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, IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Johnson submits this reply brief as a response to the state's answer brief. This reply brief does not challenge every statement in the state's answer, and where this reply brief is silent this is not an affirmance of the state's argument or characterization of the facts but a reliance on Mr. Johnson's initial brief. The record on appeal will be cited as "R.", the record on appeal from the denial of the Rule 3.850 motion as "M.".

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STATEMENT OF THE CASE AND FACTS

Mr. Johnson does not accept Appellee's statement of the case and statement of the facts. These statements are incomplete and contain irrelevant and argumentative statements. The state has chosen to present an inaccurate and lengthy summary of the entire transcript instead of a statement confined to the relevant issues and facts adduced at the postconviction evidentiary hearing.

Mr. Johnson's trial transcript was reconstructed in one four (4) hour session without the presence of Mr. Johnson. The state's characterization of this trial transcript as "the subject of extensive hearings into its accuracy and reliability" is unfounded and misleading (Answer Brief at 3).

The state incorrectly stated that Mr. Johnson was arrested at 2:00 a.m. on January 6 (Answer Brief at 5). In fact he was arrested around 10:30 p.m. on January 5, 1980 (M. 1218). The state cited to testimony from a police officer whose first contact with Mr. Johnson occurred hours after the arrest (R. 196). This police officer's narrative introduced at the post-conviction proceedings established that Mr. Johnson was arrested hours before this particular police officer had contact with Mr. Johnson (M. 1218). No statements were taken from Mr. Johnson until over thirty-nine (39) hours after his arrest (R. 209). In the meantime, Mr. Johnson was interrogated repeatedly and permitted to see his girlfriend, Patricia Sweeney, in order to obtain a confession (M. 1219).

The state also incorrectly asserted that Mr. Johnson shot the patron when he "got up" (Answer Brief at 5). In fact Mr. Johnson only started shooting because "As the customer started to get down, he turned and tried to grab me. And I got scared and started shooting" (R. 225). The facts establish that Mr. Johnson was intoxicated at the time of the offense. Pat Sweeney said he "sounded as if he had been drinking" shortly before the crime (M. 286). Officer Wedeking "smelled alcohol . . . he told me he had a couple

of drinks" shortly after the crime (R. 114-115).[1] 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. 170-171). 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. deBlig 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).

Lay witnesses who knew Mr. Johnson well would have supported the intoxication defense by testifying that he was never violent when he was sober but that when he was drinking it was almost like an inner force that would take over that was very much unlike Terry (M. 216). The testimony established that his judgment was impaired by a lifelong history of severe substance abuse, in combination with brain dysfunction, intoxication and personality disorders. The state mistakenly stated Mr. Johnson remembered details when in fact Mr. Johnson stated: "I don't remember too many more details about the robbery or shooting the men because I was a little drunk at the time." (R. 219) (Answer Brief at 6). The experts testified that "a little drunk" to an alcoholic could mean a "significant amount of alcohol . . . considerably beyond legal intoxication" (M. 170-71).

Although there were ten wounds, the evidence established that they could have been caused by five or six bullets. The jury obviously accepted the evidence which showed that in a panic, Mr. Johnson just started shooting when they found a conviction of the lesser offense of second degree murder for the

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[1]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, .5" (M. 182).

customer. Obviously, the jury acquitted of any "heightened premeditation" thus cold, calculated and premeditated was improperly considered by the sentencing court.

The state attempted to rebut the claim of deficient performance because defense counsel objected to the stippling evidence (Answer Brief at 8). However, a simple objection at trial does not cure defense counsel's surprise. Either defense counsel's performance was unreasonable in not discovering the evidence or the state withheld material information in violation of Brady and Florida discovery rules. In any event the adversarial process was thwarted and Rule 3.850 relief is mandated. State v. Michael, 530 So. 2d 929 (Fla. 1988).

Mr. Johnson was drinking heavily the week of the homicides. The state deliberately mischaracterized Dr. McMahon's report, by asserting that "he [Terrell Johnson] had been sober for 33 days before the murder" (Answer Brief at 47). The state repeats this misrepresentation stating "Dr. McMahon said Johnson had not been drinking for the 33 days preceding the murders" (Answer Brief at 58). Dr. McMahon's report reads:

> By his account, his longest period of continuous sobriety, prior to the homicides, including former prison terms, was for 33 days in late 1979, when he was last hospitalized for alcohol abuse. Nevertheless, he began drinking heavily again one week after terminating the program and it was during this period of intoxication that the homicides occurred.

(M. 526)(emphasis added). It is clear that Dr. McMahon does not say that Mr. Johnson was sober for the 33 days before the murders. Mr. Johnson began drinking again after receiving treatment for alcohol abuse. During this period of intoxication the homicides occurred.

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.

