeditation was important, although he realized that the jury was instructed by the judge that it wasn't, that felony murder could do it (M 284-285). Counsel stated that there was no evidence of intoxication in the case other than putting his client on the stand, other than his remark, "I was a little drunk," to Prineville. Counsel indicated that he did not know what "a little drunk" means when coming from an alcoholic. Even if counsel had contacted an expert in alcoholism, he still would not have tried an intoxication defense based upon an expert's interpretation of the words "a little drunk." In counsel's opinion, that would be a little tenuous (M 285). He was aware of the Sweeney deposition that when she talked with Johnson after the offense on the telephone, "he sounded to me as if he had been drinking." Counsel also had the handwritten statement that said Johnson was "a little bit drunk" (M 286). Police officer Wedeking stopped Johnson and testified in the trial itself that Johnson smelled of alcohol and "told me he had a couple of drinks" (M 287). Counsel was also aware of Peterson's deposition that when asked whether Johnson indicated whether he was high or drink at the time, Johnson indicated "he had been drinking; he had been in the Tavern drinking" (M 287). Counsel was aware of the taped statement of Nancy Porter from January 8, 1980, (that she gave to the police but was not part of her testimony at trial) that when

she picked Johnson up after the offense, "He threw up. He was sick. He needs help badly. He does things out of control, doesn't mean to. He had blackouts from drinking." (M 288). Counsel's recollection of the law at the time of trial was that you had to show intoxication to the degree that a defendant could not formulate the requisite intent and based on those statements, he did not think that would have qualified to get a jury instruction (M 289).

Jones did not attempt to contact an independent ballistics expert or independent forensic expert prior to trial. He spoke to Dr. Kessler at some length prior to his testifying at trial. He did not think that he deposed Harry Park for whatever reason (M 245). He had Greg Scala's report before trial and may have talked with him on the telephone but didn't think that he did. All Scala said was that the bullets came from that particular weapon which was really not an issue. During the course of the trial there was a discussion by a witness about a paper ballistics test. He had not heard anything about that before trial even though he had asked the state for discovery. If he had known that it was going to be used at trial, he would have been concerned about it and contacted someone to determine whether that kind of test was a good or bad test (M 246). He was not familiar with an expert by the name of Vincent J. M. DiMaio. DiMaio had written a letter to Terrence Acker questioning the procedures used by Mr. Park and Dr. Kessler (M 248-250). Counsel indicated that this was information that could have helped prepare this case (M 250).

Jones further testified that he recalled objecting to the testimony of Harry Park and the jury did not hear all of the testimony as there was a proffer and the evidence was excluded. There was nothing that Harry Park testified about that he felt was inconsistent with the other facts of the case. Johnson told the police he heard moaning, went back in, and put the

fellow out of his misery. The fact that there was evidence of the gun being held down when fired was not inconsistent with what Johnson had already told the police. From what Johnson said, he marched the victims back into a bathroom and the shots were all fired at pretty close quarters, within five feet. When he came back in and killed the fellow who had lunged at him, that was also very close (M 272-273). Having such information would have been helpful only in keeping the test from being introduced but to his recollection, it wasn't introduced anyway. The facts of stippling on the skin and powder on the paper targets would not really make that much difference since it was consistent with what Johnson told the police (M 273). Counsel had asked on cross examination of the medical examiner if there was any stippling associated with the other body shots and he said no (M 274).

In regard to the detainer issue, Bruce Hinshelwood, the prosecutor, contacted him and stated that the trial date was too soon and that he was going to file a motion to have the trial date reset because they had to go to Oregon (M 253). Counsel was concerned that trial be set within the one hundred eighty day limit and would not agree to a continuance for any reason because he knew that would waive Johnson's right to a speedy trial, thinking again of the one hundred eighty day limit rather than the one hundred twenty day limit. The continuance was not Johnson's. If counsel had known of the one hundred and twenty day period, he would not have agreed to that continuance. He believed he did not agree to a continuance, but agreed to having the trial reset (M 254). He was simply resetting the trial so they could go to Oregon to depose the witnesses and police officers that arrested Johnson. He did not intentionally waive any speedy trial right on behalf of his client (M 255). Jones went to Oregon in August and the case was reset for later in September (M 280). Counsel was the one taking the depositions, and

he felt that it was very necessary for him to do so in order to prepare the case. The resetting of the case actually aided him in doing that. However, if he had known of the one hundred and twenty day rule, he would have filed a motion to discharge (M 281).

Jones was aware of the proposition of law that if a client indicates that he wishes not to speak any longer to investigating officers, they cannot continue questioning him unless he reinitiates contact. He did not request any psychological assistance in analyzing any issue regarding to the confessions (M 256). The Oregon police told him that it was a standard practice to send a psychiatrist in before they interviewed somebody in major crimes. Counsel did not represent Johnson in Oregon (M 260). There was nothing he could recall that would have suggested to him that he should call psychological experts to argue that Johnson was in sort of state where he couldn't voluntarily make decisions. There was a blood alcohol test done on Johnson shortly after he was arrested and it registered .06, which is fairly low. It was some time that evening before he started talking with the police officers (M 282). The police officers said that Johnson appeared tired but fully in control of his faculties as far as being able to recite things about himself personally and that he gave no evidence of psychosis or thought disorder (M 283). Johnson had, in fact, been examined by a psychological expert at the behest of the police at a later date. Counsel had that report (M 283-284).

On cross examination counsel admitted that he was aware that Johnson had an extensive history of alcoholism and had been hospitalized. He also had the opportunity to talk to Dr. deBlij. She told him that she didn't really have that much contact with Johnson, that she had met him a couple of times in group therapy, and didn't think that she would be very much help to counsel.

He relied on that statement in assessing her value to him as a witness and tried to find someone who had more contact with Johnson. Evidently, however, she had more contact than anyone else and that is why he used her. A couple of physicians had indicated to him that they were only involved in evaluating Johnson as part of admitting him to an alcohol program (M 261). She was the only one that was involved in counseling where he would be talking about his background and problems (M 262).

Counsel called Dr. deBlij at the penalty phase to testify about Johnson's alcoholism and history (M 276). Prior to the penalty phase hearing they met in his office that morning. He explained what was going on, that this was an advisory phase of the proceeding, there were certain aggravating and mitigating circumstances that the court could consider. He told her that he had called her for whatever circumstances there were, particularly the ability of the defendant to appreciate the nature of his acts or severe emotional distress. He would have told her why she was there and what he was seeking although he couldn't recall specifically doing that (M 277). His strategy was to point out that during that period of time, Johnson was going through a bad period regarding his alcoholism. He wanted her impressions of him, his personality, how he would react, and whether he could cope with the situation such as that (M 278). The court asked counsel about the doctor taking the stand earlier and testifying that, in her opinion, Johnson was impaired, suffered diminished capacity at the time of the offense due to intoxication and from the effects of long-term alcohol abuse, was under mental stress or strain, and that she was prepared to testify as to those two aspects if asked those questions but she was not asked those questions (M 278). Counsel replied that "We discussed her testimony at length that morning, and I talked with her for a short while after she testified, and she never indicated

to me, why didn't you ask me so and so or why didn't you ask me something we had agreed. I don't really understand why she would say that." (M 279).

John Cassady, Sr., was the last defense witness (M 294). He was staff psychologist with the Orange County Sheriff's Office for nine and one half years (M 295). He testified that the name Johnson did not ring a bell and he did not recall any details (M 296). The medical records section had purged their files and the only files he had were from 1983 to 1986 (M 297). His letter to Judge Powell indicates that the evaluation was done pursuant to a court order. To the best of his knowledge, it was not a confidential evaluation. He never had to do an evaluation that was confidential pursuant to court order. The second page of the letter indicated that a copy was sent to the public defender and the state attorney's office as well as to the judge. That would have been the policy at that point in time to send to all three parties (M 300). Cassady went to undergraduate school at St. Mary's University and Seminary where he received a bachelor of arts degree in philosophy. Some years after graduating he decided to get into the field of psychology and took an equivalent to get him admitted to graduate school at the Florida Technological University. He then pursued his master's in clinical psychology, which was awarded in 1974 (M 300-301). He did not receive any forensic training. He was vaguely familiar with the Florida death penalty statutes and its provisions regarding statutory mitigating circumstances. He would not consider himself as being able to converse fluently in that area (M 301). He was qualified to administer a Rorschach test but doesn't ordinarily use it because of its subjective nature. Cassady was not licensed as a psychologist in the State of Florida (M 302). He had never been licensed (M 303). He usually used two testing tools, the MMPI and the California Psychological Inventory. If the letter to the judge dated

September 2nd described the administering of a battery of tests, it would have been one of them (M 303). Although it would have been helpful to know that at one point Johnson was on psychotic medication, he was able to ascertain that there was a history of alcohol and drug abuse. He felt that it was probably based on self report and it was usually a good thing to get other information as well (M 304). Cassady testified that when you work for a government entity no license is needed. However, if complaints were lodged against him, the Sheriff's Department could investigate and terminate his employment (M 306). He was familiar with no rule or regulation that an unlicensed person is not entitled to give or express a public opinion in regard to competency and insanity in a forensic setting without a supervisor. In fact, it was his understanding that the Department of Health and Rehabilitative Services went around the state to train people at the master's level and mental health counselors to do such type of things because of the new rule in chapter 916 (M 307).

The court refused to accept Robert Norgard as competent to offer an opinion to the court as to the standards of ineffective assistance of counsel and possible deviance from the same in this particular case (M 327). Norgard had only been practicing law for about five and one half years and only handled two capital cases which actually went to the penalty phase. The judge felt that he had not reached a level of expertise at this point in his career to render an opinion as to the reasonableness of the conduct of defense counsel in this case (M 327-328). His affidavit was submitted as a proffer for the record (M 328).

DOCUMENTARY EVIDENCE

The record on appeal from the denial of the motion to vacate contains numerous documents. These include documents contained in the Appendix to the

motion to vacate (M 1086-1465), those listed as exhibits at the evidentiary hearing (M 520-925), and those listed in the separate volume labeled "Transcript of Evidence"[7].

The earliest documentation of Johnson's background appears to be the hospital records from Memorial Hospital on Jury 5, 1972. Johnson, who was 26 years old, was admitted for a cut on his right arm. The report says he drinks very little and takes no drugs (M 557). On September 29, 1974, Johnson was again admitted to Memorial Hospital at 10:05 for alcohol psychosis but was never seen because he checked himself out at 10:25 (M 566). Johnson was admitted to Memorial Hospital on October 18, 1974 complaining that he had been beaten by a policeman and had seizures. The EEG and brain scan were normal (M 570). During this stay, Johnson threatened to check himself out. Johnson was discharged with the admonition to continue outpatient medication (M 571). Johnson then saw Dr. Berken, whose November 28, 1974 report shows that Johnson was admitted to Memorial Hospital complaining of shaking attacks, headaches, depression and anxiety which resulted from an automobile accident and subsequent beating by police in April of 1973. The EEG, skull films and brain scan were within normal limits (M 570-71, 763). Dr. Berken recommended outpatient care and Johnson went to Hollywood Pavilion (M 728-29). The Pavilion report shows Johnson avoided all therapy and drugs were found in his

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[7] The documents are substantially duplicated in these three places. The only documents that were admitted at the evidentiary hearing were: 1) letter and affidavit of Dr. deBlij; 2) personal data on Dr. McMahon; 3) psychological report of Dr. McMahon; 4) medical records; 5) motion for psychological testing; 6) report of Dr. Cassidy (sic); and 7) affidavits of Gerald Jones (Transcript to Evidence). The other documents are included in the record as an appendix to the motion to vacate filed October 6, 1986 (M 980, 1086) and as exhibits which were filed July 30, 1986, the same day the Amended Motion for Continuance of Evidentiary Hearing was filed (M 514, 520).

room (R 729). The Pavilion noted Johnson had a history of antisocial behavior (M 730). Johnson had taken an overdose to gain his wife's sympathy.

