IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,662

TERRELL M. JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Johnson's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

Citations in this brief shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number. The record on appeal from the denial of the Rule 3.850 motion shall be referred to as "M. ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

On December 4, 1979, the bartender and a customer at Tolas' Tavern in Orange County were shot and killed. On January 5, 1980, Terrell Johnson and his girlfriend, Patricia McSweeney, were arrested in Oregon at 10:30 p.m. Mr. Johnson was advised of his Miranda warnings with the critical exception of the right to stop questioning at any time that he wanted to obtain the advice of counsel. Mr. Johnson maintained his silence but asked if he could see his girlfriend. Over the next thirty nine hours, the police engaged in a sophisticated, psychological interrogation designed to break Mr. Johnson's will. Police arranged for Mr. Johnson to see his girlfriend on two different occasions so that she could urge him to confess. Ultimately the police arranged a wedding for Mr. Johnson and Pat McSweeney with the marriage license witnessed by his interrogators. A police psychiatrist "evaluated" Mr. Johnson and provided the police with information on his weaknesses. Religious persuasion tactics were used. Mr. Johnson suffers from mental illness and brain damage. In addition he was in withdrawal from severe alcoholism. After thirty nine hours his will was broken -- a confession was obtained.

According to police, Mr. Johnson stated that he had pawned a gun for $50 with a bartender. The bartender demanded $100 to return the gun to Mr. Johnson. After testfiring the gun in a field across the street, Mr. Johnson returned to the bar with the intent to rob the bartender. A lone customer was the only other person present. During the robbery, the customer lunged at Mr. Johnson causing him to panic and fire at both men. He was convicted of second degree murder in the death of the customer and first degree murder in the death of the bartender. The evidence showed that the bartender died instantly from one gun shot to the head.

Mr. Johnson was indicted for two counts of first degree murder on May 23, 1980 (R. 625). The jury returned verdicts of guilty and a judgment of

conviction was entered on September 26, 1980, for first degree murder as to Count I and the lesser included offense of second degree murder as to Count II (R. 738-40). The sentencing jury voted 6-6 on a recommendation: a life sentence. Due to incorrect instructions, the jury thought this was unacceptable and continued to deliberate. The ultimate vote was 7-5 for death, in an advisory sentence returned on September 29, 1980 (R. 744). Mr. Johnson was sentenced to death on October 3, 1980, for Count I of the indictment, and to life imprisonment for Count II of the indictment (R. 804-08).

Mr. Johnson appealed from the judgment of conviction and this Court remanded for gross errors and omissions in the trial transcript. The case was resubmitted over lengthy enumerated objections of defense counsel and Mr. Johnson's convictions were affirmed on November 23, 1983. Johnson v. State, 442 So. 2d 193 (Fla. 1983). Mr. Johnson was not permitted to appear at any post-trial proceedings, including reconstruction of the record conferences (informal) and evidentiary hearings held concerning the reconstruction.

At the subsequent 3.850 evidentiary hearing, Mr. Johnson established that the only mental health expert who was asked to evaluate Mr. Johnson pretrial was a jailhouse psychologist who was not licensed to practice. Further, this so-called expert only evaluated Mr. Johnson for competency and sanity. Although he was asked to consider mitigation, he was unfamiliar with the statutory mitigating factors. Finally, his evaluation consisted solely of administering two simple psychological profile tests without any review of background, circumstances of the offense or brain function testing.

Mr. Johnson, prior to the time of the offense, had been treated by Dr. deBlij, a psychiatrist. She was called at the penalty phase to testify regarding Mr. Johnson's history. However, she was never asked to evaluate Mr. Johnson and was never asked about statutory mitigation. At the 3.850 hearing she stated she would have testified that Mr. Johnson was under the influence of

extreme mental disturbance and that his capacity to appreciate the criminality of his conduct or to conform it to law was substantially impaired; however, she was not asked at trial.

At the 3.850 hearing, substantial testimony was presented regarding the presence of brain damage, the long term effects of substance abuse, the effects of withdrawal from alcohol and other mental disabilities which the judge and jury never heard. Although this testimony was critical in evaluating the intoxication defense and the voluntariness of the confession, the judge and jury never heard it. Finally, evidence was presented that the State's witnesses who testified as to the results of a paper ballistics test and the autopsy were wrong in their conclusions that Mr. Johnson's statement had been untruthful.

The trial court conducted the evidentiary hearing on December 22, 1986, and issued an order denying relief on June 12, 1989 (M. 1761-70). Motion for rehearing was denied June 30, 1989, and notice of appeal was filed August 28, 1989 (M. 1783-84).

SUMMARY OF ARGUMENTS

I. Mr. Johnson's trial counsel conducted no investigation into the penalty phase issues until the guilt phase concluded. He called Mr. Johnson's treating psychiatrist to discuss Mr. Johnson's history, and never asked or learned that in her opinion two statutory mitigating factors were present. Trial counsel's failure to timely investigate prejudiced Mr. Johnson because the jury did not know of expert opinion that statutory mitigation was present and did not learn of the full extent of nonstatutory mitigating factors.

II. Mr. Johnson's jury initially voted six for death and six for life, under Florida law a life recommendation. Unfortunately, the jury was not properly and correctly instructed that a six-six vote was a life recommendation. The jury's continued deliberation and ultimate death recommendation violated double jeopardy. The jury instructions were in error and counsel's performance

was inadequate in failing to challenge the instructions.

III. Mr. Johnson did not receive the confidential assistance of a competent mental health expert. The "expert" provided was not licensed and reported his findings to the court in violation of Estelle v. Smith. Counsel ineffectively failed to litigate this issue.

IV. Mr. Johnson's trial counsel rendered ineffective assistance as to voluntary intoxication as both a guilt and penalty phase defense. Counsel failed to know the law. He did not pursue the defense because he believed to establish it, Mr. Johnson had to testify. He also was unaware that alcoholism is a disease. As a result of counsel's ignorance, Mr. Johnson was prejudiced. The jury was not allowed to consider "voluntary intoxication" at the guilt phase; at the penalty phase it did not receive all of the evidence regarding Mr. Johnson's disease and its effects at the time of the crime.

V. Trial counsel's failure to depose the State's witnesses and learn of critical ballistics evidence was deficient performance. Counsel should have obtained the assistance of an expert. Mr. Johnson was prejudiced by the failure to impeach and rebut the unreliable and misleading ballistics evidence.

VI. The State's intentional withholding of the fact it had conducted a ballistics "test," and the exhibits thereto, and presentation of that evidence to the jury at both guilt and penalty phases, knowing it was misleading, violated the fifth, sixth, eighth, and fourteenth amendments.

VII. Mr. Johnson's statements were obtained in violation of his fifth, sixth, eighth and fourteenth amendments, and the State violated due process by concealing the violations.

VIII. Mr. Johnson was denied a full and fair hearing on the court's attempted reconstruction of the record; the procedure utilized to attempt reconstruction of the trial record violated the sixth, eighth, and fourteenth amendments, deprived Mr. Johnson of equal protection under the fourteenth

amendment; and denied Mr. Johnson effective assistance of counsel under the sixth amendment by denying him a meaningful appeal; and reconstruction counsel was ineffective.

IX. The lower court failed to properly apply relevant legal principles in denying Mr. Johnson relief on the trial judge's sentence based on the gross mistake of fact regarding the jury's sentencing vote.

X. Mr. Johnson was prejudicially denied effective assistance of counsel in violation of the sixth, eighth, and fourteenth amendments by trial counsel's ignorance of the speedy trial rule under the Interstate Agreement on Detainers (IAD), and counsel's failure to move to discharge pursuant to the act.

XI. Mr. Johnson's sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing in violation of the eighth and fourteenth amendments. Counsel was ineffective in failing to litigate this issue.

XII. The trial court erred by applying the Florida death penalty statute as if it was mandatory and mercy could not be applied in violation of the eighth and fourteenth amendments.

ARGUMENT I

MR. JOHNSON WAS DENIED A MEANINGFUL AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION DUE TO COUNSEL'S UNREASONABLE FAILURE TO CONDUCT TIMELY INVESTIGATION AND FAILURE TO PRESENT COMPELLING MITIGATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Johnson was tried on two counts of first degree murder four months after he was indicted. His trial counsel testified that at the time he was attempting to investigate and prepare Mr. Johnson's case, he was supervising two trial divisions in the Public Defender's Office, handling four to five capital cases, and approximately sixty felony cases (M. 221-22). Under these conditions it is hardly surprising that he was ill prepared as to his understanding of the

law and the facts of Mr. Johnson's case.

Counsel testified that no witness interviews occurred until after the guilt verdict was returned at 11:00 p.m. Friday, September 26, 1980. Counsel testified what witness interviews he conducted were either that Friday night or Monday morning before commencement of the penalty phase (M. 237-28). Trial counsel failed to learn of all the available mitigation by waiting until after the guilty verdict was returned to commence his investigation. However, the circuit court rejected Mr. Johnson's claim that counsel's performance was deficient because the circuit court was "satisfied that the trial counsel's investigation was within the required degree of professional reasonableness" (M. 1763). The cicuit court's conclusion is in error as a matter of law. See Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985).

At the evidentiary hearing conducted by the circuit court, Mr. Johnson presented a compelling case for the existence of serious mental health deficiencies which numerous experts testified were evidence of two statutory mitigating factors as well as overwhelming evidence of nonstatutory mitigation. Unbelievably, Dr. Katherine deBlij, testified at the sentencing hearing but had not evaluated Mr. Johnson and was never asked her opinion as to statutory mitigation. Even more unbelievably, the only pretrial evaluation sought by trial counsel consisted of a one page report concerning the results of two simple personality tests administered by a non-licensed employee of the Sheriff's Department. The assistance of a competent mental health evaluation was simply not obtained. See Ake v. Oklahoma, 470 U.S. 68 (1985); State v. Sireci, 536 So. 2d 231 (Fla. 1988); Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990).

An effective counsel would have conducted a thorough background investigation regarding Mr. Johnson's past psychiatric history and intoxication

at the time of the offense. Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989). This information would then have been provided to competent, independent mental health experts for an opinion as to the defense of voluntary intoxication as well as statutory and nonstatutory mitigation. None of this was done. A competent, independent mental health expert was not obtained. Instead, the court provided counsel with an unlicensed jailhouse psychologist who was "vaguely familiar" with statutory mitigating circumstances, but "wouldn't consider myself an expert in the area" (M. 301). No mental health background information was provided to this "expert." No evaluation was conducted, and no opinion was obtained regarding statutory mitigation or voluntary intoxication. Had counsel followed elementary, criminal defense practice, he would have been able to present strong evidence of voluntary intoxication and a compelling case for statutory mitigation.

Trial counsel testified at the evidentiary hearing:

> Q Now, are you familiar with the term neuropsychologist, and, if so, how familiar?
>
> A Neuro?
>
> Q Neuropsychologist?
>
> A I'm familiar with the term, but I couldn't give you a definition for it.
>
> Q Now, with regard to members of Mr. Johnson's family, did you talk to members of his family, get information about Terrell Johnson's background and go over and talk to the psychologists about it or call the psychologists up about it?
>
> A No, sir.
>
> Q Did you ever get any school records and take them over to the psychologists?
>
> A No, sir.
>
> Q Did you talk to any schoolteachers?
>
> A No, sir.
>
> Q Family physicians?

A No, sir.

Q Former employers?

A I did talk to a former employer, but whether I passed that on to Mr. Cassady, I don't think so. Typically, what I do for psychiatrists is send them a copy of the police reports and a letter indicating why I am filing the motion and what I base my opinion that this fellow may have been incompetent at the time, what I'm basing that on.

I wasn't seeking a finding of competent or incompetent in Mr. Johnson's case. And I didn't do that in this case.

Q And, of course, this wasn't a psychiatrist?

A This was not a psychiatrist. I wanted a personality profile, and I really wasn't certain what part a background investigation would play in profiling someone.

Q Pardon?

A I wasn't certain if background information would really be that relevant in giving a personality test to someone. It's pretty much an objective test, as I understand.

(R. 235-36)(emphasis added).

Trial counsel's understanding of mental health mitigation was almost nonexistent:

Q Now, the tests that you wanted performed; do you know what an MMPI is?

A No, sir. Something with Minnesota.

Q Minnesota Multiphasic Personality Inventory?

A No, sir.

Q Do you know what the California Psychological Inventory test is?

A No, sir.

Q And those are the only two tests that he conducted?

A That's correct.

(M. 231).

The request for the assistance of a mental health expert was not made until "a week before trial" (M. 236). No effort was made to investigate mitigation

until the trial itself. Counsel's contact with witnesses in advance of trial "was to tell them when and where" (M. 237). Counsel simply wrote or called witnesses within a couple weeks of trial "to make arrangements" for their presence (M. 237). The guilt phase ended on a Friday at 11:00 p.m., and the penalty phase commenced at 9:00 a.m. the following Monday. Trial counsel testified that if he talked to the witnesses in advance of the penalty phase it would have been on that Friday at rendition of the verdict. "So if I saw them at all before Monday, it would have been say, a Friday" (M. 237).

This Court has addressed similar issues in State v. Michael where the trial counsel failed to develop and elicit testimony as to statutory mitigation:

> In regards to the sentencing phase, however, the court found that counsel should have obtained, but did not, the experts' opinions on the applicability of the statutory mental mitigating factors. According to the court, even though counsel correctly decided there was no insanity defense to pursue, counsel admitted he was on notice of Michael's disturbed condition. The court found the failure to pursue this line of investigation so unreasonable as to constitute substandard representation, the first prong of the Strickland test. The inability to guage the effect of this omission undermined the court's confidence in the outcome of the penalty proceeding. Therefore, the court decided that the second prong of the Strickland test, prejudice, had also been established and granted Michael a new sentencing proceeding. The court held the other instances of alleged ineffectiveness of counsel's assistance and of the psychiartic experts' assistance moot because a new sentencing hearing would be conducted.

530 So. 2d 929, 930 (Fla. 1988)(emphasis added). This Court affirmed the trial court's finding. The same factors are present in Mr. Johnson's case.

The failure to present mental health evidence in support of the intoxication defense and statutory and nonstatutory mitigation was not the result of a tactic or strategy. Trial counsel acknowledged that the intoxication defense was Mr. Johnson's only legal defense (M. 242-43). Yet he failed to present substantial, independent evidence of Mr. Johnson's intoxication to a mental health expert, the judge or the jury. Although counsel indicated he did not want to present Mr. Johnson as a witness, he presented no

tactical or strategy reason for the failure to develop what he acknowledged was Mr. Johnson's only legal defense.

Dr. Katherine deBlij testified at the evidentiary hearing. Dr. deBlij had been Mr. Johnson's treating psychiatrist before the homicide. She stated at the evidentiary hearing that she had been contacted by trial counsel by phone; she was unsure when (M. 58-59). However, she indicated "we did not discuss at that time details of the testimony" (M. 59). She spoke with counsel again on the morning she took the stand (M. 60). She was not asked about the applicability of statutory or nonstatutory mitigating factors. Had she been asked, she would have testified that Mr. Johnson was under the influence of an extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct was substantially impaired (M. 61). However, she and trial counsel never even discussed the statutory mitigators:

> Q What did you-all speak about then?
>
> A It's not terribly clear to me what we spoke about. We spoke in a general way about the issues, what had happened on that day. We did not talk about either of those statutes.
>
> Q Statutory, the circumstances?
>
> A Hmm-hmm.
>
> Q So he did not -- I don't mean to lead you. But it sounds like he did not specifically address these questions to you.
>
> A No, he did not.
>
> Q If he would have addressed those questions to you, you would have responded as you have today?
>
> A Yes.

(M. 61)(emphasis added).

Dr. deBlij would have testified to the applicability of statutory mitigating factors, but counsel did not prepare her for, or even discuss with her, this incredibly important inquiry (M. 60, 61, 65-66). Had she been asked, Dr. deBlij would have testified, "We have to conclude that the frontal lobe was

quite anesthetized at the time [of the offense]" (M. 63). She would have explained that long term alcoholism causes damage to the frontal lobe "that would persist for many years and possibly, [but] not necessarily be a chronic condition" (M. 63). Dr. deBlij clarified, on cross-examination, testimony as to her availability at the time of Mr. Johnson's trial, to testify concerning statutory mitigating factors:

> I was prepared in the sense that I would have supported those statements at the time. I was never asked to consider those statements, nor was I prepared in the sense of being given questions that I might be asked either by the prosecution or by the defense.

(M. 65-66). Dr. deBlij was apparently "the last professional that had worked with Mr. Johnson" before his discharge from a three-week residential alcohol treatment program, one week before the instant offenses were committed (M. 68).

Dr. Elizabeth McMahon also testified at the evidentiary hearing. Dr. McMahon has trained forensic psychiatrists at the University of Florida Department of Psychiatry and is familiar with the aggravating and mitigating circumstances in the Florida death penalty statute (M. 97, 115). Dr. McMahon and her associate evaluated Mr. Johnson in May, 1984. Her evaluation was based on a diagnostic interview, a 15-20 minute conversation explaining the purpose of the examination, the administration of a battery of "formal testing, and then probably three to four hours of interviewing" (M. 84-85). Her testing included the Wechsler Adult Intelligence Scale, the MMPI, the Rorschach, the Hand test, and the Sack's Sentence Completion (M. 85-86).

Dr. McMahon testified that Mr. Johnson suffers from "an <u>emotional stunting</u> at an extremely early age, certainly before any child has the option of choosing, quote, how they are going to be as an adult" (M. 96)(emphasis added). Dr. McMahon elaborated on this "emotional stunting" and Mr. Johnson's mental condition at the time of the offense:

> Once he becomes aroused, back then in time, even more than now, <u>has little or no coping mechanisms for that</u>. So he gets himself into a situation, drinking heavily, exhausted from lack of sleep, at

least as he related it, and then was confronted with somebody who was taking advantage of him, from his perception, and became angry and did not have the coping mechanism to figure out another way to handle it.

One of the things that we see with people who are alcoholics is that one of the deficits that they carry with them, that is measurable five to ten years later, is their inability to solve problems by using alternative mechanisms. In other words they will zero in on a mechanism, and they have little or no ability to become flexible enough to figure out alternative ways of behaving.

They also are restricted in what we call scanning mechanism, which is what we use to scan the environment in a way to say, "What's going on here, and how can I take care of the situation?" Being confronted with a new situation, if they're old habits, they can do fine.

Q These two deficits that alcoholics have are true with Terrell Johnson?

A Yes.

Q Five years later you can detect that?

A Yes.

Q And that's true here?

A Yes.

Q Go ahead.

A So looking at that in terms of someone who is suddenly confronted with a situation that they feel very vulnerable and become very angry, he struck out in an extremely tragic way.

My understanding of this is that that is different from someone who sets out to harm.

(M. 104-06)(emphasis added). Dr. McMahon testified that Mr. Johnson suffered from an emotional disturbance and had substantial impairment of his capacity (M. 116), and that she would have testified to that effect at Mr. Johnson's trial had she been asked (M. 117). Mr. Johnson's history as a chronic alcoholic was separately and independently verified, and is not contested by the State.

Dr. McMahon's opinion was based in part on her "clinical impression that he [Mr. Johnson] suffers from both acute and chronic alcoholism" and associated "brain damage" (M. 91). Concerning alcohol-related brain damage, Dr. McMahon

testified:

> There is recovery to various degrees. Some functions seem not to recover at all. Some seem to recover almost fully, and some partially. The individual never comes back to where they were originally, at least according to all the literature.

(M. 97-98).

Upon inquiry from the Court, Dr. McMahon elaborated on the condition of Mr. Johnson's brain at the time of the offense, some five years before she evaluated him:

> THE COURT: Do you have an opinion whether or not his brain was intact?
>
> THE WITNESS: Since from this point, Your Honor when he has had five years of time for resolution, and he is showing mild cognitive deficits that are certainly compatible with someone that has chronic brain dysfunction, my assumption is when he had been drinking heavily, most probably he was not functioning with a brain that had its full integrity.
>
> I would say certainly there would have been deficits that would have been obvious at that time as to a grosser extent.