The state does not contest the key facts relied upon by Mr. Johnson. They concede that no licensed mental health expert was asked to evaluate Mr. Johnson regarding the existence of statutory mitigating factors.[2] They concede that the only mental health evaluation obtained by defense counsel was performed by John Cassady, an unlicensed counselor who was employed by the sheriff's department. The state acknowledges that Mr. Cassady did not interview Mr. Johnson regarding the offense or review background materials. He only administered two personality tests and he had no knowledge of, and did not evaluate for, statutory mitigation. The state concedes that trial counsel provided no background information to either John Cassady or Dr. deBlig:

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

(State's Answer Brief at 32). The state does not contest that although counsel made arrangements for witnesses to appear at the trial of a few weeks earlier, counsel's entire witness preparation took place either Friday afternoon or Monday morning before the penalty phase began. Trial counsel may not treat sentencing phase as merely a postscript to the trial. Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989). The circuit court erred as a

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[2] Dr. deBlig, the licensed expert who testified regarding Mr. Johnson's past history of alcoholism, stated at the 3.850 hearing that she would have testified to two statutory mitigating circumstances and given evidence which rebutted a finding that the crime was cold and calculated.

matter of law in failing to recognize trial counsel's duty to prepare for a penalty phase.

Contrary to the state's assertion, organic brain damage cannot be discounted. Dr. Fleigelman ran some tests on the cranial nerves, but this does not test one's ability to think or exercise judgment. The cranial nerve "enervates sensory and visceral organs in the body glands, smooth muscles and other organs in the body" (M. 194-95). Dr. Glennon directly responded: "cranial nerves have nothing to do with judgment" (M. 195). Thus, the state's heavy reliance on Dr. Greener's viewpoint that there was no evidence of organic brain syndrome (utilizing Dr. Fleigelman's report) should be rejected by this Court. Dr. Glennon's and Dr. McMahon's licensed opinions that there was brain damage cannot be discounted by stating they did not perform brain scans or an EEG.[3]

The state incorrectly states Mr. Johnson was sober 33 days before the crime (Answer Brief 58). In fact Mr. Johnson drank heavily for the week preceding the crime:

> By his account, his longest period of continuous sobriety, prior to the homicides, including former prison terms, was for 33 days in late 1979, when he was last hospitalized for alcohol abuse. <u>Nevertheless, he began drinking heavily again one week after terminating the program and it was during this period of intoxication that the homicides occurred.</u>

(M. 526)(emphasis added).

The state's arguments and the circuit court's order are either not supported by the facts or not supported by the law. The state alleged that defense counsel consulted with Dr. deBlig regarding statutory mitigation. This allegation is not supported by the facts. Counsel speculated that he thought he "would have" discussed statutory mitigation with Dr. deBlig but that he couldn't recall specifically having done that (M. 277). Dr. deBlig, on the other hand, was clear in her recollection that she was <u>not</u> asked to testify regarding statutory mitigation:

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[3]The testing relied on by the State done one week before the deaths likewise lacked brain scans and an EEG. The State relied on outdated, unspecified 1974, 1976 exams.

Q Let me ask you -- referring to the statute, if I can locate it, let me read to you two statutory mitigating circumstances to the statute and ask you whether in your opinion they apply in this case.

One, "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

Now, going back to when you testified before, were you prepared to testify that it was your expert opinion to a degree of scientific study that this was true of Terrell Johnson?

A I certainly could have testified to that.

Q Now, the other is, quote: "The capital felony was committed when the Defednant was under extreme mental or physical duress or emotional disturbance."

Could you have scientific certainty that this statutory mitigating circumstance applied to the case of Terrell Johnson?

A Yes.

Q Did the attorney that you spoke with -- well, you talked on the telephone. Did you meet or speak with that attorney ever again?

A Yes, I spoke with him on the morning of the trial.

Q Is that Mr. Jones?

A Mr. Jones.

Q Did you see him here this morning and recognize him?

A Yes.

Q What did you-all speak about then

A It's not terribly clear to me when 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, would you have responded as you have today?

A Yes.

(M. 60-61). In response to the trial court's inquiry as to this discrepancy, counsel replied only that the doctor never indicated to him that she hadn't

been asked something they had agreed upon (M. 279). The only witness with a clear recollection was Dr. deBlig. She testified that she was not asked about statutory mitigation; counsel could only state that he did not have an independent recollection. The state's position is not supported by the facts in the record.

The state alleged that trial counsel made a "tactical decision" to present Dr. deBlig.[4] There can be no tactical decision when there is no choice due to a lack of investigation and preparation. After the guilty verdict at 11:00 a.m. on Friday, counsel had no expert available to testify who had evaluated Mr. Johnson. His only "choices" were Dr. deBlig who had previously treated Mr. Johnson for alcoholism and Mr. Cassady who had given the personality tests to determine competence and sanity. There could be no choice because no competent evaluation had been conducted. No background information had been provided to an expert. The law requires an adequate investigation before a strategy decision can be made.[5]

The state argued that the evidence which could have been presented was merely cumulative. Evidence of two statutory mitigating circumstances and intoxication at the time of the offense is not cumulative. The jury never knew that licensed experts are of the opinion that Mr. Johnson suffered from such severe alcoholism, mental disorders, probable brain damage and intoxication at the time of the offense that his judgment was substantially impaired and that he had an extreme emotional disturbance. Neither the state

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[4]Moreover, counsel did not recall a specific tactical reason for not asking Dr. deBlig about the presence of statutory mitigating circumstances. "[A] reviewing court should not second guess the strategic decision of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990). At the same time counsel should not be allowed to shield his failure to investigate simply by raising a claim of "trial strategy and tactics." Crisp v. Duckworth, 743 F.2d 580, 584 (7th Cir. 1984).