On October 21, 1975, Johnson was referred to Community Mental Health in Leesburg for a psychiatric evaluation. Dr. Golwyn's diagnosis was antisocial personality (M 669). Dr. Golwyn also noted Johnson accepts no responsibility for his behavior.

Johnson entered the state prison system in December, 1975 (M 1268). The April 2, 1976 report of Dr. Gonzalez shows that Johnson came to R.M.C. on March 22, 1976, from Lake County jail to serve a five-year sentence. The doctor ordered an EEG and psychological testing to rule out organicity (M 572-73)[8]. Dr. Ramayya, a clinical psychologist, administered psychological testing on April 7, 1976, and ruled out organicity. The personality profile indicated character disorder and alcoholic problems (M 574). Johnson was also evaluated by Dr. Papas, a clinical psychologist, who noted Johnson met Dr. Ramos, staff psychiatrist, at Avon Park Correctional on a weekly basis (M 576). The psychological evaluation of Dr. Costa on October 1, 1976, states that Johnson was in good contact with reality (M 578). Johnson was to attend weekly group sessions (M 576). The July 23, 1977 report of Dr. Ramos indicates that Johnson was meeting with the doctor on a weekly basis, and that there was no psychosis but that Johnson was severely depressed (M 751). The Polk Correctional evaluation of April 12, 1979, shows that Johnson was scheduled for parole April 17, 1979 (M 577).

On November 1, 1979, Johnson was admitted to Memorial Hospital in Hollywood, Florida. At that point, his memory and intellectual functioning were intact and insight was fair (M 581). Dr. Fliegelman's November 4, 1979, neurological assessment was: "cranial nerves II-XII grossly intact. DTRs

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[8] The record contains the results of the EEG which was normal (M 746).

equal bilaterally. Babinski's both down. There is no ataxia. Vibratory sense good" (M 588). Dr. Greener's November 28, 1979[9] letter to Mr. Wilson at HRS states that the former conducted a psychiatric assessment, that Johnson spent 4 years at Raiford from 1975 to 1979, that concentration and attention were good, sensorium clear, Johnson was oriented and denied hallucinations, was of average intelligence and that memory for immediate, recent, and remote events was good. Dr. Greener also stated that judgment was generally poor and Johnson lacked insight into his difficulties. There was evidence of mild depression but no evidence of a psychosis or an organic brain syndrome. The best possible diagnosis was 1) antisocial personality disorder, 2) alcohol addiction, 3) drug abuse, and 4) previous reactive depression. He also noted Johnson's DUI arrest one month before could result in a parole violation (M 582-85).

Johnson was arrested in Oregon on January 6, 1980. The record contains the police reports of the arrest and subsequent confession (M 1218-23). These reports relate that Johnson said he confessed to the Florida murders because he was tired of life and that Johnson saw prison psychiatrists from 1976 to 1979 (M 733). Dr. Gardiner conducted a psychiatric exam in Prineville, Oregon, on January 6, 1980. In his opinion, Johnson was well oriented in time, place and person. He had no difficulty with memory for either recent or remote information. Dr. Gardiner discussed Johnson's rights, that he did not have to answer questions, and that anything he said could be used in court against him (M 610). Johnson was oriented, had no memory deficit, no problem with reality testing, no hallucinations, no projections, and no paranoid

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[9] The present murders occurred on December 4, 1979.

delusions. There were no depersonalizations (M 611). Dr. Gardiner's conclusions were:

> SUMMARY: This is a diminutive individual who evidences no psychopathology that would be recognized in Oregon as a defense to the crime for which he is charged. He understands the charges against him, and he can participate in his own defense. He has no mental disease or defect which would preclude his understanding the criminality of his act, or which would preclude his conforming his conduct to the requirements of the law, or which would preclude his forming the intent to carry out whatever acts he wishes. He hasn't much commitment to candor.
>
> DIAGNOSTIC IMPRESSION: Personality disorder, antisocial personality.

(M 612). Cassady evaluated Johnson in September, 1980, and indicated that Johnson has a "broad range of disturbance", had used large quantities of alcohol and drugs to reduce depression, anxiety, guilt, and feelings of hopelessness; has an antisocial personality disorder, has little ability to control impulses, knows the difference between right and wrong but has a disregard for the difference; does not regard the consequences of his acts and does not learn from reward or punishment (M 680). Cassady concluded that Johnson has an emotionally unstable personality along with a conduct or behavior disorder, was competent to stand trial, was sane at the time of the offense, and was able to appreciate the nature and consequences of his acts (M 680).

Dr. McMahon (who testified for the defense at the evidentiary hearing) indicated that on June 25, 1984, she felt Johnson did not have any major thought disorder or major affective disturbance (M 523). He was of average intelligence. He had been sober for 33 days before the murder (M 526). She felt the time to have documented any dysfunctioning was within the fist six to

twelve months of incarceration, i.e. "the earlier, the better" (M 530). She found only mild indications of previous neuropsychological deficits (M 530).

The record shows that Jones requested the following medical records on June 25, 1980:

1. Memorial Hospital in Hollywood (M 632);
2. HRS in Hollywood (M 633)
3. Dr. Berken in Dania (M 652);
4. Dr. deBlij (M 665);
5. Waterman Memorial Hospital in Eustis (M 678).

The record also shows that Dr. Salazar from Community Mental Health Center in Leesburg was in contact with Jones (M 667). Jones' affidavits included the following:

> 1. That while I have no specific recollection of having consented to a continuance of the trial date, I would need to look at my file and the dates involved to determine whether a continuance was needed to depose out of state witnesses. I do recall being present with Judge Powell and Bruce Hinshelwood when a continuance was discussed with the judge, but I cannot recall the substance of the conversation.
>
> 2. That while I did not take the deposition of the medical examiner, I do recall discussing his testimony with him for approximately thirty minutes prior to the State calling him as a witness for trial. I do not recall if I took the deposition of the evidence technician, however, I did review a number of reports from the technician and I reviewed all photographs taken at the scene (M 446).
>
> 3. That I recall hearing from sources unknown that the jury had deadlocked at 6-6 during the sentencing phase on whether to recommend death or life in prison with no possibility of parole for 25 years. No instruction was ever given to the jury to

> the effect that it was not necessary for a majority of them to agree on either sentence (M 793).

On direct appeal, appellate counsel moved to relinquish jurisdiction for an evidentiary hearing on ineffective assistance of counsel regarding the Interstate Agreement on Detainers (M 797-808). This court denied the motion on July 22, 1982 (M 812).

The trial court granted a motion the interview the jury foreman (M 972). Fred H. Cooper was deposed on September 25, 1986 (M 1224-33)[10].

The record also contains three affidavits of Dr. DiMaio, a medical examiner in Texas (M 1235-40). DiMaio reviewed the testimony of Greg Scala and felt there should have been a control swab of another area of the bathroom wall (M 1236). DiMaio reviewed the testimony of Park and says that if Park used .38 caliber cartridges when the cartridges that caused death were .357 the test patterns are not valid and vice versa. If he used flake powder and the actual cartridges were loaded with ball powder, the tests were not valid. There was no evidence Park swabbed the wall to obtain a control area (R 1238). DiMaio also reviewed the testimony of Dr. Kessler and opined that stippling can extend out to three to four feet rather than the six or seven inches indicated by Dr. Kessler (M 1239). The range depends on the type powder. Dr. Kessler did not say whether there was hair around the entrance wound in the scalp which is important since hair can filter out gunpowder and reduce the size of powder tattooing. DiMaio also thought the bullet that entered the arm exited the head (R 1240)[11].

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[10] The deposition is attached for the court's convenience.

[11] Dr. DiMaio did not testify at the evidentiary hearing and his affidavits were no offered into evidence. They are in the record as exhibits file in July, 1986, and in the appendix to the motion to vacate.

SUMMARY OF ARGUMENTS

POINT I: INEFFECTIVE ASSISTANCE OF COUNSEL - MENTAL HEALTH. Trial counsel requested Johnsons' medical and mental health records at least three months before trial. He received records from at least five sources. He contacted Johnson's last treating psychologist, Dr. deBlij, who testified in the penalty phase. He then asked the jail psychologist, Mr. Cassady, to administer psychological tests. Dr. deBlij testified in the penalty phase about Johnson's personal background, alcoholism, and mental health, and said he was able to appreciate the criminality of his conduct. Johnson's father testified about his background. Nancy Porter testified about Johnson's alcoholism and about "the good person". The evidence presented at the evidentiary was cumulative to that presented in the penalty phase. The testimony of the mental health experts at the evidentiary hearing was contradicted by the record. Prior evaluations by at least five sources diagnosed Johnson as having a character or antisocial personality disorder. Even Dr. McMahon said Johnson had a characterological disorder. Prior testing showed Johnson had no brain damage. Counsel was not deficient in his investigation and presentation, and even if he had done everything present counsel now advocates, the outcome would not have changed.

POINT II: JURY INSTRUCTIONS AND INEFFECTIVE ASSISTANCE OF COUNSEL. Whether the jury was properly instructed is procedurally barred. The instructions given were the standard instructions. Counsel was not ineffective for failing to object to the standard instructions or anticipate a change in law. The jury did not reach a final vote of 6-6 and proceed to deliberate because they thought they had to reach a majority as Johnson alleges.

POINT III. INCOMPETENT MENTAL HEALTH ASSISTANCE. Mr. Cassady was the last of a series of mental health professionals to evaluate Johnson. His evaluation

was consistent with that of six prior mental health evaluations. Mr. Cassady did not testify at the penalty phase and his report was mentioned only in cross examination of Dr. deBlij, who said she agreed with most of the findings. The trial court did not rely on Mr. Cassady's report. Counsel had the prior evaluations of Johnson and asked Cassady for a personality profile which would be nearer in time to the trial. Mr. Cassady's conclusions were consistent not only with the prior evaluations but also with Dr. deBlij's testimony that Johnson was able to appreciate the criminality of his conduct.

POINT IV: INEFFECTIVE ASSISTANCE - VOLUNTARY INTOXICATION. Trial counsel made a tactical decision not to pursue a voluntary intoxication defense because it was not supported by the facts. Johnson said he was "a little drunk" at the time of the incident. The only person who had contact with Johnson before the murders was four to five hours previous. The people who had contact with Johnson after the murders - Officer Wedeking, Nancy Porter, and the auto repairman - said he was not drunk. The deliberateness of Johnson's actions and detailed confessions negated possible intoxication. Trial counsel argued that the state failed to prove premeditated murder as charged since Johnson began shooting only after the customer lunged at him. The jury convicted Johnson of second degree murder as to the customer. The testimony showed that Johnson deliberated a moment before shooting the bar owner who was lying on the bathroom floor. Not only did Johnson have the specific intent to murder the bar owner, he also premeditated the killing. The evidence showed that Johnson decided to rob the victims and had the specific intent to rob the victims. If the jury had followed a felony murder theory, Johnson should have been convicted of first degree murder for both victims. Counsel was effective in his strategy. Counsel was not deficient in failing to object to the robbery instruction since it was the standard

instruction. Furthermore, the jury did not follow a felony murder theory so any error in the instruction was irrelevant.

