IN THE SUPREME COURT OF FLORIDA

NO. 85028

TERRELL M. JOHNSON,

Petitioner,

v.

HARRY K. SINGLETARY, JR.,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

Mr. Johnson was tried for murder and sentenced to death at proceedings so fraught with egregious disregard for his constitutional rights that one cannot help compare the case to an infamous Star Chamber proceeding. The outcome of Mr. Johnson's trial was stacked at virtually every turn because of the improprieties committed in sequence by virtually every player at the proceedings.

Upon being taken into custody by authorities in Oregon, Mr. Johnson's assertions of his right to remain silent were ignored by law enforcement officers who reinitiated questioning and obtained a confession from Mr. Johnson in exchange for arranging a wedding ceremony for Mr. Johnson and his girlfriend, Pat Sweeney. At the wedding, the wife of one of the interrogators served as Pat's attendee providing her with a dress to wear for the occasion. Police also invoked Mr. Johnson's fear of his "Creator" in order to obtain the confession they sought after a police psychiatrist supplied them with information about Mr. Johnson's weaknesses.

Once in Florida, the trial court who would later determine Mr. Johnson's sentence, without notice to Mr. Johnson's trial counsel, ordered an employee of the Sheriff's Department, an unlicenced psychologist, to evaluate Mr. Johnson and report directly to the prosecutor and the court.

Mr. Johnson's trial was then recorded by a court reporter whose product was called "virtually incomprehensible" by this

Court. At Mr. Johnson's trial, he was forbidden the opportunity to be present at numerous bench conferences. Mr. Johnson was placed in a silent vacuum while these bench conferences took place. He remains in that vacuum to this day because in addition to being denied the right to be present at these events, they were never recorded! In light of defense counsel's later testimony that he "remembered thinking to [himself], its a good thing this court reporter is up here, because I have no idea what these people [prospective jurors] are going to say up here" (R. 1466), the prejudice to Mr. Johnson becomes self-evident.

When this Court ordered "reconstruction" of the record, the court reporter invited some of the trial participants to a meeting to make changes to the record, changes which now no one can remember. Was everyone present who should have been at this meeting which should never have happened in the first place? No, Mr. Johnson and his then counsel of record were not present.

Mr. Johnson was then kept away from perhaps the most bizarre and crucial proceeding of all, the hearing to ultimately decide what would and would not appear in the record. At this event, the best evidence of the record's pitiful state was testified to by the judge who presided at Mr. Johnson's trial.

About bench conferences held to argue whether the confession would be admitted, the trial judge said, "I am almost confident that no new grounds other than those previously made in the Motion to Suppress and the two objections appearing here on the

record were raised at that bench conference. But I have no specific recollection" (R. 1413).

Regarding numerous other bench conferences which were never recorded or "reconstructed"[1], the trial judge testified, "[m]y own impression was that there was **not much important of a legal nature** that was discussed at these bench conferences that did not later appear in some fashion on the record ... **That's not to say there wasn't**" (R. 1410)(emphasis added). The record covered the gist of the trial "except for the unreported bench conferences, as the court reporter put it, where the challenges were exercised and the court ruled on some of them" (R. 1426-27).

The jury returned an acquittal of first degree murder as to Count II. They decided no felony murder had occurred that night at Lola's. Why then did the court let the jury consider whether Count I was committed while the defendant was engaged in a felony? Why did the prosecutor tell the jury (and the court later conclude) that Count I was cold, calculated and premeditated based on the jury's verdict of guilty of first degree murder on that Count?

On top of other failures, this Court added a final insult. Although facing execution, Mr. Johnson was told he had briefed too many issues on appeal. Mr. Johnson's remaining chances for review by this court, already stunted by the condition of the record and counsel's failure to raise all existing claims, were

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[1]The court ruled that reconstruction of the bench conferences was outside the mandate received from this Court.

cast away when this Court imposed an arbitrary page limit on Mr. Johnson's direct appeal brief.

PRELIMINARY STATEMENT

This is Mr. Johnson's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Johnson was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives.

PROCEDURAL HISTORY

On December 4, 1979, the bar owner and a customer of Lola's Tavern in Orange County were shot and killed. On January 5, 1980, Terrell Johnson and his girlfriend, Pat Sweeney, 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 Sweeney 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 and a confession was obtained.

According to the police Mr. Johnson stated that he had pawned a gun for $50 with a bar owner, Mr. Dodson. When he returned with money to retrieve the gun, Dodson demanded $100 instead of the previously agreed upon $50. Before paying the $100, Mr. Johnson, upset by the deal, asked if he could test fire the gun before paying so much to get it back. After testfiring the gun in a field across the street, Mr. Johnson returned to the bar. When he reentered the bar, a lone customer was the only other person present. At trial, each law enforcement officer testifying as to Mr. Johnson's confession admitted that at this point, Mr. Johnson had no intent to rob or kill anyone in the bar.

Once inside, still upset by the deal, Mr. Johnson held up the bar owner Dodson. During the robbery, the customer lunged at Mr. Johnson. Mr. Johnson panicked and began firing. In the death of the customer he was convicted of second degree murder, but in the death of the bar owner, he was convicted of first

degree murder for the single shot which resulted in the instantaneous death of the bar owner.

Mr. Johnson was tried for two counts of first degree murder. One of the witnesses called by the prosecutor was Harry Park. Park, a Deputy Sheriff of Orange County, not a ballistics expert, had performed "powder pattern" tests and made findings regarding the stippling which were used to support the state's contention that Dodson had been shot at close-range to the back of the head. The existence of the tests was never disclosed to defense counsel prior to trial. Had defense counsel been timely advised of this test, counsel would have been able to present ample evidence of its unreliability. The State's own crime lab had indicated the test was unreliable.

At the trial, the prosecutor argued both premeditation and felony murder theories of first degree murder as to both Counts. The jury was instructed that a reasonable doubt was a substantial doubt about which the jury had a moral certainty. The jury returned verdicts of guilty of first degree murder as to Count I and second degree murder as to Count II (R. 738-40). As to Count II -- the homicide of the patron, Mr. Johnson was acquitted of first degree murder.

The only mental health expert who was appointed pursuant to Mr. Johnson's request for the assistance of a confidential expert was a jailhouse psychologist employed by the Sheriff's Office who was not licensed to practice in Florida. This psychologist was ordered to evaluate Mr. Johnson, visited him in the jail, and

reported directly to the judge unbeknownst to Mr. Johnson's trial counsel until the day before trial. The "expert" then sent his report directly to the judge, the prosecutor, and defense counsel. The psychologist only evaluated Mr. Johnson for competency and sanity. Although he was asked to consider mitigation, he was unfamiliar with the statutory mitigating factors and did not evaluate Mr. Johnson for purposes of aiding the defense prepare for penalty phase proceedings. The evaluation consisted solely of administering two simple psychological profile tests without any review of background, circumstances of the offense or brain function testing. Thus, Mr. Johnson did not receive the assistance of a independent, confidential and competent mental health expert on the penalty phase issues.[2]

Capital penalty phase proceedings were pursued as to Count I on September 29, 1980.[3] Over objection, the sentencing jury was instructed to consider all nine statutory aggravating circumstances. The jury was read instructions regarding aggravating circumstances which have since been held unconstitutionally vague. Mr. Johnson, however, had objected that the aggravating circumstances were vague and overbroad.

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[2]During his 3.850 proceedings, Mr. Johnson challenged the adequacy of the mental health assistance he had received; however, this Court held that this issue could have and should have been raised on direct appeal.

[3]In denying Mr. Johnson's 3.850 motion, this Court noted that Mr. Johnson had "presented evidence of six nonstatutory mitigating circumstances." Johnson v. State, 593 So. 2d 206, 209 (Fla. 1992).

The prosecutor argued that the jury should consider the evidence regarding the death of Himes in its deliberations over how to sentence Mr. Johnson for the death of Dodson. Although Mr. Johnson had been acquitted of any premeditation in the death of Himes, the prosecutor argued that evidence that Mr. Johnson premeditated the death of Himes supported the finding of the "cold, calculated, and premeditated" aggravating circumstance in the death of Dodson. In closing, the prosecutor commented upon Mr. Johnson's exercise of his constitutional rights, belittled the mitigation Mr. Johnson did present and misconstrued the law and the facts before the jury. The jury returned an advisory sentence of death as to Count I on September 29, 1980 (R. 744).[4]

In sentencing Mr. Johnson to death for the death of Dodson, the trial court rejected statutory mitigation. Regarding non-statutory mitigation, the trial court enumerated the six non-statutory mitigating circumstances offered by the defense, but failed to specify what weight each was being given in its sentencing calculus. The trial court found five (5) statutory aggravating circumstances, although the jury had been instructed to consider nine (9).

Regarding the "avoiding or preventing a lawful arrest" aggravating circumstance, the court relied as had the prosecutor,

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[4]Subsequently, it was learned that the death recommendation resulted when the jury initially voted six for death and six for life, but continued to deliberate until a majority voted (7 to 5) for death.

on the evidence of premeditation as to the death of Himes.[5] The judge also found "cold, calculated, and premeditated" without any explanation at all. In applying the law of Florida to the evidence in the case, the trial court found that it was "mandated" to sentence Mr. Johnson to death. Mr. Johnson appealed from the judgment of conviction and sentence of death.

On appeal, this Court remanded the case for further proceedings when gross errors and omissions were discovered in the trial transcript. An informal reconstruction conference was held in Mr. Johnson's absence and in the absence Mr. Johnson's newly appointed appellate counsel. At that conference were the court reporter, the trial judge, the prosecutor and the trial defense counsel who at the time no longer represented Mr. Johnson. At a subsequent more formal proceeding,[6] none of those present at the earlier proceedings could remember what had been discussed although the court reporter had altered the transcript in some way in light of the discussion. At the formal proceeding, the trial judge, the prosecutor, and Mr. Johnson's trial counsel were all uncertain about what objections the defense had raised during the trial. However, Mr. Johnson was not permitted to appear at any post-trial proceedings regarding the record including the informal record reconstruction

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[5]Of course, the jury specifically rejected that evidence when it acquitted Mr. Johnson of first degree murder as to Himes' death.

[6]This formal proceeding was conducted without the presence of Mr. Johnson.

conferences and the evidentiary hearings held concerning the reconstruction.

The trial judge was recused from presiding over the hearings concerning the accuracy of the record because he was to be a witness during those proceedings. The trial judge, once recused and named as a witness, nevertheless contacted the judge presiding over the hearing to express his opinion about how the hearing should proceed and how the court should rule.

The "reconstructed" record was resubmitted as the record on appeal over the objection of Mr. Johnson's appellate counsel and despite its incompleteness[7] and the remaining uncertainties about its accuracy.

On direct appeal, this Court then refused to accept Mr. Johnson's ninety-four (94) page initial brief and ordered him to submit a brief of seventy (70) pages or less. Mr. Johnson's appellate counsel complied with this Court's order although to do so he was forced to delete constitutional claims and arguments made in Mr. Johnson's behalf. Mr. Johnson's convictions and death sentence were affirmed on November 23, 1983, despite Justice Shaw's vigorous dissent. Johnson v. State, 442 So. 2d 193 (Fla. 1983).

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[7]For example, at least 28 bench conferences held to question prospective jurors and hear challenges by counsel against jurors were never recorded. The judge and counsel were under the impression that their bench conferences were being recorded as they conducted voir dire; Mr. Johnson was not permitted to attend these bench conferences which subsequently did not appear in the record.

Subsequently, Mr. Johnson sought post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure at a time when Chapter 119 materials were not available. The trial court conducted an evidentiary hearing on December 22, 1986, and issued an order denying relief on June 12, 1989 (PC-R. 1761-70).

Mr. Johnson, prior to the time of the offense, had been treated by a psychiatrist named Dr. deBlij. Dr. DeBlij was called during the penalty phase of Mr. Johnson's trial to testify regarding his history of psychiatric treatment, but had not been asked to evaluate Mr. Johnson at any time after the offense and did not testify about statutory mitigation. At the 3.850 hearing Dr. deBlij stated that she would have testified that Mr. Johnson was under the influence of extreme mental disturbance at the time of the offense and that his capacity to appreciate the criminality of his conduct or to conform it to law was substantially impaired. Substantial testimony regarding the presence of brain damage, the long term effects of substance abuse, the effects of withdrawal from alcohol, and other mental disabilities was also presented at the 3.850 hearing.

Finally, evidence was presented that the prosecution suppressed exculpatory evidence at trial. The State knew that the results of the paper "ballistics" test which had been presented at trial were unreliable. Had the State timely revealed the results of the "ballistics" test, Mr. Johnson would have been able to show the test was unreliable and did not, as

the State argued, establish that Mr. Johnson's statements denying the existence of premeditation had been untruthful. Subsequently, Mr. Johnson's appeal to the Florida Supreme Court was denied. Johnson v. State, 593 So. 2d 206 (Fla. 1992).

On May 5, 1992 Mr. Johnson filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. Subsequently, the District Court ordered Petitioner to present his claims to this Court on a petition for a writ of habeas corpus. Mr. Johnson's rehearing request was denied. As a result, Mr. Johnson has prepared and filed this petition seeking habeas corpus relief.

Citations 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 "PC-R. ___." All other references will be self-explanatory or otherwise explained herein.

This is Mr. Johnson's first and only state petition for habeas corpus relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Johnson's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Johnson's direct appeal. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Johnson to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's

exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Johnson's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Johnson asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BY THIS COURT'S RULING THAT HIS DIRECT APPEAL BRIEF NOT EXCEED SEVENTY (70) PAGES. THIS RULING VIOLATED MR. JOHNSON'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY INTERFERING WITH THE EFFECTIVE ASSISTANCE OF APPELLATE AND POST-CONVICTION COUNSEL. MR. JOHNSON WAS IN EXCESS DENIED HIS RIGHT TO APPEAL THOSE MATTERS THAT DID NOT FIT WITHIN THE LIMITED BRIEF.

Mr. Johnson was prejudiced by this Court's interference with his right to effective assistance of appellate counsel.[8] Mr. Johnson attempted to file a ninety-four (94) page initial brief

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[8]Counsel was also handicapped by having to work with a transcript that was at best an approximation of what occurred at trial. See Claim VII. The trial judge, prosecutor, and defense attorney all agreed that there were numerous bench conferences and defense objections which were missing from the record.

on direct appeal. This Court refused to accept Mr. Johnson's initial brief and indicated it would only accept an initial brief that was seventy (70) pages or less.[9] Mr. Johnson was forced to either drop claims from his brief altogether or abbreviate claims to abide by this Court's ruling that he delete twenty four (24) pages from his initial brief.[10] Mr. Johnson was sentenced to death and yet was denied effective assistance of appellate counsel as a result of this Court's interference with the presentation of his constitutional claims.

This Court has stated that even in capital cases, appellate counsel should choose to brief only the strongest issues, Cave v. State, 476 So. 2d 180 (Fla. 1985), yet national standards for competent performance of capital appellate counsel duties are violated if less than all arguable issues for reversal are not sought. Both the American Bar Association (ABA) and National Legal Aid and Defender Association (NLADA) agree that counsel should seek to present all arguable meritorious issues. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines), Guideline 11.9.2.D (1989); Standards for the Appointment and Performance of Counsel in Death Penalty Cases (NLADA Standards), Standard 11.9.2(d) (NLADA 1989).

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[9]Mr. Johnson recognizes that this Court conducts an independent review in all capital appeals in order to consider whether any reversible error is present. LeDuc v. State, 365 So. 2d 149 (Fla. 1978); Gibson v. State, 351 So. 2d 148 (Fla. 1977). However, this Court's independent review is not an adequate substitute for the guiding hand of a zealous advocate.