(M. 101-02)(emphasis added). On redirect examination, Dr. McMahon emphasized that her expert testimony was not that Mr. Johnson had no capacity to conform his conduct to law, but that this capacity was substantially impaired (M. 133).

At the time of hearing, Dr. Daniel C. Glennon was an Orlando-area psychiatrist specializing in alcohol and chemical dependency, medical director for the Orlando Metropolitan Alcoholism Council, director for the dual diagnosis units at Laurel Oaks Hospital, director for Young Recovery, a private treatment program for chemically dependent adolescents and also evaluated all Myers Act petitions for Orange County (M. 148, 150). Dr. Glennon testified that "Terrell Johnson was clearly alcoholic by his late teens" (M. 154). He testified that alcohol ingestion over a substantial period of time causes brain damage, in particular to the frontal lobes, i.e., "that part of the brain [that] also serves to regulate emotional responses" (M. 155). Dr. Glennon described Mr. Johnson's mental and emotional state at the time of the offense:

> When someone drinks, particularly a chronic alcoholic, they're going to affect the frontal lobe and lymphic area. That their emotional areas are going to go unchecked. That they're not going to have an ability to inhibit responses, to show restraint. They're going to misinterpret stimuli and overreact to them. They're going to have limited ability to consider alternative actions.

(M. 171-72)(emphasis added).

Dr. Glennon testified that Mr. Johnson, at the time of the offense, was committable under the Myers Act (M. 150). When asked about the applicability of statutory mitigating circumstances, Dr. Glennon testified, "Yes. He was definitely mentally disturbed, significantly, at the time" (M. 179).

Dr. Glennon described Mr. Johnson's mental state:

> [T]he frontal lobe of the brain is primarily the area which is very early on affected by drinking, which has to do with the ability of an individual to consider consequences of the behavior, appropriateness of the behavior, rightfulness versus wrongfulness, to think abstractly and also to provide inhibitions and restraint, emotional arousal.

(M. 155-56)(emphasis added). Dr. Glennon testified Mr. Johnson's "judgment was clearly impaired" (M. 171), adding:

> When someone drinks, particularly a chronic alcoholic, they're going to affect the frontal lobe and lymphic area. That their emotional areas are going to go unchecked. That they're not going to have an ability to inhibit responses, to show restraint. They're going to misinterpret stimuli and overreact to them. They're going to have limited ability to consider alternative actions.
>
> They're going to lose appreciation for consequences of their behavior. Although they may behave purposefully, it is without regard to the impact that it will have on others or likely have on themselves.

(M. 172)(emphasis added). Dr. Glennon said of Mr. Johnson's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law: "It was substantially impaired" (M. 179).

Counsel could and should have presented much more than was presented. His failure to do so was unreasonable, given the abundance of available material, and the deficiency prejudiced Mr. Johnson. Mr. Johnson demonstrated at the evidentiary hearing what reasonable trial counsel would have presented at the

sentencing hearing had he conducted adequate and reasonable investigation. Effective counsel would have proved, in addition to the applicability of the two statutory circumstances described supra, several nonstatutory mitigating circumstances.

A. ALCOHOLISM

Terrell Johnson is an acute, chronic alcoholic. Mr. Johnson's sentencing jury and judge were not informed of the gravity of Mr. Johnson's disease. His attorney, much less the jury, did not even know that alcoholism was a disease (M. 250). Mr. Jones testified as to his omission that he would have obtained expert assistance to present this issue to the jury had he been aware of the disease:

> [I] think I would have had persons who were experts in the field of alcoholism testify at the mitigation portion of the trial, the advisory portion of the trial, regarding the effects of long-term alcoholism and how it can impair someone's judgment.

(M. 251).

Had counsel obtained an expert they would have informed the judge and the jury that alcoholism derives from both hereditary and environmental sources:

> One, it's certainly environmental. It is the pattern of coping with stress or with problems that is role modeled for the child growing up.
>
> And, secondly, the recent research has indicated that there is some physiological difference in response to alcohol that may well be inherited. It appears to be a genetic difference in the physiological response mechanism to alcohol.

(M. 92-93).

> So, given that both sides of his family were alcoholic, regardless of environment in which he grew, there was probably a 10 to 15 times greater likelihood that Terrell would become alcoholic later in his life if he did drink.

(M. 154).

Mr. Johnson's father, Arthur Johnson, testified at the sentencing phase of Mr. Johnson's trial. Because trial counsel failed to ask, the father did not

testify to the extent of his "drinking problem," i.e., that he was an alcoholic for forty years, or that Terrell's mother was also alcoholic. By contrast, Arthur Johnson stated at the evidentiary hearing that he is an alcoholic, that his wife was an alcoholic up until she died, and that Terrell Johnson's grandfather was an alcoholic (M. 13). The reason the jury did not hear from Arthur Johnson about the pervasive alcoholism in Terrell's background was explained at the evidentiary hearing -- trial counsel did not prepare his witnesses:

> Q If you had been informed by counsel that your status, that the fact that you were an alcoholic was or could be important in the case, would you have testified regarding it?
>
> A Yes, I would have.
>
> Q Would you have admitted that you were an alcoholic?
>
> A Yes.

(M. 14).

> Q Six years ago when Mr. Jones had you on the stand, at that point you didn't feel you were alcoholic? You didn't feel that you had a drinking problem? And when he asked you that question that's what you told the jury; is that correct?
>
> A That's true. If he would have gone into detail like this gentleman that is here today, I would have gone into detail like I have today.

(M. 27)(emphasis added).

> Q Sir, regardless of whether, when you testified in the trial previously, you would have said you were an alcoholic or you weren't an alcoholic, regardless of that, if you had been told that it was important to detail and tell the truth about how much you drank and how long you had been drinking and when you started and all those things we went through, would you have testified to those matters.
>
> A I certainly would have. I certainly would have.

(M. 29).

Arthur Johnson also testified that he would have told the sentencing court:

> A I believe the responsibility for Terry's problems is more my fault than anybody else's fault, not being the decent father that I should have been. I take as much blame as I could put on him, or more. If he had been brought up correctly -- Terry's always been a

good boy. He never gave me any problems when he was growing up. And I believe, I believe the last ten years of his life was my fault, actually.

Q Can you tell us why?

A Well, my drinking and my wife's drinking, and -- not that we didn't keep food on the table. We didn't go that far. But we just didn't -- he lacked a lot of supervision he should have had when he was younger.

Q Because of your absence?

A Yes, and --

Q And drinking?

A Yes.

(M. 21-22).

Mr. Johnson's aunt, Mildred Hefner, testified that Terrell's and his parents drinking problem worsened after Terrell's brother Sandy died in Vietnam (M. 208), and that "everything was just over" for Terrell's mother after Sandy's death. Although "she drank a lot before and continuously[,] . . . after Sandy . . . she would just drink constantly" (M. 209).

Alcoholics who are as ill as Mr. Johnson cannot control their drinking. The judge and jury at trial were not told this. As was explained in post-conviction:

A I would say Terrell Johnson was clearly alcoholic by his late teens, in terms of his drinking patterns and the lifestyle associated with his use of alcohol. His behavior was clearly out of control. He had lost the critic ability when he drank, how much he would drink and was unable to control his behavior.

Q What is an alcoholic?

A Well, an alcoholic is any individual who has lost the ability to predict how much they will drink once they begin to drink, and they've lost the ability to predict their behavior once they begin to drink.

It really has nothing to do with how much a person drinks or how often or with whom or what they drink. What it has to do, when an alcoholic picks up their first drink, they lose control over their drinking, and they develop subsequent life problems linked to their drinking, and yet they will continue to drink and continue to have further problems.

(M. 154-55).

Mr. Johnson's former sister-in-law, Shelia Young, also testified about Terrell's alcoholism:

> Q Let me ask you about whether it appeared to you that Terry had any control over his drinking:
>
> A No, it did not appear to me that he had any control. It was almost like an inner force that would take over, that was very, very much unlike Terry himself.
>
> Q Did anybody contact you back at the time of this trial and ask you any of these questions?
>
> A No, no one.
>
> Q Did you ever see Terry do anything violent to anybody?
>
> A No, I did not, never.
>
> Q If someone had come and talked to you about that and some of the other things that we've been talking about, would you have talked to them? Defense attorneys, if they had come, would you have talked to them about Terry?
>
> A Certainly.
>
> Q Any investigators they might have, you would have talked to them, too?
>
> A Certainly.
>
> Q Would you have come and testified at the time of trial or sentencing to the things we've talked about and other things regarding alcoholism and the way Terrell was?
>
> A Definitely.

(M. 216-17)(emphasis added)

Terrell Johnson suffered severely from alcoholism, a disease. His illness is documented in nearly ten years of medical records that his jury and judge never saw or knew about. His illness was attested to by esteemed, mental health professionals and addiction specialists at the evidentiary hearing. Dr. deBlij, who testified at trial, would have testified to this if only she had been asked. Trial counsel was ineffective, unreasonably so, for failing to present Mr.

Johnson's illness in mitigation. This was a very close case which would have had a different result had this evidence been presented.

B. PSYCHIATRIC HISTORY

Mr. Johnson has a substantial history of mental illness and psychiatric treatment which is documented by his medical records. On September 23, 1974, at the age of 29, he was admitted to Memorial Hospital in Ft. Lauderdale with a diagnosis of alcohol psychosis (Mem. Hosp. record). He was in and out of that hospital for years, and prison records show Mr. Johnson was diagnosed as a chronic alcoholic in 1976 by prison psychiatrists, and his family history of alcoholism was noted (Avon Park and Polk Correctional Records). Mr. Johnson also had a history of other mental problems intertwined with physical problems. He suffered a severe beating in 1974, and began to experience seizures after that time. On October 18, 1974, he was admitted again to the Memorial Hospital with "migraine headaches of such intensity that their onset provoked 'uncontrollable behavior' which necessitated restraint." On October 28, hospital records indicate Mr. Johnson said he was "having a spell," and had a seizure lasting several minutes, which was ultimately controlled by an injection of thorazine (Mem. Hosp. Records). He was so difficult to stabilize at the hospital that he was placed on 100 mg. of Mellaril by the time he left. His exit diagnosis was a "traumatic neurosis with features of agitated depression."

Mr. Johnson again attempted suicide after an arrest in October, 1975, and was referred to Lake/Sumter Community Mental Health Center. He was seen by Dr. Gilbert Brecken as a result of this incident and given an MMPI, which was analyzed by the Roche Psychiatric Institute. The test reflected Mr. Johnson was a "seriously disturbed person," who "may experience periods of dizziness, confusion, and inability to concentrate." He had "suicidal thoughts or fears." The Institute noted people with Mr. Johnson's personality makeup are "frequently found to be schizophrenic or schizo-effective." The Institute concluded "the

test results on this patient are strongly suggestive of a major emotional disorder. The test pattern resembles those of psychiatric outpatients who later require inpatient care." (Brecken records).

On November 1, 1979, Mr. Johnson was admitted to the Memorial Hospital after a suicide attempt, and voluntarily committed to the alcohol rehabilitation program there until released on November 25, 1979, less then two weeks before the killings. He was still reporting seizures, blackouts and suicidal ideations at that time. The psychologist in charge of the program noted at his release that "Terry could exercise some control when not under the influence of drugs, but I feel it is highly likely that his limited control vanishes when he is drug-involved. At that time the need to act out may be considered a compulsion." (Mem. Hosp. Records).

Counsel's performance was deficient when he failed to discover the extensive mitigation in Mr. Johnson's background and present it to the sentencing judge and jury. It was unreasonable to fail to present Mr. Johnson's history of mental illness in mitigation at the penalty phase and to fail to present the history from competent mental health professionals. Counsel's ignorance of the legal importance of the mitigation was deficient performance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). This prejudiced Mr. Johnson.

C. INADEQUACY OF TREATMENT

Mr. Johnson submitted himself for psychiatric and alcoholism treatment on several occasions, unsuccessfully. Dr. Glennon, a leading expert on alcoholism and substance abuse, testified:

> Q All right. Thank you, sir. Given Terry's background and history and the program that he went to in 1979 that we just discussed and the other information that you looked at, do you have an opinion within a reasonable degree of medical or scientific certainty as to whether Terry would return to drinking or not after leaving such a treatment program?
>
> A Given that he had many years of active drug and alcohol use, progressive use of one drug to the next, using street drugs and a lifestyle totally disrupted by his use of drugs and alcohol, the

likelihood that three weeks in treatment would make a significant alteration in his life was virtually nil. He was close to one hundred percent likely to return to using drugs and alcohol. And the three weeks that he was in the SHARE program, although it would seem to me that the treatment was appropriate, it really served little more than a period of detoxification.

Q And that's just not sufficient or was not in his case; is that correct?

A No. Again, given the length of time he had been drinking and using drugs, his associated lifestyle; every area of his life had been negative, spiritually, emotionally, maritally. He needed long-term changing, which would take place only in long-term treatment, from six months to a year.

(M. 163-64)(emphasis added).

D. THE AGGRAVATION OF MR. JOHNSON'S ILLNESS DUE TO MIS-PRESCRIPTION OF DRUGS

During his hospitalization and treatment for his psychiatric and alcohol abuse problems, Mr. Johnson was prescribed medication that "would actually hasten and promote. . . . would worsen his addiction" (M. 157), and that "allow[ed] the disease to progress rather than arrest it" (M. 162):

Q Now, the hospitalizations in the mid-'70's or the diagnoses in the mid-'70's, did those result in any medication being prescribed to Mr. Johnson?

A Yes, he was treated with several medications including antidepressants and antipsychotic medication.

Q Do you remember any of the technical names for any of the medication that he received?

A Yes. He was treated with Triavil, and Etrafon, and Sinequan. Plus there were other times he was treated for medical problems, and that included drugs as Valium, Tuinal and I think he was also treated with Quaalude.

Q Can you tell me, sir, whether you have a professional opinion with regard to whether treatment with those kinds of -- are they narcotics, barbiturates -- those kinds of antipsychotic medication?

A Well, the Valium, Tuinal and Quaalude are all sedative hypnotic drugs and would actually hasten and promote his becoming, would worsen his addiction.

Q To alcohol?

A Yes. They are all direct substitutes for alcohol.

* * *

Q So your expert opinion is that's mis-treatment? That's a wrong prescription?

A Yes.

Q In that it did more harm than good?

A Yes. It will allow the disease to progress rather than arrest it.

(M. 156-57, 162)(emphasis added). Dr. Glennon analogized the prescription of mood altering drugs for Mr. Johnson to "treating a diabetic with sugar" (M. 193). According to Dr. Glennon, "there were a number of professionals who, although very well meaning, actually promoted his disease" (M. 192).

Mr. Johnson's jury and judge were never told of the aggravation of his illness by drugs that were mis-prescribed for him. Had counsel done the proper investigation into alcoholism, its roots, proper treatment, and long term effects -- an omission he admitted was a mistake -- counsel would have known and presented the jury with this important mitigating material. His failure to do so was unreasonable, given Mr. Johnson's manifest illness, and prejudicial.

E. TERRELL JOHNSON, THE GOOD PERSON

At the penalty phase of Mr. Johnson's trial, Nancy Porter testified that Mr. Johnson is "gentle" and "willing to help anybody" when he's sober. That was essentially all the jury and judge heard about Mr. Johnson's good and redeeming qualities. There was much, much more that they could and should have heard had counsel presented a reasonably effective sentencing case, as demonstrated at the evidentiary hearing.

At the evidentiary hearing, Arthur Johnson testified about Terry's superior work ability:

> A I was a union carpenter, myself. And Terry worked hard, and he finally got a union card. And of all the people I worked with in Florida, I worked with some great carpenters -- Terry wasn't the greatest carpenter. I mean, because of lack of experience, of course. But Terry was the best worker I ever did work with.

Q What do you mean?

A I mean he and I could produce more work in the length of time it took other than most any other carpenter I have ever worked with.

(M. 22).

It is significant that six years after Mr. Johnson's trial and over ten years after his separation from Deborah Beasley, his wife, that Ms. Beasley and her mother and sister cared enough about Mr. Johnson to tell the circuit court about his good qualities. Portions of their testimony are excerpted below:

[Deborah Beasley, ex-wife]

Q Now, during this period of time and during any of his drinking episodes, was he ever violent with you?

A No, sir.

Q Ever hit you?

A No, sir.

Q Ever violent with children?

A No, sir.

Q Was he good with children?

A He was very good with children.

(M. 38).

A Terry was a very kind person. He was a great husband to me, you know, when he wasn't drinking. He would be willing to help clean or mow the grass. He would constantly look for a reason to buy flowers or buy me a gift. If he went to his mother's or sister's for dinner, he would always want to buy flowers and take gifts. He was very good with my nephew who was very young at that time.

Q How young?

A I believe he was about three at that time.

Q Did he ever baby-sit?

A Yes, he would be alone and keep him.

Q When he was sober?

A Yes. And he was great with him, and my nephew was very

close to him. You couldn't have asked for a better person. He didn't say an unkind word or anything when he wasn't drinking.

(M. 40).

[Mary McDaniel, ex-mother-in-law]

A Well, Debby got married to him, I believe, in 1973, I believe. Terry was a real nice person when he wasn't drinking. He did drink a lot.

Q Did you see it?

A Yes, I've seen him drink, yes.

Q Go ahead.

A When he did drink, he was a complete different person.

Q Tell us who the two different people are. How was he different?

A Well, when he drinked, sometimes I would see him cry and talk about things that happened when he was a child.

Q What sort of things?

A Well, I guess times were bad; that they were left alone as little children and had to find their own food and prepare it and do their own laundry, and that they were in a home of some kind.

Q Orphanage?

A Orphanage, at one time.

Q What about when he wasn't drinking?

A Well, he was a complete different person.

Q How was he to you?

A Well, he was real good to me. He's been to the house and, you know, had dinner. And he was pleasant, would offer to help me do things. Just a complete different person.

Q Did he do things around the house for you?

A Yes. He would offer to cut the grass or, you know.

* * *

Q Did you ever see him hit anybody?

A No.

* * *

Q Did you ever see him hurt anybody, physically?

A No.

Q When he was drunk or sober?

A No.

Q Did you ever see him around children?

A Yes.

Q Was he good or bad with children?

A He was real good. I have a grandson, Sheila's son, and he was real good with him or played with him and that kind of thing.

(M. 49-51).

[Sheila Young, ex-sister-in-law]

Q What kind of difference? Tell me what he's like when he's not drinking?

A He's a very likable person. I liked him very much.

Q Do you have children?

A Yes. My son now is 15. He was about two years old at the time. And he and Terry were very close. They loved each other. Terry would play with him, bring him gifts, ride him around on his shoulders. They cared very much for each other.

Q Was he a helpful and caring individual to others, to his mother-in-law, to his own family, to you?

A Oh, yes. Oh, yes, very kind, very considerate.

Q What about when he was drinking?

A Well, most of the time when he was drinking, he would get very depressed.

Q How would you know that? How could you tell he was depressed?

A Well, sometimes he would cry.

Q Would he talk to you about the depression?

A He would talk about his childhood, a death of his mother, the death of his brother, being in an orphanage home, things of that nature, about his childhood.

Q Did you ever see his father? Do you know his father?

A I met his father on two or three different occasions. Mostly in just passing.

Q Was he drinking on those occasions, his father?

A Yes, yes.

Q Let me ask you about whether it appeared to you that Terry had any control over his drinking?

A No, it did not appear to me that he had any control. It was almost like an inner force that would take over, that was very, very much unlike Terry himself.

Q Did anybody contact you back at the time of this trial and ask you any of these questions?

A No, no one.

Q Did you ever see Terry do anything violent to anybody?

A No, I did not, never.

(M. 215-16).

Mr. Johnson's ex-wife was not called to testify on his behalf in mitigation, nor was her mother or sister. Trial counsel never even spoke with Ms. Beasley although she sat outside the courtroom during the trial (M. 41-42). She would have testified as to the good Terrell Johnson had she been asked (M. 42). Likewise, Mr. Johnson's former mother-in-law, Mary McDaniel, would have testified for him but she was never contacted (M. 52).