[5]Due to counsel's lack of preparation, the only lay witness counsel presented were the defendant's father, who denied that he was alcoholic and had been abusive to Mr. Johnson, and a friend. Due to the lack of preparation, Mr. Johnson's girlfriend, who could have given critical testimony regarding his severe substance abuse problem, was present but not called as a witness.

or the court contest these opinions. This evidence cannot be characterized as merely cumulative. The circuit court in imposing death indicated that Mr. Johnson failed to establish these mitigating circumstances. Not only does this evidence establish two statutory mitigation factors but it negates a finding that the offense was cold and calculated or committed to avoid a lawful arrest. The jury never knew that independent witnesses both before and after the offense corroborated that he had been drinking at the time of the offense and another witness described him as vomiting the next morning. This is not cumulative. Further, the jury never knew that the alcohol "treatment" Mr. Johnson received was grossly insufficient and actually wrong.[6] This was not cumulative.

Trial counsel testified that he would have wanted to present expert testimony regarding alcoholism and had no tactic for failing to do so (M. 250-51). The state concedes that "The theory of defense involved demonstrating that Johnson's state of mind was clouded with intoxicants and showing a sudden passion or excitement with no premeditation" (Answer Brief at 34). Yet the state inexplicably argued that because defense counsel thought alcoholism was an addiction but not a disease that the omission of this critical evidence was justifiable. Had counsel conducted an adequate investigation, provided background materials to an expert and sought an opinion, a tactical decision could have been made. None of these steps were taken. There could be no "strategy" decision. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989).

Finally, although the state conceded that adequate preparation would have resulted in the presentation of two unrebutted, statutory mitigating circumstances, evidence of intoxication and denigration of the existence of heightened intent to commit the offense in a cold and calculated manner they allege that a sentence of death would still have been the result (Answer Brief at 60). At one point in the deliberations at penalty the jury vote was 6-6.

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[6]Dr. Glennon testified that Mr. Johnson was treated with pills which had the effect of making him high and would actually exacerbate his condition. Further, the voluntary three week program was grossly insufficient when his condition required a 6 month to a year involuntary treatment.

The final vote was 7-5. The jury found no premeditated intent to kill one of the victims. The jurors did not have any strong opinions:

> 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 defendant's past history had been nonviolent and the witnesses agreed that he was a caring, kind person when he was not intoxicated. There was substantial evidence that at the time of the offense he had been drinking heavily and that his judgment was severely impaired. Under these circumstances, it is error to find that there was no "reasonable likelihood" that the result would have been different. The closeness of the jury's vote is a proper consideration in determining prejudice. Preston v. State, 564 So. 2d 120 (Fla. 1990).

The trial court erred in its application of the "Strickland test" to Mr. Johnson's case. The Strickland test for prejudice requires only a "reasonable probability" that the proceeding was unreliable:

> On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.
>
> * * *
>
> Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112, 66 S.Ct. 464, 466, 90 L.Ed. 562 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finally concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.
>
> * * *

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

(466 U.S. at 694-95)(emphasis added).

The correct Strickland inquiry is as follows:

> (1) were there omissions of fact due to counsel's ineffectiveness (466 U.S. 693).
>
> (2) were those omissions due to a strategy decision or to a lack of investigation or preparation.
>
> (3) if the omissions were a strategy decision made after competent preparation and investigation then it raises a "strong presumption" that the strategy decision was correct (466 U.S. 689).
>
> (4) However, if the omission of fact was due to a failure to investigate, the court must apply a lower standard to the prejudice analysis (466 U.S. 694).
>
> (5) In making a prejudice finding where there was a failure to investigate the court should grant relief "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." A defendant need only show that confidence in the outcome has been undermined. A defendant need not show that counsel's deficient conduct more likely than not altered the outcome (466 U.S. at 693-94).

In Mr. Johnson's case, the trial counsel failed to present evidence of two statutory mitigating factors and additional nonstatutory mitigation due to his failure to investigate and prepare. He failed to present evidence of intoxication and to attack the allegation that the offense was cold and calculated. He did not make a strategy decision not to put on the evidence. The trial court erred in applying a strong presumption of no prejudice. Mr. Johnson need only show by less than a preponderance of the evidence that confidence is undermined. When the jury: (A) vote was 6-6 and then 7-5, (B) found no premeditated intent to kill one of the victims, and (C) where the jury never heard evidence of two statutory mitigators or that there was substantial evidence that Mr. Johnson had been drinking heavily at the time of the offense; confidence in the outcome is undermined.

The correct standard of proof has been applied in countless cases. See State v. Lara, 16 F.L.W. S306 (Fla. 1991)(Even though the defendant was uncooperative and the witnesses reluctant, this does not relieve defense

counsel from his obligation to investigate the defendant's background, utilize expert witnesses or "virtually ignore" the penalty phase of the trial.); State v. Michael, 530 So. 2d 929 (Fla. 1988)(Trial counsel was ineffective for failure to investigate and prepare available mental health evidence for the penalty phase. The inability to gauge the effect of this omission undermined the courts confidence in the outcome)[7]; Stevens v. State, 552 So. 2d 1082 (Fla. 1989)(A new sentencing is required when counsel fails to investigate, and as a result, substantial mitigating evidence is never presented to the judge and jury); Bassett v. State, 541 So. 2d 596 (Fla. 1989)(Bassett received resentencing because counsel failed to discover material nonstatutory mitigation evidence relating to defendant's tendency to be dominated by others); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989)(Defense counsel cannot make a strategy decision without a prior investigation); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991)(Ineffective assistance of counsel exists where evidence of mitigation is readily available and counsel inexplicably fails to present and argue the evidence); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1989)(A tactical decision not to present mitigating evidence cannot be made without adequate investigation); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989)(An attorney whose omissions are based on lack of knowledge cannot have made a strategy decision); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(No tactical motive can be ascribed to an attorney who failed to properly investigate and prepare); and Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc)(Only if adequate investigation had been conducted, may counsel make a reasonable tactical decision).

In Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989), the defense counsel's duties are explained:

> [D]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors.

---

[7] Although there was substantial jury vote for death at his original trial, John Michael received a unanimous jury recommendation for life at his resentencing.

* * *

> While the <u>Strickland</u> threshold of professional competence is admittedly low, the defendant's life hangs in the balance at a capital sentencing hearing. Indeed, in some cases, this may be the stage of the proceedings where counsel can do his or her client the most good.

<u>Kubat</u> at 369. After holding that the performance of Mr. Kubat's counsel at sentencing was deficient the <u>Kubat</u> court addressed the <u>Strickland</u> prejudice prong:

> In Kubat's case, counsel, in effect, presented no defense at the sentencing hearing. We view this failure of counsel as "a breakdown in the adversarial process that our system counts on to produce just results." <u>Id</u>. On this basis alone, our confidence in the outcome is sufficiently undermined to find that Kubat was prejudiced.

<u>Kubat</u> at 369. Mr. Johnson's trial counsel, like Mr. Kubat's, was unprepared and gave a deficient performance. Mr. Johnson's, like Mr. Kubat's, trial outcome was sufficiently undermined, and Rule 3.850 relief is warranted.

Most recently, the Seventh Circuit applied this standard in <u>Brewer v. Aiken</u>, 935 F.2d 850 (1991) where prejudice was found by a failure to present mitigating evidence. Although defense counsel claimed to have a strategy for his failure to present evidence, the court found there could be no strategic decision without an adequate investigation. Furthermore, although the trial judge actually considered the mitigation before sentencing, the court found:

> We are unpersuaded that the sentencing judge's consideration of the mitigating factors precludes prejudice to the defendant. In our opinion "there is a reasonable probability that [if the jury had been aware of Brewer's low I.Q. and deprived background, it] . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." <u>Strickland</u> 466 U.S. at 695, 104 S.Ct. at 2069. <u>While the sentencing judge did not find the above evidence sufficiently mitigating to overcome the aggravating circumstance of the murder, there is a reasonable probability that the jury, if presented with evidence of Brewer's entire history -- troubled childhood, low I.Q., deprived background, and myriad of other psychiatric problems -- might very well have felt differently</u>. The state has failed to establish any likelihood that the sentencing judge would have refused to follow the jury's recommendation if it had recommended a sentence of years as opposed to death. Thus, we agree with the district court that the writ should issue unless the State of Indiana provides Brewer with a new sentencing hearing.

(935 F.2d 858-59)(emphasis added).

Mr. Johnson's trial counsel admitted that he never obtained a complete mental health evaluation by a licensed psychologist for purposes of the penalty phase. His only efforts were to call a doctor to testify that had previously provided alcohol treatment to Mr. Johnson and to get an unlicensed counselor to administer two personality tests a week before the trial. But even this minimal effort was further diminished by counsel's failure to provide any background material or to inquire of the former treating doctor whether Mr. Johnson suffered from a mental state which supported a finding of two statutory mitigating circumstances.

Just as a court cannot use hindsight to second guess a strategy decision by a defense counsel, a court later cannot create a possible strategic reason for failure to present evidence:

> Just as a reviewing court should not second guess the strategic decision of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer.

Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990). Defense counsel offered no strategic reason for failure to provide background materials to an expert, failure to obtain a complete evaluation by a licensed expert, or to interview witnesses more than a few hours before the penalty phase began. Finally, counsel offered no strategy reason for failure to present readily available statutory mitigation from a witness who actually testified at the penalty phase. The circuit court improperly constructed possible strategic defenses in denying relief.

Critical evidence never reached the jury. Counsel could give no strategy for his failure to investigate and present the evidence. Mr. Johnson has proven to a "reasonable probability" that the jury which first voted 6-6, and then 7-5, would have recommended life had they had evidence which established two statutory mitigating circumstances, evidence of intoxication, and evidence which denigrated the cold, calculated planning resulting from

heightened premeditation. The aggravating circumstance of being on parole[8] is entitled to lesser weight. Songer v. State, 544 So. 2d 1010 (Fla. 1989). The "previous conviction" involved an offense committed after the murder. The pecuniary gain circumstance was related to the state's claim of felony murder. Mr. Johnson was abandoned and abused by alcoholic parents. He blamed himself for the death of his brother in VietNam and his mother's subsequent suicide. He suffered from extreme substance abuse problems resulting in suicide attempts, hospitalization, blackouts, and delirium tremors. However, when he was sober he was a caring, nonviolent person who often wept for his mother and brother. There is a reasonable probability that one juror would have changed their vote given the additional evidence. Relief should be granted.