POINT V: INEFFECTIVE ASSISTANCE - BALLISTICS. This court has previously held that the testimony by a nonexpert (Park) about a firing test he conducted was admissible. Counsel objected to the testimony. Even if he had conducted further investigation, Johnson has failed to show he would have been able to discredit the testimony of Park, Dr. Kessler, Greg Scala and Jerry Rathman. Although Park testified about a powder pattern on paper, Scala and Rathman both testified it was difficult to determine the distance from which a gun was fired. Dr. Kessler testified that the purple red tattooing on both victims indicated a close range shot to the head. This was consistent with Johnson's statements and the facts. The jury found Johnson guilty of second degree murder of one victim, so the stippling testimony could not have been dispositive of premeditation. Johnson attached affidavits of Dr. DiMaio to his motion to vacate. Dr. DiMaio did not testify at the evidentiary hearing and the state was not afforded the opportunity to cross examine his claims questioning the testimony of Park, Dr. Kessler and Scala. Whether the type of information in DiMaio's affidavits would have assisted trial counsel is speculative since the information may or may not be true. Johnson has failed to show deficient performance or prejudice.

POINT VI: BRADY VIOLATION AND PRESENTATION OF MISLEADING EVIDENCE. The state did not withhold material, exculpatory evidence (Park's firing test) that would have changed the outcome of the trial. Johnson has failed to show any evidence presented was misleading or that the state attorney knew it was false.

POINT VII: CONFESSIONS. The issue is procedurally barred. Raising the issue as ineffective assistance counsel will not resurrect the claim. This court

found on direct appeal the confessions were voluntary. Counsel moved to suppress the statements. If he did not succeed it was because, as this court found, the issue had no merit.

POINT VIII. RECORD RECONSTRUCTION. This issue is procedurally barred.

POINT IX: TRIAL COURT MISAPPREHENSION OF LAW. This issue is procedurally barred. The record shows that trial court conducted an independent review of the aggravating and mitigating circumstances. The fact he reached the same conclusion as the jury is because the five aggravating circumstances outweighed the mitigating circumstances.

POINT X: INEFFECTIVE ASSISTANCE - INTERSTATE AGREEMENT ON DETAINERS. The state moved to reset the trial beyond the 120-day period provided by the IAD. Trial counsel agreed to the continuance because he had to travel to Oregon to depose the officers to whom Johnson confessed. Trial counsel was not ineffective in waiving the IAD period in order to zealously represent his client. Johnson has failed to show prejudice since, if counsel had not agreed to the continuance, the state had good cause and the continuance would have been granted, anyway.

POINT XI: CALDWELL ISSUE. The issue is procedurally barred.

POINT XII: MERCY. The issue is procedurally barred.

POINT I

TRIAL COUNSEL'S INVESTIGATION AND PRESENTATION OF MITIGATING EVIDENCE WAS EFFECTIVE.

Trial counsel's alleged deficiencies can be classified into three main categories:

(1) Background information not provided to experts

Johnson claims the available information would have established voluntary intoxication as a defense in the guilt phase plus statutory and nonstatutory mitigation in the penalty phase. Because Johnson was evaluated only by an "unlicensed jailhouse psychologist" he feels his defense was compromised. Yet he says that if counsel had provided background information to this expert he would have been able to present strong evidence of voluntary intoxication and a compelling case for statutory mitigation (Initial Brief at 7).

(2) Failure to investigate mental health mitigation

Johnson faults counsel for not being well-versed in psychological test names, failing to request assistance of a mental health expert until a week before trial, failing to investigate mitigation until the trial, and not conducting in-depth interviews with witnesses. He also complains that trial counsel was supervising two trial divisions. Johnson compares his case to State v. Michael, 530 So.2d 929 (Fla. 1988).

(3) Failure to present mental health evidence to support voluntary intoxication defense and statutory and nonstatutory mitigation

Johnson argues that trial counsel should have presented a voluntary intoxication defense. He also argues that, had trial counsel inquired, Dr. deBlij could have established "substantially impaired capacity" and "extreme mental or emotional disturbance". He claims Dr. McMahon could have testified

that Johnson was emotionally stunted, had little or no coping mechanisms, suffered from an emotional disturbance and had substantially impaired capacity. Dr. McMahon could also have verified Johnson's acute and chronic alcoholism and the brain damage caused by alcoholism, extrapolating back five years. Johnson also claims Dr. Glennon could have testified about his alcoholism, brain damage caused by alcoholism, mental disturbance at the time of the murder, and substantially impaired capacity. Johnson claims that all the above material was available at the time of his trial in 1980.

Johnson classifies the mitigation that should have been presented as follows:

> a) alcoholism;
> b) psychiatric history; specifically, alcohol psychosis seizures, migraine headaches, traumatic neuroses with features of agitated depression, suicide attempts, indicia of schizophrenic personality, blackouts;
> c) inadequacy of treatment;
> d) mis-prescription of drugs; and
> e) the good person

Johnson's final claim is that the trial court's conclusion that trial counsel's "investigation was within the required degree of professional reasonableness" was error as a matter of law. He claims that the testimony presented at the evidentiary hearing established serious mental health deficiencies which established not only two statutory mitigating circumstances but also nonstatutory mitigation.

Contrary to Johnson's allegations, the record shows trial counsel was contacting the appropriate sources for medical records as early as June, 1980. The record shows that counsel had requested Johnson's prior medical records, had obtained reports from five sources, had contacted Dr. deBlij about testifying, and then had requested a current psychological profile from Cassady. The profile was consistent with the prior evaluations, so there was

no reason to pursue the subject further. Cassady was of the opinion as was Dr. deBlij that Johnson was able to appreciate the criminality of his actions. Although Cassady provided a psychological evaluation, he did not testify at the penalty phase. Counsel elected to use Dr. deBlij who covered the same area but had more contact with Johnson. Counsel testified at the evidentiary hearing that Dr. deBlij was the person who had the most recent contact so he considered her the best witness.

Cassady's profile was consistent with the prior evaluations of Dr. Ramayya, Dr. Golwyn, Hollywood Pavilion, and Dr. Greener i.e., antisocial personality disorder or character disorder and alcoholism. Even Dr. McMahon, the defense expert at the evidentiary hearing, said Johnson had a "characterological disorder".

Although Johnson claims he presented a "compelling" case at the evidentiary hearing, the information was cumulative and substantially all the information had been presented at the penalty phase. The evidentiary hearing witnesses repeated the testimony at the penalty phase and each other. The information about Johnson's background was presented at the penalty phase through his father and Nancy Porter. The testimony at the evidentiary hearing, although greater in quantity, was substantially the same as at the penalty phase. Counsel was aware of Johnson's history of alcoholism, and Johnson's father, Nancy Porter and Dr. deBlij testified in 1980 about how he acted when he drank. Johnson's father, Nancy Porter and Johnson testified about the father's alcoholism. Even in 1990, the father continued to deny the extent of his alcoholism, so counsel can hardly be deficient in not presenting the extent of the problem. The information about Johnson's mother committing suicide and his brother being killed in Vietnam was presented in 1980 by Johnson's testimony at the penalty phase. Johnson also testified he was

drinking in his teens, his mother started drinking when he was twelve, his father would stay away days at a time because he was drinking and he had a alcohol problem for which he sought help. Nancy Porter and Johnson's father testified in 1980 about Johnson "the good person." Trial counsel was aware of all the information Johnson says he should have presented. He made a tactical decision to present Dr. deBlij, Johnson's most recent mental health expert. Johnson, Nancy Porter, and Dr. deBlij testified at the penalty phase that he had sought treatment. It is quite obvious treatment failed since Johnson murdered two people one week after he was discharged from Memorial Hospital. The record also shows Johnson disregarded the admonitions of counsel, did not cooperate in programs, and was aware of his problems but would not take responsibility for his actions.

The jury was aware of Johnson's alcoholism. Jones knew alcohol was an addiction. The relevance of Jones' knowledge whether alcoholism was a disease is tenuous since whether alcoholism was a "disease" in 1980 has not been established. As stated in Strickland v. Washington, 466 U.S. 668, 689 (1984), hindsight vision should be avoided.

The evidentiary hearing testimony was contradicted by the record and impeached on cross exam. For example, the 1974 and 1976 evaluations reported there was no organicity or brain damage, yet the current experts testified there was. Dr. Fleigelman found a normal Babinski on November 4, 1979, and Dr. Greener found no evidence of organic brain syndrome on November 29, 1979. The current experts testified that the rehabilitation programs offered were insufficient but the record shows Johnson either did not follow the advice to participate in such programs or voluntarily signed himself out from treatment. Dr. Glennon admitted that such programs are rarely successful. The record shows Johnson had programs available in prison from 1975-79. Both Dr. Glennon

and Dr. McMahon said there was continuous chronic alcoholism resulting in brain damage, but the record shows Johnson was incarcerated for 3 1/2 years from 1975 to April 1979. Although Johnson said he was able to drink in prison, it is ridiculous to believe he could have been continually intoxicated while in prison. Dr. McMahon said Johnson had not been drinking for the 33 days preceding the murders. Although Dr. McMahon testified she could detect deficits characteristic of alcoholics five years later, she also admitted a more contemporaneous evaluation would be more accurate. Her diagnosis of brain damage is refuted by the record which shows that tests done one week before the murder showed no brain damage, and there was not chronic and continuous alcohol ingestion for the years preceding the murders. Dr. Glennon also felt there was brain damage. Dr. McMahon and Dr. Glennon's opinions are not based on brain scans or on EEG as were the 1974 and 1976 evaluations. If Johnson was a chronic alcoholic in his teens, certainly the brain tests should have shown some damage if the current experts' theory that chronic alcoholism equals brain damage was correct. Counsel made a strategic decision, after considering the available information, not to present a voluntary intoxication defense (See Point IV).

Dr. deBlij said at the hearing she had never been asked about mitigating factors and would have testified they existed, but the record shows counsel did ask her about them before the penalty phase and she did testify on cross examination that Johnson had the ability to appreciate the criminality of his actions. Mr. Jones said that if Dr. deBlij was now saying he had not talked to her about mitigating circumstances, she was mistaken.

Although Johnson cites a section of the record to attempt to show counsel failed to provide background information to Cassady, what counsel wanted from Cassady was just for him to administer psychological tests. He

already had the background information from Johnson and the other reports he had requested in June. The fact counsel was not familiar with the various tests is precisely why a professional in the field is called in to administer the appropriate test. Johnson cites State v. Michael, 530 So.2d 929 (Fla. 1988) to support his allegations. Michael was a state appeal in which the state was challenging the trial court's findings. The general rule stated in Michael, that when the trial court bases its findings on competent substantial evidence, the ruling should not be disturbed, is true in this case. See Henderson v. Dugger, 522 So.2d 835, 837 (Fla. 1988). Here, counsel had available all Johnson's prior history. He knew the facts of the case and did argue for statutory mitigation (extreme emotional disturbance and substantially impaired capacity) (R 518).

The trial court found:

> It is clear from the record, the testimony presented at the Defendant's trial, and testimony of trial counsel at the evidentiary hearing, that trial counsel did conduct a reasonable investigation into the Defendant's background. Trial counsel had enough information available to him to make informed strategic decisions as to the proper course of action to pursue in defending the Defendant. Trial counsel testified in the evidentiary hearing that he had reviewed "numerous" psychological studies of the defendant (see 227 evidentiary hearing (ER)). These psychological studies have been incorporated into the appendix of the Defendant's present motions. After reviewing them, the Court observes that they contain substantial psychological, medical, and historical data on the Defendant. Trial counsel also testified that he contacted persons familiar with the defendant in preparation of his case: attending physicians (ER 261); Dr. Deblij (ER 261, 277); Police Officers who had contact with the Defendant (ER 281); a former employer (ER 237); family members (ER 237, 238), girlfriend (ER 238), and those deposed by trial counsel in this case.

As warned by the Court in STRICKLAND, it is tempting to second guess the trial counsel in his decision to pursue or not to pursue a particular defense. The Court is satisfied that the trial counsel's investigation was within the required degree of professional reasonableness.