Mr. Johnson's trial counsel simply did not have the knowledge or resources to present an effective case for mitigation of the death sentence. He failed to timely investigate and present evidence of overwhelming mitigation. The failure to prepare was not reasonable. Counsel's efforts to make do were not adequate to cure the prejudice resulting from the failure to timely investigate. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). Had he done so the jury would clearly have voted for life; Mr. Johnson was prejudiced. Rule 3.850 relief is warranted.

ARGUMENT II

THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTION THAT A MAJORITY VOTE WAS REQUIRED FOR A LIFE SENTENCE RECOMMENDATION PREVENTED MR. JOHNSON'S JURY FROM RETURNING A LIFE RECOMMENDATION, AND VIOLATED MR. JOHNSON'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS. COUNSEL'S FAILURE TO LITIGATE THIS ISSUE WAS DEFICIENT PERFORMANCE.

Mr. Johnson's trial judge repeatedly misinstructed the jury that a majority vote was required for a recommendation of a life sentence. The evidence presented at the 3.850 hearing established that the jury initially reached a 6-6 vote, which is a life recommendation. However, the jury then deliberated further to return the narrow 7-5 vote in favor of the death penalty, and the trial judge imposed that recommended death sentence. The trial court erred in finding no prejudice from these misstatements. Prejudice is inherent in the court's erroneous instructions themselves because the resulting jury sentencing decision is unreliable and capricious. The inaccurate majority requirement distorted the sentencing process and prevented the jury from making "a reasoned moral response" based on Mr. Johnson's personal culpability and the circumstances of the crime. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The resulting death sentence violated Mr. Johnson's fifth, eighth, and fourteenth amendment rights.

The 3.850 court erred in holding that this claim should have been raised on appeal. At the time of direct appeal, there existed no evidence in the record that the jury had initially been deadlocked 6-6 at the penalty phase. The claim is cognizable now because of this new evidence, because it involves fundamental error and because new law mandates resentencing. Arizona v. Rumsey, 467 U.S. 203 (1984); Hitchcock v. Dugger, 481 U.S. 393 (1987). In Arizona v. Rumsey, the United States Supreme Court held that despite an improper understanding of the law, a life recommendation is an implied acquittal of death for double jeopardy purposes. In Hitchcock, it was held that a Florida jury must receive correct and accurate instructions at a penalty phase proceeding. These opinions are

significant new law as defined in Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980), and justify relief now.

In addition, Mr. Johnson's trial counsel was ineffective in failing to object to or correct the court's inaccurate statements. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). This ineffective failure to object does not preclude review since no contemporaneous objection is necessary to preserve sentencing errors appearing on the face of the record. See Forehand v. State, 537 So. 2d 103 (1989).

Florida's death penalty statute requires a jury recommendation of the sentence to be imposed on the convicted capital defendant, but is silent with respect to whether the recommendation must be unanimous or by majority vote. In Alvord v. State, 322 So. 2d 533 (1975), cert. denied, 428 U.S. 923 (1976), this Court established that a recommendation for death by majority vote was permissible. This Court has expressly recognized that a majority is not required for a life recommendation. Rose v. State, 425 So. 2d 521 (1982). There, the sentencing jury, after deliberating for some time, advised the court that they were tied six to six and the jury requested further instruction. The trial judge responded by giving the jury an "Allen charge," and the jury responded with a seven-five recommendation for death shortly thereafter. On appeal, this Court reversed the death sentence. This Court held that the trial judge, after receiving the jury's request for further instructions, should have instructed the jury, consistently with Florida law, that it was not necessary to have a majority reach a sentencing recommendation, because "if seven jurors do not vote to recommend death, then the recommendation is life imprisonment." Id. at 525. This is the same instruction which should have been given to Mr. Johnson's jury.

In Patten v. State, 467 So. 2d 975 (1985), the jury interrupted their sentencing deliberations to inform the trial judge that they were deadlocked

six-six. Rather than giving a full blown "Allen" charge, demanding a majority for either recommendation and excluding as an acceptable alternative a six-six life recommendation, the trial judge merely encouraged the jury to deliberate further, instructing them:

> If you can agree on a majority to either life or death, without trying to pressure you, by talking it over one more time and agreeing one way or another, and I'm not suggesting any result, but if after trying one more time you can't agree and it's still six/six, I will instruct you to go ahead and sign that verdict form that includes life imprisonment . . . .

Id. at 977. The jury shortly thereafter returned with a seven-five recommendation of death. The Florida Supreme Court reversed.

In Harich v. State, 437 So. 2d 1082 (Fla. 1983), the jury had been similarly but less extensively misinstructed than Mr. Johnson's jury, but had also received a correct instruction -- that only six of their number were required to return a verdict of life. Recognizing the inconsistency in the instructions, and again condemning that part of the instructions which incorrectly indicated that a majority was required to recommend life, the Court nevertheless affirmed the death sentence. Since the "body" of the challenged instruction was a correct statement of the law, and since the jury returned a nine to three recommendation of death, with no indication they had any difficulty achieving a majority consensus, the Harich court found that there was nothing in the record to indicate that the jury was confused by the inconsistent instruction or that the appellant was prejudiced thereby. Id. at 1086 (emphasis added).

The instructions to Mr. Johnson's jurors were not inconsistent. The instructions were clear but wrong. The trial judge repeatedly told jurors that a majority vote was required for life. Defense counsel never objected. No statements by the court, the prosecutor or defense counsel corrected this inaccurate view of the law. Mr. Johnson should not be penalized because his

jurors were never given any proper instructions and thus were completely in the legal dark. "Accordingly, a defendant who is constitutionally entitled to an acquittal but who fails to receive one--because he happens to be tried before an irrational or lawless factfinder or because his jury cannot agree on a verdict--is worse off than a defendant tried before a factfinder" who is confused because of partially correct instructions. Richardson v. United States, 468 U.S. 317, 327 (1984)(Brennan, J., dissenting)(emphasis in original). "Indeed he is worse off than a guilty defendant who is acquitted due to mistake of facts or law." Richardson, 468 U.S. at 327 (Brennan, J., dissenting)(emphasis in original) (citation omitted). Despite improper jury instructions, Mr. Johnson still received an acquittal and Mr. Johnson should not be punished solely because his jurors were lawless because they were not instructed that a 6-6 vote was a life recommendation.

The misstatements began at the very opening of Mr. Johnson's trial. The trial judge, prior to the commencement of voir dire, told the first venire panel that only by a majority could the sentencing jury return a recommendation of life. The trial judge described the jury's sentencing decision as:

> An advisory sentence to the court as to whether the defendant should be sentenced to life imprisonment or to death, which is by a majority vote of the jury. In other words, an advisory sentence is by majority vote of the jury.

(R. 1032)(emphasis added). The second panel of prospective jurors was similarly misinstructed that the jury's sentencing decision was "an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment or death. . . by a majority vote of the jury, seven or more" (R. 1286)(emphasis added).

During individual and sequestered voir dire the trial judge reiterated and expanded the erroneous instructions, and many of the venire receiving those instructions ultimately served as jurors. The trial judge explained the jury's

sentencing deliberations to venire person Carrafiello as follows:

> THE COURT: You hear the evidence and arguments of counsel, and the Court tells you how to consider that, and then a majority recommends either life or death, do you understand that?
>
> MS. CARRAFIELLO: RIGHT
>
> THE COURT: Could you follow the evidence and follow the Court's instructions and do just that?
>
> MS. CARRAFIELLO: I will do so.

(R. 1054)(emphasis added).

Venireperson Appelton was likewise informed that "a majority recommends either life or death" (R. 185), as were venirepersons Wimberly (R. 1091: "a majority of them recommend either life or death"); Stevens (R. 1104: "seven of you recommend life or death"); McFarland (R. 1167: "either seven or more recommend death or seven or more recommend life"); Green (R. 1182: "a majority of the jury, seven or more, would return a recommendation."); and Kuhns (R. 1199: "a majority of seven jurors or more recommend to the Court to impose the death sentence or impose a life sentence.").

The exact role and function of the sentencing jury was explained in even greater detail to venire person Zinicola. What should happen, according to the Court, would be that the jury, after hearing the evidence regarding mitigating and aggravating circumstances, would then,

> [I]n accordance with the Court's instructions, com[e] back in and say[]; Judge, we recommend the death sentence, seven of us do or seven recommend life. That is the way it is done.

(R. 1110)(emphasis added). Ms. Zinicola agreed that she could follow the Court's instructions, and was selected to and did sit on Mr. Johnson's jury.

Venire persons Smith and Cooper, both of whom were selected as jurors, were informed in detail, during voir dire by the trial judge, of the contents of the verdict form which they would ultimately be required to return:

> What happens is, a written verdict slip is brought back into court by the jury foreman which reads: 'we, a majority of the jury, advise the court that... to the effect, we advise the sentence ought to be life

or ought to be death.'

(R. 1292)(emphasis added). Or, alternatively,

> When the jury brings back an advisory verdict, it's a slip signed by the foreman which says; we, a majority of the jury, recommend and advise the Court on life.

(R. 1338-39)(emphasis added).

Venire person DePaiva was also selected and ultimately served on Mr. Johnson's sentencing jury, after satisfactorily answering the following questions propounded by the Court during individual voir dire:

> THE COURT: If you were selected to sit on the jury, and you returned one or two verdicts of murder in the first degree, then the jury goes into a brand new phase called the penalty phase.
>
> * * *
>
> The jury goes back, comes in and recommends, seven of them, the death sentence. The Court can impose the death sentence, or seven of them recommend the Court impose the life sentence. All right.
>
> If you felt. . . the death sentence was warranted, would you have any reservation of being one of the seven that recommend death?
>
> MS. DEPAIVA: No, I would not.
>
> THE COURT: On the other hand, if you felt the death sentence was not warranted . . . would you have any reservation about being one of the seven or more . . . that would recommend life?
>
> MS. DEPAIVA: No.

(R. 1136)(emphasis added). Juror DePaiva served on the jury that ultimately returned Mr. Johnson's sentence of death after swearing to follow the law as given by the trial judge.

Venire person Phillips was selected to and did serve on Mr. Johnson's sentencing jury after she too gave the appropriate answer to a similar question:

> THE COURT: . . .You would listen to all of that, talk to the other jurors and if you felt in your heart, mind and conscience that a sentence of life imprisonment would be appropriate; would you have any hesitation about coming in and through a majority say your verdict, a majority of us advise the Court to impose life imprisonment. Would you have any reservations about that?

(R. 1188)(emphasis added).

At no point prior to, during, or after the proceedings did trial counsel attempt to correct this fatal misinformation. Instead, counsel exacerbated the error by telling the jury in his closing argument that: "you must decide what penalty is the voice of the community, what penalty you feel the majority of you, Judge Powell, should ultimately impose in this case, whether it be death . . . or life . . . ." (R. 512).

Finally, the trial court twice repeated the error in its jury instructions at sentencing. The court instructed the jurors:

> On the other hand, if, after considering all of the law and 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, Terrel M. Johnson.

(R. 528-29)(emphasis added). These were also the words of the forms provided the jury to fill out upon coming to a recommendation. And the very last instruction to the jury, the last thing they heard before retiring to deliberate, restated the misinformation that a majority was required to return a verdict of life:

> The law requires that seven or more members of the jury agree upon any recommendation advising the death penalty or life imprisonment.
>
> [T]he jury will now retire to consider its 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, dated, and the jury will return to court. You may now retire and consider your advisory sentence.

(R. 529) (emphasis added).

The fatal instructions are not saved merely because they were standard instructions. The law is plain; a split vote is a life vote. The instructions were simply wrong. The court's statements and the jury instructions are prejudicial in and of themselves. Inaccurate instructions violate the eighth

amendment because they inject factors irrelevant to a personal, individualized sentencing determination. Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Lockett v. Ohio, 438 U.S. 586 (1978). Any death sentence arising from such instructions is unreliable; it violates the constitutional prohibitions against arbitrary and capricious capital sentences. Woodson v. North Carolina, 428 U.S. 280 (1976).

The United States Supreme Court has recognized the need for correct jury instructions at the capital penalty phase. Hitchcock v. Dugger, 481 U.S. 393 (1987). Inaccurate jury instructions must be viewed as a reasonable juror would interpret them. Francis v. Franklin, 471 U.S. 307 (1985). Further, a resentencing is required unless there is no possibility that the jury verdict rested on an improper ground. Mills v. Maryland, 108 S. Ct. 1860 (1988).

Mr. Johnson's jury was not merely confused or misled; it was clearly given wrong instructions. The error exists in the instructions themselves -- the prejudice is the unreliability and arbitrariness of the sentence. But the prejudice is shocking in Mr. Johnson's case because his jury initially reached a 6-6 vote entitling him to a life recommendation. The Rumsey court held that

> [r]eliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' ... affects the accuracy of that determination, but it does not alter its essential character."

467 U.S. at 211 (citation omitted). Thus, despite Mr. Johnson's jurors' misperception that they must reach a majority decision, their 6-6 tie vote was an acquittal and has the full force and effect of terminating jeopardy and establishing a double jeopardy bar. See Arizona v. Rumsey.

Jury foreman Fred Cooper explained in a post-conviction deposition that the jury deliberated and initially took a vote resulting in a 6-6 split (M. 1230). The misinformed jury then resumed deliberation and again voted, this time reaching a 7-5 vote for death. The jury was told, many times, that a majority

vote was necessary for either a life or death sentence. The jury was never told anything other than this; the jury was never advised that a majority was only required for death. Any reasonable juror would believe, as this jury did, that a 6-6 vote was a "tie vote."

At no time did foreman Cooper ever indicate that he or the jury understood that 6-6 was not a tie vote. In fact, his testimony clearly indicates that the jury thought that 6-6 was a tie vote and the only reason that a second vote was taken was that they did not want to come back to the court with an inconclusive vote. This is supported by his statement that no one on the jury had strong feelings either way and a couple jurors were vacillating in their vote:

> I don't want to make it synonymous to a scoring, but basically it came down to that. And then it was just something I did, but I had each juror discuss the things individually, their thoughts, their ideas, their views to make sure that, like with any group of people, you're going to have some people that are strong in one direction, some strong in another. We really didn't have too much of that. But certainly there were a couple of them that were, you know, they had gone both ways.
>
> So each person, we had a general discussion, and a vote was taken. And the vote was six to six.

(M. 1229-30)(emphasis added).

The jury never knew they had already reached a decision for a life recommendation when the vote was 6-6, and that jeopardy was terminated at that point. No juror had strong feelings one way or the other. No juror understood that instead of resolving an impasse that they were changing the original result in violation of the double jeopardy clause of the fifth amendment.

The jury's resumption of deliberations after the original 6-6 vote demonstrates that Mr. Johnson's jurors believed they had not reached a decision. Moreover, after further deliberations, the jury voted for death by the slim margin of seven to five. In contrast to Harich, in which this Court found no prejudice in a 9-3 death vote, the close vote by Mr. Johnson's jurors reveals their reluctance to reach that vote for death.

Mr. Johnson was deprived of a life sentence in violation of the double jeopardy clause.[1] The trial court incorrectly told the jury that a majority vote was necessary for the life sentence. These instructions themselves render Mr. Johnson's death sentence constitutionally invalid; however, in addition the 6-6 vote by the jury was an acquittal terminating jeopardy and barring further deliberation in violation of Mr. Johnson's fifth amendment rights. Since there was overwhelming evidence to reasonably support a life sentence, the trial court would have been compelled to follow a life recommendation. This Court should vacate Mr. Johnson's death sentence.

ARGUMENT III

TERRELL JOHNSON WAS DENIED HIS CONSTITUTIONAL AND STATUTORY RIGHT TO THE INDEPENDENT AND COMPETENT ASSISTANCE OF A MENTAL HEALTH EXPERT, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At the evidentiary hearing, trial counsel acknowledged that the intoxication defense was an important legal defense available to Mr. Johnson (M. 242-43). Trial counsel also acknowledged the importance of independent, competent mental health testing as to guilt-innocence and at the sentencing phase of the trial. Mr. Jones also stated that he wanted a confidential mental health report. Despite his agreement with these elementary precepts of criminal defense of a capital case, counsel did not request appointment of a psychologist until the week before trial (M. 226). The circuit court appointed an unlicensed jail psychologist who was an employee of the Orange County Sheriff's Department (M. 295, 302); the evaluation was not confidential (M. 300); and consisted solely of the administration of the Minnesota Multiphasic Personality Inventory

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[1]If the jury had returned the original 6-6 life recommendation, the trial judge would have been bound to impose a life sentence, because the record contained abundant evidence on which a reasonable person could base a life recommendation. Tedder v. State, 322 So. 2d 908 (Fla. 1975); Christian v. State, 550 So. 2d 450 (Fla. 1989). Correct instructions would have led to a jury life recommendation which in turn would have led to a sentence of life from the judge, and this would have been the equivalent of a life verdict as in Bullington v. Missouri, 451 U.S. 430 (1981).

and the California Psychological Inventory (M. 303). This was the only evaluation for purposes of trial provided by the court.

The jail psychologist, Mr. Cassady, acknowledged that he was not provided with background material although it would have been helpful (M. 304). Trial counsel was in possession of psychological evaluations which indicated that Mr. Johnson had a lifelong history of severe alcoholism, had previous psychiatric admissions, and had been on psychotropic medication in the past (M. 68, 230). Yet the jail psychologist did not review these materials. Perhaps it would not have mattered since Mr. Cassady was not even familiar with the statutory mitigating factors (M. 301).

On September 18, 1980, less than one week before trial, and four months after he was appointed, Mr. Johnson's counsel requested that the trial court appoint a psychologist (R. 704). The motion suggested "that the very nature of the crime would seem to indicate that the defendant is suffering from type of personality disorder (sic)" and asked that a psychologist "conduct a battery of tests to determine personality traits of the defendant" (R. 704). The motion suggested the expert's testimony "may be needed in the advisory penalty phase of the trial should the jury return a verdict of first degree murder" (R. 704).

On September 22, 1980, the day before trial was to begin, the trial court told counsel:

> I am going to grant the Motion for Psychological Testing. I really made that decision back last week. I have already signed an order on that and I have been advised by the psychologist, Mr. Cassady, that he has completed the evaluative test. He was dictating his report this morning. I ought to have it tomorrow.

(R. 416). The trial court received, reviewed, and used the report in imposing a death sentence.

Mr. Cassady's assistance was not competent and violated due process. As will be shown below, a competent evaluation, based upon proper records and background information, would have substantially benefited Mr. Johnson. Mr.

Cassady was not competent for a variety of reasons. Mr. Cassady's "evaluation" consisted of two simple personality tests and he spent an inordinately short period of time conducting it. Second, Mr. Cassady is not licensed in the State of Florida and never has been. Third, the report gratuitously ignored the requested "sentencing assistance," and the Court's order to address that issue, and instead focused (incompetently) on competency to stand trial and sanity. Fourth, Mr. Cassady had no understanding of the statutory mitigating factors. Fifth, Mr. Cassady was provided no background information. Sixth, Mr. Cassady reported his findings straight to the judge in violation of Estelle v. Smith, 451 U.S. 454 (1981). Mr. Johnson requested and consented to one type of evaluation and its use but received another. Defense counsel was prejudicially ineffective for failing to correct those errors of constitutional dimension.

A. NO COMPETENT EVALUATION

John Cassady is not and never has been licensed as a psychologist (M. 301-02). Although Cassady received a Master's degree from Florida Technological University in 1974, between 1974 and 1980 (the time of his "evaluation" of Mr. Johnson), he undertook no post-M.S. study (M. 301). He has no forensic training (M. 301).