[10]See Claims II and III.

When less than all arguable issues for reversal are sought, appellate counsel has not effectively served its dual roles of persuading the direct appeal court that prejudicial error occurred and preserving all arguable issues for review by other courts.

> Traditional theories of appellate practice notwithstanding, appellate counsel in a capital case should not raise only the best of several potential issues. [footnote omitted.] Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if a case is lost, counsel (and the courts) should not let any possible ground for relief go unexplored or unexploited.

ABA Guidelines, Guideline 11.9.2.D Commentary; NLADA Standards, Standard 11.9.2(d)(NLADA 1989).

If counsel believes that briefing many issues is in the best interest of the client as was true in Mr. Johnson's case, then when this Court ruled to limit the number of issues which could effectively be raised, this Court interfered with the Mr. Johnson's right to effective assistance of appellate counsel. Any state interest in the appellate court having short briefs must give way to ensure the right to counsel. Geders v. United States, 425 U.S. 80 (1976). When the professional judgment of counsel is to raise all arguable issues, then impingement of that judgment through the application of a page limit rule which requires counsel to forego factual and legal arguments is an unconstitutional interference with the right to effective appellate counsel.

This Court routinely accepts initial briefs in capital cases of one hundred (100) pages and longer and in fact, has an unwritten rule that initial briefs in capital direct appeals may be up to one hundred (100) pages without the formality of a motion for excess pages. See Affidavit of Billy H. Nolas; Affidavit of M. Elizabeth Wells; Affidavit of Gail Anderson, attached as Appendix A. In post-conviction cases this unwritten rule allows the filing of initial briefs of up to one hundred (100) pages without the formality of a motion for excess pages, where an evidentiary hearing was held in circuit court.[11]

The prejudice to Mr. Johnson resulting from this Court's ruling that his brief be limited to 70 pages is clearly evident. Appellate counsel was forced to delete several passages. For example, the following passages were deleted:

> The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and thus detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.
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> The Florida capital sentencing scheme fails to provide notice to the capital defendant of the aggravating circumstances upon which the State intends to rely, and thus denies due process of law. See Cole v. Arkansas, 333 U.S. 196, 92 L.Ed 644, 68 S.Ct. 514 (1948). The state's statement of

[11]Seventy-five pages are allowed in post-conviction proceedings where no evidentiary hearing was allowed.

aggravating circumstances ordered by the court in this case noticing the defense on all aggravating circumstances in the statute was not made in good faith because the state conceded in its closing argument that some aggravating circumstances did not apply. (R497, 417, 717)

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975) supra, and does not define "sufficient aggravating circumstances." The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 466 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner.

Execution by electrocution is a cruel and unusual punishment.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denied the right to fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968). The trial court in this regard erred when it failed to grant Appellant's motion to preclude challenges for cause. (R715).

The Elledge Rule (Elledge v. State, 346 So.2d 998 (Fla. 1977), if interpreted to automatically hold as harmless error any improperly found aggravating factor in the

absence of a finding by the trial court of a mitigating factor, violates the 8th and 14th Amendments to the United States Constitution. See Initial Brief of Appellant 45-59, Elledge v. State, Case Number 52,272, served June 2, 1980.

The Amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute in violation of the 8th and 14th Amendments to the United States Constitution because it results in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating. See Initial Brief of Appellant, Gilvin v. State, Fla. S.Ct. Case Number 50,743, served April 13, 1981.

It is a denial of equal protection to allow a finding of an aggravating circumstance when the defendant committed a capital felony while on parole and legally not incarcerated, but to prohibit a finding of an aggravating circumstance in the same circumstances for a defendant on probation.

The Florida Supreme Court does not independently weigh and re-examine aggravating and mitigating circumstances.

The trial court's defining "reasonable doubt" as "a doubt for which there is a reason" denies due process by shifting the burden of proof to the defendant to prove "a reason." (R308)

This Court's order that Mr. Johnson submit a brief of only 70 pages required his counsel to forego his proper function to persuasively brief the issues presented, and to brief all issues he determined warranted presentation.[12]

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[12]Again, Mr. Johnson recognizes that this Court conducts an independent review in all capital appeals for any error. LeDuc v. State, 365 So. 2d 149 (Fla. 1978); Gibson v. State, 351 So. 2d (continued...)

This Court has barred review in post-conviction of any claims, including constitutional ones, which could have been raised direct appeal but were not. Presumably, this is because this Court nevertheless conducted its independent review and determined no reversible error was present. LeDuc; Gibson. Despite this Court's obligation to review the record in a capital appeal for any error, some briefing of an issue is required to fully apprise this Court of the nature of the error and the prejudice which resulted. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). In Wilson, this Court specifically found that its own independent review of the record was not a complete substitute for zealous advocacy. This Court's ruling limiting the number of pages Mr. Johnson could file in his brief on direct appeal was an interference with the effective assistance of his appellate and post-conviction counsel. This Court cannot legitimately require counsel to fully brief issues and then limit the brief's size.[13] Certainly application of such a page limit in Mr. Johnson's case was arbitrary and capricious. It violated Eighth Amendment jurisprudence and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

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[12](...continued)
948 (Fla. 1977). However, that independent review is insufficient to protect Mr. Johnson's rights without the guiding hand of a zealous advocate.

[13]Given this court's numerous declarations that it considered the entire record for error, records which in some cases contain thousands of pages, the review of additional pages of briefing to the court's work constitutes a negligible addition. Additional pages of briefing aids this court exercise its duties by highlighting the instances of error.

Furthermore, inadequate appellate review in a capital case causes the sentencing to be arbitrary in violation of the prohibition against cruel and unusual punishment. A complete review of all claims of error in appeals from a death sentence must be performed or the appellate court cannot make a reliable individualized determination. Parker v. Dugger, 498 U.S. 308 (1991); Clemons v. Mississippi, 494 U.S. 738 (1990). Whatever interest in judicial economy this Court has in short briefs, that interest is insignificant in contrast with this Court's duty to provide "meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dugger. This Court cannot apply different rules to particular capital appellants. See Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987).

This Court should consider on the merits the issues that Mr. Johnson raised in his original initial brief on direct appeal. Further, this Court should allow supplemental briefing on those issues that were deleted or partially deleted from the original initial brief.

This Court's ruling limiting the pages of Mr. Johnson's initial brief on direct appeal constituted a violation of Mr. Johnson's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The application of such a page limitation to Mr. Johnson can only be described as arbitrary. Mr. Johnson is entitled to habeas relief.

CLAIM II

MR. JOHNSON'S DEATH SENTENCE WAS THE RESULT OF A WEIGHING PROCESS WHICH INCLUDED CONSTITUTIONALLY INVALID AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS RIGHT TO A RELIABLE CAPITAL SENTENCE. MR. JOHNSON'S SENTENCING JURY WAS GIVEN INVALID INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES WHICH FAILED TO GUIDE AND CHANNEL ITS SENTENCING DISCRETION CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. JOHNSON WAS EITHER DENIED EFFECTIVE ASSISTANCE OF APPELLATE AND POST-CONVICTION COUNSEL BY THIS COURT'S RULING LIMITING HIS INITIAL BRIEF ON DIRECT APPEAL TO 70 PAGES FORCING HIM TO DELETE ARGUMENT ON THIS ISSUE OR APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE.

The United States Supreme Court has held that in a weighing state aggravating circumstances which are vague and overbroad on their face may be adequately narrowed when applied if the sentencing body (or bodies) received and apply an adequate narrowing construction. At trial, Mr. Johnson argued that the statutorily defined aggravators were facially vague and overbroad and failed to give the judge and the jury adequate guidance. Mr. Johnson's motion was well founded and erroneously denied.

A. "INVALID" AGGRAVATING CIRCUMSTANCES WERE PRESENTED TO MR. JOHNSON'S JURY.

At the penalty phase of Mr. Johnson's trial over objection, the jury was instructed to consider all nine (9) aggravating circumstances.[14] The jury was read the following:

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[14]Certainly, the transcript of Mr. Johnson's trial is suspect. According to the judge, the prosecutor, the defense attorney and the court reporter, the transcript is at best an approximation. See Claim VII.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

A, that the crime for which the Defendant is to be sentenced was committed while the Defendant was under sentence of imprisonment;

B, that at the time of the crime for which he is to be sentenced the Defendant had previously been convicted of another capital offense or of a felony involving the use or threat of violence to some person. Attempted robbery, robbery, attempted murder, and second degree murder are felonies involving the use or threat of violence to some person.

The fact that you have found the Defendant guilty of first degree murder is not in itself an aggravating circumstance. Further, conviction of the crime of burglary is not an aggravating circumstance to be considered in determining the penalty to be imposed upon the Defendant,but a conviction of that crime may be considered by the jury in determining whether or not the Defendant has a significant history of prior criminal activity.

C, that the Defendant in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons. The risk of death must be to many persons, not just one or two;

D, that the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

E, that the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody. This would include murder to eliminate a witness and thereby avoid lawful arrest; however, the mere fact of death is

not enough where the victim is not a police officer; the evidence must prove beyond a reasonable doubt that the Defendant intended thereby to avoid detection and arrest.

F, that the crime for which the Defendant is to be sentenced was committed for pecuniary or monetary gain. However, if you find that the murder was perpetrated during the commission of a robbery these two circumstances must be combined and treated as one single circumstance.

G, that the crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

H, that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others, pitiless. So to find that this circumstance exists you must find that the murder was accompanied by such additional acts as would set it apart from the norm; it must be a consciousless or pitiless crime which was unnecessarily torturous to the victim.

I, that the crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you it will be your duty to recommend a sentence of life imprisonment.

Should you find sufficient of these aggravating circumstances to exist, then it will be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

(R. 522-525).

On direct appeal Mr Johnson challenged the constitutionality, on its face and as applied, of numerous aspects of the Florida capital sentencing statute including the vagueness of the statutory aggravating circumstances and jury instructions regarding them. Johnson's initial brief on Direct Appeal read as follows:

Claim X

> THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED
>
> The following issues are presented in summary form because it is recognized that this Court has specifically or impliedly rejected each of the challenges to the constitutionality of the Florida death sentencing statute. The Florida capital sentencing scheme denies due process and constitutes cruel and unusual punishment on its face and as applied because: ... (2) Aggravating circumstances ... are not adequately defined....(6) Aggravating circumstance "i: results in death being automatic unless the jury finds some mitigating circumstance out of an infinite array of possibilities.... (7) This Court does not independently weigh the aggravating and mitigating circumstances. (8) The aggravating circumstances have been applied in a vague and inconsistent manner.... (emphasis added).

(Appellant's Initial Brief on Direct Appeal at 68).[15] Mr. Johnson then argued that the "[a]ggravating circumstances ... were not adequately defined" and that "cold, calculated and premeditated" had been applied overbroadly since neither the

[15]This was clearly a sufficient presentation of this claim. Trevino v. Texas, 112 S. Ct. 1547 (1992).

judge nor the jury believed more than simple premeditation was necessary to establish that aggravating circumstance.

This Court considered these claims and rejected them on the merits of the claim stating, "we find no support for appellant's other points on appeal and see nothing to be gained by discussing them." Johnson v. State, 442 So. 2d 193, 197 (Fla. 1983).

Another brief had been filed in Mr. Johnson's behalf which this Court struck in denial of Appellant's Motion for Leave to File Enlarged Brief (Johnson v. State, No. 59,811 (January 18, 1983)). Appellate counsel was forced to shorten presentation of this issue by deleting the following:

> ...The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and thus detailed brief would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.
>
> * * *
>
> The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980).
>
> The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner.

(Appellant's Rejected Initial Brief on Direct Appeal (served December 20, 1982) at 92-93) (emphasis added).

Appellate counsel further argued that the "cold, calculated and premeditated" aggravating circumstance was so overbroad and

vague that it resulted in a defendant's "automatic" eligibility for the death penalty:

> The Amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5) (i) (cold and calculated) renders the statute in violation of the 8th and 14th Amendments to the United States Constitution because it results in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

(Appellant's Rejected Initial Brief on Direct Appeal (served December 20, 1982) at 94) (emphasis added).[16]

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[16]In Porter v. State, 564 So. 2d 1060 (Fla. 1990), this Court fully adopted the very argument Mr. Johnson had sought to present:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder. Therefore, section 921.141(5)(i) must apply to murders more coldblooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder.

Porter, 564 So. 2d at 1063-64 (footnotes omitted). However, in Mr. Johnson's case the prosecutor was able to argue to the jury that simple premeditation, which had been found at the guilt phase, required the jury to conclude this aggravator was present. In finding this aggravator, the judge apparently believed this was the law since he found no additional facts were necessary to justify his conclusion that this aggravator was present.

In the initial brief accepted by this Court, Mr. Johnson's claim that the aggravators were vague and overbroad was shortened and the citation to Godfrey was deleted, but counsel did not abandon the claim. The state and the Court were obviously on notice of the issue raised because the state's answer brief argued against it (Answer Brief of Appellee at 43).

Mr. Johnson objected at trial to Florida's vague and overbroad aggravating circumstances in his Motion to Declare Florida Statutes Section 921.141 Unconstitutional (R. 687-692):

> 1. Florida Statutes §921.141 is unconstitutional on its face in that it is violative of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I Sections 9 and 17 of the Constitution of the State of Florida. In support of this allegation the Accused would state:
>
> A) The aggravating and mitigating circumstances as enumerated in Florida Statute §921.141 are impermissibly vague and overbroad.

(R. 687) (emphasis added).

In addition, Mr. Johnson filed a Motion to Delete Aggravating Circumstances in another attempt not to have the invalid unconstitutionally vague and overbroad aggravators aggravating circumstance read to the jury. Mr. Johnson maintained:

> 1. That the jury should not be permitted to hear, nor consider, those aggravating circumstances which, as a matter law, do not apply in this case.
>
> 2. That, upon hearing such circumstances, the jury may give unnecessary weight to such circumstances and return an

advisory sentence of death when they would not have done so had the inappropriate aggravating circumstances not been read to them.

3. That the aggravating circumstances which, as a matter of law, do not apply in this case, are as follows:

(c) The defendant knowingly created a great risk of death to many persons. [citations omitted].

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest of effecting an escape from custody. [citations omitted].

(f) The capital felony was committed for pecuniary gain. [citations omitted].

(h) The capital felony was especially heinous, atrocious or cruel. An instanteous death by gunshot does not qualify. [citations omitted].

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

(R. 748-49) (emphasis added). This motion was denied. The prosecutor was able to argue to the jury that the murder was heinous, atrocious or cruel even though the judge subsequently agreed with Mr. Johnson that as a matter of law this aggravator did not apply.

Despite the fact that the penalty phase charge conference is not a part of the record, (R. 475), defense counsel persisted in his objections to the instructions. After the charge conference, the following exchange occurred:

> MR. JONES: That's correct, Your Honor. I can't recall, did I put my objections on the record in my Motion In Limine or is that automatically on the record?
>
> THE COURT: That was on the record and the Court's ruling on that was that it was granted in part and denied in part. And we covered that thoroughly. And the Court instructed the state attorney what matters he could not comment upon. The Court denied motion to exclude certain aggravating circumstances with leave to renew it. It has not yet been renewed. Do you want to renew it at this time?
>
> MR. JONES: Yes, Your Honor...

(R. 476) (emphasis added).