As to the contention by the Defendant that there existed two statutory mitigating circumstances that could have been raised by trial counsel in the penalty phase - assuming arguendo that these could have been presented for consideration during the trial, there was still a greater weight of aggravating circumstances existing: 1) the Defendant was on parole from a conviction for burglary at the time of the commission of the offense; 2) the Defendant had been previously convicted of attempted robbery, robbery, attempted murder, and second degree murder, at the time of sentencing; 3) the Defendant committed the offense for pecuniary gain, in that the Defendant committed the offense during the course of a robbery; 4) the crime was committed for the purpose of avoiding or preventing a lawful arrest; 5) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The Defendant's argument that trial counsel erred in not presenting further nonstatutory mitigating circumstances, and that by doing so would have resulted in a different sentence is without merit. The Defendant's trial counsel presented evidence of the Defendant's alcoholism and alcohol psychosis (see trial transcript page (TR) 441, 442, 445, 447, 448, and 451); his father's alcoholism (TR 440, 446, and 447); the Defendant's parent's separation (TR 462, 466, and 453); the time the Defendant spent in an orphanage (TR 466); the death of the Defendant's mother (TR 443, and 471); and the death of the defendant's brother in Vietnam (TR 442, and 471).

This Court finds that even if the Defendant had been successful in raising the two statutory mitigating circumstances that he now alleges, that a sentence of death would still have been the result.

(M 1762-64).

The evidence presented at the hearing on this point proved nothing. The burden was on Johnson to prove that the alleged error actually prejudiced the defense. Johnson now suggests that in his opinion Jones could have done a better job of presenting evidence on these issues. This is speculative at best, and Johnson presented no proof that had Jones called more witnesses on issues of past family and psychiatric history which he raised in the penalty phase, that a different outcome would have resulted.

To support a claim of ineffective assistance of trial counsel, not only must the defendant demonstrate that counsel's performance was deficient, he must also demonstrate that this deficiency affected the outcome of the trial proceedings. Strickland v. Washington, 466 U.S. 668 (1984). A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. Strickland, supra; Correll v. Dugger, 558 So.2d 422, 426 (Fla. 1990).

A claimant asserting ineffective counsel bears a heavy burden. He must first identify the specific omission and show that counsel's performance falls outside the wide range of reasonable assistance. In determining whether this has occurred, courts must eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time and must indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The burden is on the claimant to show that counsel was ineffective. Having demonstrated inadequate performance, the claimant must then show an adverse effect so severe that there is a reasonable probability that the results would have been different except for the inadequate performance. Cave v. State, 529 So.2d 293, 297 (Fla. 1988).

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Squires v. State, 558 So.2d 401, 403 (Fla. 1990), citing Strickland at 691.

Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected. State v. Bolender, 503 So.2d 1247 (Fla. 1987); Gorham v. State, 521 So.2d 1067 (Fla. 1988); Jones v. State, 528 So.2d 1171 (Fla. 1988); McCrae v. State, 510 So.2d 874 (Fla. 1987). In Strickland, the Court stated:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel of the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

The Court also stated:

> [a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy".

Id. at 688-89.

A defendant is not entitled to perfect or error free counsel, only to reasonably effective counsel. Waterhouse v. State, 522 So.2d 341, 343 (Fla. 1988).

Johnson has failed to prove counsel failed to furnish Cassady or deBlij with any vital information which would have affected their opinions. See Engle v. Dugger, 16 F.L.W. S123 (Fla. Jan. 15, 1991). It is difficult to imagine how a confidential examination by Cassady (who did not testify at the trial and whose profile was consistent with prior evaluations and with Dr. deBlij except for the antisocial personality diagnosis) would have rendered a different result. Engle, supra. The trial court found counsel was not deficient and the record shows he was not. See Daugherty v. State, 505 So.2d 1323 (Fla. 1987). Counsel is not ineffective for failing to present testimony that would have been entirely cumulative. Card v. State, 497 So.2d 1169 (Fla. 1986). The fact that a more detailed and thorough and detailed investigation could have been done does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorough job being done than was actually done. Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986). The trial court found the outcome would have been the same even if the evidence current counsel presents had been introduced. See Steinhorst v. State, 16 F.L.W. S126 (Fla. January 15, 1991). Where counsel makes a tactical decision to present certain mental health testimony and there is no reasonable probability further testimony would have changed the outcome, counsel is not ineffective. Medina v. State, 573 So.2d 293 (Fla. 1990). The additional cumulative testimony presented at the evidentiary hearing would not outweigh, under any view, the five aggravating circumstances. See Engle, supra; Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990); Correll v. Dugger, 558 So.2d 422 (Fla. 1990); Spaziano v. State, 545 So.2d 843 (Fla. 1989); Glock v. Dugger, 537 So.2d 99 (Fla. 1989); Francis v. State, 529 So.2d 670 (Fla. 1988); Doyle v. State, 526 So.2d 909 (Fla. 1988). Johnson has failed to demonstrate how the failure to introduce any further information regarding his background other

than that which was already before the jury prejudicially affected the outcome of the trial. Kennedy v. State, 547 So.2d 912 (Fla. 1989).

Where the only testimony regarding voluntary intoxication at the time of the offense was the defendant's, counsel was not ineffective in not pursuing that avenue of defense. Hill v. Dugger, 556 So.2d 1385 (Fla. 1990); (See Point IV herein).

Trial counsel was not ineffective for failing to provide competent mental health assistance where he obtained prior evaluations, consulted Dr. deBlij, and had psychological test administered shortly before trial. Bertolotti v. State, 534 So.2d 396 (Fla. 1988). His actions were a reasonable exercise of professional judgment and Johnson has failed to show prejudice. Cave v. State, 529 So.2d 293 (Fla. 1988). The fact that current experts are willing to give more favorable opinions does not mean counsel was ineffective. Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990). That current counsel, through hindsight, would now do things differently is not the test for ineffectiveness. Stano v. State, 520 So.2d 278 (Fla. 1988). Mental health experts often reach differing conclusions. This does not mean an expert is incompetent. See Engle, supra.

As the trial court found, Johnson has not proved either deficient performance or prejudice as required by Strickland. The burden of proof at this stage rests upon the petitioner, and Johnson has not met the burden. Cave v. State, 529 So.2d 293, 297 (Fla. 1988). The trial court findings were supported by sufficient competent evidence and should not be disturbed. See Henderson v. Dugger, 522 So.2d 835, 838 (Fla. 1988); Martin v. State, 515 So.2d 189 (Fla. 1987); Stewart v. State, 481 So.2d 1210 (Fla. 1985); Demps v. State, 462 So.2d 1074 (Fla. 1984); Kight v. Dugger, 574 So.2d 1066 (Fla. 1990).

POINT II

WHETHER THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY IS PROCEDURALLY BARRED AND COUNSEL WAS NOT INEFFECTIVE[12].

Johnson claims the trial court misinstructed the jury that a majority vote was required for a life sentence and the instruction resulted in the jury changing a 6-6 vote into a 7-5 vote. He also claims the trial court erred in finding the issue procedurally barred since there was no evidence at the time of the 6-6 "deadlock" that this had occurred. Finally, he says trial counsel was ineffective for failing to object to the instructions.

This issue is procedurally barred since it could have been raised on direct appeal. Buenoano v. State, 559 So.2d 1116 (Fla. 1990); Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Henderson v. Dugger, 522 So.2d 835 (Fla. 1988); Maxwell v. State, 490 So.2d 927 (Fla. 1986).

The trial court found:

> This Court rejects the Defendant's request for relief based on the allegations in Claim IV for several reasons. First, objection to a jury instruction is a matter properly raised on direct appeal, and it was not error on the trial counsel's part to fail to object to a then standard jury instruction. Second, the Defendant has failed to present evidence to substantiate his claim that he was denied a life sentence due to the instruction used. In fact, the jury foreman testified in a deposition that the jury was not confused by the instruction, and did not feel bound to reach a majority decision in either direction (See page 7 of deposition of Fred Cooper dated September 25, 1986).

(M 1765-66).

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[12] This issue was Claim IV in the Motion to Vacate.

Johnson's claims that the trial court erred and counsel was ineffective have no merit. The trial court gave the standard jury instruction and counsel is not required to object to standard instructions or anticipate the instructions will be changed. Engle v. Dugger, 16 F.L.W. S123 (Fla. Jan. 15, 1991); Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982). The standard instruction in 1980 was:

> Should a majority of the jury determine that the defendant should be sentenced to death, you should recommend an advisory sentence as follows:
>
> "A majority of the jury advise and recommend to the court that it impose the death penalty upon the defendant, _____".
>
> On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the jury determine that the defendant should not be sentenced to death, then you should render an advisory sentence as follows:
>
> "A majority of the jury advise and recommend to the court that it impose a sentence of life imprisonment upon the defendant, _____".
>
> The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment. You will now retire to consider your recommendation, and when seven or more are in agreement as to what sentence should be recommended to the court, that form of recommendation should be signed by your foreman and returned into court.

Florida Standard Jury Instructions (Criminal) Penalty Proceedings - Capital Cases (1975) p. 80-81.

As this court recognized in Harich v. State, 437 So.2d 1082, 1086 (Fla. 1983), the standard jury instruction was revised in June, 1981. Case law decided after 1980 considered the effect of a tie vote by the penalty phase jury, and the jury instructions were amended in 1985 to encompass this change

in the law. See, Florida Bar re: Standard Jury Instructions Criminal Cases, 477 So.2d 985 (Fla. 1985). In Ford v. Wainwright, 451 So.2d 471 (Fla. 1984), this court held that the jury instructions given accurately tracked the statute in effect at the time and Harich did not constitute a change in the law which would merit relief in a collateral proceeding. Ford at 474.

Collateral counsel's assertion that the unobjected to jury instruction caused the jury to continue to deliberate when it had reached a firm 6-6 decision is contradicted by the record. The deposition of the jury foreman shows the jury was not deadlocked but rather was engaged in meaningful deliberations. Before the jury arrived at a final decision, there was more than one poll. The votes were taken, then they discussed and deliberated and went through the mitigating and aggravating circumstances very, very carefully (M 1229). Mr. Cooper had each juror discuss his feelings, conducted a general discussion and took a vote. Then each person discussed everything again, and a second vote was taken (M 1230). Mr. Cooper's deposition testimony at this point was as follows:

A: So each person, we had a general discussion, and a vote was taken. And the vote was six to six.

Q: Okay.

A: And so each person then discussed everything again. And a second vote was taken.

Q: Why was that?

A: Why was what?

Q: Why was the second vote taken on that? Did you feel that you couldn't return with a six to six vote?

A: The jury didn't want to. They wanted to discuss it some more. We weren't told that we had to do anything. But we -- it was one of those cases that I remember I tore up little slips and gave everybody a slip. And then I went around and

> collected from one another. It wasn't a matter of putting them in the middle of the table. I went around and picked them up so there wouldn't be a mistake on anybody's part.

(M 1230). There is nothing in this deposition to support Johnson's "deadlock" claim. This case is not like Rose v. State, 425 So.2d 521 (Fla. 1982) or Patten v. State, 467 So.2d 975 (Fla. 1985), in which the jury asked for an instruction on deadlock and was given an "Allen charge".

The fact that a lawyer in a different case raised an objection to this instruction and succeeded in having it set aside does not mean counsel was ineffective for not also attacking the instruction. See Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990). Because the instructions were the standard instructions, the failure to object did not constitute a serious and substantial deficiency, measurably below the standard of competent counsel. Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988). The trial court was correct in finding this issue procedurally barred and without merit.