Mr. Johnson presented the testimony of two licensed clinical psychologists at the evidentiary hearing. Both testified as to the requirements for licensing in Florida and as to the professional ethical standards of the psychology profession as regards the necessary qualifications for performing psychological reports:

> Q What does it take to become licensed in Florida:
>
> A Beyond completing the academic program, you have to do 2,000 supervised hours under a clinical licensed Ph.D., and then you can sit for the licensing exam. Then, upon completion of that, you are licensed by the State.
>
> Q Do you know whether you are qualified to write reports regarding competency and sanity and things like that, if a member of your profession has not gone through that supervision period that

you're talking about?

A That is not considered to be ethical for someone without that training to sign off on that kind of report.

(Testimony of Dr. deBlig, M. 55)(emphasis added).

This testimony was corroborated by the testimony of Dr. McMahon, who trains forensic psychiatrists for the University of Florida Department of Psychiatry (M. 77):

Q In your profession, were you allowed after receiving a Master's degree to perform tests and to take background information and come to conclusions with regard to competency and insanity and testify in court about them?

A No.

Q Would you be disciplined somehow if you did that?

A Yes. Maybe, an ethical discipline. It's certainly -- my supervisors at the training site would not have allowed that to occur, to begin with.

(M. 135-36).

Mr. Cassady does not remember evaluating Terrell Johnson. The name "doesn't ring a bell at all" (R. 296). The fact that Mr. Johnson's was a murder case did not assist Mr. Cassady in remembering his involvement in the case, despite the rarity of such an assignment during his over nine years as the Sheriff's psychologist:

Q When I called you up on the phone and got you out at the shopping mall, you indicated some surprise that you would have conducted such an evaluation in a murder case, first degree murder case. Why is that?

A Well, I just don't get that many calls in murder cases. As a matter of fact, I can only recall one other one, that I can recall.

(M. 299). Because Mr. Cassady's file on Mr. Johnson has been "purged" (M. 297), and because Mr. Cassady has no independent recollection of Mr. Johnson, the only extant record of the "evaluation" is the one-page "report," a letter sent to the trial court introduced in this proceeding as Defense Exhibit #6.

Mr. Cassady and trial counsel also failed to recognize the need for further

testing to assess the extent of structural and functional damage to Mr. Johnson's brain. Dr. McMahon testified that under the circumstances, such testing would have been a "mandatory" part of a competently performed evaluation:

> Q Well, with that in mind, there's another point that you have made in your report, and that is that a neuropsychological should have been performed at the time the initial interview by Dr. (sic) Cassady was made?
>
> A Yes.
>
> Q Do you stand by that, and why?
>
> A Why?
>
> Q Why.
>
> A Anybody with the history of drug and alcohol abuse that Mr. Johnson had, it would simply be a part of an evaluation that, if I were doing it, I would feel it mandatory to look at this individual's brain functioning, to see to what extent their brain was intact at that time. . . .

(M. 100-02)(emphasis added).

It is axiomatic that a competent psychological "interview should be complemented by a review of independent data" on the subject's mental history. Mason v. State, 489 So. 2d 734, 737 (Fla. 1986). Defense counsel admitted he provided no such information to Mr. Cassady (M. 235-236). Mr. Jones "wasn't certain what part a background investigation would play in profiling someone" (M. 236). Mr. Cassady testified that background information would have been helpful (M. 304), and that his "report" would "certainly" have reflected his receiving such information had any been provided (Id.). With regard to the usefulness of background material in performing an evaluation, Mr. Cassady testified, "as much as you can get is usually a good thing" (Id.).

Mr. Cassady was not qualified or competent to render the type of evaluation authorized by Fla. R. Crim. P. 3.216 or required under Ake v. Oklahoma, 470 U.S. 68 (1985). The Eleventh Circuit recently held:

> We hold that the state meets its Ake obligation when it provides

> a competent psychiatrist. A competent psychiatrist is one who, by education and training, is able to practice psychiatry and who has been licensed or certified to practice psychiatry--that is, a properly qualified psychatrist. See In re Fichter's Estate, 155 Misc. 399, 279 N.Y.S. 597, 600 (N.Y. Surrogate's Court 1935)("competent" "having sufficient ability or authority; possessing the requisite natural and legal qualifications"); Towers v. Glider & Levin, 101 Conn. 169, 125 A. 366 (1924)(under Workmen's Compensation Act, "competent physician or surgeon," must have legal competency and competency in particular case, that is, person must be licensed to practice type of healing art he employed, and must be able to treat particular kind of injury in question by means of that art); Mason v. Moore, 73 Ohio St. 275, 76 N.E. 932, 935 (1906)(competent bookkeeper is "one who is qualified by education and experience to examine and compare the various books kept by the bank, and trace the bearing of one entry upon another in the different books").

Clisby v. Jones, 907 F.2d 1047, 1049-50 (11th Cir. 1990). Trial counsel was ineffective for failing to provide his client the benefit of the rule; for failing to provide available pertinent, background information; and for allowing the incompetent "evaluation" to be used at trial to Mr. Johnson's detriment.

B. NO INDEPENDENT EVALUATION

"Independence" of an expert means at least two things: a) the expert is the defendant's, and is "loyal" to the defendant, and b) the results of evaluations, tests, and diagnoses are confidential and not revealed without proper consent. Cf. Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988). Neither of these constitutional promises were kept here.

Counsel allowed the Cassady "report" to go straight to the trial court. The State also received a copy. The State cross-examined a witness at sentencing based on the Cassady conclusions which came from his interview (interrogation) of Mr. Johnson (R. 460-61). Defense counsel unreasonably failed to object to such use of the Cassady "report," which violated Mr. Johnson's right to confront the witnesses against him, his right to silence, his right to effective assistance of counsel, and to independent assistance of experts contrary to the fifth, sixth, eighth, and fourteenth amendments. Mr. Johnson was not informed that the evaluation and his words would be so used and did not

waive his rights to silence and counsel. The court read the report and expressly used its findings and conclusions against Mr. Johnson to reject mental mitigation (R. 548). Mr. Johnson was never warned that his words to Cassady would be used against him, in violation of his fifth, sixth, eighth, and fourteenth amendment rights, and was not provided an opportunity to rebut the report. This is precisely what was condemned by the Supreme Court in Estelle v. Smith, 451 U.S. 454 (1981).

The assistance was not "independent" for a second reason: Cassady was a deputy with the Orange County Sheriff's Department. He was employed there as a "staff psychologist" at the time of the evaluation. He was a police agent, paid by the State, whose function was to serve the State, and not to serve his "client," Mr. Johnson, exclusively. This conflict per se prevented independence and competence, in violation of the fifth, sixth, eighth, and fourteenth amendments.

Q During the course of your work between -- in 1979, then your paycheck came from the County Sheriff's Department; is that correct?

A It did.

Q You were an employee whose primary function was to serve the Sheriff?

A It was and still is.

Q And you're still paid by the Sheriff?

A Yes.

Q Or by the County. And your ultimate boss is the Sheriff?

A Exactly.

Q That boss is the person who determines whether you continue to be on the payroll or you don't continue to be on the payroll?

A Yes.

(M. 295-96).

Although counsel presented the testimony of Dr. Katherine deBlig, Dr. deBlig had evaluated Mr. Johnson prior to the offense in relation to a prior psychiatric commitment. She testified that the only contact she had with trial counsel was a telephone call arranging for her to come to the court and a general discussion of the case shortly before she testified (M. 60-61). At no time did Mr. Jones ask her to testify regarding statutory mitigation (M. 61). Had she been asked, she would have testified that, as a licensed mental health expert, it was her expert opinion Mr. Johnson's capacity to appreciate the criminality of his act was substantially impaired and he suffered from an extreme mental or emotional disturbance (M. 60).

A defendant is entitled to an independent competent mental health expert evaluation when the State makes his or her mental state relevant to his criminal culpability and to the punishment he might suffer. Ake v. Oklahoma. What is required is an "adequate psychiatric evaluation of his state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). There is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). Mental health and mental state issues permeate the law. Their significance is amplified in capital cases where the jury is to give a "reasoned moral response" to the defendant's "background, character, and crime." Penry, 109 S. Ct. at 2949. In a capital case, counsel has the duty to conduct a minimally competent independent investigation to discover if his or her client has any mental health problems and to understand the legal impact of such problems on competency, sanity, waivers, specific intent, and mitigating circumstances. This careful investigation and assessment must be done before any "strategy" decisions are made. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). If not, the "strategy" decisions, if any, are tantamount to no strategy at all. Id. See also Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988).

Because of the errors of counsel and the inadequacy of a so called expert, Mr. Johnson never received the psychiatric/psychological examination that was necessary for a "just result" and "fair trial." See Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (where counsel does not timely and reasonably employ expert assistance in a case in which mental health is or should be at issue, no "tactic" can be ascribed to any decision counsel may make regarding mental health issues). Moreover, the right to the assistance of a mental health expert guarantees that the assistance be confidential. Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990).

The circuit court never comprehended the crux of this claim and merely saw it as a restatement of the ineffectiveness of counsel claim. The court found that the attorney's performance was not ineffective, but never addressed the issue of Mr. Cassady's competency and the adequacy of his assistance (M. 1764). The circuit court significantly discussed only the issue of sanity and never addressed the penalty phase. The circuit court then ruled relief was not required because:

> 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.
>
> Accordingly, the Defendant's request for reversal based on the allegations made in Claim II is denied.

(M. 1764). This finding is inexplicable when the incompetent, one page report was used to reject mental health mitigators at the same time that a competent evaluation would have established those factors. These conclusions of law are legally wrong. The findings are contrary to the evidence presented at the evidentiary hearing. The lower court totally failed to address the crux of this claim which was that Mr. Cassady was incompetent, not independent, and his report was not confidential.

The jury never heard about the "real" Mr. Johnson. It was never presented with evidence that was necessary for them to make a "reasoned moral response" to Mr. Johnson's background, character, and offense. Penry v. Lynaugh. The jury never received any of the ample evidence of Mr. Johnson's brain dysfunction, his deficient mental health, his alcoholism, his intoxication and the effects of these deficits on his behavior at the time of the offense. In Penry, the law kept this type of information from the jury. In Mr. Johnson's case, it was omissions of counsel and the so-called expert. The result, however, is the same: Mr. Johnson's death sentence violates the eighth and fourteenth amendments; it is neither individualized, nor reliable. See Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985).

> The key aspect of the penalty trial is that the sentence be individualized, focusing on the characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were [not permitted to] mak[e] such an individualized determination.

Thomas v. Kemp, 796 F.2d at 1325. The same is true of Mr. Johnson's case. The unreasonable omissions of counsel and the mental health "expert" denied Mr. Johnson's right to a competent and independent mental health evaluation contrary to his rights pursuant to the fifth, sixth, eighth and fourteenth amendments.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. JOHNSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL'S COMPLETE FAILURE TO USE EVIDENCE OF VOLUNTARY INTOXICATION IN A MYRIAD OF WAYS AT TRIAL AND AT SENTENCING.

Mr. Johnson's trial counsel completely failed to use plentiful and available evidence of Mr. Johnson's voluntary intoxication at the time of the offense. Counsel could have used this evidence in a number of significant ways both at trial and sentencing but instead counsel ignored this area. Counsel failed to develop a defense of voluntary intoxication, failed to request a jury instruction on the issue, and failed to present evidence of intoxication to rebut the aggravating circumstance of premeditation. In denying this claim, the

lower court found that counsel's decision not to pursue a voluntary intoxication defense was a reasonable strategic decision. However, trial counsel's own testimony at the evidentiary hearing established that his omissions were the result of ignorance, not strategy. The lower court's order is erroneous because it conflicts with the competent, substantial evidence of the record. See Michael v. State, 437 So. 2d 138 (Fla. 1983). Mr. Johnson has established deficient attorney performance and resulting prejudice; he is entitled to relief for this violation of his right to effective assistance of counsel.

Florida law on the voluntary intoxication defense is clear and long-standing, dating from the 19th century. See Garner v. State, 28 Fla. 113, 9 So. 35 (Fla. 1891). "Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery." Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985)(citations omitted). Voluntary intoxication could have been employed as a defense to Mr. Johnson's first-degree murder charge on both theories of first-degree murder: premeditated murder and felony murder. On the theory of felony-murder, the State must prove the required mental element for the underlying felony. The underlying felony here, robbery, is a specific intent crime. Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982), cert. denied, 460 U.S. 1103, rehearing denied, 462 U.S. 1124 (1983); Gardner, 480 So. 2d at 92-93. An intoxication defense could have defeated first-degree murder on the felony-murder charge as well.

Mr. Johnson's counsel himself recognized the significance of intoxication, noting at the evidentiary hearing that it seemed to be the only possible defense:

> Q Did you off the record at any time request an instruction from the Court on voluntary intoxication as a defense to a criminal action on a specific intent crime?
>
> A I don't recall doing that.
>
> Q If you had done that I suppose your file would reflect it?

A It should, yes, sir.

Q And does it reflect.

A No, sir.

Q And the reason I'm saying this is because it didn't happen on the record. Were you familiar at that time with the law of voluntary intoxication?

A Yes, sir.

Q What was your understanding, if you can tell us what your understanding was then, without filtering what you've learned over the past several years. What was your understanding then?

A Well, I recall I did some reading on that at the time since it seemed to be the only possible defense, if it were available, to be available to Terry based upon what I knew of him and his case. And my understanding was if someone is intoxicated to the extent they can't formulate the intent regarding specific intent crimes, that that would be a legal defense.

Q Did you read any cases that indicated if there was any evidence of intoxication that you were entitled to that defense or that instruction?

A I don't recall that, no, sir.

(M. 242-43).

However, counsel did not present the defense because of his misunderstanding of the law:

Q Are you aware in the Sweeney deposition at Page 7, that she discussed that when she talked with the Defendant, after the offense, on the telephone she stated that, "He sounded to me as if he had been drinking"? Do you know about that?

A I think I recall that.

Q That's evidence of intoxication, correct?

A Yes, sir.

Q And then you had the handwritten statement that said, "a little drunk." That's evidence of intoxication?

A Yes, sir.

Q You don't need the Defendant to testify to that?

A No, sir.

Q The police had it, introduced it?

A Yes, sir.

Q Same thing with Sweeney, the Defendant wouldn't have to testify for her to say that; that it sounded to her as if he had been drinking?

A No, sir. If he made some admissions to her, that would probably come in.

Q Right. Police officer stopped him, Weeken, is that the name, said that he smelled, in the trial itself he testified that the Defendant smelled of alcohol. That's evidence of intoxication?

A Yes, sir.

Q "Told me he had a couple of drinks." That's evidence?

A Yes.

Q Doesn't have to come from the defendant testifying, does it?

A I don't recall that testimony.

Q Page 115 of the transcript, Peterson deposition: "He, the Defendant, indicated he had been drinking; he had been in the tavern, drinking."

That's evidence. Your client doesn't have to testify about that.

* * *

Q Did you know about that?

A Yes, sir.

Q Taped statement by Nancy Porter from 1-8-1980. When she picked him up after the offense, quote, "He threw up. He was sick." When referring to your client, he threw up and was sick. Do you remember that?

A You said taped statement?

Q The taped statement of Nancy Porter from 1-8-1980.

A Is that part of her testimony at trial?

Q No, it was part of a taped statement that she gave to police.

A Okay. I do recall that being said at one time or another, yes, sir.

Q And her saying, "He needs help badly. He does things out of control, doesn't mean to. He has blackouts from drinking." Remember

that?

A The police reports, I guess I remember that.

A All right. So --

A That would be history, though.

Q Right, exactly. Do you have any idea whether this type of testimony, if presented with regard to the count of murder, that your client receive the death penalty upon him and upon which you say you had no defense, would have supported an instruction to the jury on voluntary intoxication?

A My recollection of, my understanding of the law at the time is that the burden was upon the Defendant to show that he was intoxicated, at the time of the offense, to the degree that he could not formulate the requisite intent. And based upon what you have told me, I do not think that would have qualified. I don't think it would have been given.

Q I mean even to get the instruction? I'm not talking about to win.

A I know what you're saying.

Q Okay.

A My recollection of what I understood the law to be at the time is that you had to show intoxication to that extent in order to get the instruction. Now, you said earlier you did not. I didn't know that.

(M. 286-89)(emphasis added).

Although aware of the felony-murder rule and the premeditation theory, counsel admitted that he "had no real plan for the defense" (M. 275-76). Counsel's only defense was an attempt to rebut only the premeditation aspect by stressing that Mr. Johnson just wanted to retrieve his gun and only began shooting after one of the victims lunged at him (M. 275-76). Evidence of intoxication would have bolstered this defense by demonstrating that Mr. Johnson had no ability to form intent but only reacted in an intoxicated panic. Defense counsel admitted there were numerous sources of evidence of intoxication other than Mr. Johnson's testimony. However, counsel did not present or develop this evidence because of his ignorance of the law.

In fact, there was a great deal of available evidence of Mr. Johnson's intoxication at the time of the offenses. Pat Sweeney said he "sounded as if he had been drinking" shortly before the crime (M. 286). Office Wedeking "smelled alcohol . . . he told me he had a couple of drinks" shortly after the crime (R. 114-115).[2] Police officers testified as to Mr. Johnson's statements that he was "a little drunk" at the time of the offense, which according to Dr. Glennon meant "a significant amount of alcohol . . . . considerably beyond legal intoxication" (M. 170-71). When Nancy Porter picked him up several hours after the offenses, as she told the police, "he threw up, he was sick." She said, "He does things out of his control, doesn't mean to. He has blackouts, from drinking." (M. 288). Dr. deBlij testified Mr. Johnson's frontal lobe was anesthetized at the time of the offense (M. 62-63). All three mental health experts testified to the adverse effects of alcohol on the "planning functions" of the brain (M. 62, 106, 127, 170-73, 175).

The witnesses who knew Terrell Johnson best, his father, his ex-wife and her mother and sister, all testified that he was a "completely different person" when he was drunk (M. 33, 50, 216). When he was sober, he was "a real decent person," "the best worker I ever worked with" (M. 22); "never violent" (M. 35, 38); "Kind, a great husband" (M. 40); "good with children" (M. 38); "a real nice person" (M. 49); "a real decent person" (M. 53); "a very likable person" (M. 214); "very kind, considerate" (M. 215). When he was drunk, on the other hand, he would attempt suicides (M. 36); "he would fall apart" (M. 41); "would punch out windows, cry, go bananas" (M. 43); "would hit windows, doors" (M. 46); "would get depressed and cry" (M. 215); "It was almost like an inner force that

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[2]Although he did not appear to the officer to be "under the influence," Dr. Glennon was unambiguous as to the deceptiveness of such an appearance with alcoholics like Mr. Johnson. "So unless you smell the alcohol on them [which the officer did and testified to] you wouldn't really be able to tell that they were intoxicated" (M. 169). "He could be anywhere from 0.0 to 0.3, 0.3, .5" (M. 182).

would take over, that was very, very much unlike Terry" (M. 216).

All of this testimony would certainly raise a question of Mr. Johnson's sobriety at the time he committed the offense. The trial court disregarded this abundant evidence by stating that, "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." (M. 1765). The lower court's analysis is incorrect. It finds counsel's performance reasonable because it assumed the only means of presenting the defense was through Mr. Johnson's own testimony. However, counsel's reasoning was premised upon an erroneous understanding of the law. Sufficient evidence was available to support a jury verdict that Mr. Johnson was intoxicated and was unable to form specific intent without Mr. Johnson testifying. This defense should have been presented.

Counsel's errors allowed further damage from prosecutorial arguments. The prosecutor argued, without objection, that the killing was no accident but was first degree murder (M. 290), and that drinking could not be a formal legal defense to a death sentencing (M. 290). Thus, the prosecutor recognized the possible significance of intoxication, he seized the chance, that defense counsel provided, to divert the jury from properly considering this theory. Failure to object to this improper argument cannot be deemed non-prejudicial. Fred Cooper, the jury foreman, made it clear that Mr. Johnson's attorney did not assert a defense when he stated, "There was no guilt or innocence. He pleaded guilty. It was a question of just a second degree murder" (M. 1228).