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 has raised two arguments in support of his jury vote claim: double jeopardy attached when the jury announced a vote of 6-6; and the jury instruction was in error. The state addressed the improper jury instruction argument; however, the state offered minimal discussion of Mr. Johnson's double jeopardy claim. In his initial brief Mr. Johnson asserted that the jury's 6-6 vote was a life recommendation and jeopardy attached at that time. Further, the jury would have returned a life recommendation had they understood that the 6-6 vote was in fact a final vote and not a tie. Despite the jury's misperception that a majority vote was required, this vote was an acquittal of death for double jeopardy purposes. Arizona v. Rumsey, 467 U.S. 203 (1984); Bullington v. Missouri, 451 U.S. 430 (1981); Freer v. Dugger, 935 F.2d 213 (11th Cir. 1991); Brown v. State, 521 So. 2d 10 (Fla.), cert. denied, 488 U.S. 912 (1988); Fla. Const. Art. I §9.

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[8] In addition, the State never proved on the record that Mr. Johnson was on parole at the time of the offense, and Mr. Johnson's trial attorney was ineffective for not objecting to and arguing against the legally-deficient documentation provided.

Once Mr. Johnson had achieved a life vote of 6-6 double jeopardy principles attached:

> Double jeopardy principles apply to the penalty phase of capital punishment trials in Florida under §921.141 of the Florida Statutes (1985), because the Florida procedure is comparable to a trial for double jeopardy purposes. See Brown v. State, 521 So.2d 110 (Fla.), cert. denied, 488 U.S. 912 (1988); accord Arizona v. Rumsey, 467 U.S. 203 (1984); Bullington v. Missouri, 451 U.S. 430 (1981). Florida law also protects individuals facing the death penalty form being twice placed in jeopardy. Art. I, §9, Fla. Const. Although federal law provides some guidance for interpreting the meaning of Florida's double jeopardy clause, we rely here on article I, §9 of the Florida Constitution, which "has historically focused upon the protection of the rights of the individual," Booth v. State, 436 So.2d 36, 39 (Fla. 1983)(McDonald, J., dissenting), and thus provides at the very least the same protection of individual rights as the federal constitution.
>
> In the context of capital proceedings, the constitutional protection against double jeopardy provides that if a defendant has been in effect "acquitted" of the death sentence, the defendant may not again be subjected to the death penalty for that offense if retried or resentenced for any reason. See Poland v. Arizona, 476 U.S. 147 (1986); Rumsey; Bullington.

Wright v. State, No. 71,534 (Fla. August 29, 1991).

The state argued in its answer brief that the entire jury vote claim is procedurally barred. Mr. Johnson would note initially that the double jeopardy claim is not procedurally barred because it was not until after the trial was concluded, that the 6-6 vote became known. It was not a matter of record; it could not have been raised on direct appeal. It was only during the postconviction investigation that the facts were made part of the record. Secondly, a double jeopardy claim could not be barred for counsel's failure to object when the trial counsel was unaware of the 6-6 vote at the time of trial. Finally, this Court did not bar similar claims for failure to object even when the tie vote was known at the time of trial.[9]

The state attempts to sidestep the double jeopardy claim by arguing that the jury was not "deadlocked." There is no question that the jury had taken a vote and that the vote was 6-6. There is no question that the jury had been

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[9] In Rose v. State, 425 So.2d 521 (Fla. 1982) and Patten v. State, 467 So. 2d 975 (Fla. 1985) no objections by trial counsel were noted as to the penalty phase.

repeatedly and exclusively instructed that 6-6 was a tie vote as opposed to a vote for life.

There is uncontroverted evidence that the jury reached a 6-6 vote. This is a life recommendation in Florida. There is no evidence that they would have been dissatisfied with a life recommendation had they known this was not a tie vote. The state's contention that Mr. Johnson must prove the jury was "deadlocked" in order to prevail in his double jeopardy claim is in error. He need only show that the vote was 6-6 and that the jury had been instructed that this was a tie vote. Another vote was taken only because the jury erroneously believed they had not reached a recommendation.

As to the improper jury instruction, Mr. Johnson would rely on the thorough analysis presented in his initial brief.

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.

The state does not contest that an unlicensed counselor from the jail, whose entire "evaluation" was to administer two personality tests and who never addressed mitigation, is incompetent. However, some of the state's arguments are at best difficult to understand. For instance, Mr. Cassady testified that background information is important to an adequate evaluation (M. 304). Yet the state opines, "Cassady did not need background information. He was simply to administer tests." (Answer Brief at 70). Mr. Johnson's claim is that because of Mr. Cassady's inadequate evaluation, the judge and jury never heard critical testimony regarding statutory and nonstatutory mitigation. The state's reply is "Whether Cassady's assistance was competent did not prejudice Johnson since his evaluation was not relied on in the penalty phase." (Answer Brief at 71). This is precisely the point -- Mr. Johnson was deprived of the benefit of a competent evaluation.