POINT III

WHETHER JOHNSON WAS DENIED COMPETENT MENTAL HEALTH ASSISTANCE IS PROCEDURALLY BARRED, CANNOT BE ATTRIBUTED TO THE STATE, AND HAS NO MERIT[13].

This issue is procedurally barred. Doyle v. State, 526 So.2d 909, 911 (Fla. 1988); Eutzy v. State, 541 So.2d 1143, 1146 (Fla. 1989). Even if cognizable, it has no merit. It is basically duplicative of Points I and IV herein. Regarding voluntary intoxication, Jones acknowledged at the evidentiary hearing that he did some reading on voluntary intoxication since it seemed to be the only possible defense, if it was available (M 242-43). He also clearly stated that he rejected a voluntary intoxication defense and gathered information from depositions and from Johnson. Jones clearly stated that he rejected the use of a voluntary intoxication defense at trial because of the very damaging facts he learned from the defendant which contradicted such a defense. See Engle v. Dugger, 16 F.L.W. S123 (Fla. Jan. 15, 1991); Kight v. Dugger, 574 So.2d 1066 (Fla. 1990). The only evidence in this record to show that the defendant was intoxicated at the time of this incident was his own self-serving statements. See Hill v. Dugger, 556 So.2d 1385 (Fla. 1990) and Point IV herein.

Regarding incompetent mental health evaluations, trial counsel had Johnson's prior evaluations from Memorial Hospital, from the psychiatrist in Oregon and three south Florida reports. Johnson admits that trial counsel had his previous psychological evaluations (Initial Brief at 37). Counsel talked with Dr. deBlij and it was her testimony that was presented. As seen in her report (M 762-63) and penalty phase testimony (R 449-463) she was well aware of Johnson's background back to 1972 and his family background back to

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[13] This issue was Claim II in the Motion to Vacate.

childhood. Trial counsel additionally wanted a recent profile and asked Cassady. Cassady's profile was consistent with the other reports: deBlij's assessment of personality disorder and alcoholism (R 453); Dr. Ramayya's assessment of character disorder and alcoholic problems (M 574); Dr. Greener's assessment of antisocial personality disorder alcohol and drug addictions (M 582-85); Dr. Gardiner's assessment of personality disorder (M 612); Dr. Golwyn's assessment of antisocial personality (M 669); and Hollywood Pavilion report of history of antisocial behavior (M 730). Dr. McMahon said Johnson had a characterological disorder. If Cassady's evaluation was incompetent, so must at least five other doctors' evaluations including that of a current defense witness. As discussed in Point I, the information at the evidentiary hearing was cumulative to that presented in the penalty phase and the jury was aware of Johnson's background, alcoholism, the personality disorder, good person and his attempts at rehabilitation.

There was no reason for counsel to object to the use of Cassady's report since there was nothing in the report that was inconsistent with Dr. deBlij's testimony. She did disagree with antisocial personality, but she informed the jury of that. The Cassady report was not in evidence and was not reviewed by the jury (See Index to Evidence in record on appeal). The only time Cassady was mentioned was by the state attorney during examination of Dr. deBlij. Dr. deBlij agreed with most of Cassady's report. Jones did ask Dr. deBlij about statutory mitigation and she testified Johnson was able to appreciate the criminality of his conduct.

The fact that counsel requested Cassady's testing a week before trial is not an indication of incompetency. Jones had requested all the other psychological information in June. He had Cassady's report before trial. Cassady did not need background information. He was simply to administer tests.

Whether Cassady's assistance was competent did not prejudice Johnson since his evaluation was not relied on in the penalty phase. Although Johnson says the trial court used Cassady's report in imposing the death sentence, the trial court order does not mention anything in Cassady's report (R 804-07). The trial court order relates to Dr. deBlij's testimony at the penalty phase. For example, the impulsive personality with depressive features with a secondary diagnosis of alcoholism and drug abuse (R 805) corresponds to Dr. deBlij's test at the penalty phase (R 453). Dr. deBlij testified Johnson could appreciate the criminality of his conduct (R 459, 805). The information in the trial court order regarding nonstatutory mitigation was derived from the penalty phase testimony: traumatic childhood (R 462, 465); periodic separation from alcoholic parents (R 438-39, 446, 462, 465-66); loss of brother and mother (R 442-43, 470); recognition of need for treatment (R 447, 454, 471); completion of treatment program (R 445, 471); mature when not drinking or being put down (R 442, 445, 456).

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985), does not support Johnson's argument. In Ake, the defense wished to raise an insanity defense and was unable to do so during the guilt or sentencing phase. In the case at bar there was no insanity or alcoholism defense mounted for the obvious reason that the facts refuted a possible diminished capacity defense. Johnson was able to function in a rational manner at the time he committed the crime. A defendant's mental condition is not necessarily at issue in every criminal proceeding. Ake, 105 S.Ct. at 1096; Bush v. Wainwright, 505 So.2d 409 (Fla. 1987). Absolutely no evidence existed at the time of trial, nor is it now alleged, that Johnson lacked sufficient present ability to consult with and aid his attorney in the preparation of a defense with a reasonable degree of understanding. Ake was not decided until 1985 and Johnson has not alleged

that it should be applied retroactively. Likewise, since Ake was decided five years after the trial, counsel cannot be ineffective for failing to anticipate this case law. See Engle v. State, 16 F.L.W. S123 (Fla. Jan. 15, 1991). In any case, Johnson has failed to show that had Jones gotten another "independent" health expert that it would have made the slightest difference. Jones did present an independent health expert, Dr. deBlij.

Even if the mental health assistance were deficient, it cannot be attributed to the state. Clisby v. Jones, 907 F.2d 1047 (11th Cir. 1990); Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990). The contention that a defendant is entitled to a favorable psychiatric opinion has been repeatedly rejected. Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), cert. denied, 479 U.S. 909 (1986); Henderson v. Dugger, 5 F.L.W. Fed. C446 (11th Cir. Feb. 20, 1991).

Counsel did not allow the Cassady report to go straight to court. He had a recurrent problem and tried to solve it. In any case, the information in Cassady's report is similar to that which Johnson now wants to present in mitigation, i.e., that Johnson used large quantities of alcohol and drugs to reduce depression, anxiety and guilt, has little ability to control impulses, is emotionally unstable, broad range of disturbance, and unable to cope. Johnson has not shown deficient performance or prejudice.

Although Johnson claims he was not informed of his rights, Jones testified he told Johnson not to talk about details of the murders. When Johnson was in Oregon, Dr. Gardner advised him a mental evaluation could be used against him in court. In any case, this issue is procedurally barred and without merit. See Preston v. State, 528 So.2d 896 (Fla. 1988).

The trial court found:

> This Court rejects the Defendant's contentions in Claim II of his petition. The record reveals that trial counsel had access to and reviewed the Defendant's medical history, which included psychological evaluations (ER 227, 230, 237, 238, and 239). Further, trial counsel had consulted with Dr. Deblij, the psychiatrist that had had the most contact with the Defendant in the past, and requested further evaluation by John Cassady, who interviewed the Defendant and administered the MMPI and the CPI tests to the Defendant.
>
> Trial counsel had sufficient information on which to base his trial strategy, and there is nothing in the record which convinces this Court that he took an improper course. Trial counsel testified that he did not have any doubts as to the Defendant's sanity (ER 231). Further, the Defendant has not made a showing that the results of the trial or sentencing would have been different had another examination taken place.

(M 1764).

The record supports the trial court's conclusions. See Roberts v. State, 568 So.2d 1255 (Fla. 1990). The mere fact that defendant has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief. Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990). This is particularly true where the new experts have presented nothing new. See Correll v. Dugger, 558 So.2d 422 (Fla. 1990). There is no requirement that the issue of a defendant's mental condition must be reopened because the psychiatrist who examined the defendant reached a legitimate conclusion based on the symptoms displayed by the defendant but failed to associate them with another mental deficiency. Nor is the attorney representing the defendant ineffective for failing to pursue every possible defense based on a particular mental condition. See Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989).

POINT IV

TRIAL COUNSEL MADE A REASONED, TACTICAL DECISION IN REJECTING THE DEFENSE OF VOLUNTARY INTOXICATION[14].

This issue was discussed in Point I. Counsel stated at the evidentiary hearing that he made a tactical decision, after a complete investigation, not to present a voluntary intoxication defense. What he did present was a hybrid defense that Johnson could not premeditate and therefore could not be convicted of first degree murder. Obviously, this was a reasonable strategy since the jury convicted Johnson of second degree murder for the customer. Johnson had the specific intent to rob and murder. After Johnson shot the customer, there was testimony from Lt. Peterson that Johnson "deliberated for moment" before he shot the bartender (R 259). There was also Johnson's statement that he "made the decision to rob the bartender and a customer" (R 258). His signed statement says "I was still mad and decided to rob the bar owner" (Exhibit 16, Index to Evidence, Record on Appeal). The record shows counsel made a tactical decision which should not now be questioned. See Kight v. Dugger, 574 So.2d 1066 (Fla. 1990); Engle v. Dugger, 16 F.L.W. S123 (Fla. Jan. 15, 1991); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

Not only did Johnson's detailed confessions belie intoxication, the circumstances of the incident show deliberate behavior. See White v. State, 559 So.2d 1097 (Fla. 1990); Henderson v. Dugger, 522 So.2d 835 (Fla. 1988). He decided to rob the victims, marched them to the bathroom where he told hem to lie on the floor so he could tie them up, and managed to shoot Dodson straight through the head. He wiped down everything he thought he touched,

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[14] This issue was Claim 3 in the Motion to Vacate.

stole the cash drawer and a .38 pistol, and sold the murder weapon, a .357 magnum.

There was no reasonable probability the jury would not have found him guilty under the circumstances even if they received an instruction on voluntary intoxication. See Lambrix v. State, 534 So.2d 1151 (Fla. 1988). Trial counsel is not deficient for failing to raise a defense which is unreasonable under the circumstances or for failing to request an instruction that is not warranted such as where the only evidence of intoxication is a defendant's self-serving declaration. Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Hill v. Dugger, 556 So.2d 1385 (Fla. 1990). Although Johnson claims there was ample evidence of intoxication, he has not alleged specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental. See Kennedy v. State, 547 So.2d 912 (Fla. 1989).

Mere evidence of alcohol consumption without evidence of intoxication is not sufficient. Linehan v. State, 476 So.2d 1262 (Fla. 1985). Self-serving statements of intoxication alone provide no basis for expert testimony as to whether a defendant was able to distinguish right and wrong at the time of the murder, see, Cirack v. State, 210 So.2d 706 (Fla. 1967), and an instruction on intoxication is only warranted when there is sufficient evidence of intoxication. Gardner v. State, 480 So.2d 91 (Fla. 1985). The only evidence of intoxication in this case are words from the mouth of Johnson.

Johnson's statement he was "a little drunk" does not support an intoxication defense. Officer Wedeking said Johnson was not drunk, the repairman at the garage said he was not drunk, and Nancy Porter said he was

not drunk. None of the witnesses who testified about Johnson's history of alcoholism were with him near the time of the murders. As trial counsel said, the person nearest and most intimate was someone in south Florida who had seen him four to five hours earlier in south Florida. Counsel clearly stated he understood he did not have to put a defendant on the stand to establish intoxication. However, in this case, the defendant was alone for a period of time before the murders and was the only person with first hand knowledge.

Counsel was not deficient in failing to object to the prosecutor's comments which were proper comments on the evidence. Breedlove v. State, 413 So.2d 1 (Fla. 1982).

Counsel was not deficient for failing to object to the robbery instruction which was the standard instruction at the time[15]. The trial court's instruction on robbery conformed to the standard jury instruction as it existed in 1980 (R 304). The trial court's instruction was:

> Robbery is the taking of money or other property of any value whatsoever from the person or custody of another by force, violence, assault or putting in fear. (R 304).