Use of the intoxication evidence and an appropriate mental health expert would have prevented a verdict of first-degree murder on either premeditated or felony murder theories (M. 175-76). Prejudice from counsel's failure is clear because Mr. Johnson could not have formed specific intent for robbery or premeditated murder. Without the element of intent, Mr. Johnson could have been convicted of nothing greater than second degree murder.

The error here is exacerbated by the omission of the element of intent in the jury instructions on robbery. Counsel admitted that "It sounds like the word intentionally is left out of the jury instruction" (M. 243-44). However, counsel failed to object or take any action to correct this error. In fact, counsel testified:

> MR. OLIVE: "Robbery is a 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." That's the entire instruction on robbery.
>
> BY MR. OLIVE:
>
> Q Did you listen to the jury instructions in the case and accept the jury instructions in the case?
>
> A Yes, sir.
>
> Q Do you see anything wrong with that robbery instruction, or did you at that time? If you had, would you have objected to it?
>
> A Typically, I follow the instructions in my book when they're being read. And if there are any omissions, I object before the jury retires so it would be timely. It sounds like the word "intentionally" is left out of the jury instruction.
>
> Q The jury instruction contains -- on robbery contains no element of intent whatsoever. Robbery is the taking of money or other property of any value whatsoever by putting the other person in fear by force, violence, assault.
>
> A The intention of taking is the typical instruction, I believe.
>
> Q Did you know that at that time?
>
> A Yes, sir.

(M. 244). Counsel failed to object to the omission from the jury instructions of an element of the offense.

This was a felony-murder case. Despite this, no instruction was given to the jury on the element of intent -- an element of the underlying felony of robbery.

> The constitutional standard recognized in [In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368] was expressly phrased as one that protects an accused against a conviction except on "proof beyond a reasonable doubt . . . ." In subsequent cases discussing the

> reasonable-doubt standard, we have never departed from this definition of the rule or from the Winship understanding of the central purposes it serves. See, e.g., Ivan v. City of New York, 407 U.S. 203, 204, 92 S. Ct. 1951, 1952, 32 L.Ed.2d 659; Lego v. Twomey, 404 U.S. 477, 486-87, 92 S.Ct. 619, 625-26, 30 L.Ed.2d 618; Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508; Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281; Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335. In short, Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307 (1979)(emphasis added).

The Florida Supreme Court has consistently held that it is fundamental error for a trial court to fail to properly instruct on the elements of felony murder in a felony murder case. In State v. Jones, 377 So. 2d 1163 (Fla. 1979), the Court explained:

> In the present case, there was a complete failure to give any instruction on the elements of the underlying felony of robbery. This was fundamental error. It is essential to a fair trial that the jury be able to reach a verdict based upon the law and not be left to its own devices to determine what constitutes the underlying felony. Robles v. State.

Id. at 1165.

In Robles v. State, 188 So. 2d 789 (Fla. 1966), an insufficient instruction on the elements of burglary, the underlying felony, was given. The court said:

> The jury is left to its own devices as to what constitutes breaking and entering and as to the character of the felonious intent that is required. As to the precise intent that appellant was alleged to have, these instructions fail to identify the felony that he allegedly intended to commit or even define the term "felony," in the abstract. It is true that the court agreed to give such instructions and the defendant's trial counsel agreed to prepare same but failed to do so. But this failure of counsel does not relieve the court of the duty to give all charges necessary to a fair trial of the issues. We hold that since proof of these elements was necessary in order to convict appellant under the felony-murder rule, the court was obligated to instruct the jury concerning them, whether or not requested to do so. Canada v. State, Fla.App.1962, 139 So.2d 753; Motley v. State, 1945, 155 Fla. 545, 20 So.2d 798; Croft v. State, 1935, 117 Fla. 832, 158 So. 454; 32 Fla. Jur. "Trial," sec. 186.

Id. at 793 (emphasis added). See also Ingram v. State, 393 So. 2d 1187 (Fla. 3d DCA 1981). Florida's courts, in fact, have consistently recognized that the failure to instruct on the elements of felony murder in a felony murder prosecution involves prejudicial, fundamental error. See, e.g., Brown v. State, 501 So. 2d 1343 (Fla. 3d DCA 1987).

Moreover, under the constitutional standard, if there is any chance that Mr. Johnson's jurors relied on felony-murder, then Mr. Johnson's conviction must be set aside:

> And "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, e.g., Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931)." Leary v. United States, 395 U.S. at 31-32, 89 S.Ct. at 1545-1546. See Ulster County Court v. Allen, 442 U.S., at 159-60, n.17, 99 S.Ct. at 2226, and at 175-176, 99 S.Ct., at 2234 (POWELL, J., dissenting); Bachellar v. Maryland, 397 U.S., at 570-571, 90 S.Ct. at 1315-1316; Brotherhood of Carpenters v. United States, 330 U.S., at 408-409, 67 S.Ct. at 782; Bollenbach v. United States, 326 U.S., at 611-614, 66 S.Ct. at 404-405.

Sandstrom v. Montana, 442 U.S. 510, 526 (1979). Here, there exists every reasonable likelihood that the jurors relied on the flawed instruction, as the State urged them to do.

The failure to adequately instruct a jury on the elements of the offense charged is as egregious as a directed verdict; such errors remove central issues from their rightful place in the jury's domain and deny the accused the right to a verdict as to his guilt or innocence provided by the jury. See Rose v. Clark, 478 U.S. 570, 578 (1986). Such instructional deficiencies,

> created an artificial barrier to the consideration of relevant . . . testimony . . . [and reduce] the level of proof necessary for the [state] to carry its burden.

Cool v. United States, 409 U.S. 98, 104 (1972). As the Supreme Court has explained:

> Of course, as the Government argues, in a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this

> reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, see Sparf & Hansen v. United States, 156 U.S. 51, 105, 15 S.Ct. 273, 294, 39 L.Ed. 343 (1895); Carpenters v. United States, 330 U.S. 395, 408, 67 S.Ct. 775, 782, 91 L.Ed. 973 (1947), regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977).

> A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See Connecticut v. Johnson, 460 U.S. 73, 95, and n.3, 103 S.Ct. 969, 982, and n.3, 74 L.Ed.2d 823 (1983) (POWELL, J., dissenting); cf. Beck v. Alabama, 447 U.S. 625, 645, 100 S.Ct. 2382, 2393, 65 L.Ed.2d 392 (1980); Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); id., at 22, 99 S.Ct., at 239 (POWELL, J., dissenting).

Cabana v. Bullock, 474 U.S. 376, 384-85 (1986).

An argument that there is no error here because premeditation was also argued and could have been the basis for the jury's verdict rather than felony murder would totally ignore the United States Supreme Court caselaw that "'when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside.' See, e.g., Stromberg v. California, 283 U.S. 359 (1931); Leary v. United States, 395 U.S. at 31-32; Ulster County Court v. Allen, 442 U.S. at 159-60 n.17 (Powell, J., dissenting); Bachellar v. Maryland, 397 U.S. at 570-71; Bollenbach v. United States, 326 U.S. at 611-14." Sandstrom v. Montana, 442 U.S. 510, 526 (1979).

> The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under

> that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict court be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury in that, if an of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

Stromberg v. California, 283 U.S. 359, 367-68 (1931).

> One rule derived from the Stromberg case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested. See, e.g., Williams v. North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.3d 279 (1942); Cramer v. United States, 325 U.S. 1, 36 n.245, 65 S.Ct. 918, 935 n.45, 89 L.Ed. 1441 (1945); Terminiello v. Chicago, 337 U.S. 1, 5-6, 69 S.Ct. 894, 896-897, 93 L.Ed. 1131 (1949); Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-1073, 1 L.Ed.2d 1356 (1957).

Zant v. Stephens, 462 U.S. 862, 881 (1983).

In Strickland v. Washington, 466 U.S. 688 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 668 (citation omitted). Strickland requires a defendant to establish unreasonable, deficient attorney performance, and prejudice resulting from that deficient performance. Here, counsel failed to ensure that the jury was instructed on all the elements of the crime.

An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc) (ineffective assistance in failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant's right to present a meaningful defense. See Crane v. Kentucky, 476 U.S. 683

(1986). Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers. In addition, failure to seek proper jury instructions and failure to object to improper prosecutorial jury argument can be prejudicial deficient performance. See Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983).

When intoxication is raised by evidence during the trial of a specific intent crime, the jury must be instructed that intoxication can be considered a bar to conviction. At the time of Mr. Johnson's trial, the law of Florida was clear that murder was a specific intent crime, and that an appropriate jury instruction was required when intoxication was raised by the evidence.

This Court has recently reaffirmed this century old rule:

> A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So. 2d 347 (Fla. 1982); Palmes v. State, 397 So. 2d 648 (Fla.), cert. denied, 454 U.S. 882, 102 S. Ct. 369, 70 L. Ed. 2d 195 (1981). Moreover, evidence elicited during the cross-examination of prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981).

Gardner v. State, 480 So. 2d at 92-93. Voluntary intoxication as a defense to specific intent crimes is not new. Garner v. State, 28 Fla. 113, 9 So. 835 (Fla. 1891). An experienced attorney expert, Robert Norgard, has reviewed Mr. Johnson's case and states, "All of these factors would lead reasonably competent counsel to conclude that a voluntary intoxication defense was tenable, that the issue of voluntary intoxication should have been investigated more fully, and that a voluntary intoxication jury instruction was required under Florida law" (M. 1663).

Mr. Jones testified he did not recall requesting an intoxication instruction nor reading any cases that indicated the defense was entitled to such an instruction (M. 242-43). Counsel "didn't know that" (M. 289). Trial counsel was clearly ineffective for being ignorant of and thus failing to

request an instruction to which Mr. Johnson was clearly entitled under the law.[3] If Mr. Johnson's counsel had performed his duty to Mr. Johnson as reasonable counsel would have, Mr. Johnson would not have been convicted of first-degree murder and would not have been sentenced to death.

Counsel admitted to having "no defense" to felony-murder (M. 284). He incorrectly believed Mr. Johnson's testimony was necessary for an intoxication defense (M. 264), ignoring a substantial body of independent evidence, some of

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[3]Premeditation is also a factor at sentencing. Fla. Stat. sec. 921.141(5)(i) states:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The State is required to prove every aggravating factor beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Clearly, if counsel had performed his function effectively the "heightened premeditation" required for this aggravating circumstance, Combs v. State, 403 So. 2d 418 (Fla. 1981); Washington v. State, 432 So. 2d 44 (Fla. 1983), could not have been found beyond a reasonable doubt. Indeed, Dr. McMahon testified that Mr. Johnson "[d]id not have the capability to form an intent to kill, if you will, premeditate" (M. 104). Dr. Glennon testified: "Based on all the information I reviewed, including the interview with Mr. Johnson, I saw no indication that the killings were premeditated." (M. 179).

As this Court has expressed:

> We further agree that the trial judge incorrectly found that the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The record is void of the kind of evidence indicative of the heightened premeditation necessary for application of the aggravating circumstance at issue. The trial court justified its finding on the grounds that appellant had planned the robbery and had shot the victim. In Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984), cert. denied, 105 S. Ct. 2369 (1985), we held that an intent to rob is not indicative of heightened premeditation: "The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor." In addition, it is well established that the heightened degree of premeditation required by this aggravating factor exceeds that necessary to support a finding of premeditated murder. See Preston v. State, 444 So. 2d 939, 946 (Fla. 1984).
>
> Appellant's convictions are reversed, and the matter remanded for new trial.

Jackson v. State, 499 So. 2d 906, 910-11 (Fla. 1986)(footnotes omitted)(emphasis added).

which went to the jury as part of the State's case. He "didn't know" Mr. Johnson was entitled to an instruction on voluntary intoxication (M. 289). Counsel knew "intent" was a required element of proof for the underlying robbery offense (M. 243), but never objected that "the word 'intentionally' [was] left out of the jury instruction," acknowledging this omission only at the evidentiary hearing (M. 244). Counsel failed to advance intoxication as a defense to the "premeditation" basis for a first degree conviction. Counsel's numerous omissions were unreasonable and prejudiced Mr. Johnson.

The trial court's denial of this claim ignored the plentiful evidence in the trial record and presented at the evidentiary hearing. Counsel did not fully understand the law of voluntary intoxication as applied to first-degree murder and capital sentencing. This misunderstanding precluded any reasonable strategic decision. The evidence would have established intoxication, negated the specific intent elements of either premeditated murder or felony-murder, and rebutted the aggravating factor of cold, calculated, and premeditated. The lower court's decision is erroneous because it ignores competent and substantial evidence in the record. This Court should grant relief on this claim.

ARGUMENT V

MR. JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BY COUNSEL'S PREJUDICIAL FAILURE TO DEPOSE PRETRIAL, AND IMPEACH AT TRIAL, THE STATE'S BALLISTICS WITNESSES, AND FAILURE TO SEEK INDEPENDENT EXPERT ASSISTANCE, AND COUNSEL'S RESULTING FAILURE TO REBUT THE STATE'S ERRONEOUS AND PREJUDICIAL BALLISTICS TESTIMONY, TESTIMONY THAT CONSTITUTED THE PRIMARY "EVIDENCE" OF PREMEDITATION AND STATUTORY AGGRAVATING CIRCUMSTANCES.

Although trial counsel was entitled to depose State witnesses, counsel never deposed the State's most critical witnesses. The State used the testimony of Officer Park to obtain a first degree murder conviction by arguing that it was an execution-style killing. This Court, in upholding the conviction and sentence of death, observed about this evidence:

The State presented evidence that Dodson's death had been caused by a

> close range execution styled 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 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.

Johnson v. State, 442 So. 2d 193, 195-96 (Fla. 1984). On direct appeal, this Court also upheld two statutory aggravating factors based on Park's testimony:

> Appellant urges that the trial court erred in finding the homicide was committed in a cold, calculated and premeditated manner and that the homicide was committed to avoid lawful arrest. Appellant's basic premise is that the main evidence supporting these findings was the testimony of Officer Park. According to this argument, had Park's testimony been held to be inadmissible, the evidence would not have supported finding these aggravating factors beyond a reasonable doubt. As we have already ruled that Park's testimony was admissible, we also find these factors to have been properly found.

442 So. 2d at 198.

Incredibly, defendant's trial counsel never deposed and/or spoke to the State's ballistics witnesses including Park until trial (M. 254). These witnesses provided critically damaging, though egregiously erroneous, testimony. The unreasonable failure to know left trial counsel totally unprepared for the trial testimony. Counsel stated that the State's paper ballistic's test, which became the main feature of the trial, was a "total surprise" (M. 246). This case is thus virtually identical to Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989), where counsel's failure to prepare left him without the evidence and/or the knowledge necessary to impeach the State's case.

Counsel's omission was particularly damaging in the case of Officer Park. Officer Park was allowed to testify about an "experiment" he conducted and the physical evidence of his experiment was admitted in evidence. Park, an evidence technician, unqualified as an expert in any forensic science, testified to his having fired the subject weapon approximately four times into a piece of paper stretched over cardboard, all at an indoor firing range, for the purpose of

obtaining a visual display of the pattern from the powder emitted from the weapon at discharge. The testimony was allowed over objection. While the evidence technician was not allowed to venture any expert opinions regarding the results of this test, the product of the test itself (the cardboard and paper) was permitted into evidence, and argument about it was allowed. Not only did counsel acknowledge that this paper test testimony was a "total surprise," but counsel further acknowledged that the independent expert testimony which showed the paper test to be unreliable and plain wrong would have been useful to him (M. 248).

The alleged test is not a test at all, but an inherently unreliable experiment yielding absolutely nothing of probative value. Because this evidence so clearly stood as the major circumstantial fact suggesting the State's theory of an execution slaying, and affected both the determination of guilt and the sentence of death, counsel's failure to properly prepare for this and the medical examiner's testimony prejudiced Mr. Johnson. In upholding Mr. Johnson's death sentence, this Court explicitly stated that the evidence of a close range "execution style" slaying [of the victim Dodson] consisted of the testimony of Park and Dr. Kessler, the State's pathologist, and the results of Park's gunfire tests. Johnson, 442 So. 2d at 195-96.

At the time of Johnson's trial, the law of Florida held that the test firing of a gun into a paper target, such as Park's test, constituted unreliable evidence of the distance from which a gun was fired at a human victim. McLendon v. State, 105 So. 406 (Fla. 1925). This Court did not suggest that such evidence was per se reliable in its refusal to follow McLendon in Mr. Johnson's appeal, but held that such evidence could be admitted into evidence, and that any challenge to its reliability should go to the weight given to it.[4]

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[4]The Court's departure from its own precedential decision creates a violation of due process for Mr. Johnson, who should have been allowed to rely upon McLendon.

Counsel did not challenge the erroneous terminology used by Park to describe the test results, ineffectively cross-examined Park, did not present evidence that would have shown that the tests were, in fact, totally invalid under the circumstances of the case, and contacted no experts to assist in evaluation of such evidence. As a result of not speaking with or deposing Park, and not consulting independent experts regarding Park and the medical examiner, counsel was prejudicially ineffective in defending Mr. Johnson against the invalid and misleading gunfire tests of Park. Defense counsel's failure to challenge erroneous testimony by Dr. Stanton Kessler, the prosecution's pathologist, relating to the proximity of the subject gun from the victim Dodson, was prejudicial and the result of unreasonable preparation. Counsel did not consult independent expert advice.

The alleged testing procedures utilized were largely unscientific in design and execution, and yielded meaningless results. In order to conduct a proper test, one must utilize the same weapon and exact same manufacture and caliber of ammunition as is suspect; the testing agent must fire a sufficient number of bullets to enable the reading of a consistent "pattern," rather than anomalies; a careful examination of the victim must be made in coordination with the medical examiner to determine the possible effects of clothing, human hair, and the human skin condition on a pattern of powder; the testing agent must have that specialized training and knowledge sufficient to permit the detection of "patterns"; and the weapon must be fired during the test at approximately the same angle in relation to the target as was the weapon to the victim. Consultation with an "expert" would have revealed those facts to trial counsel.

In the case at hand, the record demonstrates that the evidence technician took no consideration of the type, manufacture, or even the caliber of the ammunition used in the alleged test, made no effort to duplicate the angle of fire, was unaware of the victim's skin condition or whether hair (and the

amounts thereof) was present, and had no specialized knowledge of gunpowder, even as to whether that utilized was of the "ball" or "flake" type. In fact, the technician referred to powder patterns as "stippling," a condition of the skin actually caused by powder injected therein, according to the medical examiner confusing the jury as to the experiment's meaning and thus import.

Officer Park erroneously described gunpowder markings on a piece of paper as "stippling." This terminology implied a connection between Park's testimony and that of Kessler, who testified about the "stippling" around the wound to the head of Dodson. In addition, Kessler gave unchallenged but erroneous testimony that "stippling" on a human occurs only when a gun is within six or seven inches of the point of entry of the bullet. In fact, "stippling" occurs when the gun is up to four feet from the victim but depends on many factors, such as the type of skin and the amount of hair where the wound occurs, according to Dr. Vincent J. M. diMaio, M.D. (M. 766-82).[5]

Dr. diMaio found Dr. Kessler's testimony that "stippling" may occur only within six to seven inches of the entry point of the bullet to be simply wrong (M. 266). In fact, as Dr. diMaio stated, "stippling" may occur when the gun is within three to four feet of the entry point. However, several factors must be known before an estimate of the gun's proximity can be made. Dr. diMaio explained that an estimation must be based on the type of bullet, cartridge, powder charge, and the manufacture of ammunition. He stated that even the manufacturing "lot" of the ammunition should be known to make the most accurate estimation. The type of skin and the amount of hair around the wound are also important (M. 766-67).