The state agrees that numerous mental health experts before and since the trial have concluded that Mr. Johnson suffers from severe alcohol abuse and personality disorders resulting from his extremely abusive childhood and

the deaths of his brother and mother. Because the results of the personality tests administered by Mr. Cassady were consistent with the previous diagnoses, the state argues that he did not render incompetent assistance to Mr. Johnson. It is impossible to understand how Mr. Cassady's complete failure to interview Mr. Johnson, review background material, or address sentencing issues[10] can be excused because the two tests he administered were consistent with the opinions of other experts.[11]

The law requires that a judge and jury be presented with the wealth of mitigating evidence that was never heard and that a reliable adversarial testing occur. Mental health mitigating evidence was available, and available in abundance. This evidence would have established mitigation and rebutted aggravation. It should have been heard at sentencing, and would have been, but for the deficiencies of the experts discussed herein -- deficiencies strikingly like the ones involved in Sireci and Mason.[12]

Mr. Johnson was entitled, as a matter of due process, to court-funded evaluations that were professionally reliable and valid. He was denied that right. As in Sireci, Mr. Johnson herein has presented "substantial evidence" that his mental illnesses, substance abuse and organic impairment existed at the time of the offense at issue, and that these significant deficits were not properly assessed by the mental health professional who conducted the original examination. Post-conviction relief was granted in Sireci. It is equally warranted in Mr. Johnson's case. This Court's holdings in Mason and Sireci

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[10]Although the court order specifically instructed Mr. Cassady to express an opinion on sentencing issues, he only discussed sanity and competence (R. 1209-10).

[11]The effect of Mr. Cassady's incompetence was compounded when his report was sent directly to the judge and the prosecutor. Mr. Cassady found an antisocial personality disorder which Dr. deBlig did not agree with. The state used the Cassady report to discredit Dr. deBlig's testimony in their cross-examination. The state pointed out that at the evidentiary hearing, trial counsel testified he wanted the report to remain confidential. However, the record reflects that when the judge informed counsel that the report would be provided to the court the next day, counsel made no objection (R. 416).

[12]Mason v. State, 489 So. 2d 734 (Fla. 1986); Sireci v. State, 469 So. 2d 119 (Fla. 1985).

are supported by independent analysis of this question in light of federal due process principles. The due process clause itself requires protection of this interest as a matter of fundamental fairness to the defendant and in order to assure reliability in the truth-determining process. Ake v. Oklahoma, 470 U.S. 68 (1985).

The requirement of professional adequate assistance by a mental health expert as defined in Ake and Smith v. McCormick has recently been applied by the Eleventh Circuit in Cowley v. Stricklin. Although, licensed mental health experts testified, the court found their performance was inadequate:

> The district court found that Dr. Habeeb was a "qualified," "independent psychiatrist." This may have been the case, but Dr. Habeeb did not provide the constitutionally requisite assistance to Cowley's defense. Ake holds that psychiatric assistance must be made available for the *defense*. This assistance may include conducting "a professional examination on issued relevant to the defense," presenting testimony, and assisting "in preparing the cross-examination of a State's psychiatric witnesses."
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> * * *
>
> Dr. Poythress, Cowley's mental health expert during the federal habeas proceedings, stated:
>
>> [Habeeb's] evaluation was inadequate in terms of depth and scope, and the testimony [contained] conclus[o]ry as opposed to descriptive or formulative kinds of information about Mr. Cowley.
>
> * * *
>
> In short, Dr. Habeeb provided little if any assistance to the defense. As the Ninth Circuit has recently noted, "The right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate . . . ."

Cowley v. Stricklin, 929 F.2d 640, 644 (11th Cir. 1991)(emphasis in original).

The trial court erred in Mr. Johnson's case by finding no prejudice because there were several aggravating factors. The Eleventh Circuit has rejected the state's argument that there is no prejudice when the aggravating circumstances are overwhelming:

> Certainly he would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the State's showing of aggravating circumstances.

Blake v. Kemp, 758 F.2d 523, 534 (11th Cir. 1985). In Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) the Court further discussed this issue:

> The State argues that the *Lockett* error was harmless in this case because so many aggravating factors were found (four) that no amount of non-statutory mitigating evidence could change the result in this case. No authority has been furnished for this proposition and it seems doubtful that any exists. The State's theory, in practice, would do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances. It is this requirement, of course, that is at the heart of *Lockett* and its progeny. *See Lockett v. Ohio*, 438 &.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)("in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense . . .," quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)).

863 F.2d at 710. The trial court's conclusion that the number of aggravating factors justifies a finding of no prejudice is in error.

Relief is warranted on the basis of this claim. The trial court's finding of no prejudice is in error.

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 SENTENCING.

Mr. Johnson had a long history of severe drug and alcohol addiction. He suffered from blackouts, delirium tremors and seizures. He had numerous hospitalizations. His inability to control his compulsive intake of alcohol was documented by both lay witnesses and experts. His self report was that after he was released from the 33 days in the treatment center, he drank heavily for the week preceding the offenses. Dr. Glennon testified that it was evidence of his alcoholism that Mr. Johnson conceived the idea of driving 250 miles in the unrealistic hope that by doing so he would make a few dollars if he could buy back a gun he had pawned and if he could resell it for more money (M. 165). Mr. Johnson reported consuming a case of beer (M. 166).

The state argues that the only evidence of intoxication was Mr. Johnson's self report (Answer Brief at 75). This is simply not true. 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). Officer Wedeking "smelled alcohol . . . he told me he had a couple of drinks" shortly after the crime (R. 114-115).[13] 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. 170-171). 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. deBlig 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).