The robbery instruction in 1980 was:

> It is the crime of robbery for any person to take money or other property of value whatsoever from the person or custody of another by force, violence or assault, or putting in fear.

Florida Standard Jury Instructions (Criminal) Robbery, Fla. Stat. 812.13 (1975) p. 185.

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[15] In actuality, Johnson's argument on this issue focuses on the propriety of instructing the jury. Any issue on instructions should have been raised on appeal and is now barred. Hill v. Dugger, 556 So.2d 1385 (Fla. 1990); Gorham v. State, 521 So.2d 1067 (Fla. 1988).

The jury instructions in 1980 also defined the elements of the offense, but there is no "intentionally" or intent phrase involved. The 1980 "taking" element provides that "the taking was by means of force, violence or assault of by putting (person alleged) in fear". Id. at p. 185. The revised instruction in the 1981 edition of the standard instructions provides that the taking must be "with the intent to permanently deprive (victim) of his right to the property...". There was no element of intent in the 1980 standard instruction and counsel cannot be ineffective for failing to anticipate a change in the law. Engle v. Dugger, 16 F.L.W. S123 (Fla. Jan. 15, 1991); Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982). Furthermore, since there was sufficient proof of premeditation, there can be no error in failing to object to the instructions on the felony underlying a felony murder. Muhammad, supra at 538. The instruction was sufficient to insure a fair trial. See, Taylor v. State, 386 So.2d 825 (Fla. 3d DCA 1980). The jury apparently did not consider felony murder since the focus was on first or second degree murder as stated by the jury foreman (M 1228) and indicated by the verdicts.

The trial court found:

> The trial counsel's decision not to pursue a defense of voluntary intoxication was a strategic decision which the Court is to give a strong presumption to in favor of reasonableness. Regardless of that presumption, this Court finds sufficient facts in the record to understand why trial counsel chose not to pursue such a defense. Trial counsel testified that he specifically rejected a voluntary intoxication defense based on the fact that the Defendant had recounted the incident in this confession with "great detail and particularity" (ER 266), and that he had confessed to forming the intent to rob the bar owner while sitting at the bar (ER 267) - both of which contradict the proposition of a diminished capacity defense.

> Trial counsel also testified that he felt that in order to attempt a voluntary intoxication defense that it would be necessary to have the Defendant testify. Trial counsel testified that based on his conversations with the Defendant that he decided it would be a "very poor strategy move" to have him be a witness (ER 264, 266). While intoxication may have been established by testimony other than that of the Defendant, the facts of the case do not support a defense of diminished capacity.
>
> As to the contention of ineffectiveness of counsel for failure to object to the State's misstatement of the law, the Defendant does not show prejudice, and this Court finds that it was harmless error.

(M 1765).

The trial court's findings are supported by sufficient competent evidence. Henderson v. Dugger, 522 So.2d 835, 838 (Fla. 1988).

POINT V

TRIAL COUNSEL WAS NOT INEFFECTIVE IN HIS TREATMENT OF BALLISTICS EVIDENCE[16].

Johnson first faults counsel for not deposing Mr. Park, then admits the information was not provided and counsel was surprised by the ballistics test. Counsel cannot be ineffective for not discovering evidence not produced by the state. Roberts v. State, 568 So.2d 1255 (Fla. 1990).

Johnson next states that counsel was ineffective in his treatment of Park, then says the testimony was allowed over objections. The record shows trial counsel objected continuously to the testimony and the court sustained one objection. The testimony of Park was not extensive on this issue. The exhibit came in only with the admonition that the prosecutor be careful in how he argued the issue. Jones made the same objection to the test-firing exhibit that defendant's present counsel has made, i.e., that it was irrelevant. Both the trial judge and the appellate court decided that it was relevant and that its admission was not error. Jones successfully objected to witness Park giving any opinion about the significance of the test and requested the trial court to rule that he was not an expert. Park was not qualified as an expert and was not allowed to draw conclusions. Whether Park was a competent witness is an issue that should have been, and was, raised on direct appeal.

Johnson next attacks the test itself which was the subject of this court's discussion on direct appeal:

> The state presented evidence that Dodson's death had been caused by a close-range execution-style shot to the back of the head. This evidence consisted of testimony by the medical examiner about the pattern of stippling around the wound and testimony by police officer Park about the results of experiments he had conducted with the

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[16] This issue was Claim VI in the Motion to Vacate.

> murder weapon. Park testified that he had fired the gun at white paper from various distances, and he described the marks made on the paper by the unexploded gunpowder discharged with the bullet. Park was not qualified as an expert witness and offered no opinion testimony. Neither did he attempt any comparison between the fatal wounds and the marks on the paper target.
>
> Appellant cites McClendon v. State, 90 Fla. 272, 105 So. 406 (1925) for the proposition that admission of this evidence was prejudicial error. In McClendon, this court ruled, on facts strikingly similar to those in the case at bar, that paper targets showing powder burns from shots fired at various ranges should not have been admitted into evidence on the issue of the range at which McClendon's alleged victim had been shot because it could not assume "that the effect of pistol fire upon human flesh and upon paper or cloth targets would be essentially similar, in respect to resulting powder burns or marks, when the requisite supporting proof is lacking." 90 Fla. at 280, 105 So. at 409.
>
> The rule of "essential similarity" between test conditions and actual conditions first enunciated in Hisler v. State, 52 Fla. 30, 42 So. 692 (1906), has been eroded as to other types of experimental evidence since that time. Janke v. Corinthian Gardens, Inc., 405 So.2d 740 (Fla. 4th DCA 1981), cert. denied, 413 So.2d 876 (Fla. 1982); Vitt v. Ryder Truck Rentals, 340 So.2d 962 (Fla. 3d DCA 1976). We are convinced that the issue is one of the weight to be given the evidence rather than its relevance or materiality. We, therefore, recede from McClendon insofar as it holds such evidence inadmissible, and we find no error on the record now before us.

Johnson at 195-96. This court found no error in admitting the evidence so it is difficult to see how counsel was ineffective.

Johnson now submits the affidavit of Dr. DiMaio, a medical examiner, to question the testimony of Scala, Dr. Kessler and Park. The record shows that what DiMaio is saying was said at trial by Scala and Rathman: that it is difficult to determine the range of residue and much depends on the weapon,

type of ammunition, and angle of the gun. There is nothing in DiMaio's affidavits which would change the outcome of the trial. Furthermore, DiMaio's affidavit says if Park had used .38 cartridges when the actual cartridges were .357 then the test patterns were not valid. And if he used flake powder instead of ball powder, the patterns would not be valid. In DiMaio's opinion flake powder can produce tattooing for one to two feet and ball powder for one to four feet. Park was not qualified as a ballistics expert and counsel had no reason to question Dr. Kessler's observations[17]. Thus, there was no deficient performance. Even if defense counsel brought in an expert to say the gun might have been three to four feet from the head instead of seven inches, there is no likelihood the outcome would be different. The fatal bullet was strategically placed in the head. There was testimony Johnson deliberated a moment about killing the bartender and shot him at close range as he lay on the floor. This testimony establishes cold, calculated and premeditated. The test was consistent with Johnson's confessions that he fired at close range. Even if DiMaio's opinions presented contradictory evidence, he did not testify at the evidentiary hearing, was never cross examined, and his opinions are just that: opinions. An affidavit from a person who has never seen the actual murder weapon or exhibit and who does not testify at the evidentiary hearing can hardly be the basis for relief. Johnson has the burden, and he has failed. See Cave v. State, 529 So.2d 293 (Fla. 1988).

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[17] Counsel can hardly be deficient for not questioning the testimony of Dr. Kessler who had performed 1800 autopsies and been in involved in 4,000, was board eligible on the American Board of Pathology and Board of Forensic Pathology, had been involved in 1,000 autopsies involving gunshot wounds, and was the Medical Examiner for Orange County.

The record is clear that both victims had head wounds with powder tattooing or stippling around them. In the case of victim Dodson the stippling was up to one half inch around the wound. Himes' head wound had stippling extending to one and one half inches around the wound. Dr. Kessler explained to the jury what stippling was and also gave a range of six to seven inches in proximity, depending on the gun. This evidence was rejected by the jury as to premeditated murder of one victim, so it impossible for Johnson to prove that the introduction of the "stippling" evidence prejudiced the defendant as to the other victim.

The jury obviously relied on other evidence to find the necessary premeditation in the Dodson murder. It is logical to assume that because Himes lunged, the jury found that Johnson was startled and began shooting Himes, but that he had sufficient time to reflect and to decide to kill Dodson to eliminate the witness to Himes' shooting. The prosecutor used the test evidence to argue that both victims were shot "execution style" in a premeditated manner (R 286). The jury rejected this argument and returned a lesser verdict as to one of the victims. It is speculation to say how much the jury relied on this evidence as to the other victim. Johnson said he shot the customer as he lay on the floor so obviously he was not far away.

Although Johnson claims the state attorney "repeatedly referred to the tests and made them the central feature of his argument" (Initial Brief at 67), the record shows the only arguments which related to the stippling were that the jury could infer a close range shot (R 287, 294). Defense counsel objected to the state's arguments in the penalty phase, but was overruled (R 501-02). Counsel can hardly be deemed ineffective for failing to rebut testimony he was not aware of, and to which he objected when made aware of it. See Roberts, supra.

Johnson's comparison of his case to Troedel v. Wainwright, 667 F.Supp. 1456 (M.D. Fla. 1986), is misplaced. A copy of the opinion was in Johnson's Appendix to the Motion to Vacate and was before the trial court (M 1435-64). The opinion shows that the writ of habeas corpus was granted because counsel failed to investigate a crucial issue - whether the defendant or codefendant fired the murder weapon. In Troedel, the state expert's opinion was the only evidence upon which the judge and jury could have concluded Troedel committed the killings. The stippling issue in the present case is not the only evidence on either guilt or aggravating circumstances. Johnson's statements, the autopsy, and the fact he shot the bartender in the head while he lay on the floor establish the shot was in close range and intended to kill the victim. Johnson has failed to establish deficient performance or prejudice. He has failed to show that Park's or Dr. Kessler's testimony was actually in error. DiMaio's affidavit was speculative and, since he did not testify at the evidentiary hearing, is unreliable hearsay which has not been tested by cross-examination. Johnson has failed to show that even if counsel had consulted an independent expert, the outcome would have changed.

The trial court found:

> This Court rejects the Defendant's allegations in Claim VI on three grounds: 1) trial counsel was not prejudicially ineffective in not deposing the evidence technician in that he was not listed as an expert witness, and in fact did not testify as an expert witness; 2) The Florida Supreme Court examined the issue of whether the evidence technicians' "test" constituted a "ballistic test", and whether the testimony of the "test" he conducted prejudiced the jury in JOHNSON V. STATE, 442 So.2d 193 (Fla. 1983). The Supreme Court found that the complained against "test" was not a "ballistic test" and that it was not grounds for reversal. This Court finds no reason to depart from that finding. This Court also notes that the prejudicial inference that the Defendant claims

> that the jury drew from the evidence technicians' testimony could have been properly drawn from the testimony of the medical examiner; 3) The jury was apparently not influenced by the testimony of the "test", and at least partially convinced by trial counsel's argument refuting that testimony, in that they did not find premeditation in one of the counts.

(M 1766).