Officer Park was not qualified as an expert in any relevant area. He was

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[5]Dr. diMaio was formerly a pathologist for the Federal Bureau of Investigation in Washington, D.C., and he has published articles concerning the pathology of gunshot wounds in the FBI Law Enforcement Bulletin, and in other publications. He is currently the medical examiner of Bexar County (San Antonio), Texas.

not presented as a pathologist, as an expert in gunpowder and shot pattern tests, or as an expert in ballistics. Nevertheless, he was permitted to testify as to the gunfire test he conducted by firing into a piece of paper backed by a piece of cardboard. The test paper itself was admitted into evidence and the jury took it into the jury room while deliberating. Park testified that he fired the subject gun to determine the size of the area of "stippling" that was found on the paper after four shots were fired from close range. This use of the term "stippling" was totally erroneous, as stated in Dr. diMaio's affidavit evaluating Park's testimony. "Stippling" occurs on skin, and has an effect that cannot be compared to the effect of a powder pattern on paper.

Defense counsel did not challenge Park's incorrect use of the term "stippling," and thus the judge and jury heard evidence that was apparently directly related to Dr. Kessler's testimony. Park proceeded to describe the area of "stippling" that resulted from two shots with the gun pressed against the surface of the paper, one shot from one inch away, and one shot from two inches away. Although Park did not give his opinion concerning the distance of the gun from the head of the victim, Dodson, his erroneous use of the term "stippling," which was used by Kessler to describe the gunpowder effect on Dodson, led the judge and jury to believe that the test shots could be considered in connection with Kessler's testimony. Specifically, Park's error tended to indicate that a test shot which left an area of gunpowder the same size as the "stippling" on the head of Dodson, as described by Kessler, was fired from the same distance as the fatal shot. Since Kessler was describing the gunshot that provided the basis for the State's argument of premeditation, and since it was the only shot described as "execution style," the invalid comparison to Park's test shots was critically prejudicial.

Park's testimony was incompetent and irrelevant to the facts of the case, even if what Park did is viewed as describing a gunpowder pattern test. See

"Gunpowder and Shot Pattern Tests," FBI Law Enforcement Bulletin, September, 1970, introduced as Exhibit I at the evidentiary hearing (M. 783-90). The victim was in a horizontal position, more or less at the feet of the person firing downward. However, in his "test," Park fired at a piece of paper which was hung in a vertical position. A test would have to be conducted with the paper in a horizontal position before it could be compared to the actual event. In addition, the test would necessarily have to be conducted with the same or similar ammunition.

At the evidentiary hearing, Mr. Johnson's trial counsel testified he did not, at any time prior to the trial in this case, attempt to contact any independent ballistics experts (M. 245). Counsel testified that while "typically, in a first degree murder case especially, I depose everyone," he did not think "for whatever reason" to depose Harry Park, the evidence technician who performed the damaging, unreliable paper test "experiment" (M. 245). Counsel also testified that he never spoke with Greg Scala before trial and that he only spoke with Dr. Kessler, the medical examiner, immediately before trial: "Just before, an hour or so I guess." (M. 245, 246).

Counsel testified:

> Q Do you remember during the course of the trial there being a discussion by a witness about a paper test, a paper ballistics test?
>
> A Yes, sir, I do.
>
> Q Had you heard anything about that before trial?
>
> A No, sir.
>
> Q Had you asked the State for discovery?
>
> A Yes, sir. That was a total surprise, as I recall. I remembered as that was developing I was thinking, "What in the world is going on here, and what is this?"
>
> Q Had you heard about that test earlier, like through discovery?
>
> A No, sir.

Q No. If you had, if the State had given it to you, and you knew it was testimony that was going to be used at trial and cited on trial -- you couldn't have known it then. But if you knew it was going to be used at trial, would you have been concerned about it, and would you have contacted anyone to determine whether that kind of test is a good test or a bad test?

A Yes, sir.

Q You would have done that?

A Yes, sir.

* * *

Q Let me ask you if the following information would have been any use to you in the case, if true. After some introductory material, and this is contained in Appendix 12 to the 3.850. June 14, 1985, letter to Terrence William Ackert, he gives the following information:

"I have reviewed the testimony of Mr. Harry Park. In his testimony, Mr. Park indicates that he fired test patterns on paper with a weapon, which I assume was subsequently shown to be the weapon that fired the fatal bullets. Mr. Park does not state whether he fired .38 or .357 ammunitions. It is very important in range determinations to fire the same style and brand of ammunition as was used in the fatal shooting. In fact, it is best to use the same lot of ammunition, as manufacturers may vary the type of powder loaded from lot to lot. Different powder under different pressures will produce different size patterns on paper," close quote.

Is that information that would have been of any assistance to you, if true, in preparing for any of the testimony that you didn't even know was coming?

A Yes, sir.

Q Going further: "If Mr. Park used .38 caliber cartridges to fire test patterns when the actual cartridges that caused death were .357 magnum, then his test patterns are not valid. It would also be true vice versa. If he used cartridges loaded with flake powder to make patters [sic] and the wounds were due to cartridges loaded with ball powder, again, his patterns would not be valid for determining range. This is also true in the opposite case."

Is that useful information to you?

A Yes, sir.

Q "There is no evidence that Mr. Park swabbed an area of wall away from the suspected area of gunshot residue. He should have done this to obtain a controlled area for analysis. Detection of antimony or barium in the suspected area does not mean anything unless you can show that in the other area of wall, where there is no other gunshot residue, there is no antimony or barium. Elevated antimony or barious

[sic] in the swabs taken from the area where the gunshot residue is suspected could just as well be due to the normal constituents of the wall or due to contamination by a cleanswer."

Likewise, would that have been of assistance?

A Yes, sir.

Q With regard to tattooing and stippling and powder burns, letter dated June 14, 1985, also in the appendix, let me ask you if this information would have been helpful to you:

"On June 14, 1985, I reviewed the courtroom testimony of Dr. Kessler. Dr. Kessler indicates that stippling or powdering tattooing usually disappears at six or seven inches, depending on the gun. This is incorrect. Powder tattooing or stippling can extend out to three to four feet. The maximum range out to which it occurs is generally dependent upon the type of powder loaded in the cartridge case. Thus, flake powder will produce tattooing out to one and a half to two feet, while ball powder will produce tattooing out to three to four feet."

Is that information that could have helped you prepare at all in this case?

A Yes, sir.

(M. 246-50).

The unrebutted and unreliable "stippling" and "paper test experiment" figured decisively in the State's closing argument at trial. In fact, the prosecutor repeatedly referred to the tests and made them the central feature of his argument (R. 286, 287, 292, 293, 294, 501, 502). The prejudice resulting from counsel's failure to investigate and prepare is thus obvious.

In a case with remarkably similar facts, the United States District Court for the Southern District of Florida found trial counsel's failure "to investigate and consult with experts concerning the testimony about the gunpowder residue analysis" to be ineffective assistance of counsel, requiring a new trial. Troedel v. Wainwright, 667 F. Supp. 1456 (M.D. Fla. 1986), affd. 828 F.2d 671 (11th Cir. 1987). The Court noted that counsel

> [N]either deposed Mr. Riley, the State's expert witness, nor bothered to consult with an expert in the field prior to the trial. . . . Petitioner has presented, by way of deposition, expert testimony to the effect that the opinion of the State's expert was not accurate, and has shown that such expert testimony would have been helpful in cross- examining and/or rebutting the State's expert.

667 F. Supp at 1466.

In addressing the "prejudice" prong of the Strickland v. Wainwright test for ineffective assistance, the district court made an additional finding of great relevance to Mr. Johnson's claim herein:

> . . . the testimony was not only material, but also was crucial to the jury's finding Troedel guilty of premeditated murder. Furthermore, it was an equally crucial factor in the jury's recommendation by a vote of 7-5 that the death penalty be imposed. Likewise, the testimony played a highly significant role in the imposition of the sentence of death by the trial court. In short, there is no question as to the materiality of the subject testimony.

667 F. Supp. at 1464.

Counsel's failure to depose the State's ballistics witnesses and to challenge their erroneous and misleading testimony violated Mr. Johnson's right to effective assistance of counsel in violation of the sixth, eighth, and fourteenth amendment. Counsel's failure to seek expert assistance was equally unreasonable and prejudicial, in violation of the sixth, eighth, and fourteenth amendments.

ARGUMENT VI

THE STATE'S INTENTIONAL WITHHOLDING OF THE FACT IT HAD CONDUCTED A BALLISTICS "TEST," AND THE EXHIBITS THERETO, AND PRESENTATION OF THAT EVIDENCE TO THE JURY AT BOTH GUILT AND PENALTY PHASES, KNOWING IT WAS MISLEADING, VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Johnson was never provided with Harry Park's testing reports and findings regarding the powder pattern testimony, nor was he ever put on notice of the existence of such a report. The prosecution used the testimony to argue the element of premeditation, and also in support of an aggravating circumstance. It is affirmatively established that Mr. Park's experiment was never provided to Mr. Johnson prior to trial. Counsel testified that the "test" in question "was a total surprise" when it came up during trial (M. 246). Furthermore, this evidence was the initial factor in obtaining both the

conviction and sentence of death. During final argument, the prosecutor argued to the jury the stippling experiment of Park to "show" that Mr. Johnson executed the victim, thus showing premeditation (R. 286-88). This testimony was critical and the State withheld the evidence from the defense. The State was obligated to provide the results of the "test" under discovery provisions, but instead simply listed witness Park as an "evidence technician," and provided as exhibits only diagrams of the crime scene. In addition, the State knew such evidence was misleading because it had access to a ballistics expert at the crime lab in Sanford, with which it was communicating, but failed to use such expert because no expert would testify to the reliability or accuracy of such test. The State effectively argued to the jury both at sentencing and guilt phases that this evidence was highly significant, knowing it was a meaningless but inflammatory test. This misconduct violated Mr. Johnson's sixth, eighth, and fourteenth amendments.

Rule 3.200 provides that both State and Defendant provide reciprocal discovery. The duty to provide discovery is a continuing duty on both parties. There is no question that Mr. Johnson filed a demand for discovery. The prosecution filed its response indicating witnesses to be presented, and furnished lab reports (R. 637, 634). One of the primary purposes of Fla. R. Crim. P. 3.200 is to prevent the use of trickery and surprise in the adjudicatory process. Dodson v. Peisell, 390 So. 2d 704 (Fla. 1980); Hicks v. State, 400 So. 2d 955 (Fla. 1981).

Mr. Johnson alleged that the State's action of withholding exculpatory evidence "violated the sixth, eighth and fourteenth amendments." Hiding evidence deprives the accused of a fair trial and violates the due process clause of the fourteenth amendment. Brady v. Maryland, 373 U.S. 83 (1963). When the withheld evidence goes to the credibility and impeachability of a State's witness, the accused's sixth amendment right to confront and

cross-examine witnesses against him is violated. Chambers v. Mississippi, 410 U.S. 284 (1973). Of course, counsel cannot be effective when deceived, so hiding exculpatory information violates the sixth amendment right to effective assistance of counsel as well. United States v. Cronic, 466 U.S. 648 (1984). The unreliability of fact determinations rendered upon less than full-examination of critical witnesses violates as well the eighth amendment requirement that in capital cases the Constitution cannot tolerate any margins of error. All these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were violated in this case. "Cross-examination is the principle means by which the believeability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). "Of course, the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." Pennsylvania v. Ritchie, 480 U.S. 39, 51-52 (1987).

Impeachment of prosecution witnesses is often, and especially in this case, critical to the defense case. The traditional forms of impeachment -- bias, interest, prior inconsistent statements, etc. -- apply per force in capital criminal cases:

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to the accused," Brady, 373 U.S., at 87, so, that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

United States v. Bagley, 474 U.S. 667, 676 (1985)(emphasis added).

Evidence which tends to impeach a critical state witness is clearly material under Brady. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984);

Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986). This is so because "[T]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative . . . and it is upon such sublet factors as the possible interest of a defendant's life . . . may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959). It matters not that the material evidence withheld by the State was relevant to the sentencing decision, rather than to guilt or innocence; in fact, the withheld evidence in Brady was relevant to sentencing.

There is no question of the materiality of this information to the sentencing decision. See generally Green v. Georgia, 442 U.S. 95 (1979); Chaney v. Brown, 730 F.2d 1334 (8th Cir. 1984). The non-disclosure at Mr. Johnson's trial affected not just guilt-innocence, but also sentencing considerations. There is no question as to the admissibility of the evidence. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986).

In Mr. Johnson's case, the State very effectively ambushed defense counsel. Trial by ambush has no place in a criminal proceeding particularly a death case. The Florida rules provide for discovery and the United States Constitution requires disclosure specifically to prevent the miscarriage of justice which was the result in Mr. Johnson's case. Due to the State's successful "ambush" no meaningful cross-examination or independent testimony was presented. The State was allowed to get away with incorrect and misleading evidence, and the truth was suppressed. The most critical piece of evidence in the entire trial went unchallenged due to the State's non-disclosure.

ARGUMENT VII

MR. JOHNSON'S STATEMENTS WERE OBTAINED IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE STATE VIOLATED DUE PROCESS BY CONCEALING THE VIOLATIONS.

Terrell Johnson was tried, convicted and sentenced to death on the basis of his statements elicited due to his physically exhausted and psychologically

incompetent mental state. This issue was raised and argued by both parties on direct appeal. However, Mr. Johnson asks this Court to reconsider the issue.

The record is clear that after Mr. Johnson was arrested and advised of his Miranda warnings that he chose to remain silent. Mr. Johnson in fact invoked his right of silence by remaining silent. However, the police ignored his refusal to make a statement and launched a lengthy, sophisticated and ultimately successful interrogation. His exercise of his constitutional rights was not "scrupulously honored," and use of the statements thus obtained against him violated the fifth, sixth, and fourteenth amendments. See Michigan v. Moseley, 423 U.S. 96 (1975); Edwards v. Arizona, 451 U.S. 477 (1981).[6]

A. SILENCE

Mr. Johnson was arrested in Madras, Oregon, at 10:30 p.m. on January 5, 1980, in relation to a shooting and a robbery of a gas station. Around midnight, Mr. Johnson was interrogated by Lieutenant Peterson of the Jefferson County Sheriff's Department. Mr. Johnson refused to make a statement. He was then permitted to see his girlfriend who advised him to "tell the truth" but he was still refusing to make a statement up to 3:30 a.m. of January 6, 1980. Mr. Johnson was interrogated again on the afternoon of January 6 but again refused to make statements regarding the Florida offense. On January 7, his arraignment was delayed so interrogation could continue and Mr. Johnson's will was finally broken and he gave a statement at 2:30 p.m. on January 7, approximately 40 hours after his initial arrest.

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[6]To the extent that the State argues that this issue was not fully litigated, counsel was ineffective due to an inexcusable ignorance of the law or an unreasonable failure to conduct even the most rudimentary research and investigation. Of course, no "tactic" or "strategy" can be ascribed to attorney conduct which is based on ignorance or a failure to investigate and prepare. See Kimmelman v. Morrison, 477 U.S. 365 (1986).

B. PSYCHOLOGICAL MANIPULATION

Mr. Johnson was taken into custody on January 5, 1980, at 10:30 p.m. At midnight he refused to make a statement. Mr. Johnson was arrested along with his girlfriend, Patricia Sweeney. At the time Mr. Johnson declined to give a statement, however, he did ask if he would ever see his girlfriend again. The police immediately made arrangements between 1:00 and 2:00 a.m. on January 6th for Patricia Sweeney to see Mr. Johnson, to advise him that she had given a statement and that he should also confess:

> I then went to the Grand Jury room where I interviewed Patricia Delores Sweeney, dob 09- 01-47, in the presence of Mrs. Tom Wayne. (See attached statement)
>
> Following this interview I met with District Attorney Sullivan and Lt. Bob Peterson to discuss the interview of Terry Johnson, male suspect in this matter. Peterson indicated that Johnson didn't wish to answer any questions and it was decided to let his girlfriend Patricia Sweeney talk to Johnson in the presence of Peterson and myself. This was done and Sweeney went over the statement she had given to me earlier about crimes in Jefferson County, Oregon, and California. Johnson did not respond during this period of time and at about 2:37 a.m. on January 6, 1980, Johnson asked if he could rest because he didn't feel very good. At this point in time the interview ended and arrangements were made to transport Johnson to Primeville to be lodged as there was no room at the Jefferson County Jail to provide any type of isolation lodging. Johnson was then transported to the Primeville/Crook County jail by Deputy Chuck Duff and me where he was lodged. Following this lodging I returned to Jefferson County and made arrangements to meet with Lt. Peterson at 1:00 p.m. on January 6, 1980, to reinterview Johnson.

(R. 1218). In spite of this police tactic, Mr. Johnson still refused to give a statement.

As a matter of "standard operating procedure" a police psychiatrist was brought in to "evaluate" Mr. Johnson on the morning of January 6. This interview produced information which was immediately provided to the police. During the "examination," Mr. Johnson told Dr. Gardner he was suicidal and alcoholic, that he had an active sex life with Pat, and that his feelings were hurt easily. In addition, Dr. Gardner informed the authorities on the day of Mr. Johnson's confession, that "he engages in self-pity. He is not very

sophisticated" (M. 1150-52).

The police decided to try another visit between Mr. Johnson and his girlfriend. They transported Mr. Johnson's girlfriend thirty miles so that she could again encourage him to confess:

> When Mr. Johnson arrived he asked if he could see his girl friend again. He stated if this could be done, he would give me a full statement with everything he had been involved in. I advised him I would make those arrangements if he would give the statement and I contacted D.A. Mike Sullivan and relayed the request.

(M. 1219). Mr. Johnson still maintained his silence.

Armed with information regarding Mr. Johnson's susceptibilities, acquired from the psychiatric police agent and the girlfriend, the police exploited his simplistic personality and religious beliefs. Detective Soules testified that:

> I said to him that I thought he was in real trouble and that I asked him if he believed in God. And he said, he did. And I told him I thought he was in enough trouble he better become honest with himself and with his Creator, because if he had committed these and if they were proven, with the concern he expressed to me, if he was to be put to death, he was in trouble at that point.

(R. 396).

Mr. Johnson was scheduled for arraignment in court and appointment of counsel on the morning of January 7, 1980. However, after learning that the gun carried by Mr. Johnson matched a gun stolen in the Florida case, Detective Peterson decided to postpone the court appearance in order to continue the interrogation of Mr. Johnson without the benefit of counsel. This was an unconstitutional delay in Mr. Johnson's right to an appearance before the court, and in violation of Mr. Johnson's sixth amendment rights in the face of a State apparatus gearing up for prosecution. In addition, this is a violation of Fla. R. Crim. P. 3.130, which entitled Mr. Johnson to a first appearance before a court within 24 hours of his arrest. Pursuant to Fla. R. Crim. P. 3.130 and 3.160, Mr. Johnson would have been further instructed of his right to remain silent and of his right to counsel or a voluntary waiver thereof. These

procedural violations in addition to Mr. Johnson's impaired mental state, the improper interrogation techniques utilized by the police, and incomplete Miranda warnings, required a suppression of Mr. Johnson's statement obtained in violation of his sixth amendment rights. Mr. Johnson had the right to the appointment of and consultation with counsel.

Mr. Johnson's condition in the early morning hours of January 6th was described as, "He looked very tired, he was red eyed, extremely nervous, his clothing was wrinkled and unkempt, his hair was messed up" (R. 372). At the Rule 3.850 hearing, Dr. Glennon describes the effects of the enforced detoxification following Mr. Johnson's arrest:

> Q We also asked you to provide us with some insight with regard to whether someone who's a chronic alcoholic, who has been drinking and who gets arrested and who the police interrogate, would have any impaired judgment, have any problems, hallucinations; for instance, any physical and mental problems that might make it difficult for them to knowingly and intelligently waive things like the right to have an attorney present, the right to remain silent, the right to give no statement to the police officer. Say six hours after being arrested, 12 hours, 24, 36, 78, two, whatever. Do you have any opinion with regard to that?
>
> A Well, a person who is drinking or someone who is withdrawing from alcohol who has been using it significantly is going to be in a state of impaired judgment. Okay? And, again, it's considering the consequence of their decisions. They're going to be less appreciative of those consequences.
>
> Q What if they're withdrawing or not taking any more alcohol? What about during that period of time?
>
> A Well, during that time there were physical changes, a rise in blood pressure, weight, tremora, poor sleep, maybe nightmares. An individual's ability to concentrate and remember is impaired; judgment is impaired. Only occasionally will there be, you know, hallucinations.