When the court read the instructions to the jury, defense counsel again objected.[17] Defense counsel again renewed its objection to the unconstitutional sentencing instructions in a Motion For New Sentencing Proceedings maintaining "[t]hat the Trial Court erred in denying portions of the Motion in Limine which was filed in this cause" (R. 801). Further, the defense's Statement of Judicial Acts to be Reviewed cited to the judge's denial of Mr. Johnson's motion in limine regarding the penalty

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[17]When gross inaccuracies were discovered in the transcript of Mr. Johnson's trial, the matter was remanded and a reconstruction hearing was held without the presence of Mr. Johnson or his then counsel. At the reconstruction hearing, it was recognized that trial counsel had made many objections at side bars which were apparently not reported by the court reporter due to her personal difficulties which also resulted in numerous other errors. Neither the judge, the prosecutor, nor trial counsel, could be sure that Mr. Johnson's numerous objections and efforts to preserve claims of error were included in the correct record. Mr. Johnson was not permitted to testify as to his recollections of what objections had been made and his direction to trial counsel to preserve all issues for appeal; including constitutional challenges to aggravating circumstances.

phase, the denial of his objections to the jury instructions as given, his finding that the death penalty statute was constitutional, and his denial of the motion for new trial (R. 820).

1. "Cold, calculated and premeditated" aggravating circumstance.

Mr. Johnson's sentencing jury was given the Florida standard instruction for the cold, calculated and premeditated aggravating circumstance which this Court has ruled is unconstitutionally vague. Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994). Mr. Johnson objected in his Motion in Limine that this aggravator was overbroad. This motion was denied, the judge ruled that the language contained in the statute and in the instruction was not vague or overbroad. Mr. Johnson objected to the jury instruction because more than simple premeditation was necessary and that it was not shown. The objection was overruled; it is clear from the record the judge believed that simple premeditation established this aggravator's existence. The prosecutor argued to the jury that its verdict of guilty required the jury to find this aggravator present. This was a clear violation of Florida law. See Porter, 564 So. 2d at 1063-64.

> A vagueness challenge to an aggravating circumstance will be upheld if the provision fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 [omission] (1972). Maynard, 486 U.S. at 361-62. The Supreme Court has found

> HAC-type instructions unconstitutionally vague because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" Godfrey v. Georgia, 446 U.S. 420 [omission] (1980); see also Maynard, 486 U.S. at 364 ("an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous'").
>
> The premeditated component of Florida's standard CCP instruction poses the same problem. Where a defendant is convicted of premeditated first-degree murder, the jury has already been instructed that:
>
> > "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> Fla. Std. Jury Instr. (Crim.) 63. Without the benefit of an explanation that some "heightened" form of premeditation is required to find CCP, a jury may automatically characterize every premeditated murder as involving the CCP aggravator (emphasis added).

Jackson v. State, 19 Fla. L. Weekly at S216.

Mr. Johnson's jury was read the following instruction:

> the crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R. 525). Under Porter and Jackson, Mr. Johnson was entitled to relief.

Mr. Johnson challenged this jury instruction on direct appeal:

> To find either circumstance [cold, calculated or premeditated, and elimination of a witness] violates the 8th and 14th amendments to the United States Constitution because such a finding gives the Florida death penalty statute such a broad and vague construction as to violate the requirement that sentencing decisions [by the judge and jury] be guided by clear, objective, rationally reviewable standards. Proffitt v. Wainwright, 685 F.2d 227 (11th Cir. 1982).

(Appellant's Initial Brief at 51) and asserted that the application of the cold, calculated and premeditated aggravating circumstance to his case constituted an "automatic" aggravator:

> (2) Aggravating circumstances ... are not adequately defined.... [and] (6) Aggravating circumstance "i": results in death being automatic unless the jury finds some mitigating circumstance out of an infinite array of possibilities....

(emphasis added)(Appellant's Initial Brief on Direct Appeal at 68).

This Court replied, "we find no support for appellant's other points on appeal and see nothing to be gained by discussing them." Johnson v. State, 442 So. 2d 193, 197 (Fla. 1983).

This Court has attempted to limit this overbroad aggravator by holding that it is reserved for murders "characterized as execution or contract murders or those involving the elimination of witnesses." Green v. State, 583 So. 2d 647, 652 (Fla. 1991); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). In Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), the Florida Supreme Court held that "calculated" consists "of a careful plan or prearranged design." Moreover, "premeditation" requires a heightened form of premeditation: the

simple form of premeditation sufficient to support a conviction of murder is insufficient to support this aggravator; greater evidence is required. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988); Holton v. State, 573 So. 2d 284, 292 (Fla. 1991). However, these limitations designed to narrow and limit the scope of this aggravator were not provided to Mr. Johnson's jury. Thus, the jury in Mr. Johnson's case had unbridled and uncontrolled discretion to apply the death penalty. The necessary limitations and definitions were not applied. This violated Maynard v. Cartwright, 108 S. Ct. 1853 and Stringer.

As the record reflects, the jury was never given, and the sentencing court and the Florida Supreme Court on direct appeal never applied a limiting construction on the cold, calculated and premeditated aggravating circumstance. The prosecutor argued that premeditation as defined at the guilt phase was sufficient. The judge apparently found this aggravator because he believed simple premeditation established its presence. However, as explained in Stringer v. Black, 112 S. Ct. 1130, 1139 (1992), a State "cannot use [as an aggravator] factors which as a practical matter fail to guide the sentencer's discretion." Simply repeating as an aggravator an element of the offense constitutes an illusory aggravator which violates the Eighth Amendment. Stringer at 1139. This aggravator was vague and overbroad as applied; habeas relief must issue.

2. "Heinous, atrocious, or cruel" aggravating circumstance.

Regarding the heinous, atrocious, or cruel aggravating circumstance, Mr. Johnson's sentencing jury was given the following instruction over objection:

> H, that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others, pitiless. So to find that this circumstance exists you must find that the murder was accompanied by such additional acts as would set it apart from the norm; it must be a consciousless or pitiless crime which was unnecessarily torturous to the victim.

Since this aggravator did not apply as a matter of law, it was error for this aggravator over objection to be submitted for the jury's consideration. Omelus v. State, 584 So. 2d 563 (Fla. 1991)(error to instruct the jury on an aggravator which as a matter of law did not apply). The prosecutor argued at length that the jury should find this aggravator present and place it on the death side of the scale (R. 506). Yet, the trial judge ruled that as a matter of law this aggravator was not present and did not apply to Mr. Johnson's case (R. 806). Since the "heinousness" aggravating factor did not apply as a matter of law, it was Eighth Amendment error to instruct the jury on it. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993).[18] The jury's

[18]In Omelus and Archer, this Court ordered new penalty phase proceedings where juries were instructed upon heinous, atrocious (continued...)

consideration of this invalid aggravator in its sentencing calculus deprived Mr. Johnson of a meaningful individualized sentencing.

Moreover, the instruction read to Mr. Johnson's jury was unconstitutionally vague. This aggravator only applies where evidence shows beyond a reasonable doubt that the defendant knew or intended the murder to be especially heinous, atrocious or cruel. Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)(this "aggravating factor cannot be applied vicariously"). Here, the jury did not receive an instruction regarding the limiting construction of this aggravator.

Recently in Stein v. State, 19 Fla. L. Weekly 532, 534 (Fla. 1994), this Court struck a finding of heinous, atrocious or cruel because "no evidence was presented to demonstrate any intent on Steins' part to inflict a high degree of pain or to otherwise torture the victims." Thus, the narrowing construction of heinous, atrocious or cruel requires that the defendant intended "to inflict a high degree of pain or to otherwise torture." This narrowing construction can be found repeatedly in this Court's opinions. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993)("absent evidence that [the defendant] intended to cause the victims unnecessary and prolonged suffering we find that the trial judge erroneously found that the murders were heinous, atrocious or cruel"); Santos v. State, 591 So. 2d 160, 163 (Fla.

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[18](...continued)
or cruel over objection and where the aggravator did not apply as a matter of law.

1991)("A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another"); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)("where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously"); Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990)("The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evidence extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another"); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989)(victim died from "manual strangulation;" however "we decline to apply this aggravating factor in a situation in which the victim who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of this capital felony 'to set the crime apart from the norm of capital felonies'"); Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988)(The victim was shot three times as he tried to flee and found himself trapped at the back door, but "[t]he[se] facts [did] not set this murder 'apart from the norm of capital felonies'"); Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979)(Victim shot several times in front of his children. Additional shots fired as the victim tried to flee in an effort to save himself. But, "[i]t is apparent all killings are heinous. However, this aggravator concerns homicides which are

unnecessarily torturous to the victims"). See also Scull v. State, 533 So. 2d 1137 (Fla. 1988)(heinous, atrocious or cruel was not established as to victim who died from blow to head by a baseball bat).

Not once did the state at trial argue that Mr. Johnson desired to inflict a high degree of pain, or intended to cause unnecessary torture to the victim (R. 505). Never did the state indicate to the jury that this narrowing construction existed and was constitutionally required. To Mr. Johnson's prejudice, the state ignored its obligation to show that Mr. Johnson intended "...to inflict a high degree of pain with utter indifference, or even enjoyment of, the suffering of [Mr. Dodson]." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). The prosecutor's argument encouraged the jury to apply the aggravator in an overbroad fashion.

In Stein v. State, 19 Fla. L. Weekly S32, S34 (Fla. 1994), this Court noted

> [N]o evidence was presented to demonstrate any intent on Stein's part to inflict a high degree of pain or to otherwise torture the victims. We have previously held that multiple gunshots administered within minutes do not satisfy the requirements for the aggravating factor of heinous, atrocious, and cruel. [citations omitted] 'The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that [the defendant] intended to cause the victim unnecessary and prolonged suffering.' Because we find no evidence in this record that Stein intended to cause the victims unnecessary and prolonged suffering, we find that the trial judge erroneously

found that the murders were heinous, atrocious, or cruel.

Id.

This Court has produced considerable case law regarding the import of instructional error regarding the mitigation a jury may consider and balance against aggravation. In Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988), a new sentencing was ordered because the jury had not received an instruction explaining that mitigation was not limited to the statutory list. The error was reversible, even though at a judge resentencing, the judge had known that mitigation was not limited to the statutory list. Because of the weight attached to the jury's sentencing recommendation in Florida, the Court found that it could not "conclude beyond a reasonable doubt that an override would have been authorized." In other words, there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override. See Tedder v. State, 322 So. 2d 908 (Fla. 1975); Omelus v. State. In Mr. Johnson's case the jury received no guidance as to the "elements" of this aggravating circumstance against which mitigation was to be balanced. Moreover, as this Court previously noted Mr. Johnson presented six nonstatutory mitigating circumstances to the sentencing jury. Johnson v. State, 593 So. 2d at 209. A Florida jury's pivotal role in capital sentencing process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Johnson's

sentencing jury the proper "channeling and limiting" instructions violated the Eighth Amendment. Maynard v. Cartwright.

Mr. Johnson challenged the definition of this aggravator given to his jury as a violation of the Eighth Amendment (Appellant's Initial Brief, p.68). This Court considered the claim but found no merit, Johnson v. State, 442 So. 2d 193 (Fla. 1983), however, the instructions on this aggravator "fail[ed] adequately to inform [Mr. Johnson's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858. Accordingly, there was an extra thumb on the death side of the scale. Stringer. An Eighth Amendment violation occurred and habeas relief must issue.

3. "Committed while engaged" in a robbery aggravating circumstance.

Mr. Johnson's jury was also read the following instruction:

> [T]hat the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

(R. 523).

On direct appeal, Mr. Johnson challenged the aggravating circumstances as applied by sentencers in an unconstitutionally vague manner (Appellant's brief p.68). This claim was found not to have merit. Johnson v. State, 442 So. 2d 193 (Fla. 1983). However, under Stringer, habeas relief is warranted.

Mr. Johnson was charged with first-degree murder: murder "from a premeditated design to effect the death of" the victim in

violation of Florida Statute 782.04. An indictment such as this charged both premeditated and felony murder. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). Felony-murder involves, by necessity, a finding of the statutory aggravating circumstance that the killing was committed in the course of a felony. Fla. State 921.141 (5)(d). Under the particulars of Florida's statute the Eighth Amendment is violated because an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). "[L]imiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). Mr. Johnson's sentencing jury was instructed that it could return a death sentence based in part upon its finding of guilt on the charge of first degree (felony) murder because the underlying felony was an aggravating circumstance which justified the death sentence.[19]

In Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991), the Wyoming Supreme Court found that the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance violates the Eighth Amendment:

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[19]Moreover, since the jury acquitted Mr. Johnson of first degree murder as to the patron, the jury must have acquitted Mr. Johnson of felony/murder. See Claim XV.

In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.

Additionally, we find a further Furman/Gregg problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.

When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at least one "aggravating circumstance" be found for a death sentence becomes meaningless. Black's Law Dictionary, 60 (5th ed. 1979) defines "aggravation" as follows:

> "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." (emphasis added)

> As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails.

820 P.2d at 89-90.

Wyoming, like Florida, provides that narrowing occur at the penalty phase. See Stringer v. Black. As the Engberg court held:

> [W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

820 P.2d at 92.

This error cannot be harmless in this case.

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137.

According to the Florida Supreme Court the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case.

Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty"). Thompson v. State, 19 Fla. L. Weekly S655 (Fla. 1994). However, in Mr. Johnson's case, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweighed the aggravating circumstance. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. In Maynard v. Cartwright, 486 U.S. at 461-62, the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Dugger, 481 U.S. 393 (1987), and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the Eighth Amendment.

4. "Avoiding arrest" aggravating circumstance.

Regarding the "avoiding arrest" aggravating circumstance Mr. Johnson's jury was read the following instruction:

> [T]hat the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.

> This would include murder to eliminate a witness and thereby avoid lawful arrest; however, the mere fact of death is not enough where the victim is not a police officer; the evidence must prove beyond a reasonable doubt that the Defendant intended thereby to avoid detection and arrest.

The trial court's instructions to the jury did not conform with Fla. Stat. sec. 921.141(5)(e), or this Court's settled precedents. See, e.g., Dailey v. State, 594 So. 2d 254, (Fla. 1991), Corrected Opinion; Riley v. State, 366 So. 2d 19, 22 (Fla. 1978); Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979); Herzog v. State, 439 So. 2d 1372, 1379 (Fla. 1983); cf. Blair v. State, 406 So. 2d 1106, 1109 (Fla. 1981).

In Dailey, this Court, in vacating a death sentence, held that where the facts fail to establish that the "dominant motive for the homicide was the elimination of witnesses," the finding of the aggravating circumstance of avoiding arrest is improper. Id. White v. State, 403 So. 2d 331, 338 (Fla. 1981). Mr. Johnson's jury was not advised of this requirement. The failure to instruct the jury on the elements of this aggravating factor violated the Eighth Amendment.

Mr. Johnson challenged this jury instruction on direct appeal:

> The evidence does not establish as required ... that appellant's "dominant or only motive" was the elimination of witnesses.... The trial court and jury tested the evidence by the incorrect and lesser standard of "beyond a reasonable doubt." (emphasis added).

* * *

> Aggravating circumstances ... are not adequately defined.

(Appellant's Initial Brief at 51, 68).

This Court ruled that there was no merit to these claims. Johnson v. State, 442 So. 2d 193 (Fla. 1983). This ruling was in error. Mr. Johnson's jury was permitted to ignore the requirements of this aggravator because the jury was not advised of those requirements. A properly instructed jury may have determined this aggravator was not present.[20]

5. "Prior felony" aggravating circumstance.