Even if evidence existed that could be used to impeach the witnesses, there is no reasonable probability the outcome of the trial would have been different. Medina v. State, 573 So.2d 293 (Fla. 1990); Kelley v. State, 569 So.2d 754 (Fla. 1990); Smith v. Dugger, 565 So.2d 1293 (Fla. 1990). Any failure in the ability to obtain a second degree murder conviction for the bartender as well as for the customer was due to quality of evidence rather than any failure to adequately prepare. See Waterhouse v. State, 522 So.2d 341 (Fla. 1988). It is clear from record that trial counsel made a significant effort to impeach the expert testimony, and his inability to do so does not render him ineffective. Waterhouse, supra. Johnson has failed to show Park, Dr. Kessler, Scala or Rathman's testimony was mistaken. He has not shown anything trial counsel could have done that was not done. Thus his allegations of ineffective assistance must fail. See Mills v. State, 507 So.2d 602 (Fla. 1987); Gorham v. State, 521 So.2d 1067 (Fla. 1988); Scott v. State, 513 So.2d 653 (Fla. 1987); Kelley v. State, 569 So.2d 754 (Fla. 1990).

POINT VI

THE STATE DID NOT VIOLATE BRADY V. MARYLAND OR PRESENT MISLEADING EVIDENCE AND THE ISSUE IS PROCEDURALLY BARRED[18].

Johnson argued in Point V that counsel was ineffective for failing to investigate, then says the state failed to provide counsel with the information in violation of Brady v. Maryland, 373 U.S. 83 (1963). The Brady issue is barred for failure to raise it on direct appeal. See Preston v. State, 528 So.2d 896 (Fla. 1988); Lambrix v. State, 559 So.2d 1137 (Fla. 1990); Kelley v. State, 569 So.2d 754 (Fla. 1990).

The trial court found:

> This issue would have been properly raised on direct appeal. Further, for the same reasons the Defendant's Claim VI failed, this claim does also.

(M 1767).

This issue has no merit. In order to establish a Brady violation, Johnson must show the state 1) suppressed material, exculpatory evidence and 2) had the evidence been disclosed the result of the proceeding would have been different. United States v. Agurs, 427 U.S. 97 (1976); Gorham v. State, 521 So.2d 1067 (Fla. 1988); Duest v. Dugger, 555 So.2d 849 (Fla. 1990). Brady requires the disclosure only of evidence that is both favorable to the accused and material either to guilt of punishment. The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result would have been different. Steinhorst v. State, 16 F.L.W. S126, 127 (Fla. Jan. 15, 1991). The powder pattern test was not material or exculpatory, and the outcome would not have been different had defense counsel had the results of the test. As discussed in Point V, there is no proof the

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[18] This issue was Claim VII in the Motion to Vacate.

testimony of Park, Scala, Dr. Kessler and Rathman was incorrect. Therefore, even if defense counsel had the powder pattern tests, Johnson has failed to establish they were invalid or what difference it would make if they were invalid. It must be noted that the testimony about the test came from a nonexpert (Park) who only testified he performed the test, not as to any conclusions. Contrary to Johnson's assertions, the testimony was not an important factor in obtaining a conviction. Johnson's own statements describe the murders and that he decided to commit robbery. He sold the murder weapon shortly after the incident, and it was easily traced back to him. There was testimony he deliberated before he shot the bartender. We also know now that he had to reload, which shows the murder was cold, calculated and premeditated. Swafford v. State, 533 So.2d 270 (Fla. 1988). Even without the tests, there was ample evidence of cold calculation. It can be easily inferred that a shot to the head is intended to be lethal. Even accepting Johnson's theory that he shot the customer because he lunged, there was no reason to shoot the bartender who was laying on the floor. The close quarters of the bathroom and the fact the bartender was laying on the floor illustrate the shooting was at close range. Obviously this was done in a cold, calculated manner and to eliminate a witness. This is further supported by the fact Johnson wiped down the fingerprints, removed anything he touched, and got rid of the murder weapon as soon as possible.

Johnson's claim that the state presented false and misleading testimony has no merit. Park testified he did the tests, that's all. The state experts (Rathman and Scala) testified about the difficulty of determining the exact distance which was also dependent on the ammunition used. Johnson has not shown that anything Park or Dr. Kessler said was false or misleading because he has not proved the tests were inaccurate. See Engle v. Dugger, 16 F.L.W.

S126 (Fla. Jan. 15, 1991). DiMaio's opinion is certainly not conclusive, and his affidavits are full of "ifs". Although Johnson claims the state knew the evidence was misleading and refers to an expert in Sanford, there is no record cite or explanation of this conclusory claim. See Engle, supra; Kight v. Dugger, 574 So.2d 1066 (Fla. 1990); Kennedy v. State, 547 So.2d 912 (Fla. 1989); Pope v. State, 569 So.2d 1241, 1245 (Fla. 1990); Roberts v. State, 568 So.2d 1255, 1259 (Fla. 1990). The state did not withhold any impeachment evidence. The fact Park conducted a powder pattern test doesn't impeach anyone or anything. Johnson claims the state withheld relevant, exculpatory and material evidence but fails to establish how or why. The issue of the propriety of the admission of the test was settled by the Florida Supreme Court in Johnson v. State, 442 So.2d 193 (Fla. 1984).

A similar issue was recently raised in Hegwood v. State, 16 F.L.W. S120, S121 (Fla. January 17, 1991). This court cited United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989), which isolated four requirements for a Brady violation:

> (1) the Government possessed evidence favorable to the defendant;
>
> (2) the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence;
>
> (3) the prosecution suppressed the favorable evidence; and
>
> (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Here, as in Hegwood, Johnson's claim does not meet this test. In Hegwood the alleged Brady material involved the statement of an identification witness whose statement was not timely disclosed and ultimately testified for the defense in the penalty phase.

Another similar case is Waterhouse v. State, 522 So.2d 341 (Fla. 1988). In that case, the defendant alleged the prosecutor failed to disclose the availability of two possibly exculpatory witnesses until the eve of trial, as well as information which would impeach the credibility of one of the state's chief witnesses. Waterhouse also claimed counsel was ineffective for failing to investigate the expert testimony and technical evidence. This court found there was no Brady violation because the defense either knew of the evidence or the information was of little or no use. Counsel was not deficient since he made a significant effort to impeach the expert testimony. The court was not convinced, as Waterhouse would have the court believe, the technical evidence was so defective that any amount of trial preparation would easily discredit the testimony. Waterhouse at 343. See also Kelley v. State, 569 So.2d 754 (Fla. 1990) (alleged Brady violation and counsel ineffective for failing to investigate); Spaziano v. State, 570 So.2d 289, 291 (Fla. 1990) (prosecution is not required to make a complete and detailed accounting of all police investigatory work); Steinhorst v. State, 16 F.L.W. S126 (Fla. January 15, 1991) (FDLE reports would not have changed the outcome); Roberts v. State, 568 So.2d 1255, 1260 (Fla. 1990) (no reasonable probability alleged "extensive exculpatory and impeachment" evidence would have changed the outcome); Medina v. State, 573 So.2d 293 (Fla. 1990) (no error in the trial court's Brady ruling and counsel not ineffective for failing to discover information).

Johnson has failed to show the information was exculpatory, material, or would have changed the outcome. There was no error in the trial court's ruling and it should be upheld. See Swafford v. Dugger, 569 So.2d 1264 (Fla. 1990).

POINT VII

THE ISSUE REGARDING INVOLUNTARY STATEMENTS IS PROCEDURALLY BARRED[19].

Whether Johnson's statements should have been suppressed is procedurally barred. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). The issue was raised as Point V on direct appeal and this court found it to be without merit. Johnson v. State, 442 So.2d 193, 197 (Fla. 1983). Johnson has pointed to no new case law which should be applied retroactively and which would entitle him to relief. See Teague v. Lane, 109 S.Ct. 1060 (1989); Butler v. McKellar, 110 S.Ct. 1212 (1990); Saffle v. Parks, 110 S.Ct. 1257 (1990); Witt v. State, 387 So.2d 922 (Fla. 1980). Johnson presented almost no evidence on this issue at the evidentiary hearing. His mental health experts were too separated in time and place from the defendant's confession to really be able to say what Mr. Johnson's condition was at the time of his confession. The record shows he was arrested at 2:00 a.m. and his first statement was approximately 12 hours later. He was advised of his Miranda rights at least three times and made three oral, two written, one taped statement, and drew a diagram of the crime scene complete with explanation.

Johnson also raises ineffective assistance of counsel in a footnote, but nowhere in their argument on this claim has present counsel cited any law so that the court can determine what law it is that Mr. Jones should have argued. See Engle v. Dugger, 16 F.L.W. S123 (Fla. Jan. 15, 1991). Even if Johnson now had new case law, counsel cannot be deemed ineffective for failing to anticipate new law. Engle, supra; Muhammad v. State, 426 So.2d 533 (Fla. 1982). This court found the suppression issue to be without merit on direct appeal, and counsel cannot be deemed ineffective for failing to prevail on a

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[19] This issue was Claim XIV in the Motion to Vacate.

meritless issue. A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel. Kight v. Dugger, 574 So.2d 1066 (Fla. 1990); Kelley v. State, 569 So.2d 754 (Fla. 1990); Woods v. State, 531 So.2d 79 (Fla. 1988).

The trial court found:

> This Court after reviewing the record does not find that the Defendant's confession was unlawfully obtained, or that there was anything that the State concealed. The police officers may have been exceptionally nice to the Defendant in order to help obtain the confession, however being nice does not constitute coercion or unlawful inducement.
>
> As to the Defendant's argument that his state of mind (due to his previous alcoholism), prevented him from giving a voluntary waiver of rights for the purpose of the confession, is not substantiated by the record.
>
> Also, the Defendant's argument that trial counsel was prejudicially ineffective in not obtaining a suppression of the statements is without merit. Trial counsel went to Oregon to depose the Police Officers involved, and reviewed the psychological report that was completed at the time of the confession. The trial counsel made a reasonable attempt at suppressing the statement, and failed. Present counsel does not provide anymore convincing of an argument.

(M 1769).

The trial court's findings are supported by sufficient competent evidence and should be upheld. See Henderson v. Dugger, 522 So.2d 835, 838 (Fla. 1988).

Johnson also raises the fact that Oregon may have violated the Florida Rules of Criminal Procedure, which is not appropriate either in this forum or on collateral attack.

POINT VIII

THE ISSUE REGARDING THE HEARING TO RECONSTRUCT THE RECORD ON DIRECT APPEAL IS PROCEDURALLY BARRED.

Whether the hearing on record reconstruction was adequate is procedurally barred. Swafford v. State, 569 So.2d 1264 (Fla. 1990). The record reconstruction issue was addressed on direct appeal:

> The case was first appealed to the Florida Supreme Court in 1980. At that time the transcript of the trial court proceedings was discovered to be virtually incomprehensible because of omissions (including omissions of several bench conferences and the entire voir dire of the venire panel) misspellings, and obvious inaccuracies in either the recording or the transcription of the trial. This Court therefore relinquished jurisdiction to the trial court to attempt to reconstruct the record and to hold an evidentiary hearing on the accuracy of the transcript. The court reporter revisited her stenographic notes and met with the trial judge and trial counsel. The corrected and supplemented transcript was the subject of extensive hearings into its accuracy and reliability. At the close of those hearings, the presiding judge found the corrected transcripts to contain "no significant or material fault ... [not to show] even one prejudicial omission or error" and issued an order submitting the revised transcript to this Court It is this transcript upon which we rely in making out review of the record.
>
> This revised transcript is also the subject of appellant's first point on appeal. He refers to inconsistencies between the original and the corrected transcripts, to the time elapsed between the trial and the reconstruction, and to possible omissions which make effective assistance of appellate counsel and independent appellate review impossible. However, he is unable to point to any omission, inconsistency or inaccuracy which prejudices the presentation of his case. The

> reconstruction and the evidentiary hearing were conducted pursuant to the order of this Court and in compliance with Florida Rule of Appellate Procedure 9.200(f). At the evidentiary hearing the trial judge, the court reporter and both trial attorneys testified to the substantial accuracy and completeness of the record in all material regards. In the absence of some clear allegation of prejudicial inaccuracy we see no worthwhile end to be achieved by remanding for new trial.