Contrary to trial counsel's assertion that Mr. Johnson would have had to testify to present an intoxication defense, there was a very convincing body of evidence which could have been presented independent of Mr. Johnson. It is well known to experts[14] and lay persons alike, that an alcoholic is a most unreliable source of reliable evidence as to the degree of intoxication. See Ross v. State, 474 So. 2d 1170 (Fla. 1985) (a defendant's assertion that he was sober is not dispositive when there is contradictory evidence). The state concedes that trial counsel's strategy was to show that Mr. Johnson was intoxicated:

> The theory of defense involved demonstrating that Johnson's state of mind was clouded with intoxicants and showing a sudden passion or excitement with no premeditation (M. 274). The only real defense counsel could see was that there was no premeditated design to effect the death of either of the men. He wanted to show that Johnson went into the bar with the intent of tying the

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[13] 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, .5" (M. 182).

[14] Dr. Glennon testified that Mr. Johnson's admission that he was "a little drunk" would indicate that he was severely intoxicated.

> victims up and was mad because the fellow had charged him one hundred dollars to get his gun back when he had only pawned it for fifty. When the fellow lunged at him, Johnson did not know what else to do so he started shooting wildly. That was the only defense counsel could see that was available to Johnson in view of the circumstances.

(Answer Brief at 34). Even though trial counsel presented a strategy reason, the so-called strategy must be evaluated for reasonableness under the Strickland standard. The strategy to present no evidence regarding Mr. Johnson's intoxication was not reasonable given the fact that his defense was that Mr. Johnson's mind was "clouded with intoxicants". See Crisp v. Duckworth, 743 F.2d 580, 584 (7th Cir. 1984)(counsel should not be allowed to shield his failure to investigate simply by raising a claim of "trial strategy and tactics.")

The state also argues that defense counsel's performance was not deficient for failing to object to the standard jury instruction on robbery which failed to require specific intent since there was no reason for him to be on notice. However, in Bell v. State, 354 So. 2d 1266 (Fla. 3rd DCA 1978), the district court certified to this Court this exact issue:

> Whether specific intent (i.e. the intent to permanently deprive the owner of property) is still a requisite element of the crime of robbery as now defined by section 812.13, Florida Statutes (1975).

Bell, 354 So. 2d at 1267. Thus, Mr. Johnson's trial attorney should have been on notice that this issue was not settled and should be litigated. In Bell v. State, 394 So. 2d 979 (Fla. 1981), this Court held that specific intent was a requisite element of robbery and traced the elements back to common law. In Bell, this Court followed its rationale in State v. Allen, 362 So. 2d 10 (Fla. 1978). In Allen, this Court held that the elimination of the word "unlawful" by the legislature was not a directive to eliminate the traditional element of specific intent from the charge of larceny. In Bell, this Court held that the 1974 elimination of the word "felonious" from the charge of robbery was not intended to eliminate the traditional requirement of specific intent. Thus,

effective, prepared defense counsel would have challenged the robbery charge[15] and its defective jury instruction. Relief is warranted.[16]

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.

The state conceded defense counsel was unaware of the stippling evidence relied on in penalty phase to establish an "execution style" killing (Answer Brief at 82). Either counsel was unreasonable in not discovering this prejudicial evidence or the state improperly withheld this Brady evidence. In Waterhouse v. State, 522 So. 2d 341 (Fla. 1988), relied upon by the state, this Court was not convinced that the evidence was so defective that any amount of trial preparation was adequate to discredit its weight. Like Waterhouse, this stippling evidence could not have been adequately challenged without trial preparation, and Mr. Johnson was prejudiced by the surprise nature of the stippling evidence. Unlike Waterhouse the evidence here is not overwhelming. The jury would have found both murders to be second degree homicides absent the prejudicial surprise "ballistics" evidence. Relief is warranted.

At trial and on direct appeal, Mr. Johnson challenged the admissibility at trial of Mr. Park's testimony as an expert and the so-called ballistics test. Mr. Parks performed a test "strikingly similar" to a test ruled inadmissible by this Court in McLendon v. State, 90 Fla. 272, 105 So. 406 (1925). However, in Johnson v. State, 442 So. 2d 193, 196 (Fla. 1983), this Court overruled McLendon and held that "the issue is one of the weight to be

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[15]The robbery charge was the only underlying felony, and if discredited, would have left the state with the much harder to prove sole charge of premeditated murder. The jury may have acquitted Mr. Johnson on this charge.

[16]Even if counsel had reasonably failed to present intoxication at the guilt/innocence phase of the trial, there was no justification for failure to present the evidence at penalty.

given the evidence rather than its relevance or materiality." Johnson at 196. The Johnson court did not rule that this was not a "ballistics test" (as the court order incorrectly states (R. 1766)) or that Mr. Parks was qualified/competent to perform this test. Even though this Court ruled that McLendon was no longer the law, this Court cannot use hindsight to create a "strategic" decision. Kimmelman v. Morrison, 477 U.S. 365 (1986); Harris v. Reed, 894 F.2d 871 (7th Cir. 1990). Mr. Johnson's trial counsel was surprised by the presentation of this test performed by Mr. Parks, and regardless of whether this surprise stemmed from deficient performance or a Brady/discovery violation, Mr. Johnson was denied his constitutional right to an adversarial testing. State v. Michael. Mr. Johnson's trial counsel did not anticipate this Court's ruling on direct appeal, but instead was ineffective and unprepared in challenging the admissibility of this evidence and not ever citing or arguing McLendon. In the very least, competent counsel should have requested a continuance to depose Mr. Parks, and get an expert to either aid in impeachment of the state's evidence and/or be a witness. Mr. Johnson's trial attorney could have also requested a Richardson[17] hearing to cure the surprise of this possible discovery violation. The State listed Mr. Parks as an "evidence technician" despite knowing he performed a ballistics test. This duped the defense attorney into thinking this was a noncritical chain-of-custody witness. The State also never revealed the existence of this test. Mr. Johnson's trial attorney failed to act because of surprise and not because of any strategy decision. The decisions were based on neglect and/or the state's improper withholding of critical evidence and were not based on investigation/preparation or knowledge, and this violated Mr. Johnson's rights. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); and Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990). A bare objection based on neglect/surprise on the day of trial with no prior effort to investigate or prepare is deficient performance.