The trial court erred further in instructing the jury that attempted robbery and attempted murder were as a matter of law offenses involving the use or threat of violence (R. 523). The standard instructions in effect at the time of the trial provided that the trial court could instruct the jury that specific offenses as a matter of law involve the use or threat of violence, but this instruction is limited to offenses "only when violence or a threat of violence is an essential element of the crime." Florida Standard Jury Instructions in Criminal Cases at 83 (2d ed. 1975). Attempted robbery may be proven without proof that there was violence or the threat of violence. Section 777.04, Florida Statutes (1991). For instance, two persons may approach an intended victim with or without a weapon but with intent to rob, but be interrupted when two of the intended

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[20]Certainly, the trial judge's finding of this aggravator makes no since given the jury determination that Mr. Johnson did not premeditate the patron's death. See Claim XV.

victim's friends approach. Farmer v. State, 315 So. 2d 225 (Fla. 2d DCA 1975). The same may be said of attempted murder.

The court's instruction that attempted robbery and attempted murder were as a matter of law offenses involving the use or threat of violence was a command that it must find the aggravating circumstance in the manner prescribed by the court and thus invaded the statutory province of the jury to recommend the sentence to the court. The instruction amounted, therefore, to a partial directed verdict of guilt as to this aggravating circumstance. See United States v. Ragsdale, 438 F.2d 21 (5th Cir. 1971). The state's burden to prove use or threat of violence was eliminated, and the court substituted its factual finding of use or a threat of violence for the jury's recommendation.

It is conceded that Mr. Johnson was also convicted of robbery and second degree murder. However, "we cannot know" and we are left only to speculate as to what weight the jury and court would have given this aggravating circumstance had the attempts not been considered. Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993). Habeas relief is warranted.

6. Other aggravators.

Over defense counsel's objection, Mr. Johnson's jury was instructed on two other aggravators which the judge subsequently ruled as a matter of law did not apply. These were "great risk of harm" and "disrupt or hinder." The jury was not advised of the case law which established these aggravators were not

present. See Omelus v. State, 584 So. 2d 563, 567 (Fla. 1991)(error to instruct the jury on an aggravator which as a matter of law did not apply); Archer v. State, 613 So. 2d at 448. The jury thus had several admittedly improper aggravators that it may have placed on the death side of the scale. The jury was thus left with unbridled discretion to impose death. This was Eighth Amendment error.

7. Conclusion

The failure to instruct on the necessary elements a jury must find constitutes fundamental error. State v. Jones, 377 So. 2d 1163 (Fla. 1979). Aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). Florida law also establishes that limiting constructions of aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Mr. Johnson's jury was not adequately instructed on the elements of the aggravating circumstances it considered. This was fundamental error. State v. Jones.

The United States Supreme Court's opinion in Richmond v. Lewis, 113 S. Ct. 528 (1992), establishes that this Court also erred in its analysis of Mr. Johnson's claims raised on direct appeal challenging the constitutionality of the Florida statute which sets forth the aggravating circumstances. This challenge was premised upon Mr. Johnson's contention that the aggravators

were vague and overbroad under the Eighth Amendment. Richmond establishes that Mr. Johnson's challenge was well taken and thus requires a resentencing before a jury in Mr. Johnson's case.

The issue in Richmond was whether an Arizona aggravating factor, statutorily defined as "especially heinous, atrocious, cruel or depraved," was constitutional as applied in Mr. Richmond's case. In analyzing the issue, the Supreme Court stated:

> [I]n a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid aggravating factors obtain.

Since the sentencer had not applied a narrowing construction to the facially vague aggravating circumstance the Supreme Court vacated Mr. Richmond's sentence of death and remanded for a new sentencing. The same result is required here. At Mr. Johnson's sentencing, the judge did not apply a narrowing construction of "cold, calculated and premeditated."

Either these claims were properly raised and erroneously decided on direct appeal or Mr. Johnson received ineffective assistance of appellate counsel as a result of this Court's page limitation order or counsel's failure to properly preserve the issue. Starr v. Lockhart, 23 F.3d 1280, 1286 (8th Cir. 1994)("To be effective, counsel in capital cases must at least recognize and object to those sentencing factors which cannot reasonably be argued to be valid under existing law." "[A]fter the 1980

Godfrey decision, reasonable minds could not fail to realize that the 'heinous, atrocious, or cruel' aggravating circumstances was unconstitutionally vague"). Thus, Mr. Johnson's Eighth and/or Sixth Amendment rights were violated.

B. THESE ERRORS WERE NOT HARMLESS.

The general test for determining whether constitutional error is harmless was formulated in Chapman v. California, 386 U.S. 18 (1967). "The Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the [recommendation] obtained.'" Yates v. Evatt, 111 S. Ct. 1884, 1892 (1991), citing Chapman. The burden is on the state to show the harmlessness of the error and to overcome a presumption of harm. Arizona v. Fulminante, 111 S. Ct. 1246 (1991). If there is a reasonable possibility that the constitutional error might have contributed to the jury's recommendation, the error is not harmless beyond a reasonable doubt and Mr. Johnson is entitled to relief. Chapman; Yates.

In Mr. Johnson's case, the Eighth Amendment error was the jury's consideration of "invalid" aggravating circumstances. In such situations the United States Supreme Court has explained:

> We require close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases. See Zant, supra, 462 U.S., at 879, 103 S.Ct., at 2744; Eddings v. Oklahoma, 455 U.S. 104, 110-112, 102 S.Ct. 869, 874-875, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605, 98 S.Ct. 2954, 2963-2965, 57 L.Ed.2d 973 (1978)(plurality opinion); Roberts v. Louisiana, 431 U.S. 633,

> 636-637, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977), Gregg v. Georgia, 428 U.S. 153, 197, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976)(joint opinion of Stewart, Powell, and STEVENS, JJ.); Woodson v. North Carolina, 428 U.S. 280, 303-304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)(plurality opinion). In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. Otherwise, the defendant is deprived of the precision that individualized consideration demands under the Godfrey and Maynard line of cases.

Stringer v. Black, 112 S. Ct. 1130, 1137 (1992)(emphasis added).

Thus, the Supreme Court has specifically indicated "[i]n order for [this court] to affirm [Mr. Johnson's] death sentence after the [jury] was instructed to consider an invalid factor, [this] court must determine what the sentencer would have done absent the factor." Stringer, 112 S. Ct. at 1136-1137 (emphasis added). "[A] reviewing court in a weighing State may not make the automatic assumption that such a factor has not infected the weighing process." Stringer, 112 S. Ct. at 1137.

The Supreme Court explained in detail why this is so:

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing

> process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer, 112 S. Ct. at 1139. In other words, "...when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." Stringer, 112 S. Ct. at 1137. "[T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty". Stringer, 112 S. Ct. at 1139. Accordingly, the Eighth Amendment requires the reviewing court to "determine what the sentencer would have done absent the factor." Stringer, 112 S. Ct. at 1137.

In Mr. Johnson's case, invalid aggravating circumstances were considered by the jury and the jury was given unconstitutionally vague instructions regarding aggravating circumstances. In order to find these errors harmless beyond a reasonable doubt, this Court must find beyond a reasonable doubt that the jury without considering the invalid aggravators would have still recommended death. This Court cannot find that the jury's seven-five death recommendation would have remained the same "absent the [invalid] factor." Stringer, 112 S. Ct. at 1137. This particularly true, here, where the jury initially deadlocked six-six.

In Rivera v. Dugger, 18 Fla. L. Weekly S570 (Fla. 1993), this Court quoted from itself in Preston v. State, 564 So. 2d 120 (Fla. 1990), and said,

> [T]he prosecutor emphasized the importance of the prior violent felony in his closing argument to the jury. In addition, only two of the four aggravating circumstances remain.... Further, there was mitigating evidence introduced at the trial, even though no statutory mitigating circumstances were found. Finally, the jury only recommended death by a one-vote margin. Had the jury returned a recommendation of life imprisonment, we cannot be certain whether Preston's ultimate sentence would have been the same. Under the circumstances, we are unable to say that the vacation of Preston's prior violent felony conviction constituted harmless error as related to his death sentence.

Rivera, 18 Fla. L. Weekly S572 (Emphasis and footnote added).

In both Rivera and Preston this Court vacated the defendants' death sentences and remanded the cases to the trial courts for resentencings. There is no reason for this Court not to do the same in Mr. Johnson's case.

This Court has already held that Mr. Johnson presented six nonstatutory, mitigating factors to the jury. Johnson v. State, 593 So. 2d at 209. The record clearly established Mr. Johnson's long history of alcoholism and the fact he had been drinking at the time of the murder. According to the trial court, Mr. Johnson had been diagnosed by a psychologist as an "impulsive personality with depressive features" (a personality disorder) with a secondary diagnosis of alcoholism and drug abuse (R. 805). This Court has recognized that the factors urged by Mr. Johnson

are mitigating and would preclude a jury override if a life recommendation were returned. See, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988); Foster v. State, 518 So. 2d 901 (Fla. 1987). Instructional error cannot be harmless where there was evidence in mitigation upon which a properly instructed jury could have premised a life recommendation. The jury must then be allowed to balance the statutorily defined aggravating circumstances and the evidence in mitigation and make a sentencing recommendation. Here, since mitigation existed in the record, the error cannot be found to be harmless beyond a reasonable doubt. Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989). Habeas relief must issue.

Given the ample mitigation offered and found by the trial judge, the jury may very well have recommended life for Mr. Johnson but for this extra "thumb" on the death side of the scale. Stringer, 112 S. Ct. at 1137. The record of the trial court clearly shows the existence of substantial and compelling mitigating circumstances.

Counsel's failure to raise this claim, and/or this Court's interference with counsel's ability to raise a claim and/or the incomplete record on appeal resulted in Mr. Johnson receiving ineffective assistance of appellate counsel, this Court's prior rejection of these precise claims not withstanding. Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989). Absent counsel's deficient performance or this Court's interference with counsel's performance or an incomplete record on appeal, there is a

reasonable probability that the outcome would be different. Strickland, 466 U.S. 668.

CLAIM III

MR. JOHNSON'S JURY RECEIVED AN UNCONSTITUTIONAL INSTRUCTION REGARDING REASONABLE DOUBT AND THE ERROR WAS COMPOUNDED BY IMPROPER PROSECUTORIAL COMMENT IN VIOLATION OF MR. JOHNSON'S CONSTITUTIONAL RIGHTS. MR. JOHNSON WAS EITHER DENIED EFFECTIVE ASSISTANCE OF APPELLATE AND POST-CONVICTION COUNSEL BY THIS COURT'S RULING LIMITING HIS INITIAL BRIEF ON DIRECT APPEAL TO 70 PAGES FORCING HIM TO DELETE ARGUMENT ON THIS ISSUE OR APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE.

Mr. Johnson sought to file an initial brief on direct appeal which this Court struck and ordered reduced by twenty-four (24) pages. Contained in that brief was Mr. Johnson's challenge to the jury instruction defining reasonable doubt. However, this Court refused to accept that brief and ordered the submission of a brief no longer than seventy (70) pages in length. As a result, Mr. Johnson's claim that "the trial court's defining 'reasonable doubt' as 'a doubt for which there is reason' denies due process by shifting the burden of proof to the defendant to prove 'a reason' (R. 308)" (Initial Brief (served December 20, 1982) at 94) was not included in the initial brief ultimately filed and accepted by this Court.

Rather than the standard Florida Jury Instruction for "reasonable doubt", Mr. Johnson's jury received the following instruction:

> Proof beyond a reasonable doubt means to a moral certainty. It does not mean to an absolute or mathematical certainty.
>
> A reasonable doubt is a substantial, honest, [conscientious] doubt for which there is a reason. It must arise from the evidence or lack of evidence.

(R. 308-09)(text in brackets added in corrected transcript). The state must prove beyond a reasonable doubt every element of a charged offense. In re Winship, 397 U.S. 358 (1970). In Cage v. Louisiana, 111 S. Ct. 328 (1990), the United States Supreme Court held that the instruction provided Mr. Cage's jury was in violation of the due process clause of the Fourteenth Amendment. The Supreme Court found the following language unconstitutional: "It must be such doubt as would give rise to a grave uncertainty," "[i]t is an actual substantial doubt" and equating reasonable doubt with "moral certainty." Cage, 111 S. Ct. at 329. The Supreme Court concluded:

> It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Cage, 111 S. Ct. at 329-30. The Supreme Court also noted that "similar attempts to define reasonable doubt had been widely criticized by the Federal Courts of Appeals. See, e.g., Monk v. Zelez, 901 F.2d 885, 889-90 (10th Cir. 1990); United States v.

Moss, 756 F.2d 329, 333 (4th Cir. 1985); United States v. Indoranto, 628 F.2d 711, 720-721 (1st Cir. 1980); United States v. Byrd, 352 F.2d 570, 575 (2nd Cir. 1965); see also Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 1936, 56 L.Ed.2d 468 (1978)." Cage, 111 S. Ct. at 330. The Supreme Court in Sullivan v. Louisiana, 113 S. Ct. 2078, 2081 (1993), stated: "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty" (emphasis in original). Clearly, the jury instruction given to Mr. Johnson's jury violated Cage and Sullivan. Because there is a reasonable likelihood that the jury understood the instruction to allow conviction based on proof insufficient to meet the Winship standard it violated the due process clause and the conviction must be reversed.

In Victor v. Nebraska, 114 S. Ct. 1239 (1994), the Supreme Court explained its concern about the use of the phrase "moral certainty" in a reasonable doubt instruction. The Court complained about the problem "that a jury might understand the phrase ["moral certainty"] to mean something less than the very high level of probability required by the Constitution in criminal cases." Id. at 1247. The ambiguity of the instruction at issue in Victor only survived constitutional muster because the phrase "moral certainty" was cast in the same sentence with the phrase "abiding conviction" and because the instruction had previously defined "moral" as "relating to human affairs". Id. The phrase "moral certainty" was read to Mr. Johnson's jury in a sentence in which it was equated with reasonable doubt. The

instruction provided no context for the meaning of the phrase nor was the term "moral" previously defined elsewhere in the instruction.

The Victor court also condemned the equation of "reasonable doubt" to "substantial doubt" because it implies that a doubt greater than required for acquittal is meant by "reasonable doubt". Id. In Victor, this ambiguity was only allowed to withstand scrutiny because the equation of "reasonable doubt" with "substantial doubt" appeared in a sentence where "reasonable doubt" was distinguished from doubt arising from mere possibility, imagination, or conjecture. Id. at 1250. Mr. Johnson's jury was however simply instructed to equate "reasonable doubt" with "substantial doubt." This erroneous equation was never corrected. The rule of Cage and Mr. Johnson's due process rights were violated.

Not only did Mr. Johnson's jury receive an unconstitutional instruction regarding reasonable doubt, but the prosecutor improperly argued the definition of reasonable doubt (R. 294). The prosecutor argued that, under the jury instructions, the jury was obligated to convict "[i]f you believe in your heart that Terrell Johnson is guilty of first degree murder" (R. 294). This argument exacerbated the unconstitutional ambiguity precisely at issue in Cage and Victor.

Moreover, in Sullivan the Supreme Court held that the failure to properly instruct the jury on the State's burden to prove guilt beyond a reasonable doubt is a structural defect

which can never be harmless. "Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the [structural] sort, the jury guarantee being a 'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." 113 S. Ct. at 2083.

Mr. Johnson sought to raise this issue on direct appeal, but was thwarted by this Court's rejection of his initial brief and interference with his right to effective assistance of appellate counsel. Mr. Johnson was also thwarted by an incomplete record which fails to include a full and accurate account of Mr. Johnson's objection to this jury instruction. This claim was deleted by appellate counsel pursuant to this Court's order to that he submit a brief of only seventy (70) pages.[21] To the extent that appellate counsel failed to include the claim in the accepted initial brief, this Court rendered him ineffective. Counsel had made a strategic decision to raise the issue. This Courts arbitrary imposition of a seventy (70) page limit violated the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This violation of the constitution caused Mr. Johnson's Cage issue to not be considered on direct appeal. This error would have required reversal had appellate counsel pointed it out to the Florida Supreme Court. Mr. Johnson is entitled to habeas corpus relief.