(M. 180-81)(emphasis added). Further, Mr. Johnson's condition was exacerbated by his underlying personality disorders and brain damage. The police psychiatrist recognized Mr. Johnson's impaired mental state when he reported to the police that Mr. Johnson was alcoholic, suicidal, got his feelings hurt easily and was not very sophisticated. Mr. Johnson's impaired mental state was

carefully and persistently exploited for thirty nine hours of sophisticated psychological interrogation.

Trial counsel testified that the Oregon police agreed to facilitate Mr. Johnson's marriage to Pat Sweeney as part of the efforts to get a confession:

> A ...I remember Pat Sweeney had been told by Mr. Johnson of the murders in Orlando. And the Defendant, for whatever reasons, wanted to marry Pat Sweeney, and there was some type of goings on regarding whether they could get married, or not.
>
> Q Do you have any personal knowledge about whether the police there helped them get married, put the marriage on for them?
>
> A Personal knowledge?
>
> Q Yes.
>
> A Being defined as what?
>
> Q If somebody told you.
>
> A Yes, sir.
>
> Q From there, who would know?
>
> A Yes, sir.
>
> Q Who was that?
>
> A I can't remember his name. I didn't get the depositions with my file. So I don't have very good recollection of what was said on the depositions out in Primeville. The chief of police out there, the former FBI agent, whatever his name was.
>
> Q You talked with that person?
>
> A Yes, sir.
>
> Q And he said, "We helped them get married?"
>
> A He said Terry wanted to get married real badly and they didn't usually do that, but they made an exception in his case, is what I recall.

(R. 259-60)(emphasis added).

The romance culminated in marriage, celebrated by all, post-confession. The sheriff's wife helped Ms. Sweeney pick out her wedding dress, a deputy performed the ceremony, and the court provided a courtroom for the couple, all

of which was preserved in photographs introduced in the post-conviction proceeding. Police interrogators Peterson and Montee witnessed the marriage license (M. 1212-17).

The police who testified at Mr. Johnson's suppression hearing repeatedly swore that they knew nothing about any connection between Mr. Johnson and this case until around 11:00 a.m. on January 7, 1980, when they received an N.C.I.C. report from Florida about a pistol connected to Mr. Johnson. However, according to St. Joseph, Michigan, police records, this was patently untrue. The report reveals:

> REPORT: 7 P.M. Monday, January 6th, 1980 At this time the undersigned detectives, Cooper and Soucek, made telephone contact with Lt. Robert Peterson at the Jefferson County Sheriff's Department in Oregaon [sic]. As indicated above in Officer Kebschull's report, Lt. Peterson advised that the above subjects, Johnson and Sweeney, were being held for the armed robbery of a service station and the attempted murder of police officer. Bond on Johnson set at 750,000 dollars.
>
> Apparently Sweeney broke down and volunteered their implication in at least 14 and as many as 20 robberies between Florida and Oregon, to include California. It further included a robbery near Orlando, Florida, in which Johnson allegedly killed two persons.
>
> Lt. Peterson advised that both Terrell and Sweeney had admitted that Johnson had robbed a beauty shop in St. Joseph, Michigan, and while do so, a shot was fired, further that they were in possession of a master charge card of Valerie KOLBERG, one of the beauty shop victims, and had used that card through Indiana, Illinois, Utah and California. At this point it was verified that no injuries were made at the beauty shop robbery.
>
> WEAPON: Lt. Peterson reports the weapon confiscated from Johnson is a IVER-JOHNSON, 38 special with 2" barrel, black in color. He has made a determination this weapon was previously stolen in Florida.

(M. 1222)(emphasis added). Obviously, the testimony presented at the suppression hearing was false. This was learned by Mr. Johnson post-conviction and is thus properly presented in 3.850 proceedings.

At the suppression hearing the officers testified that they did not know about the connection with the Florida murder until the next day at 11:00 a.m., January 7, 1980. By delaying Mr. Johnson's scheduled arraignment, the police

were able to initiate yet another interrogation without the benefit of counsel. Still, Mr. Johnson said he did not want to make a statement because he feared the death penalty in Florida, and that he would be "put to death for these crimes if he admitted to them" (R. 395). It was only after approximately 39 hours of maintaining his right to silence and six different interactions that the police were finally able to break Mr. Johnson's will and obtain a confession.

Mr. Johnson was only advised of his rights two times before his confessions; and, he was never advised that he could halt the questioning at any time. Clearly he never understood his right to stop the police from continuing this marathon interrogation. Richard Montree, Chief of Police in Prineville, Oregon, testified:

> Q Now, in the interview at 1:30 p.m. on the 7th day of January, you stated earlier that you advised him of his Rights from the Miranda card, is that correct?
>
> A Yes, sir.
>
> Q Where did you get your card from, your Miranda card?
>
> A I have no idea. They are from some police supply house, I don't know which supply house we obtain them from.
>
> Q How long have you used that particular card?
>
> A Well, that card was --
>
> Q Or that type of card?
>
> A That was the card that was being utilized by the Primeville Police Department at the time I took it over, in February of 1979.
>
> Q Make note of number six; you have the right to interrupt the conversation at any time, what does that mean?
>
> A That if he wishes to interrupt the questioning or conversation at any time, he has that right.
>
> Q Anywhere on there does it say, if at any time he wishes the conversation to cease, no more questions will be asked him?
>
> A It states he has the right to remain silent.
>
> Q Right. But, does it state that once he starts talking he

has a right to stop the conversation, and no more questions will be asked of him?

A I don't recall offhand. I don't memorize the card.

Q I show you a copy of the card.

A (Witness examining card.) No, only number six.

Q About the interruption?

A. Yes, sir.

Q Does it say on there, if any time during the conversation he wishes to have an attorney present, all questioning will stop until such attorney can be obtained for him?

A I don't believe it does.

Q Did you advise him of any rights that would not be contained on the card?

A No, sir, I follow the rights.

Q To the letter?

A Yes, sir.

(R. 374-75)(emphasis added). At no time was Mr. Johnson advised that he could stop the questioning at any time if he wanted to have an attorney present.[7]

At one point during the lengthy coercive interrogation, Mr. Johnson was transported from Portland, Oregon, to Madras, Oregon, by Lt. Peterson for the interview with the police psychiatrist. In his deposition, Lt. Peterson stated:

> I may even have told him that I was aware of the things that happened down there. I am not certain that I did that.

Lt. Peterson did not advise Mr. Johnson of any Miranda warnings (R. 409). The

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[7]The facts here should be compared to those in Duckworth v. Eagan, 109 S. Ct. 2875 (1989). There, adequacy of the Miranda warnings was upheld because:

> We think the initial warnings given to respondent touched all of the bases required by Miranda. The police told respondent that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had "this right to the advice and presence of a lawyer even if [he could] not afford to hire one," and that he had the "right to stop answering at any time until [he] talked to a lawyer."

109 S. Ct. at 2880.

statements made by Mr. Johnson were solicted by the police without the benefit of adequate Miranda warnings and are inadmissible. Thus, the warnings given were not adequate. Moreover, the police did not honor his invocation of his right to silence. Finally, the ultimate waiver was not valid.

The inquiry into the validity of a waiver has two distinct dimensions as illustrated in Moran v. Burbine, 475 U.S. 412, 421 (1986). First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Burbine, 475 U.S. at 421. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Burbine, 475 U.S. at 421 (citation omitted); see Edwards, 451 U.S. at 482 (inquiry has two distinct dimentions). In particular, "[t]he determination of whether there has been an intelligent waiver . . . must depend in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); see Miranda v. Arizona, 384 U.S. 436, 475 (1966)(applying Johnson v. Zerbst standard to waiver of Miranda rights). The accused's mental state is the critical factor. When evaluated by Dr. Glennon, the doctor could not conclude, given the facts, that Mr. Johnson had the ability to comprehend or knowingly waive his rights at the time approximate to the offense (M. 180-81).

Moreover, Mr. Johnson in fact indicated a desire to invoke his right to silence and his right to direct that questioning cease. In Miranda, the United States Supreme Court declared "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time

prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74 (emphasis added). This ruling was reaffirmed in Edwards v. Arizona, 451 U.S. at 482, and in Michigan v. Mosley, 423 U.S. 96 (1975). See Owen v. Alabama, 849 F.2d 536 (11th Cir. 1988); Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987).

In addition to not understanding or rationally waiving the rights that were read to Mr. Johnson by Sheriff Montee, see Miranda, Mr. Johnson was never properly informed of his rights at all. The State never established that Mr. Johnson had been sufficiently advised of his right to counsel. In fact, Chief Montee never advised Mr. Johnson that he could stop the questioning at any time and an attorney would be appointed (R. 373-75).

A full recitation of an accused's rights must be conveyed by the police. Failure to do so may result in the inadmissibility of any subsequent statements. This Court has spoken directly to this issue:

> We hold that the failure to advise a person in custody of the right to appointed counsel if indigent renders the custodial statements inadmissible in the prosecution's case-in- chief and Caso's statement in the present case was improperly admitted.

Caso v. State, 524 So. 2d 422, 425 (Fla.), cert. denied, 488 U.S. 870 (1988). Here the constitutional error is even clearer: Mr. Johnson was in custody, but he was not advised that he had a right to stop the interrogation and have appointed counsel if he could not afford one. Moreover, it is the State's burden to establish that adequate Miranda warnings were given. Here, the State's witness admitted that he never advised Mr. Johnson of his right to stop the questioning and request appointed counsel. Caso establishes that improper and inadequate Miranda warnings were given in this case. See Duckworth v. Eagan, 109 S. Ct. 2875 (1989).

The Eleventh Circuit has recently affirmed the importance of the "rigid prophylactic rule" that upon any request for counsel, whether it is explicit or

equivocal, any interrogation should immediately cease. Towne v. Dugger, 899 F.2d 1104, 1106 (11th Cir. 1990). Further, a court must "give a broad, rather than a narrow interpretation to a defendant's request for counsel." Towne, 899 F.2d at 1106 (citation omitted). Mr. Johnson was never properly instructed on his right to counsel and should not be punished due to a defective Miranda warning.

An individual does not have to speak in order to exercise his right of silence. The State failed to honor Mr. Johnson's right to remain silent and in fact introduced evidence of his silence against him at trial. This violated the Miranda warnings given to Mr. Johnson which indicated that Mr. Johnson retained the right to remain silent.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court declared "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74 (emphasis added). This ruling was reaffirmed in Edwards, 451 U.S. at 482.

Recently, this Court explained:

> [A] suspect's equivocal assertion of a Miranda right terminates any further questioning except that which is designed to clarify the suspect's wishes. See Long v. State, 517 So. 2d 664 (Fla. 1987), cert. denied, 108 S. Ct. 1754 (1988), and cases cited therein; and Martin, where although there was no violation of the fifth amendment by continuing questioning after an equivocal invocation of Miranda rights, the court held that the continued questioning was reversible error under Miranda. Given this clear rule of law, and even after affording the lower court ruling a presumption of correctness, we cannot uphold the ruling. The responses were, at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified. It was error for the police to urge appellant to continue his statement. Such error is not, however, per se reversible but before it can be found to be harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. Chapman v. State, 386 U.S. 18, 24 (1967); Martin v. Wainwright. Applying this standard, we are unable to say in this instance that the error was harmless beyond a reasonable doubt. Even though there was corroborating evidence, Owen's statements were the essence of the case against him. We accordingly reverse Owen's

> convictions on the basis of the inadmissible statements given after the response, "I'd rather not talk about it."

Owen v. State, 560 So. 2d 207, 211 (Fla.), cert. denied, 111 S. Ct. 152 (1990).

Certainly refusing to talk for thirty nine hours indicates a desire to remain silent. And even though the exact number of minutes necessary to constitute an invocation of the right of silence may be an open question (cf. Smith v. Illinois, 469 U.S. 91 (1984)), certainly it takes considerably less than thirty nine hours of silence to convey the desire not to talk.

Further, the Miranda violation was exacerbated by the police interrogation tactics. Mr. Johnson's girlfriend was transported to headquarters for the purpose of obtaining a confession from Mr. Johnson. A police pyshiatrist was used to aid the police in their interrogation of Mr. Johnson. Religious persuasion was employed. Throughout all this time, Mr. Johnson maintained his right to silence. Under the principles of Miranda and Edwards, Mr. Johnson was completely shielded from further police initiated interrogation unless Mr. Johnson re-initiated the contact. The failure of the police to honor Mr. Johnson's exercise of his fifth amendment rights rendered the resulting statements inadmissible.

Furthermore, in order to be admissible an accused's statements to law enforcement officers must have been voluntarily given. In Spano v. New York, 360 U.S. 315 (1959), the United States Supreme Court held:

> We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts in their post-indictment setting. Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. [citations] They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these.

360 U.S. at 323-24.

The statements that the police were ultimately able to obtain from Mr. Johnson resulted from psychological coercion and the authorities' willingness to arrange his marriage to his girlfriend. Mr. Johnson's subsequent statements were not voluntary. Certainly Mr. Johnson's prolonged silence evidenced his desire to maintain his silence, but his will was overborne.

Florida law provides for first appearance and an offer of counsel within 24 hours of the time of arrest. Under Rule 3.130(c)(4), in order for a defendant to waive his right to counsel he must execute a written waiver at his first appearance. The rationale for this Rule is to prevent the unconstitutional and coercive interrogation practiced by the Oregon authorities in this case. In fact, here the arraignment was postponed to prevent Mr. Johnson from having the opportunity to have counsel appointed in accordance with Mr. Johnson's sixth amendment rights. The police employed a successful interrogation scenario that culminated in the marriage of Mr. Johnson to "his girlfriend" Patricia Sweeney -- arranged, facilitated, attended, photographed, costumed, jeweled, officiated, and witnessed by Montee, Peterson, and other law enforcement officers (See App. 8).

Mr. Johnson's sixth amendment right to counsel was violated under the circumstances since the interrogation was continued by the police at least fifteen hours after Florida law would have required the initiation of adversarial proceedings and an offer of counsel in which Mr. Johnson would have had the opportunity to sign a written waiver if properly understood by Mr. Johnson. The sixth amendment guarantees an accused the right to legal representation once adversarial proceedings have been initiated. Massiah v. United States, 377 U.S. 201 (1964). Mr. Johnson's sixth amendment right to counsel attached when he was scheduled for arraignment or within 24 hours of his arrest.

Mr. Johnson's confession occurred immediately after his religious beliefs were probed by Officer Soules (R. 394, 395, 404, 405). He was interrogated on the heels of a lengthy "psychiatric examination" administered at the instruction of the local district attorney handling the case. The police knew all of this when they manipulated Mr. Johnson to talk by appealing to his religious beliefs. Rhode Island v. Innis, 446 U.S. 291 (1980), would consider this factor in determining the constitutionality of Mr. Johnson's statement:

> Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect.

Innis, 446 U.S. at 302 n.8. It is well-established that an involuntary confession may result from psychological, as well as physical, coercion. See, e.g., Blackburn v. Alabama, 361 U.S. 199, 206 (1960)("A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion."); Spano v. New York, 360 U.S. 315 (1959); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949). In particular, the use of religious influence to extract a confession is coercive. See Brewer v. Williams, 430 U.S. 387 (1977).

To determine the voluntariness of a confession, the court must consider the effect that the totality of the circumstances had upon the will of the defendant. Schneckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973); Frazier v. Cupp, 394 U.S. 731, 739 (1969); Boulden v. Holman, 394 U.S. 478, 480 (1969). Spano v. New York, 360 U.S. 315 (1959). The question in each case is whether the defendant's will was overborne when he confessed. See, e.g., Schneckloth, 412 U.S. at 225-26; Haynes v. Washington, 373 U.S. 503, 513 (1963).

The State may not knowingly exploit the vulnerability of an uncounseled defendant in the manner so egregiously employed against Mr. Johnson.

> [The right to counsel] is not violated whenever -- by luck or happenstance -- the State obtains incriminating statements from the accused after the right to counsel had attached. [Citation omitted.] However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity.

Maine v. Moulton, 474 U.S. 159, 176 (1985)(emphasis added).

Mr. Johnson's will was indeed overborne by the cumulative effect of the arsenal of psychologically coercive weapons wielded by the Oregon police who held him in custody. His confession was clearly not the result of free will. Rule 3.850 relief is warranted.

ARGUMENT VIII

MR. JOHNSON WAS DENIED A FULL AND FAIR HEARING ON THE COURT'S ATTEMPTED RECONSTRUCTION OF THE RECORD; THE PROCEDURE UTILIZED TO ATTEMPT RECONSTRUCTION OF THE TRIAL RECORD VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, DEPRIVED MR. JOHNSON OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT; AND DENIED MR. JOHNSON EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT BY DENYING HIM A MEANINGFUL APPEAL; AND RECONSTRUCTION COUNSEL WAS INEFFECTIVE.

The transcript of Mr. Johnson's capital trial and sentencing is riddled with omissions and inaccuracies that prevented adequate appellate review and now preclude proper post-conviction review. On direct appeal, this Court ordered an evidentiary hearing to reconstruct the record. A second transcript, that was merely the original transcript with thousands of handwritten interlineations, additions and deletions, was filed in the circuit court. The original trial judge recused himself. The judge assigned to the cause discussed the record on occasions with the trial prosecutor and defense counsel, but neither appellate counsel nor Mr. Johnson were asked to be present at these discussions. At the later evidentiary hearing for reconstruction, Mr. Johnson was not permitted to be present and the court refused to allow testimony of a renowned court reporter and a memory expert.

Some of the errors and omissions include 28 unreported bench conferences and numerous inaccuracies in crucial ballistics testimony. The transcript in

its present state is filled with interlineations and corrections; much of the language still appears inaccurate and incomplete. Comparison of the transcript with an Orlando television station's videotape of the State's closing argument indicates that the court reporter omitted two words on the videotape. The prosecutor, speaking very slowly in a clear, distinct voice is heard to say:

> And if you don't believe it is first degree murder -- nothing is, and I urge you, ladies and gentlemen, to turn him loose.

Remarkably, the sentence in the trial transcript, page 295, reads:

> And if you don't believe it is first degree murder, then I urge you ladies and gentlemen, turn him loose.

The words "nothing is" are notably missing in the "corrected" transcript, words of paramount importance. The prosecutor illegally injected his opinion and "experience" into the factfinding process. This sentence is indicative of the extent and magnitude of the errors in the rest of the transcript. Reconstruction counsel unreasonably failed to obtain this videotape.

At the status hearing July 23, 1982, Judge Baker revealed his nonchalant attitude toward the accuracy of the transcript:

> . . . here you've got a story of a guy, Terrell Johnson, who loans his gun to a bartender, or pawns his gun with a bartender, for fifty bucks. He goes off, comes back to get his gun, and the bartender says, I'll give you the gun back for a hundred bucks. And he said, that ain't fair, you don't treat me right. And the bartender says, that's life in the little city. And the bartender then allows the defendant to take the gun out to see if it still works, walks across the street with a loaded gun, takes a couple shots with it, and comes back, shoots at the bartender and somebody in the bar, and leaves, and finally confesses to it out in Oregon or Washington.
>
> What else is there in the case? What happened that wasn't reported? I read it, and it's a clear and clean story.

(R. 1675). The issue at reconstruction was not whether Mr. Johnson committed the act in question, whether he confessed, or whether "it's a clear and clean story." The issue was the adequacy, for appellate purposes, of a trial record about which numerous profound reliability questions were raised. The issue was whether Mr. Johnson could be made to suffer the ultimate sentence of death where

he did not have the benefit of a constitutionally guaranteed review of a bona fide record of the trial proceedings. Fla. Const. art. V., sec. 3(b)(1). See Delap v. State, 350 So. 2d 462, 463 (Fla. 1977).