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[17] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

The Court's recent ruling on Burns v. State, No. 16 F.L.W. S389 (Fla. 1991), holds that the trial court has broad discretion as to the subjects of expert witness' testimony. However, Mr. Parks was not an expert witness and the tests he performed were not within his field of evidence technician (the title given to Mr. Parks in response to Mr. Johnson's discovery request). If the state is now arguing that Mr. Parks is more than an evidence technician, then the state violated Brady and/or Florida discovery rules. The medical examiner's testimony in Johnson was impeachable and was unrelated to Mr. Park's test. Mr. Parks' testimony and test led the jury to draw impermissible and prejudicial inferences without any indicia of reliability, unlike in Burns. Thus, Burns is distinguishable.

This evidence prejudiced both phases of Mr. Johnson's trial. The evidence went to the jury without Mr. Johnson's trial attorney adequately or effectively challenging the admissibility or even the weight of the evidence. The state used this evidence to prove both premeditation and the aggravator of cold, calculated, and premeditated. A mere objection to Mr. Parks as an expert does not cure Mr. Johnson's trial counsel's surprise as to the testimony and the evidence.

Mr. Johnson's jury did not have strong feelings one way or the other, and in fact voted for a life recommendation (6-6) only later changed to a 7-5 death recommendation. This testimony and evidence was the state's penalty phase case. Any impeachment or the exclusion of this evidence in addition to the objection to Mr. Parks as an expert would have changed Mr. Johnson's guilt-innocence trial outcome. At the least, it would have changed the most fragile of penalty phase verdicts. Prejudice occurred here, and 3.850 relief is required.

ARGUMENT VII

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.

As Justice Shaw stated in his well-reasoned dissent in Johnson v. State, 442 So. 2d 193, 197-98 (1983), justice cannot be ensured because an incomplete and inaccurate record "precludes effective appellate advocacy and careful review." Reversible error can turn on a phrase, and Mr. Johnson's life or death should not hinge on a noticeably defective transcript.

Justice Shaw's dissent mirrors the federal courts' requirement of reviewing all relevant portions of a state court trial transcript. In Hall v. Whitley, 935 F.2d 164 (9th Cir. 1991), the Hall court could not resolve the issues on appeal without "an examination of the facts elicited at trial." Hall at 165 (quoting Syncom Capital Corp v. Wade, 924 F.2d 167, 169 (9th Cir. 1991)). Similarly a complete and reliable transcript was essential for this Corut's review. Mr. Johnson's constitutional rights should not be lost because the state is unable to provide a complete and accurate trial transcript. Thus, instead of the state benefitting from its failures, the constitutional guarantees would suggest that the burden should be on the state to show that none of Mr. Johnson's constitutional rights have been violated. Where the state fails, constitutional violations should be presumed, especially since Mr. Johnson's life is at stake. Moreover reconstruction of a trial record must be a critical stage at which a defendant has a right to be present. Rule 3.850 relief is required.

ARGUMENT VIII

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

The trial court's finding that "being nice does not constitute coercion or unlawful inducement" (M. 1769) is error. Establishing a "false friends" relationship is a form of coercion. See Leyra v. Denno, 347 U.S. 556 (1954);

Spano v. People of New York, 360 U.S. 315 (1959). Mr. Johnson was improperly "tricked and cajoled" into a confession. See Anderson v. U.S., No. 90-1741 (2d Cir. April 2, 1991). The totality of the circumstances establish that Mr. Johnson's statements were involuntary and should have been suppressed.

ARGUMENT X

MR. JOHNSON WAS PREJUDICALLY 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 maintains that the State Attorney did not have good cause for the initial continuance. Mr. Johnson's trial counsel was ineffective for not realizing there was a one hundred and twenty (120) day limit and not one hundred and eighty (180) days. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991). Mr. Johnson should not be penalized because his trial counsel was tricked or unaware of Mr. Johnson's rights. Mr. Johnson's trial counsel admitted that this decision was the result of ignorance.

CONCLUSION

Based upon the foregoing and upon the discussion presented in Mr. Johnson's previous brief, this Court should grant a new trial and sentencing.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 6, 1991.

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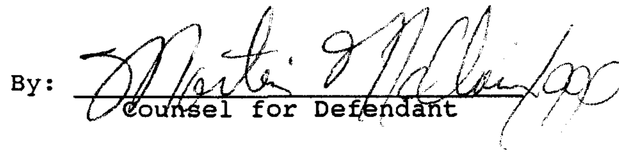
By: 
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