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[21] See Claim I.

CLAIM IV

MR. 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 JUDGE APPOINTED AN EMPLOYEE OF THE SHERIFF'S OFFICE TO INTERROGATE MR. JOHNSON AND TO REPORT WHAT MR. JOHNSON SAID TO THE JUDGE AND THE STATE. THIS VIOLATED MR. JOHNSON'S FIFTH AND SIXTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

Mr. Johnson was denied the confidential, independent and competent mental health evaluation to which he was entitled. Mr. Johnson filed a motion seeking the assistance of a mental health expert. Mr. Johnson wanted this assistance at the penalty phase where numerous mental health issues were present and warranted the assistance of a qualified, independent mental health expert. Mr. Johnson's motion was taken under advisement. It was granted and the purported expert was sent to see Mr. Johnson without notice to Mr. Johnson or his counsel. Psychological testing was ordered and performed without notice to counsel or the issuance of Miranda warnings to Mr. Johnson. The "expert" reported directly to the judge regarding his encounters and interrogation of Mr. Johnson.[22]

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[22]In the motion, defense counsel specified the unlicensed expert who was employed by the Sheriff's Office as his choice of expert. However, Mr. Johnson was not advised of Mr. Cassady's employment and did not waive the conflict. Moreover, the motion presupposed that the findings of Mr. Cassady would be confidential. Certainly, Mr. Johnson was not advised that Mr. Cassday was a pipeline straight to the judge and to the State. Trial counsel was unaware of the actual appointment and the lack of confidentiality until after the fact. Thus, counsel could not (continued...)

Mr. Johnson presented this claim at his 3.850 proceedings contending that non-record material presented at the 3.850 hearing established that Mr. Johnson was deprived of his right to the assistance of a confidential, independent, competent mental health expert. Mr. Johnson further argued that trial counsel had been ineffective in inadequately litigating this issue. This Court has held that this claim should have been raised on direct appeal. Johnson v. State 593 So. 2d 206, 208 (Fla. 1992). Since Mr. Johnson's direct-appeal counsel failed to raise this clear violation of Mr. Johnson's constitutional rights on direct appeal, appellate counsel was ineffective. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994).

On September 17, 1980, less than one week before trial, and four months after he was appointed, Mr. Johnson's counsel filed a motion requesting that the trial court appoint a mental health expert (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

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[22](...continued)
have advised Mr. Johnson of the dangers. Certainly, trial counsel's performance was deficient in this regard. However, this Court previously found that this issue should have been raised on direct appeal and refused to entertain this issue in 3.850 proceedings.

Moreover, Mr. Johnson is handicapped as to this claim because the record is not complete and is not accurate. Bench conferences wherein objections were registered by Mr. Johnson's trial counsel were lost and cannot be reconstructed.

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). Thus, the trial court appointed an unqualified expert who was not independent (he was an employee of the Sheriff's Office), who was not confidential (he was discussing his testing directly with the judge), all without notice to Mr. Johnson or his counsel. The trial court received, reviewed, and used the report in imposing a death sentence even though Mr. Johnson did not introduce it.

The circuit court appointed an unlicensed jail psychologist who was an employee of the Orange County Sheriff's Department (PC-R. 295, 302); the evaluation was not confidential (PC-R. 300); and consisted solely of the administration of the Minnesota Multiphasic Personality Inventory and the California Psychological Inventory (PC-R. 303). This was the only evaluation for purposes of trial provided by the court.

At the post-conviction evidentiary hearing, the jail psychologist, Mr. Cassady, acknowledged that he was not provided with background material although it would have been helpful (PC-

R. 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 (PC-R. 68, 230). Yet the jail psychologist did not review these materials. Mr. Cassady was not even familiar with what constituted statutory mitigating factors (PC-R. 301).

Mr. Cassady's "evaluation" consisted of two simple personality tests conducted over an inordinately short period of time. Mr. Cassady was not and never had been licensed in the State of Florida. 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. Mr. Cassady had no understanding of the statutory mitigating factors and reported his findings straight to the judge in violation of Estelle v. Smith, 451 U.S. 454 (1981). Mr. Johnson requested one type of evaluation but received another. Mr. Cassady's employment by the Sheriff's Office created a conflict of interest of which Mr. Johnson was not advised and did not waive. See Quince v. State, 592 So. 2d 669 (Fla. 1992); Wright v. State, 581 So. 2d 882 (Fla. 1991); Herring v. State, 580 So. 2d 135 (Fla. 1991). Defense counsel was prejudicially ineffective for failing to adequately raise and litigate those errors of constitutional dimension. This Court previously determined that the record on these errors were so

clear that they should have been raised on direct appeal.[23] Accordingly, appellate counsel should have raised this issue on appeal. However, he was seriously hampered by an incomplete record regarding Mr. Johnson's request for an evaluation and his unhappiness with Mr. Cassady, the unlicensed and incompetent mental health expert who was employed by the Sheriff's Department at the time, and the failure of Mr. Cassady to observe confidentiality. This incomplete record, not a product of any action of Mr. Johnson precluded adequate representation by appellate counsel.

A. NO COMPETENT EVALUATION

John Cassady is not and never has been licensed as a psychologist (PC-R. 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 (PC-R. 301). He has no forensic training (PC-R. 301).

Mr. Johnson presented the testimony of two licensed clinical psychologists at the post-conviction 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:

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[23]Mr. Johnson does not concede that was necessarily a correct determination. This Court normally holds that ineffective assistance of counsel claims and other claims requiring evidentiary development should be heard in 3.850 proceedings.

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. deBlij, PC-R. 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 (PC-R. 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.

(PC-R. 135-36).

Mr. Cassady does not remember evaluating Terrell Johnson. The name "doesn't ring a bell at all" (PC-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.

(PC-R. 299). Because Mr. Cassady's file on Mr. Johnson has been "purged" (PC-R. 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 at the post-conviction proceeding as Defense Exhibit #6.

Mr. Cassady 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. . . .

(PC-R. 100-02)(emphasis added).

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 psychiatrist. 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).

B. ESTELLE V. SMITH

The Cassady "report" went straight to the trial court. The State also received a copy. Yet, trial counsel did not introduce the report or chose to have Mr. Cassady testify. There was no waiver of Mr. Johnson's rights under Miranda v. Arizona, 384 U.S. 436 (1966). The trial judge, thus, sent in an agent of the state to report to the judge and the State what Mr. Johnson had to say, also in violation of Mr. Johnson's Sixth Amendment right to counsel. Maine v. Moulton, 474 U.S. 159 (1985).

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. In fact, he was told that the evaluation was to assist him. Once the report was completed, he and his attorney would decide what to do with it. However, despite the defense's decision to not introduce the report, 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).

Lack of notice to defense counsel of visits to the jail by a state agent to observe and examine Mr. Johnson was reversible error. Powell v. Texas, 492 U.S. 680 (1989). Here, trial counsel did not have notice that the judge was sending Mr.

Cassady to see Mr. Johnson and to report to the judge and the State. This was no different than the judge sending in a police officer to interrogate a criminal defendant after the Sixth Amendment right to counsel had attached. The fact that trial counsel requested the assistance of a confidential evaluation can not be deemed a waiver of the Sixth Amendment right since the confidential nature of the evaluation would presuppose the Sixth Amendment right would remain intact.

To the extent that counsel failed to adequately assert Mr. Johnson's Fifth and Sixth Amendment rights, deficient performance was rendered which prejudiced Mr. Johnson. To the extent that the court recorder's personal problems have deprived Mr. Johnson an adequate record reflecting his efforts to preserve this issue, his Fifth, Sixth, Eighth and Fourteenth Amendment rights have been violated. He did not waive his right to an appeal or an adequate record for that appeal.

In sum, Mr. Johnson's Fifth and Sixth Amendment rights were violated and appellate counsel was ineffective for failing to raise this issue on direct appeal.

C. 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. Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) (right to assistance of psychiatric expert not satisfied by appointment of "neutral"

expert); cf. Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988). Neither of these constitutional promises were kept here.

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. Quince v. State; Wright v. State; Herring v. State.

> 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.

(PC-R. 295-96).

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.

The jury was never presented with evidence that two statutory mitigating circumstances were present in addition to at least six nonstatutory mitigating circumstances. The jury never learned of the ample evidence of Mr. Johnson's brain dysfunction, his deficient mental health, his alcoholism, his intoxication and that the effects of these deficits on his behavior at the time of the offense established two statutory mitigating circumstances. Mr. Johnson was prejudiced by the denial of an independent expert. To the extent that counsel inadequately litigated this issue, Mr. Johnson was denied effective representation. To the extent that the court reporter failed to accurately report Mr. Johnson's efforts to preserve and present this issue, he has been denied his right to appeal.

D. CONCLUSION

Use of the Cassady "report" violated Mr. Johnson's right to confront the witnesses against him, right to silence, right to counsel, right to effective assistance of counsel, and to independent assistance of experts. 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 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), and Powell v. Texas, 492 U.S. 680 (1989).

Appellate counsel was ineffective for failing to raise this substantial claim on direct appeal. This Court said in denying Mr. Johnson's Rule 3.850 appeal, "Claims 3 (assistance of mental health expert) ... could have been raised on direct appeal." 593 So. 2d at 208. Appellant counsel's failure to raise this clear violation of Estelle v. Smith was deficient performance. Counsel was entitled to the assistance of an independent mental health expert. He did not get one. The judge violated Mr. Johnson's Fifth and Sixth Amendment rights by sending an employee of the Sheriff's Office in to interrogate Mr. Johnson and report to the judge and the State. Counsel's failure to raise this issue was deficient performance which prejudiced Mr. Johnson. To the

extent that the record is incomplete and inaccurate and fails to show the extent of the error and Mr. Johnson's objections, Mr. Johnson was denied his right to appeal and the assistance of counsel in violation of the Sixth and Fourteenth Amendments. Habeas relief is warranted.

CLAIM V

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. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

This Court has held that this claim should have been raised on direct appeal. Johnson v. State, 593 So. 2d 206, 208 (Fla. 1992). Appellate counsel was ineffective for failing to raise this claim on direct appeal.

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 (PC-R. 246). Furthermore, this evidence was a critical 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.[24] This misconduct violated Mr. Johnson's Sixth, Eighth, and Fourteenth Amendments.

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

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[24]Trial counsel was unable to show this evidence was meaningless because the State successfully ambushed him failing to provide adequate discovery.

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 Dr. Kessler, the medical examiner, who testified about the "stippling" around the wound to the head of Dodson. In addition, Dr. 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. (PC-R. 766-82).[25]

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 (PC-R. 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 (PC-R. 766-67).

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

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[25]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.

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 Dr. 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 Dr. 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 Dr. Kessler, was fired from the same distance as the fatal shot. Since Dr. 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 (PC-R. 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 (PC-R. 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" (PC-R. 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" (PC-R. 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 cleanser."

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.

(PC-R. 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).

Rule 3.220 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. 3.220 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). However, the State failed to comply with Rule 3.220.

Mr. Johnson also alleges 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 believability 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.

Again in denying this Claim in the 3.850 appeal, this Court said this issue "could have been raised on direct appeal." 593 So. 2d at 208. The failure to raise this issue on direct appeal was deficient performance which prejudiced Mr. Johnson. To the extent that the court reporter's failure to provide an accurate record of the trial proceedings deprived Mr. Johnson of an accurate transcript which reflected this error and his objections, Mr. Johnson was deprived of his right to appeal. Habeas relief is warranted.

CLAIM VI

MR. JOHNSON'S STATEMENTS WERE OBTAINED IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, AND THE STATE VIOLATED DUE PROCESS BY CONCEALING THE VIOLATIONS. MR. JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND AN ADEQUATE APPEAL REVIEW BECAUSE COUNSEL FAILED TO ADEQUATELY RAISE THIS ISSUE ON DIRECT APPEAL OR WAS PREVENTED FROM EFFECTIVELY RAISING THIS ISSUE BECAUSE OF THIS COURT'S ORDER LIMITING THE NUMBER OF PAGES OF HIS BRIEF ON DIRECT APPEAL OR BY THE INCOMPLETE AND/OR INACCURATE RECORD. FURTHER, TO THE EXTENT THAT THE POLICE REPORTS REGARDING THE INTERROGATION ARE INCONSISTENT WITH THE TESTIMONY AS TRANSCRIBED, EITHER THE STATE VIOLATED BRADY V. MARYLAND, AND GIGLIO V. UNITED STATE OR THE INACCURATE TRANSCRIPT HAS DENIED MR. JOHNSON VINDICATION OF HIS CONSTITUTIONAL RIGHTS.

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.

See Johnson v. State, 593 So. 2d 206, 208 (Fla. 1992)("Claim [] 7 (statements by defendant) ... [was] raised on direct appeal"). However, Mr. Johnson asks this Court to reconsider the issue because this Court had an incomplete record and imposed an arbitrary page limit which rendered appellate counsel ineffective. As a result this issue was inadequately litigated.

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).

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 when he was placed in a jail cell. 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.

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, invoking his right to silence. See Edwards v. Arizona, 451 U.S. 477 (1981).[26] 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. Ms. Sweeney was clearly acting as an agent of the police:

> 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.

[26]Under Edwards, the interrogation should have ceased until Mr. Johnson re-initiated questioning.

> 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.

(PC-R. 1218). In spite of this police tactic, Mr. Johnson still refused to give a statement. See Edwards v. Arizona.

As a matter of "standard operating procedure" a police psychiatrist was brought in to "evaluate" Mr. Johnson on the morning of January 6. The psychiatrist was also clearly an agent of the police who interviewed Mr. Johnson in violation of Edwards v. Arizona. 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" (PC-R. 1150-52).

The police decided to try another visit between Mr. Johnson and his girlfriend. Again, Ms. Sweeney was used as an agent of the police. 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.

(PC-R. 1219). However, 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. Interrogation was again re-initiated by the police in violation of Edwards v. Arizona. 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, tremors, 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.

(PC-R. 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. 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 (PC-R. 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.

(PC-R. 1222)(emphasis added). Obviously, Ms. Sweeney when she confessed advised the police of the Florida case. Thus, the police knew all about this case early on when Sweeney confessed

and began acting as an agent of the police. 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. 242). His invocation of silence was not honored.

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 because his invocation of silence was never honored. Richard Montee, Chief of Police in Primeville, 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.

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 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.

The statements made by Mr. Johnson were solicited 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. Edwards v. Arizona. 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 dimensions). 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 (PC-R. 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 "[o]nce 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 results 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.

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.

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 psychiatrist 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 to Motion to Vacate Judgment and Sentence).

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. Keep, 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).

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.

C. EITHER BRADY/GIGLIO VIOLATION OR AN INACCURATE RECORD HID FULL SCOPE OF CONSTITUTIONAL VIOLATION FROM APPELLATE COUNSEL.

It is clear from police reports discovered in the post-conviction process that the transcript of law enforcement testimony is inconsistent with the content of the police reports. The police reports make crystal clear that Mr. Johnson invoked his right to counsel, that Sweeney told the police early on about the Florida case at issue here, and that Sweeney acted as a police agent. However, the transcript of the police testimony, though filled with interlineations and supposed corrections reflects answers and testimony which contradicts the police

reports. Either the transcripts is in error (a fair likelihood see Claim VII), or the State failed to disclose Brady material, i.e. the police reports and presented false testimony in violation of Giglio v. United States.