Johnson at 194-95.

The trial court found:

> This claim was summarily denied by this Court on the grounds that the issue had been heard and decided by the Florida Supreme Court (see Johnson v. State, 442 So.2d 193 (Fla. 1983).

(M 1767).

Johnson's argument that the trial court's rulings rendered counsel ineffective is simply a reassertion of claims which are procedurally barred because they either were raised on direct appeal or could have been raised on appeal. See Roberts v. State, 568 So.2d 1255 (Fla. 1990); Correll v. Dugger, 558 So.2d 422 (Fla. 1990); Woods v. State, 531 So.2d 79 (Fla. 1988).

POINT IX

THE ISSUE REGARDING THE TRIAL COURT'S FAILURE TO PROPERLY APPLY LEGAL PRINCIPLES IS PROCEDURALLY BARRED[20].

Whether the trial failed to properly apply legal principles is procedurally barred. Roberts v. State, 568 So.2d 1255 (Fla. 1990); Buenonano v. State, 559 So.2d 1116 (Fla. 1990).

This issue has no merit. Johnson claims that the trial judge was under the misapprehension the jury recommendation of death was by a vote of 10-2, considered this as a nonstatutory aggravating factor, and thus his sentence was unreliable. There is no record support that the judge would give more weight to a 10-2 recommendation than to a 7-5 recommendation. The advisory verdict, the trial court's statement at sentencing and findings of fact are that death was recommended by a "majority" of the jury (R 531, 541, 804). The findings of fact show that the trial court sentenced Johnson to death after considering the aggravating and mitigating circumstances and that "under the evidence and the law of the state a sentence of death is mandated" (M 806-07). He did not say that because the jury recommended death by 10-2 he had to impose a death sentence. It is well settled that a trial court is not bound by a jury recommendation and makes an independent evaluation of the aggravating and mitigating circumstances. See Fla. Stat. 921.141 (2) and (3); Spaziano v. Florida, 469 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976); Cave v. State, 529 So.2d 293 (Fla. 1988). The trial judge weighed the aggravating and mitigating circumstances and arrived at the only possible conclusion: that death was the appropriate sentence.

The trial court found:

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[20] This issue was Claim X in the Motion to Vacate.

> The ultimate decision in the penalty phase is with the trial judge. In this instance the jury recommended death by a vote of 7 to 5. The trial judge found a number of aggravating circumstances, and accordingly imposed a sentence of death.
>
> The Defendant did not present any evidence at the evidentiary hearing to substantiate his claim.

(M 1707).

Johnson has failed to show this claim has merit. The trial court's findings are supported by the record and should not be disturbed.

POINT X

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE FOR DISCHARGE UNDER THE INTERSTATE AGREEMENT ON DETAINERS[21].

This issue whether the trial court should have discharged Johnson was raised on direct appeal, and this court addressed the issue as follows:

> Fourth, appellant argues that the trial court should have automatically dismissed the charges against him once the 120-day limits specified in the Interstate Agreement on Detainers (IAD), section 941.45, Florida Statutes (1979), had elapsed. Appellant was brought to Florida from Oregon, where he was serving a sentence, pursuant to the IAD. He was booked into the Orange County jail May 15, 1980 and brought to trial September 23, 1980, obviously more than 120 days after entering the custody of the State of Florida. During this period he was represented by counsel and the IAD documents were a matter of record. Nonetheless, the appellant agreed to a continuance of a trial date from August 12, when trial was originally scheduled. Appellant failed to raise the issue of the 120-day limit at that time or any time before bringing this appeal.
>
> We cannot find any reason to hold the IAD's 120-day limit to be unwaivable and self-executing. Florida's speedy trial rule, Florida Rule of Criminal Procedure 3.191, protects a constitutional right enunciated in Florida's Declaration of Rights, article I, section 16, Florida Constitution. This fundamental right is neither unwaivable nor self-executing. We see no justification for granting greater dignity to a statutory provision designed to provide for cooperation between the states to effect the "expeditious and orderly disposition of . . . charges" against one in custody of another state. 941.45, Fla. Stat. (1979). The underlying policy of the IAD is to enhance the possibility of rehabilitation

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[21] This issue was Claim IX in the Motion to Vacate.

> by resolving all outstanding charges against a convict regardless of which state had filed the charges. See 941.45(1), Fla. Stat. (1979). We find no merit to this issue.

Johnson, 442 So.2d 192, 196-97 (Fla. 1983).

Johnson claims counsel was ineffective for failing to be aware of the 120-day IAD discharge rule. Even if counsel had been aware of this rule, the outcome would not change so there is no ineffective assistance. Strickland v. Washington, 466 U.S. 668 (1984).

Trial was set for August 12, 1980, well within the 120 days. The prosecutor wrote Jones to advise he would oppose any continuance except for the most compelling reasons. The prosecutor later moved to reset the August 12 trial date because he would be out of the jurisdiction until August 20. The court set the motion for hearing and granted the motion to reset the trial after hearing argument. At the evidentiary hearing, trial counsel said he agreed to having the trial reset to September 23, 1980, which was 11 days past the 120 days. The reason he agreed to resetting the trial was so he and the state attorney could go to Oregon. Counsel conducted depositions in Oregon on August 20. The motions to suppress were filed September 18, 1980. The motions were heard September 22. As apparent from Point VII above, suppression of Johnson's statements was an important issue. Surely, present counsel is not suggesting trial counsel should not have diligently pursued this issue. In order for the trial to have been within the 120 days, it would have had to been set by September 12. Johnson's motion to vacate contains claims that counsel failed to adequately prepare, yet he would have counsel shorten his preparation time further.

If counsel had known about the 120 day limit, he would have had to agree to a continuance in order to prepare for trial. If he felt he could be

prepared and had objected to the continuance, the trial court would have still granted it since the prosecutor had good cause. Florida Statute 941.45(4)(c) provides that the trial court may grant any necessary or reasonable continuance for good cause shown. The record from the evidentiary hearing indicates that the reason the prosecutor was absent from the jurisdiction until August 20 was because he had reserve duty (M 255). Although Johnson alleges the trial could have proceeded without the particular state attorney, the trial record shows that Mr. Hinshelwood was the prosecutor and Mr. Small was the Assistant State Attorney who was "also present" (R 1-535, Supp. R.1-472). Furthermore, Johnson was "unable" to go to trial on August 20 since the discovery and motions on the suppression issue had not been done by August 12. See 941.45(6)(a) Fla. Stat. (1979); Toro v. State, 479 So.2d 298 (Fla. 3d DCA 1985).

In Toro, the court observed that federal law controls the interpretation of the IAD, citing Cuyler v. Adams, 449 U.S. 433, 438-42 (1980). The recent Eleventh Circuit Court of Appeals case of Seymore v. State of Alabama, 846 F.2d 1355 (11th Cir. 1988), expresses the opinion that "when petitioner alleges no facts casting substantial doubt on the state trial's reliability on the question of guilt", a violation of the IAD will support no post-conviction relief. Id. at 1357. As this court recognized in Johnson, the purpose of the IAD is rehabilitation, not to provide a technical loophole for murderers. Johnson has not alleged he was prejudiced by the 11-day delay. In fact, the additional time allowed counsel to depose the Oregon officers and move to suppress Johnson's statements.

The trial court found:

> This Court does not find prejudicial counsel error in this claim. Trial counsel was not prepared for trial within the time frame of the

> 120 day period. Had he gone to trial in that period of time, it appears from the record trial counsel would [not] have been prepared. It is not a valid argument that trial counsel should have sprung the IAD's bar to prosecution in this case.
>
> Further, this issue was raised on direct appeal and the Florida Supreme Court found that trial counsel's actions in agreeing to the continuance constituted a waiver to the speedy trial requirement of the IAD (see Johnson v. State, 442 So.2d 193 (Fla. 1983).
>
> The purpose of this type of motion for relief is to ensure that the Defendant received fair trial. Trial counsel's waiver of the speedy trial period under the IAD did not prejudice the reliability of the Defendant's trial, it is more likely strengthened the likelihood that it was a fair trial by allowing the trial counsel to more properly prepare with the additional time.

(M 1767-68).

Johnson has failed to show prejudice as required by Strickland, and the trial court's findings are supported by the record.

POINT XI

THE ISSUE THAT THE JURY'S SENSE OF RESPONSIBILITY WAS DILUTED IS PROCEDURALLY BARRED; AND COUNSEL WAS NOT INEFFECTIVE IN FAILING TO LITIGATE THE ISSUE[22].

The issue is procedurally barred. Swafford v. Dugger, 569 So.2d 1264, 1267 (Fla. 1990); Henderson v. State, 522 So.2d 835 (Fla. 1988); Clark v. State, 533 So.2d 1144 (Fla. 1988); Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1990); Correll v. Dugger, 558 So.2d 422 (Fla. 1990); White v. State, 559 So.2d 1097 (Fla. 1990); Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990); Provenzano v. State, 561 So.2d 541 (Fla. 1990).

The trial court found:

> This Court has reviewed the transcript and read the complained against language, and finds nothing misleading in the statements. Further, the Defendant has failed to show prejudice.

(M 1766).

Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), is not applicable in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988). Unlike Caldwell, in Florida the judge rather than the jury is the ultimate sentencing authority. Ford v. State, 522 So.2d 345 (Fla. 1988). Caldwell is distinguishable from the Florida procedure which treats the jury's recommendation as advisory only and places the responsibility for sentencing on the trial judge. Advising the jury that its sentencing recommendation is advisory only and that the ultimate decision rests with the trial judge is an accurate statement of Florida law and does not improperly minimize the sentencing jury's role or misstate Florida law. Cave v. State, 529 So.2d 293 (Fla. 1988); Grossman v. State, 525

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[22] This issue was Claim V in the Motion to Vacate.

So.2d 833 (Fla. 1988). In any case, the trial occurred in 1980 and Caldwell is not such a change in the law as to give relief in post conviction proceedings. Foster v. State, 518 So.2d 901 (Fla. 1987), or to overcome a procedural bar. Demps v. State, 515 So.2d 196 (Fla. 1987). Because the Supreme Court of Florida has previously found Caldwell inapplicable in this state and has upheld the standard instructions on the jury's role in sentencing, trial counsel is not ineffective for failing to object. Tafero v. State, 561 So.2d 4557, 559 n.2 (Fla. 1990).

POINT XII

THE ISSUE REGARDING THE TRIAL COURT'S APPLICATION OF THE DEATH PENALTY IS PROCEDURALLY BARRED[23].

Johnson's final argument is that the trial judge applied an erroneous rule that once a sentencing judge concludes that aggravating factors outweigh mitigating factors the death penalty is mandatory and the court cannot exercise mercy. This attack on the trial court's sentencing order is procedurally barred. Correll v. Dugger, 558 So.2d 422 (Fla. 1990); Hill v. Dugger, 556 So.2d 1385 (Fla. 1990). This claim was raised as Point VII on direct appeal and found to be without merit. Johnson v. State, 442 So.2d 192, 197 (Fla. 1983).

The trial court found:

> The Defendant failed to present any evidence in support of this claim, and this Court finds that it is without merit.

(M 1768).

The trial court's finding is supported by the record and should not be disturbed.

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[23] The issue is Claim XI in the Motion to Vacate.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the order denying post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Martin J. McClain, and Judith J. Dougherty, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 8 day of April, 1991.

Barbara Davis

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Of Counsel