In its direct appeal opinion, this Court referred to the initial transcript as "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." Johnson, 442 So. 2d at 195. The Court stated that "the trial judge, the court reporter, and both trial attorneys testified to the substantial completeness of the record in all material regards." Id. However, defense counsel did not testify to the "substantial accuracy and completeness of the record in all material regards." He specifically recalled a portion of the jury instructions that was never recorded or transcribed; he recalled bench conferences, where he thought to himself "it's a good thing the court reporter is up here," that were never recorded or transcribed; and he asserted that his general recollection was not very good. The shocking state of the transcript and the superficial attempts to correct it violate Mr. Johnson's constitutional rights. Justice Shaw dissented because of the inadequacy of the "reconstructed" record:

> I would remand for a new trial because the inadequacy of the reconstructed record precludes effective appellate advocacy and careful review. I do not see how a meaningful, independent review of this proceeding can be accomplished when the transcript contains omissions and inaccuracies. I recognize that a complete trial transcript is not required in every instance where there is an alternative adequate substitute. Draper v. Washington, 372 U.S. 487 (1963). I do not think we have an adequate substitute here.
>
> In the context of providing indigent defendants with trial transcript at state expense, the United States Supreme Court has identified two factors to be considered in determining need: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." Britt v. North Carolina, 404 U.S. 226, 227 (1971)(footnote omitted). Our duty in cases where there has been a judgment of conviction for a capital felony and sentence of death is

to review the entire. Section 921.141(4), Fla. Stat. (1979)); Ferguson v. State, 417 So.2d 639 (Fla. 1982). If we find that the interests of justice require a new trial, we must reverse. Fla. R. App. P. 9.140(f). In the event fundamental error has occurred at any stage of the trial, it is our obligation to discover the error and reverse the conviction or the sentence, as the case might be. This obligation exists regardless of whether defense counsel has discovered such an error. The scope of our review necessitates access to a transcript which reflects more than the general gist of the proceedings, one which is more than "substantially accurate." The record contains omissions; the entire voir dire and numerous changes and additions were inserted some year and a half after the proceedings, when memories admittedly were dim. Reversible error can turn on a phase. Did it occur here? We cannot be certain.

Moreover, appellate counsel did not participate in the trial and is in the same predicament as we are regarding the transcript. In Hardy v. United States, 375 U.S. 277 (1964), involving a federal criminal prosecution, the Court stated

> When . . . new counsel represents the indigent on appeal, how can he faithfully discharged the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less than that. For Rule 52(b) of the Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The right to notice "plain errors or defects" is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended.

Id. at 279-80 (footnote omitted). In his concurrence, Mr. Justice Goldberg stated

> appointed counsel must be provided with the tools of an advocate. As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.

Id. at 288 (footnote omitted). When there is missing from a record a "substantial and significant portion" in a criminal appeal involving new appellate counsel, reversal is required even in the absence of a specific showing of prejudice. United States v. Selva, 559 F.2d 1303 (5th Cir. 1977). The present condition of the transcript in this appeal, in my opinion, renders it the functional equivalent of a transcript with substantial and significant missing portions.

In my view an unequivocally accurate record of the proceedings below is required to enable counsel and this Court to ensure that justice is done.

I would reverse.

Johnson v. State, 442 So. 2d 193, 197-98 (1983).

The constitutional due process right to receive transcripts for use at the appellate level was acknowledged by the United States Supreme Court in Griffin v. Illinois, 351 U.S. 12 (1956). The existence of an accurate trial transcript is crucial for adequate appellate review. Id. at 19. The sixth amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277 (1964), Justice Goldberg, in his concurring opinion, wrote that since the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy." Hardy, 375 U.S. at 288.

Complete and effective appellate review requires a proper and complete record on appeal. Adequate appellate review is impossible when the trial record is missing portions of the voir dire, the trial record is virtually incomprehensible because of numerous gross inaccuracies and errors, the trial record does not reflect bench conferences, and the record fails to accurately reflect what occurred. The United States Supreme Court in Entsminger v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. Lower courts follow Entsminger. The concurring opinion in Commonwealth v. Bricker, 487 A.2d 346 (Pa. 1985), citing Entsminger, condemned the trial court's failure to record and transcribe the sidebar conferences so that appellate review could obtain an accurate picture of the trial proceedings. In Commonwealth v. Shields, 383 A.2d 844 (Pa. 1978), the Supreme Court of Pennsylvania reversed a second-degree murder and statutory rape conviction solely because a tape of the prosecutor's closing argument was lost in the mail. "[I]n order to assure that a defendant's right to appeal will not be an empty,

illusory right . . . a full transcript must be furnished." The court went on to say that meaningful appellate review is otherwise impossible. Entsminger was cited in Evitts v. Lucey, 469 U.S. 387 (1985), in which the court reiterated that effective appellate review begins with giving an appellant an advocate and the tools necessary for the advocate to do an effective job. In Gardner v. Florida, 430 U.S. 349 (1977), the Supreme Court recognized the need for a complete record.

Mr. Johnson's constitutional rights were violated by his exclusion from the evidentiary hearing on reconstruction (certainly it was a critical stage at which his presence was required); the improper and prejudicial interference with and influence over the reconstruction proceedings by the trial judge who was disqualified; the denial of a full and fair hearing on reconstruction; and the transmittal of a "reconstructed" transcript that is a thoroughly unreliable record of what happened at his trial.

Mr. Johnson's sixth, eighth, and fourteenth amendment rights were violated because of the inadequacy of the trial record. Since it was impossible to properly afford his constitutionally required appeal and 3.850 proceedings, Mr. Johnson is entitled to a new trial. Furthermore, the denial of Mr. Johnson's right to be present at the evidentiary hearing on reconstruction -- clearly a "critical stage" in the proceedings in his case -- constitutes a fundamental denial of due process. The 3.850 proceeding was not a full and fair one, because it was predicated on the unreliable transcript. The circuit court judge who presided at the 3.850 hearing was not the trial judge and was forced to rely on the inaccurate and incomplete record. Based upon the new evidence regarding the unreliability of the record the Court should grant relief on this claim.

ARGUMENT IX

THE LOWER COURT FAILED TO PROPERLY APPLY RELEVANT LEGAL PRINCIPLES IN DENYING MR. JOHNSON RELIEF ON THE TRIAL JUDGE'S SENTENCE BASED ON THE GROSS MISTAKE OF FACT REGARDING THE JURY'S SENTENCING VOTE.

The trial record contains no reference to the actual vote of the jury on its sentencing recommendation. However, the jury foreman, in a post-conviction deposition, revealed that the jury initially was split 6-6 and after further deliberation reached only a 7-5 vote for death. The trial judge was under the gross misapprehension that the jury recommendation for death was 10-2. Significantly, this misapprehension was an important and uncorrected factor in the judge's decision to impose death. In a letter to the Florida Parole and Probation Commission, dated April 18, 1984, pursuant to Mr. Johnson's clemency application to the Governor and Cabinet, Judge Powell wrote:

> During the facts and circumstances presented during the trial, at the penalty phase and at sentencing and considering the jury's 10-2 recommendation, death was the only sentence which should and could have been imposed under the law.

The 3.850 court denied this claim without addressing the real harm. The court merely noted the jury's 7-5 vote and remarked that the trial judge, bearing the ultimate sentencing responsibility, found several aggravating circumstances and imposed a death sentence. This superficial review ignored the constitutional principles offended here. The court's misapprehension is detrimental in several ways. It involves non-record and inaccurate evidence that should not be considered in sentencing. The court used this evidence in sentencing Mr. Johnson, but Mr. Johnson had no chance to rebut this inaccurate evidence. Thus, the use of this evidence violated Mr. Johnson's constitutional rights to counter the evidence against him.[8] See Gardner v. Florida.

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[8]In addition, this mistake of fact is in essence a nonstatutory aggravating factor. Nonstatutory aggravating factors are not permitted in Florida capital sentencings. E.g., Miller v. State, 373 So. 2d 882 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988).

A sentencer's consideration of such evidence is harmful because it tips the scales in favor the death penalty. Miller; Elledge v. State, 346 So. 2d 998 (Fla. 1977). This imbalance violates the constitutional requirement that a sentencer's discretion be channeled to minimize the risk of an arbitrary and capricious sentence. See Elledge; Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Woodson v. North Carolina, 428 U.S. 280 (1976). Mr. Johnson's death sentence is more than unreliable; it is based on an incorrect fact. The sentence violates the safeguards the eighth and fourteenth amendments impose on capital sentencing. This Court consistently has ordered resentencings for similarly flawed sentences based on nonstatutory aggravators. See Miller; Riley v. State, 366 So. 2d 19 (Fla. 1978); Robinson. Since Mr. Johnson could not have known of this error until the judge's letter on April 18, 1984, relief is proper in this post-conviction proceeding.

ARGUMENT X

MR. JOHNSON WAS PREJUDICIALLY DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY TRIAL COUNSEL'S IGNORANCE OF THE SPEEDY TRIAL RULE UNDER THE INTERSTATE AGREEMENT ON DETAINERS (IAD), AND COUNSEL'S FAILURE TO MOVE TO DISCHARGE PURSUANT TO THE ACT.

Mr. Johnson was tried in violation of the 120-day trial time limit provided in the Interstate Agreement on Detainers. Fla. Stat. sec. 941.45 (1979) (hereinafter referred to as IAD). He should have been discharged had a motion to discharge been filed. Trial counsel was unreasonably not aware that the IAD provided a 120 day time limit, and thus did not file a motion to discharge. Trial counsel, however, was on notice that the State had obtained custody of Mr. Johnson pursuant to the IAD, and was, therefore, at least charged with the duty to research the applicable law pertaining to the IAD. Had counsel filed the motion, the trial court would have been obligated to discharge Mr. Johnson and return him to the custody of the State of Oregon to serve a 40 year sentence.

Pursuant to the IAD, the State of Florida obtained custody of Terrell

Johnson from the State of Oregon, where he was serving a forty (40) year prison term. Based on a complaint affidavit charging two counts of murder (R. 610), on January 9, 1980, the circuit court issued a warrant for Terrell Johnson's arrest (R. 613). On April 2, 1980, the Oregon prison authorities wrote an assistant state attorney in Orlando, Florida, acknowledging receipt of a request for temporary custody under the IAD, and enclosed with this letter a certificate that Terrell Johnson was a prisoner at the Oregon State Penitentiary and was serving a term of forty (40) years (R. 614-15). Oregon authorities offered to deliver temporary custody by a form dated April 9, 1980 (R. 617-18).

On May 15, 1980, Mr. Johnson was booked into the Orange County Jail (R. 62). Twenty (20) days later, on June 4, 1980, the State served a motion to reset the trial date which had been scheduled for August 12, 1980 (R. 639). The motion alleged that the "State Attorney assigned to this case will be absent from this jurisdiction until the 20th of August," "that the defense has no objection to a brief continuance for this reason," and "that speedy trial runs 18 November 1980" (R. 639). On June 20, 1980, the trial court granted the State's motion, in chambers and rescheduled the trial date for September 23, 1980 (R. 641). The trial, in fact, began on September 23, 1980, one hundred and thirty one (131) days after Terrell Johnson was booked into the Orange County Jail; eleven (11) days after the IAD limit had run. At the time the State served its motion to reset the trial, one hundred (100) days remained in the statutory speedy trial period, and at the time the Court granted the State's motion eighty four (84) days remained.

Trial counsel acknowledged that he was unaware of this speedy trial rule; Mr. Johnson was never made aware of it (M. 254). In fact, trial counsel did not lodge an objection to the resetting of the trial date. He testified as follows at the 3.850 hearing:

> A This was a telephone conversation with he and I. And I remember I was concerned that it be set within the 180-day limit in

that I was concerned that I would not agree to a continuance for any reason because I knew that would waive Mr. Johnson's right to a speedy trial, thinking again of the 180-day limit.

Q You thought it was 180-day?

A Right. The Florida speedy law statute said 180 days. So it was re-set within the 180-day limit. Not knowing about the 120-day limit, that was fine with me.

Q It wasn't your continuance?

A It was not my continuance, no.

Q And if you had known of the 120-day period you wouldn't have agreed to that continuance?

A That's correct.

Q Or if you did --

A I didn't agree to a continuance. I agreed to having the trial re-set. I know, a rose by any other name and that sort of thing. It did have the effect of putting the trial on another date that was further away than originally planned, but I wasn't thinking of it as being a continuance. It was simply re-setting it in order for us to go to Oregon, I think was the reason.

But I wanted to be sure that it was within the 180-day limit, and I certainly didn't intentionally waive any speedy trial right on behalf of my client.

(M. 255-56).

The time provision of the act, and dismissal upon violation thereof, are mandatory and constitute the very core of the protections offered by the IAD. The failure to properly observe them denied effective representation to Mr. Johnson. Had counsel raised the issue, charges would have had to be dismissed. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990)(counsel found ineffective for failure to raise a double jeopardy claim that would have required dismissal of charges).

When it adopted the IAD, the legislature provided for a definite period of time within which to try a defendant from the time when he is first within the physical custody of the State of Florida. Section 941.45(4)(c) provides that:

In respect of any proceeding made possible by this subsection, trial shall be commenced within one hundred and twenty days of the arrival

of the prisoner in the receiving state, but for good cause shown in open court having jurisdiction of the matter may grant any necessary or reasonable continuance.

The statute also provides that if trial is not had within the period of time applicable, the court shall dismiss the information filed against the defendant. Section 941.45(5)(c) provides in relevant part as follows:

> . . . in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in subsection (4), the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

Since Terrell Johnson was booked into the Orange County Jail on May 15, 1980, it is clear that he arrived in Florida, the "receiving state," at least by that date. His trial began one hundred and thirty one (131) days later. Therefore, unless the trial court granted a "necessary or reasonable" continuance "for a good cause shown," extending the one hundred and twenty (120) day period, or Mr. Johnson waived the time limit by affirmatively requesting to be treated in a manner contrary to the IAD, the trial court was obliged to dismiss the indictment.

Counsel testified had he known of the 120 day rule he would have sought a dismissal:

> Q Are you able now to say whether or not you would have agreed to an extension beyond the 120-day rule in order to do that? In order to have more time to go to Oregon and take the deposition?
>
> A If I had known of the 120-day rule?
>
> Q Yes. Or are you able to say?
>
> A If I had known of the 120-day rule, on the week following the 120 days, I would have filed a motion to discharge or whatever you do under the 120-day rule.
>
> Q Okay.
>
> A Or once 120 days had expired.
>
> Q I see.

A Once I was convinced it had expired, I would have filed something.

(M. 281).

Counsel's ignorance of relevant provisions of the IAD and his failure to move to dismiss the indictment pursuant to the Act rendered counsel's assistance ineffective, in violation of Mr. Johnson's constitutional rights. Since the motion to discharge should have been granted, but was not raised due to counsel's lack of knowledge, Mr. Johnson was prejudiced by counsel's failing. The 120 day limitation (if not waived properly) is (as the other sections affording such protection) mandatory, not directory. 18 U.S.C. App. Art. I; see also S. Rep. No. 91-1356, 2nd Sess., reprinted in 1979 U.S. Code Cong. and Ad. News at 4866; Stroble v. Anderson, 587 F.2d 830, 834-36 (6th Cir. 1978); United States v. Mauro, 436 U.S. 340, 354 (1978); Cuyler v. Adams, 449 U.S. 433, 444 (1981); Cody v. Morris, 623 F.2d 101 (9th Cir. 1980). In Cuyler, the Court observed at page 444:

> The prisoner is transferred to the temporary custody of the receiving state where he must be brought to trial on the charges underlying the detainer within one hundred twenty days of his arrival. Again, if the prisoner is not brought to trial within the time period, the charges will be dismissed with prejudice absent good excuse shown.

(emphasis added). Thus, the errors of trial counsel effectively meant that an absolute defense was lost.

Trial counsel is charged with at least constructive knowledge of the applicable statutes and case law relevant to the case in which he is representing his client. In this particular case, counsel had the responsibility to research the law relating to the IAD. He must have been aware that the State obtained custody of his client by using the IAD. Before the 120 day limit expired, trial counsel physically traveled to Oregon to depose State witnesses who testified about a statement following his arrest in Oregon (R. 814-16). While taking the deposition, counsel was informed of Jefferson County,

Oregon, charges against his client (R. 587-609). It was these charges which served as the basis for the 40 year Oregon sentence pending when the State requested custody of Terrell Johnson pursuant to the IAD (State's Composite Exhibit No. 4, penalty phase). Additionally, IAD documents used to obtain custody of Terrell Johnson were filed in April, 1980, in the circuit court file. Therefore, counsel actually knew, or should have known, that his client was in Florida pursuant to the IAD.

In Commonwealth v. Simpson, 409 A.2d 95, 98-99 (Pa. 1979), the court determined that trial counsel was ineffective for failure to move to discharge on speedy trial grounds, and stated,

> Counsel's failure to file a petition to dismiss between the date of July 18, 1976 (the 180th day for Rule 1100 purposes) and October 5, 1976 (the date of the trial), necessitates a finding that appellant was denied effective assistance of counsel . . . we can perceive no reasonable legal basis for an attorney to fail to object to a violation of his client's right to speedy trial...

See also Commonwealth v. Roundtree, 364 A.2d 1359, 1364 (Penn. 1976), where the court held,

> We, therefore, agree with appellant that counsel's failure to raise a pre-trial motion asserting appellant's speedy trial claim lacked any reasonable strategic basis and that, as a result, appellant was deprived of the effective assistance of counsel.

Counsel clearly had the duty to research the applicable law relating to the IAD. That he apparently did not was a substantial and serious deficiency measurably below that of competent counsel. As a result, Mr. Johnson's sixth, eighth, and fourteenth amendment rights were violated. Rule 3.850 relief is required.

ARGUMENT XI

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

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 109 S. Ct. 1353 (1989), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Johnson's eighth amendment rights. Mr. Johnson should be entitled to relief under Mann, for there is no discernible difference between the two cases. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

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

Throughout Mr. Johnson's trial, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase (R. 185, 512, 528-29, 1032, 1054, 1091, 1104, 1110, 1136, 1167, 1182,

1188, 1199, 1286, 1292, 1338-39). In preliminary instructions to the jury in the penalty phase of the trial, the judge emphatically told the jury that the decision as to punishment was his alone. After closing arguments in the penalty phase of the trial, the judge reminded the jury of the instruction they had already received regarding their lack of responsibility for sentencing Mr. Johnson, but noted that the "formality" of a recommendation was required.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Hitchcock v. Dugger, 481 U.S. 393 (1987), the Supreme Court for the first time held that instructions for the sentencing jury in Florida was governed by the eighth amendment. This was a retroactive change in law. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object the adequacy of the jury's instructions and the impropriety of prosecutor's comments. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Johnson's jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer was erroneously instructed. Moreover, counsel failed to object to the misinformation under Pait v. State, 112 So. 2d 380 (Fla. 1959). This was deficient performance which prejudiced Mr. Johnson.

In Caldwell, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere." 472 U.S. at 328-29. The same vice is

apparent in Mr. Johnson's case, and Mr. Johnson is entitled to the same relief. The Court must vacate Mr. Johnson's unconstitutional sentence of death.

ARGUMENT XII

THE TRIAL COURT ERRED BY APPLYING THE FLORIDA DEATH PENALTY STATUTE AS IF IT WAS MANDATORY AND MERCY COULD NOT BE APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In his sentencing order, 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. The circuit court said:

> The Court, after weighing the aggravating and mitigating circumstances, finds that sufficient aggravating circumstances exist which outweigh the matters offered as a mitigating circumstance summarized in paragraph (H) above, and that under the evidence and the law of this State a sentence of death is mandated.

(R 805-07)(emphasis added).

This is error, first, because it eliminates the possibility of mercy; second, because it drastically limits the discretion the sentencer in a capital case must have; and third, because it truncates the process of reasoned judgment which guides that discretion. New case law has established that this error is cognizable in 3.850 proceedings. Eddings v. Oklahoma, 455 U.S. 104 (1982); Sumner v. Shuman, 483 U.S. 66 (1987). Rule 3.850 relief is required.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Margene Roper, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 12th day of March, 1991.

_____
Attorney