As a result, Mr. Johnson's appellate counsel failed to fully and adequately litigation this issue (the statements claim) in its appropriate constitutional context on direct appeal. The ruling issued by this court on direct appeal was arbitrary in violation of Mr. Johnson's Eighth Amendment rights. Magill v. Dugger, 824 F. 2d 879 (11th Cir. 1987). To the extent that the record was incomplete and inaccurate, this Court could not conduct meaningful review. To the extent the State failed to disclose Brady and Giglio material, this Court and counsel were misled. Mr. Johnson was denied the effective assistance of counsel and a meaningful appeal in violation of his Sixth, Eighth and Fourteenth Amendment rights.

CLAIM VII

MR. JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND ADEQUATE REVIEW ON DIRECT APPEAL AND EFFECTIVE REPRESENTATION BY POST-CONVICTION COUNSEL BECAUSE THE TRANSCRIPT WAS AND IS UNRELIABLE AND INCOMPLETE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. MR. JOHNSON WAS DENIED A FULL AND FAIR HEARING ON THE TRIAL COURT'S ATTEMPTED RECONSTRUCTION OF THE RECORD AND THE PROCEDURE UTILIZED TO ATTEMPT RECONSTRUCTION OF THE TRIAL RECORD VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Because of deficiencies in the court reporting during Mr. Johnson's trial, the trial transcript is not complete or

reliable. Bench conferences which the trial judge and defense counsel believed were being reported were in fact not reported. An undetermined portion of the trial court's instructions to the jury were missing. The transcript was not a correct verbatim report of the trial proceedings. As a result of the incompleteness of the transcript, this Court ordered a reconstruction of the record. Mr. Johnson who was present at the trial was not permitted to be present for the unreported reconstruction meetings between the court reporter, the trial judge, the prosecutor, and the trial defense counsel, who at the time no longer represented Mr. Johnson.[27] The procedure followed to reconstruct the record was not full and fair. Moreover, the transcript following the reconstruction was still not complete and in many instances remained unintelligible.

Mr. Johnson was and continues to be prejudiced because neither appellate counsel, this Court, nor post-conviction counsel have ever fully reviewed the trial proceedings for error with any confidence that the transcript on which they were relying was correct or complete.

A. NO FULL AND FAIR HEARING ON THE TRIAL COURT'S ATTEMPTED RECONSTRUCTION OF THE RECORD

Upon noting obvious and serious deficiencies in the first version of the trial transcript submitted to this Court, Mr. Johnson moved to remand to the trial court for the purpose of reconstructing the record and holding an evidentiary hearing

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[27]Mr. Johnson was also denied the right to be present at the evidentiary hearings on the reconstructed record. See Claim IX.

regarding its accuracy. The motion was granted. The original trial judge, Judge Powell, recused himself, and Circuit Judge Joseph Baker presided over the hearings on remand (R. 1788).

Unfortunately, the reporter had used only a stenograph machine, and reported the trial without a backup tape recorder. The reporter was ordered to compare her stenographic notes to the first version of the transcript, and submit revisions as needed.

The court reporter submitted a second "transcript" of Mr. Johnson's trial with the Clerk of the Circuit Court for Orange County which consisted of the original "transcript" with thousands of interlineations, deletions, and additions hand written into the text.[28] Mr. Johnson's appellate/reconstruction attorney filed lengthy objections to the corrected transcript (R. 1848).

At a hearing, Judge Baker stated repeatedly that he believed Judge Powell, not Judge Baker, was the proper person to oversee the reconstruction proceeding (R. 1562, 1577, 1588, 1595, 1597, 1598, 1600). The reconstruction judge repeated this view at further hearings (R. 1623, 1635, 1355, 1356).

Judge Baker wrote Judge Powell a letter asking Judge Powell to rescind his order of disqualification (R. 1795-96). Judge Powell wrote Judge Baker a letter stating that Judge Baker should retain the case (R. 1808-09). In the letter, Judge Powell

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[28]Some of the changes were made when the court reporter met with the prosecutor, trial judge, and former defense attorney, outside the presence of Mr. Johnson or his then counsel. However, none of those present knew exactly what had been discussed during that meeting.

outlined the procedure he believed Judge Baker should follow, suggested numerous orders, defined the "sole issue" in the case, and urged Judge Baker to deny Mr. Johnson's counsel's request to depose the trial reporter and to retain an expert court reporter as "superfluous, not authorized by law, wasteful of taxpayer's money, and of absolutely no help to the defendant's case" (R. 1808-11).[29]

Some time between December 1981 and May 1982, according to the varying recollections of Mr. Johnson's trial attorney Gerald Jones, trial prosecutor Bruce Hinshelwood, and Judge Powell, a meeting was held in Judge Powell's chambers involving Mr. Jones, Mr. Hinshelwood, Judge Powell, and the trial court reporter, Rose Wheeler, to discuss certain omissions in the trial transcript. Neither Mr. Johnson nor his appellate counsel were notified of the meeting. No record was kept of this ex parte session. The reporter said she called the meeting because she "wanted to go over a few of the bench conferences and make sure they were correct" (R. 1499). The meeting resulted in at least one change to the transcript. The reporter said that she did not want to make the change, and that her notes had something else (R. 1503). The reporter did not "think" there were other changes based on the meeting (R. 1504). This, of course, was not to say there were no other changes. At the evidentiary hearing on the reconstructed record, no one was able to remember how many or which passages were discussed or what was said at this meeting.

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[29] See Claim VIII.

No record of the meeting was made. Defense counsel thought testimony and not bench conferences were discussed (R. 1486).

At the evidentiary hearings held before Judge Baker, Mr. Jones, Mr. Hinshelwood, Mrs. Wheeler, and Judge Powell testified regarding the "reconstructing" of the record of Mr. Johnson's trial. The evidentiary hearing judge refused to allow a renowned court reporter to testify regarding the record dilemma, and refused to listen to the testimony of a memory expert offered by Mr. Johnson's appellate counsel for the purpose of showing the inherent unreliability of testimony reconstructed following such a lengthy period of time during which the judge, court reporter and trial counsel had heard many other cases. The request that an independent and expert court reporter be allowed to review selected passages of the reporter's stenographic notes was made so it could be determined whether the second version of the transcript accurately reflected the reporter's stenographic notes. Judge Baker refused this request. The best chance of obtaining a reliable record was lost.[30]

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[30]The judge refused to allow examination of the notes or to hear testimony about them. However, after the proceedings on remand were entirely completed, the judge allowed an examination of the notes but refused to entertain a motion for rehearing. Counsel examined the stenographic notes with a volunteer court reporter who transcribed selected passages.

Mr. Johnson's appellate counsel filed a motion to remand contemporaneously with his brief because the volunteer court reporter's transcription of the notes revealed (1) that the official reporter did not take down the trial verbatim, (2) the errors in the first transcript were not caused by poor proofreading, and (3) many if not most of the reporter's revisions to the first transcripts were invented by the reporter to make sentences in the original transcript make sense.

B. THE TRANSCRIPT IS NOT RELIABLE OR COMPLETE

At the hearings, Judge Powell testified that the second transcript was "probably not too far from substantially correct" (R. 1414). Mr. Jones, defense counsel, testified that the second transcript was "grossly correct, . . . to the best of my recollection, which isn't very good" (R. 1486). The four witnesses, whose recollections during earlier proceedings were relied upon for "reconstructing" the record of Mr. Johnson's trial, were not able to agree on the date, length, or substance of the meetings that had taken place earlier in Judge Powell's chambers:

	Judge Powell	Mr. Jones	Mr. Hinshelwood	Mrs. Wheeler
Date of Testimony	5/14/82	5/14/82	5/14/82*	5/14/82
Date	"several weeks ago" (R. 1423)	"February" (R. 1469)	"a couple three months ago" (R. 1544) *statement made at hearing 3/19/82	N/A
Length	less than an hour (R. 1424)	15 minutes (R. 1476)	1 to 1/2 hours (R. 1972)	25-30 minutes (R. 1500)
Subject	5 or 6 bench conferences (R. 1424)	no bench conferences (R. 1486) several "passages" from trial (R. 1470)	10-12 passages in the transcript (R. 1973, 1975-76)	remembers bench conferences; doesn't remember which words or passages (R. 1500)

The witnesses however agreed that changes to the second version of the transcripts should be made. The specific changes suggested, however, were for the most part based on the same type of unreliable analysis used by the court reporter, that is, a

reading of the transcript to see if it made sense in context, followed by a suggestion of how to make it make more sense. Each of the witnesses' testimony was couched in phrases such as, "probably", "I think," "might be," "it makes more sense."

However, the witnesses appeared to be able to remember some matters. For example defense counsel testified that at trial when questioning a witness he said: "Now, you stated earlier that you found the remains of a bullet in this area, and I am pointing to outside the bathroom door..." (R. 1453), rather than what the reporter transcribed, "... I am putting it to outside the bathroom door" (R. 1453). Another witness said additionally, the reporter's "Rodiland" should be "Rhode Island" (R. 1404). The recollection of the witnesses some twenty months after the trial was that the transcript was still inaccurate. Because of the passage of time, who knows how many other errors were present that no one was able to recall.

Dr. Loftus, the memory expert, testified at the evidentiary hearing that some of the gist of the trial could be reconstructed but there is no way of knowing "whether somebody just recreated something that made sense" (R. 1716).

Amazingly enough the court reporter admitted at the evidentiary hearing that she revised the first version of the transcript based on whether she thought it made sense (R. 1498). But she didn't know how many or which corrections she made on this basis (R. 1498). Such revisions are no more than invention.

The reporter apparently used court documents, not just her notes as the court ordered, while making her revisions. The original transcription of the court's charge although not comparing exactly to the written instructions of the record departed strikingly from the previous pattern of errors. The reporter admitted that she had the court file and the written instructions when she revised the transcript though she did not "recall" if she made changes based on the written jury instructions (R. 1497-1498, 1504-1505). Defense counsel testified that the trial judge became "tongue tied" while giving the instructions, and told the jury he would start over, but that this event was not reported (R. 1464). The problem with the reporter's use of written documents is, of course, that there is no way to know whether what the jury heard is the same as the written documents.

1. Unreported Bench Conferences

Dozens of bench conferences were unrecorded despite the judge's stated assumption that all were being recorded (R. 1404-10). The trial judge testified "if I had it to do over again, I would have instructed the court reporter to take every single word that was said in that trial..." (R 1429). Defense counsel remembered "thinking to myself, it's a good thing this court reporter is up here, because I have no idea what these people [prospective jurors] are going to say up here" (R. 1466). Remarkably, there were <u>at least</u> 28 unrecorded proceedings at the

bench at which individual jurors were questioned. (See, e.g. R. 11, 12, 21, 22, 347, 348, 349, 350, 353, 355, 357, 377).

While bench conferences were omitted from the voir dire examination in great number defense counsel testified that bench conferences occurred when the reporter was present but which do not appear in the transcript. About one of these conferences he said:

> And I particularly remember thinking to myself, "It's a good thing this court reporter is up here, because I have no idea what these people [prospective jurors] are going to say up here."

(R. 1466). The unreported bench conferences during the voir dire preclude review of the challenges for cause.[31]

The trial judge believed that all conferences were being reported (R. 1404-1410). The witnesses, at the hearing on remand, were not able to say how many bench conferences were unreported or what was said. The trial judge was uncertain about the content of the bench conferences during the testimony of the trial:

> My own impression was that there was not much important of a legal nature that was discussed at these bench conferences that did not later appear in some fashion on the record, either through the specific nature of the objection or my ruling. That's not to say there wasn't....

(R. 1410)(Emphasis added).

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[31] See also Claim XI.

When asked about a conference which appeared to be about the admission of a diagram attached to a written statement by the defendant, the judge said:

> I am <u>almost</u> confident that no new grounds other than those previously made in the Motion to Suppress and the two objections appearing here on the record were raised at that bench conference. But I have no specific recollection.

(R. 1413)(Emphasis added). The judge distinguished the conferences which occurred during the voir dire, and was not able to say that most of the important legal matters there were reported (R. 1411). Mr. Johnson was arbitrarily denied his right to appellate review of the unreported bench conferences in violation of the Eighth and Fourteenth Amendments.

2. Other Errors and Omissions

During the reconstruction evidentiary hearings, numerous other serious errors and omissions from the transcript were described.[32] Again, defense counsel testified that the judge became "tongue-tied" while giving the jury instructions and told the jury he would start over (R. 1464), but that does not appear in the trial transcript. There is no way to know what else may have occurred during the jury charge or other crucial trial proceedings that are likewise absent from the record. ("Reversible error can turn on a phrase. Did it occur here? We

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[32]For example the testimony of the medical examiner regarding the cause of death is replete with handwritten changes (R. 42, 45, 57).

cannot be certain." Johnson v. State, 442 So. 2d (Fla. 1983), (Shaw, J., dissenting)).

Crucial ballistic testimony that formed the basis of the Court's finding of premeditation in both the conviction and sentencing phases was riddled with interlineations and corrections. Here, too, slight errors or omissions assume critical and constitutional importance.

The court reporter admitted at the evidentiary hearing that she corrected the transcript based on "whether or not the sentences made sense" (R. 1498). For example, she changed "medical examiner messed up with the magnum" to "defendant pressed up with the magnum" (R. 1503) and deleted entire phrases, such as "remains subsequent on our side" (R. 1506). She could not testify how such errors got into the transcript or why they were deleted (R. 1506-07).

Omissions more subtle in nature are suspected from the context of the language in the transcript. Numerous examples appear throughout the transcript. One example is where the transcript reports that a medical examiner described a head wound as follows:

> In the gunshot wound to the head, which was a three-eighths inch wound, since it was a close gunshot wound, it had one-sixteenth of an inch, was black in margin and had purple red tattooing or stippling if you will, for up to one-half inch around it.

(R. 44).

The transcript omits the object referred to by the phrase, "it had one-sixteenth of an inch." What "had one-sixteenth of an

inch?" This type of phrasing appears throughout the transcript. These omissions show the transcript cannot be relied upon as accurately reflecting testimony. As a result, meaning is lost, and meaningful review could not occur.

It is also suspected that there are inaccurate transcriptions as opposed to simple omissions because some statements made by witnesses do not make sense. For example, the transcript reports that a ballistics expert testified as follows:

> And another set of swabs were blank or just a swab used to identify the agent which was used in the swabbing procedure, it was wetted in the cotton swab to assure there was no contamination in the collection, and analysis of the swabs revealed the presence of both barium antimony, and the cotton swabs labeled upper and lower swab in the concentration were consistent with gunshot residue.

(R. 167).

This quote does not make sense. One suspects subjects and objects may have been inverted. The transcript does not indicate what "the concentration" is. Should "collection" be substituted for "concentration"? Or, should the punctuation of the statement be different?

The same witness said that primer residue would be deposited "very near" a weapon (R. 167). Yet, the transcript reports that the expert also said that residue was "very rarely seen within [sic farther than?] a couple of feet of the discharging weapon..." (R. 168, line 22). Again, the internally inconsistent testimony precluded appellate review because no one can review the transcript and know what was actually said at trial.

Based upon the testimony at the evidentiary hearing, it is apparent that the record of Mr. Johnson's trial is incomplete and inaccurate. Comparison of the transcript with an Orlando television station's brief videotape of a portion of the State's closing argument indicates that the court reporter omitted the prosecutor impermissibly injecting his personal opinions into Mr. Johnson's trial.

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). "It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record." Parker v. Dugger, 111 S. Ct. 731, 739 (1991). Where the record is incomplete or inaccurate, there can be no meaningful review.

The State sought to establish that the gist of the proceedings were correctly reported. The trial judge testified that he thought the reconstructed record was substantially correct. However, throughout his testimony he used equivocal language. Among his comments was the following:

> "But if you read the whole thing as a whole, it's probably not too far from substantially correct."

(R. 1414).

> Yes, sir; it is , except for the unreported bench conferences, as the court reporter put it, where the challenges were exercised and the court ruled on some of them. And that is not in the record. But otherwise, that record is substantially correct in my opinion.

(R. 1426-1427).

Defense counsel's testimony was:

> Q: And after this and with the inclusions of your submitted corrections that you had a question about, do you feel that the transcript is now substantially representative of the testimony at trial, of what went on at trial?
>
> A: Like I say, substantially, yes. But let me qualify that by saying --

Q: I'm not asking you word for word. Don't get me wrong.

A: Right. But let me qualify that by saying this was probably two years ago, and I can't remember an awful lot of what happened. But grossly, yes, I would say.

Q: It is substantially correct?

A: It's grossly correct; right. The people were there, and they testified pretty much --

Q: To the best of your recollection.

A: Yeah, to the best of my recollection, which isn't very good.

(R. 1486-1487).

The trial court authorized and considered a deposition of Dr. Elizabeth Loftus, a nationally renowned expert on memory. Dr. Loftus testified that memory does not just fade but actually changes with the passage of time and receipt of post-event suggestions. She indicated that the meeting called by the court reporter was "just the kind of situation in which one would expect to see an influence due to post-event information...[It] would be extremely difficult to figure out whether the information as a result of that meeting is accurate or inaccurate" (R. 1712-1713).

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).

Two other factors indicate that the second version of the transcripts cannot be considered reliable. First, the existence of known omissions and errors implied the existence of other omissions and errors which are not readily apparent or

remembered. Second, unknown portions of the second version of the transcripts were supplied from the unreliable discussion at the group meeting called by the reporter. No participant was able to say what was discussed at the meeting. According to Dr. Loftus, the memory expert, the discussion would act as a post-event suggestion which can actually change fading memory.

Mr. Johnson's Sixth, Eighth, and Fourteenth Amendment rights were violated because of the inadequacy of the trial record. Since appellate counsel could not provide effective representation without an adequate transcript, Mr. Johnson is entitled to a new trial. See Parker v. Dugger; Evitts v. Lucey, 496 U.S. 387 (1985). 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, constituted a fundamental denial of due process.[33] Kentucky v. Stincer, 482 U.S. 730 (1987).

C. THE COURT REPORTER

We rely on transcripts because we trust the competence of court reporters. Unfortunately, we cannot trust the reporter's performance in this case. In addition to her admission that she made corrections based on whether the first transcript version made sense and that she had used court documents while revising the transcript, the court reporter's lack of credibility is evidenced by a number of factors.

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[33] See Claim IX and X.

1. The Original Transcripts

The condition of the original transcripts reflected on the credibility of the reporter because of the sheer magnitude, in quantity and significance, of the errors. The transcripts were so obviously riddled with omissions and errors that only a person with very little skill or care at reporting or editing could have submitted them in a case as important as this one. The magnitude of the errors in the original transcripts was detailed with many examples in Mr. Johnson's Motion to Relinquish Jurisdiction filed in the Florida Supreme Court.

Judge Baker's order on remand indicated that the reporter explained the errors as a lack of proofreading. The reporter, however, in extremely indefinite language said only:

> "I thought I proofed, and now I would say I didn't, the first one. And it should have been the way the second transcript was. I'd like to forget the first.

(R. 1515). The reporter was looking for a convenient "out". It cannot be believed that an official reporter of significant experience would submit an unproofread transcript to this Court. Moreover, the examination of the reporter's stenographic notes, which Mr. Johnson obtained but was not allowed to present demonstrated that the inaccuracies occurred because the reporter failed to take down the trial verbatim. This evidence clearly establishes that there is no reliable basis for either the first or second transcript.

2. The Number and Kind of Changes in the Transcript

The very large number of changes in the resubmitted transcripts implies that the new transcripts were not reliable. As the Supreme Court has explained: "We have repeatedly emphasized the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dugger, 111 S. Ct. 731 (1991). Clearly, no meaningful review could occur from the transcripts provided this Court. The record is inaccurate and incomplete. Under Parker v. Dugger, habeas relief is required.

The character of the changes also demonstrates the unreliability of the transcripts. Some of the changes drastically altered the entire meaning of a passage. One change substituted the word "defendant" for "medical examiner." It is one thing for a defendant to shoot a gun, but when a medical examiner shoots a gun at a crime scene the interpretation of the physical evidence can be vastly different. Strangely, after claiming at the evidentiary hearing that the transcript "should" accurately reflect her notes (R. 1497), the reporter admitted that "medical examiner" appeared in her notes but that she changed it at the meeting she called, though she did not want to.

3. The Group Meeting

The fact that the reporter needed to call a meeting to verify passages of the transcripts demonstrates that she herself believed her notes to be unreliable. If her notes are unreliable, then any transcript based on those notes is also

unreliable. Moreover, the group meeting did not include Mr. Johnson who had been present at the trial and would have been a witness to the proceedings, just as necessary as any of the other individuals who participated at the informal gathering.

4. A Pattern of Poor Performance

This case is not the first time the reporter had submitted deficient transcripts. In at least one other case, State v. Legree, Orange County Case Number CR78-2395, the reporter submitted a transcript with the same type of errors characteristic of this case.

When at the evidentiary hearing the reporter was shown the three pages of the State v. Legree transcript she saw no problem with them (R. 1512-1513). Her inability to recognize the obvious problems, in addition to supporting the conclusion that she did in fact poorly proofread the first version of the transcript, reflected poorly on her credibility. Again, the state court refused to hear the testimony of an expert who had reviewed the court reporters raw notes and could have testified that the reporter had failed to take down the trial verbatim. This court must consider the expert's testimony.

D. INEFFECTIVENESS OF APPELLATE AND POST-CONVICTION COUNSEL

Through no fault of Terrell Johnson, the transcripts of his trial are not reliable or complete. They cannot be corrected because there was no back-up machine to the reporter's stenograph, the reporter was incapable of correcting them, and

trial counsel and the trial judge did not sufficiently remember the trial.

Terrell Johnson has a constitutional right to a complete transcript on appeal. Griffin v. Illinois, 351 U.S. 12 (1956); Entsminger v. Iowa, 386 U.S. 748 (1967); Mayer v. Chicago, 404 U.S. 189 (1971). In a capital case, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution demand a verbatim, reliable transcript of all proceedings in the trial court. Parker v. Dugger.

The right to a transcript on appeal is meaningless unless it is an accurate, complete, and reliable transcript. New appellate counsel, who was not at the trial proceedings in this cause, had no means to fully review the proceedings below with a defective transcript, and thus, could not render effective assistance. United States v. Cronic, 466 U.S. 648 (1984); Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989). Similarly, the rights to appeal and meaningful access to the courts were negated because both appellate counsel and this Court could not fully review the proceedings below. Evitts v. Lucey; Hardy v. United States, 375 U.S. 277 (1964). In Hardy, the Court held that the duties of an attorney could not be discharged on appeal without a whole transcript. Similarly in Bounds v. Smith, 430 U.S. 817 (1977), the Court held that the right to access to the courts encompasses a "meaningful" access. See Parker v. Dugger.

The omissions and inaccuracies in the transcripts in their current condition are substantial, and Terrell Johnson is

prejudiced thereby. The voir dire and challenges for cause were incomplete. The jury charge was incomplete. We know what appears in the written instructions, but we cannot know what the judge told the jury. The bench conference concerning Mr. Johnson's objection to the introduction of his statements is missing. We cannot know if error was committed at any proceeding not contained in the record. Many bench conferences are omitted, though the trial judge and defense counsel believed they were being reported. We cannot know what was said, what objections were made, if objections were made, and what rulings were made, if rulings were made. We do not know what words a witness spoke since it appears words were omitted, and we cannot rely on the accuracy of the transcript.[34] Under the circumstances, Mr. Johnson could not obtain meaningful appellate review.

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[34]As to the importance of word for word accuracy, Dr. Loftus testified:

> ...Well, in my own work, we have showed that just changing a word or two in the question or words or two in the sentence can have a significant effect on how the question is answered and the entire reconstruction of the event.
>
> For example, we took people who saw a film of an automobile accident. Some of them would be asked, "how fast were the cars going when they smashed into each other." And others would be asked, "how far were the cars going when they hit each other?"
>
> Not only would you get different estimates of speed in these two cases, but the people who hear these questions reconstruct different experiences in their minds. (R. 1716-17).

Confidence in the precise reporting of what a prospective juror says is especially important when reviewing the issues raised elsewhere in this petition. For example, the entire meaning of what a juror says can be drastically changed by one omitted or inaccurately transcribed word. For example, contrast "I would not automatically vote against the death penalty" with "I would automatically vote against the death penalty," or "I probably wouldn't automatically vote against the death penalty."

Crucial to issues raised elsewhere in this petition is the problem that the medical examiner's testimony was reported inaccurately and incompletely. The transcript reports the medical examiner as saying:

> In the gunshot wound to the head, which was a three-eighths inch wound, since it was a close gunshot wound, it had one-sixteenth of an inch, was black in margin and had purple red tattooing or stippling if you will, for up to one-half inch around it. (R44)

What was it that "had one-sixteenth of an inch?" Was it sooting? Was it tearing? Was it a different kind of tattooing? Each answer would ostensibly indicate a different kind of wound. Further, because the transcript cannot be relied on for accuracy we cannot know if the wound was "three-eighths of an inch" as reported or if the stippling was up to "one-half inch around." Precise information is absolutely essential to appellate review. But here, the testimony cannot be taken as correct or precise. Did the medical examiner really shoot the gun at the scene? If

not what did he do? Why did the trial judge say in the reporter's notes that the "medical examiner" messed up?

In United States v. Selva, 559 F.2d 1303 (5th Cir. 1977), the court held that where counsel on appeal is different than trial counsel specific prejudice need not be shown when there are transcript deficiencies. Prejudice is presumed. A demonstration of substantial omissions from the transcript is sufficient to require a new trial. This is consistent with Harding v. Davis.

Here, however, specific prejudice exists in addition to the substantial omissions, because it is apparent that neither the parties nor the courts can rely on the accuracy of the record. Certainly the proportionality review conducted by this Court was impaired if not nonexistent as a result of the incomplete record. The medical examiner's testimony could easily have resulted in a life sentence on a proportionality review had an accurate transcript been provided. Here, as in Parker v. Dugger, habeas corpus relief is mandated.

E. LACK OF FULL REVIEW

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, is "virtually incomprehensible" because of numerous gross inaccuracies and errors, does not report bench conferences, and fails to accurately reflect what occurred. The Supreme Court in Entsminger v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. In Commonwealth v.

Bricker, 487 A.2d 346 (Pa. 1985), the court 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.

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.

F. CONCLUSION

Mr. Johnson was denied his right to an accurate transcript of his trial for appellate review. Where the transcript necessary for a complete review is unavailable, this Court has no alternative but to remand for a new trial. Delap v. State, 350 So. 2d 462 (Fla. 1977). Mr. Johnson was deprived of his right to effective appellate counsel and appellate review because appellate counsel and this Court was provided an inaccurate and incomplete transcript. Habeas corpus relief must issue.

CLAIM VIII

MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN APPELLATE COUNSEL FAILED TO MOVE TO DISQUALIFY JUDGE BAKER, THE RECONSTRUCTION HEARING JUDGE, AFTER LEARNING THAT JUDGE BAKER HAD RECEIVED AN IMPROPER COMMUNICATION FROM JUDGE POWELL, THE ALREADY DISQUALIFIED JUDGE. MR. JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THIS ISSUE WAS NOT RAISED ON APPEAL.

In June of 1981, Judge Rom. W. Powell recused himself from Mr. Johnson's case which was before the Circuit Court on the issue of the reconstruction of Mr. Johnson's trial transcript because he was to be a witness on the issue of the transcript's accuracy and completeness. Judge Powell had sentenced Mr. Johnson to death on October 3, 1980. Eventually the issue of the record was assigned to Judge Joseph P. Baker. Although

disqualified and knowing he would be a witness, Judge Powell, wrote Judge Baker a letter dated April 8, 1982 (R. 1808-9). The letter indicates a copy was sent to Mr. Johnson's appellate counsel as well as the chief judge, and others. In the letter, Judge Powell, expressed his opinions about the substantive issue of the record reconstruction.

> At the hearing, it seems to me that the sole issue should be the correctness of the corrected transcript. Jones, Hinshelwood, Mrs. Wheeler and I should be called to testify. Any objections filed should be ruled upon....
>
> I trust the procedure outlined above will meet with your approval and that of counsel. I also think that Mr. Zimmet's proposal to take Mrs. Wheeler's deposition and to retain expert court reporters to testify at this hearing is superfluous, not authorized by law, wasteful of taxpayers money and of absolutely no help to the defendant's case. In my opinion, he ought not be allowed to do these things.

(R. 1808-9).

Appellate counsel should have immediately moved to disqualify Judge Baker. Judge Baker had engaged in improper communications with a witness to a proceeding over which he was presiding. He gained personal knowledge of disputed evidentiary facts via the improper communication. Mr. Johnson's appellate counsel was aware of the improper communication for almost three weeks before proceedings began in front of Judge Baker, but did not use the ample time to move to disqualify Judge Baker. Appellate counsel was ineffective.

Due process guarantees the right to a neutral detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978). The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974).

In capital cases, judicial scrutiny must be more stringent than it is in non-capital cases. As the United States Supreme Court indicated in Beck v. Alabama, 447 U.S. 625 (1980), special procedural rules are mandated in death penalty cases in order to insure the reliability of the sentencing determination. "In a capital case, the finality of the sentence imposed warrants protections that may or may not be required in other cases." Ake v. Oklahoma, 470 U.S. 68, 87 (1985)(Burger, C.J., concurring). Thus, in a capital case such as Mr. Johnson's the Eighth Amendment imposes additional safeguards over and above those

required by the Fourteenth Amendment. In Caldwell v. Mississippi, 472 U.S. 320 (1985), for example, a prosecutor's closing argument in the penalty phase was found to violate the Eighth Amendment's heightened scrutiny requirement even though a successful challenge could not be mounted under the Fourteenth Amendment. See Caldwell, 472 U.S. at 347-52 (Rehnquist, J. dissenting); Adams v. Dugger, 816 F.2d 1493, 1496 n.2 (11th Cir. 1987).

The impartiality of the judiciary is especially important in "this first-degree murder case in which [Mr. Johnson's] life is at stake and in which the circuit judge's sentencing decision is so important." Livingston, 441 So. 2d at 1087. The court's adverse predisposition would surely prevent Mr. Johnson from ever receiving fair treatment before the court.

In Livingston and Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), this Court concluded that the failure of the judge to disqualify himself was error due to apparent prejudgment and bias against counsel, and predetermination of the facts at issue. Consequently, the Court reversed and the matter was remanded for proceedings before a different judge. In Suarez, the issue arose after a post-conviction hearing in a capital case. There the trial court erred in failing to grant a motion to disqualify after expressing an opinion as to the issues before the court prior to receiving testimony.

A fair hearing before an impartial tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133

(1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. Suarez teaches that even the appearance of prejudgment is sufficient to warrant reversal.

The Code of Judicial Conduct emphasizes the importance of an independent and impartial judiciary in maintaining the integrity of the fact-finding process. The purpose of the disqualification rules emanates from the directive of the judicial canons that a judge must "avoid even the appearance of impropriety." The Third District Court of Appeals has stressed:

> It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. Crosby v. State, 97 So.2d 181 (Fla. 1957); State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 3331 (1930).
>
> * * *
>
> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed

> or even questioned. Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

"Prejudice of a judge is a delicate question to raise," Livingston, 441 So. 2d at 1085-86, and under the circumstances of this case, the trial judge should have disqualified himself. "No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned." Id. Relief is warranted. Appellate counsel was ineffective in failing to raise this issue on direct appeal. Habeas relief is warranted.

CLAIM IX

> **MR. JOHNSON WAS NOT PERMITTED TO ATTEND RECORD RECONSTRUCTION MEETINGS OR HEARINGS IN VIOLATION OF HIS THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE MR. JOHNSON WAS NOT PRESENT, COUNSEL WAS DENIED ACCESS TO MR. JOHNSON IN VIOLATION OF GEDERS V. UNITED STATED. THIS COURT IMPOSED ARBITRARY PAGE LIMITS UPON APPELLATE COUNSEL WHICH OPERATED TO PRECLUDE PRESENTATION OF THIS ISSUE AND OTHER ISSUES. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.**

The court below attempted to reconstruct the record of Mr. Johnson's trial and sentencing proceeding in meetings and hearings which Mr. Johnson was prohibited from attending despite the fact that Mr. Johnson had been present during most of the trial and had urged his trial counsel to object to and preserve his constitutional claims. Appellate counsel repeatedly requested Mr. Johnson's presence at the meetings and hearings in

writing and in open court because he knew that Mr. Johnson had a right to be present and that his ability to provide Mr. Johnson with effective representation was interfered with by the fact that Mr. Johnson was not present (R. 1603, 1630, 1631). Counsel reminded the court that Mr. Johnson's presence had been authorized by this Court when this Court granted Mr. Johnson's Motion to Relinquish Jurisdiction (R.1754) which had specifically requested Mr. Johnson's presence at the reconstruction (R.1631). Mr. Johnson had a right to be present because the goal of the hearing was to decide questions of fact within his personal knowledge. Kentucky v. Stincer, 482 U.S. 730 (1987). His presence was necessary to guide and assist counsel in confronting and cross-examining witnesses regarding the completeness and accuracy of the trial transcript. Afterall, Mr. Johnson was at the trial, although he was excluded from bench conferences. Appellate counsel was denied the ability to consult with Mr. Johnson during the proceedings. Geders v. United States, 425 U.S. 80 (1976); Perry v. Leeke, 488 U.S. 272 (1989).

Mr. Johnson was also denied due process and equal protection by the court's rationale that because he had been sentenced to death, he was less entitled to be present than if he had not been sentenced to death. Upon learning that Mr. Johnson was on death row, the reconstruction judge said, in denying the request for Mr. Johnson's presence: "If he were requesting we pack up some cat burglar from Brevard County, I'd have less problem" with the

defendant being transported to the courtroom for the hearing (R 1634).

A criminal defendant's Sixth and Fourteenth Amendment right to be present at all critical stages of the proceedings against him is a well established. See, e.g., Kentucky v. Stincer; Francis v. State, 413 So. 2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); see also Fla. R. Crim. P. 3.180. "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. United States, 146 U.S. 370 (1892).

Mr. Johnson was denied the right to be present at the record reconstruction hearings and meetings in violation of his constitutional right to effective assistance of counsel and due process. Appellate counsel, having argued throughout for the presence of Mr. Johnson at the reconstruction hearings, failed to directly raise Mr. Johnson's absence in appropriate constitutional context on direct appeal. This was deficient performance which prejudiced Mr. Johnson.

If there is any "reasonable possibility" that Mr. Johnson's rights were prejudiced because of his absence, he is entitled to relief. Proffitt, 685 F.2d at 1260 (11th Cir. 1982). To the extent that counsel was denied access to his client, the error can never be harmless. Perry v. Leeke, 488 U.S. at 280.

Defense counsel was ineffective for unreasonably failing to ensure Mr. Johnson's presence at all proceedings, to Mr. Johnson's substantial prejudice. Mr. Johnson was a witness to the trial just as was the judge, the prosecutor, and the trial attorney. Appellate counsel should have been able to consult with Mr. Johnson when examining witnesses regarding what did or did not occur at the trial. Mr. Johnson's absence and inability to consult with counsel should have been raised on direct appeal. Counsel's failure to adequately litigate these matters was deficient performance which prejudiced Mr. Johnson.

CLAIM X

MR. JOHNSON WAS ABSENT DURING CRITICAL STAGES OF JURY SELECTION AT HIS CAPITAL TRIAL. THESE PROCEEDINGS INCLUDED UNRECORDED BENCH CONFERENCES WITHOUT AN EXPRESS RECORD WAIVER OF MR. JOHNSON'S PRESENCE. THIS COURT'S ENFORCEMENT OF AN ARBITRARY PAGE LIMIT RENDERED APPELLATE COUNSEL INEFFECTIVE. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS FUNDAMENTAL ERROR ON DIRECT APPEAL.

Mr. Johnson was excluded from all bench conferences during the voir dire of his trial when jurors approached the bench.[35] At these bench conferences, individual voir dire was conducted and challenges for cause were exercised by the parties. No one is able to say what else may have occurred. However, no record

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[35]Of course, these bench conferences were not reported due to the court reporter's personal problems. No one else remembers what occurred at these conferences. However, the trial attorney testified he remembered thinking it was important stuff. Mr. Johnson faces a serious catch-22. He was not present for these proceedings at which jurors were individually voir dired and challenges for cause were exercised, and no record of these proceedings exist.

exists of these bench conferences. Since Mr. Johnson was not present for these bench conferences, he is left with no knowledge of these proceedings or even a way to ascertain what occurred.

A criminal defendant has a Sixth and Fourteenth Amendment right to be present at all critical stages of the proceedings against him. See, e.g., Francis v. State, 413 So. 2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); see also Fla. R. Crim. P. 3.180. "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. United States, 146 U.S. 370 (1892).

In Francis v. State, 493 So. 2d 1175 (Fla. 1982), this Court reversed a capital conviction on the grounds that the defendant was not present during exercise of a preemptory challenge. Relying both of Fla. R. Crim. P. 3.180 and the Fourteenth Amendment, the Court held that defendants have a constitutional right to be present during jury challenges.

Here, it is undisputed that individual voir dire occurred during these bench conferences at which Mr. Johnson was excluded. In addition, the evidence indicates the jude heard challenges for cause at these unreported bench conferences conducted in Mr. Johnson's absence. If there is any "reasonable possibility" that Mr. Johnson's rights were prejudiced because of his absences, he

is entitled to relief. Proffitt, 685 F.2d at 1260 (11th Cir. 1982).

Mr. Johnson had a right to be present at the bench conferences and in the absence of a valid waiver or acquiescence to juror strikes made at the bench, his exclusion was fundamental error. Coney v. State, No. 80,072, 20 Fla. L. Weekly S17 (Fla. Jan. 5, 1995).

Appellate counsel for Mr. Johnson was ineffective for failing to raise this meritorious and compelling claim on direct appeal. Appellate counsel was hampered by an inaccurate and incomplete record, as well as this Court's arbitrary invocation of a seventy (70) page limit on the initial brief. Counsel could have no valid strategic reason for not presenting this argument other than lack of an accurate record and adequate briefing space. This claim is now properly brought pursuant to this Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. The denial of an accurate record, adequate briefing space, and counsel's failure deprived Mr. Johnson of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985); Maitre v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). Accordingly, habeas relief must now be accorded.

The error here is clear and fundamental. It should have been brought to this Court's attention. Appellate counsel's failure to raise these issues constituted ineffective assistance

of counsel. To the extent that the record is incomplete and inaccurate, Mr. Johnson was deprived of meaningful appellate review, and his Sixth and Fourteenth Amendment rights. Habeas relief is warranted.

CLAIM XI

MR. JOHNSON'S RIGHT TO AN APPELLATE REVIEW OF HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT WAS DENIED BECAUSE BENCH CONFERENCES DURING WHICH JURORS WERE QUESTIONED AND THE COURT AND COUNSEL DISCUSSED REMOVALS FOR CAUSE AND PEREMPTORY REMOVALS WERE NEVER RECORDED AT TRIAL AND NEVER REVIEWED BY THIS COURT ON DIRECT APPEAL. MR. JOHNSON WAS DENIED A MEANINGFUL APPELLATE REVIEW AND THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE NEITHER APPELLATE COUNSEL OR THIS COURT WAS PROVIDED A FULL RECORD OF THE JURY SELECTION PROCESS.

Mr. Johnson had the right to an impartial and indifferent jury at trial, Turner v. Louisiana, 379 U.S. 466 (1965), and the right to remove jurors for cause and to challenge efforts by the state to remove jurors for cause. Mr. Johnson also had the right to meaningful review by this Court of the trial court's action. Due to the omission in the record of bench conferences during which jurors were questioned by the court and counsel, and counsel made challenges and objections to challenges, Mr. Johnson's rights to an impartial jury were and remain unreviewable by this Court.

For example, Mr. Johnson also had the right to remove any juror for cause who maintained the view that the death penalty should be automatically imposed on any defendant found guilty of first degree murder, Morgan v. Illinois, 112 S. Ct. 2222

(1992)("If even one juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence). Due to the omission in the record of bench conferences during which jurors were questioned by the court and counsel, and counsel made challenges and objections to challenges, Mr. Johnson's right to remove such jurors was and remains unreviewable by this Court. Mr. Johnson had the right to remove jurors who were biased and/or prejudiced, or who were exposed to extrajudicial information. However, the individual voir dire regarding these matters and the resulting challenges for cause are missing from the record.

In addition, Mr. Johnson had the right to challenge peremptory strikes to jurors at trial on the basis that the state was engaging in racially discriminatory jury selection. Batson v. Kentucky, 106 S. Ct. 79 (1986). Again, due to the omission in the record of bench conferences during which jurors were questioned by the court and counsel, and counsel made challenges and objections to challenges, Mr. Johnson's rights to a jury selection process free from racial discrimination were and remain unreviewable by this Court.[36]

Mr. Johnson's appellate counsel raised the issue that the court had improperly excused two prospective jurors on the basis of their views about the death penalty, but the extent to which the record was inaccurate or incomplete and did not contain transcription of the bench conferences during voir dire, counsel

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[36]See also Claims IX and X. Mr. Johnson was not present at the bench conferences or at the record reconstruction proceedings.

was rendered ineffective. Moreover, Mr. Johnson was absent from the bench conferences and thus was unable to advise appellate counsel what had occurred. Trial counsel had no specific recollection other than remembering to be thankful for the presence of a court reporter because of the importance of the matters being discussed. Without a complete record of the voir dire and the objections of trial counsel, appellate counsel was unable to raise Mr. Johnson's constitutional claims. Mr. Johnson was denied a meaningful appeal and his Sixth, Eighth and Fourteenth Amendment rights. This Court's arbitrary imposition of a seventy (70) page limit further exacerbated the constitutional deprivations. Habeas relief is required.

CLAIM XII

MR. JOHNSON'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT RESPONDED TO A REQUEST BY THE JURY THAT TESTIMONY FROM THE TRIAL BE REHEARD. NEITHER MR. JOHNSON OR HIS COUNSEL WERE PRESENT WHEN THE TRIAL COURT COMMUNICATED WITH THE JURY IN RESPONSE TO THEIR REQUEST. THIS FUNDAMENTAL ERROR WAS NOT RAISED ON DIRECT APPEAL. MR. JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BECAUSE COUNSEL FAILED TO RAISE THIS ISSUE, OR BECAUSE THE RECORD WAS INCOMPLETE AND/OR INACCURATE. FURTHER THIS COURT'S ARBITRARY SEVENTY (70) PAGE LIMIT DEPRIVED MR. JOHNSON OF EFFECTIVE APPELLATE COUNSEL.

Mr. Johnson's trial recessed at 5:05 p.m. The courtroom was cleared pending the return of the jury's verdict (R. 327). At 9:15 p.m., the trial court resumed the trial to respond to an inquiry by the jury. Neither Mr. Johnson nor his counsel were present or aware that the jury had submitted a request to rehear

evidence. The Clerk re-read Mr. Johnson's statements to the jury outside the presence of Mr. Johnson and his attorney. This was fundamental error which violated Mr. Johnson's right to be present with the assistance of counsel at all stages of his trial. State v. Franklin, 618 So. 2d 171 (Fla. 1993); Williams v. State, 488 So. 2d 62 (Fla. 1986); Ivory v. State, 351 So. 2d 26 (Fla. 1977).

The trial court ordered the Clerk of the Court to re-read Mr. Johnson's statements and directed the clerk regarding how to read the statements. The statements had been admitted into evidence over the strenuous objections of counsel, but at this time were re-read to the jury in the absence of either Mr. Johnson or his attorney.[37]

This Court stated in State v. Franklin: "per se reversible error occurred if there was any communication between the jury and the trial court pertaining to the jury's request for items enumerated in Rule 3.410 outside the presence of the defendant, defendant's counsel and the prosecutor." 618 So. 2d at 172-73.

This per se reversible error was not raised on direct appeal. Mr. Johnson was denied the effective assistance of counsel because counsel failed to raise this issue. Had the issue been raised, reversal would have been required. Thus, Mr.

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[37]Due to the condition of the record, we cannot know whether the Clerk re-read the statement exactly as it originally was read into evidence. Because Mr. Johnson and his counsel were not present during this communication with the jury, this portion of the record could not even be attempted to be "reconstructed".

Johnson was prejudiced by appellate counsel's deficient performance.

CLAIM XIII

MR. JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS A RESULT OF ASSISTANT ATTORNEY GENERAL MENSER'S REPEATED IMPROPER ATTACKS ON THE CREDIBILITY OF HIS APPELLATE COUNSEL. THE ASSISTANT ATTORNEY GENERAL'S CONDUCT INTERFERED WITH APPELLATE COUNSEL'S REPRESENTATION OF MR. JOHNSON IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The effectiveness of appellate counsel was impermissibly interfered with by the State's attacks on his credibility before this Court during the direct appeal and record reconstruction process. At the conclusion of the record reconstruction hearing on June 18, 1982, the trial prosecutor (who was permitted to argue with the defendant's trial counsel even while giving testimony), and counsel for the state, engaged in the following commentary:

> STATE TRIAL COUNSEL: Assuming that the State is going to get notice of that deposition. That a crass assumption in light of Mr. Zimmet's assumption of service of process. But I would request that we be apprised of any such deposition, if that's the way we're going to proceed.
>
> STATE APPELLATE COUNSEL: Your Honor, I would request one thing on behalf of the State, since it's now our time. We're not going to put on any particular dog and pony show here for the court. I think the witnesses have all testified that they have read the thing. The defense lawyer, the State attorney, they've all said its substantially accurate.
>
> The defense lawyer got on the stand and went through 27 points on appeal. None of the if's, and's or but's prejudiced his client in

> any way. So, we're going to ask if the Court is going to allow any prejudicial substance to come into the court file.
>
> Because the Supreme Court is already upset that this has been dragging on and dragging on, and we do want this death case to be decided, not to be facetious, but to be terminated as quickly as possible before this man dies of natural causes.
>
> DEFENDANT'S APPELLATE COUNSEL: What court order was that, Mr. Menser? [sic: obvious omission by reporter.]
>
> STATE APPELLATE COUNSEL: It was just before you asked that the case be remanded. You do remember it? If so, speak up. I didn't think you would answer.
>
> That is all we have, Your Honor.
>
> THE COURT: What you want is, you want Mr. Johnson terminated as soon as possible?
>
> STATE APPELLATE COUNSEL: Hopefully, Your Honor.
>
> STATE TRIAL COUNSEL: A noble ambition and ennobling thought.
>
> THE COURT: All right. I was in the process of reading the Executioner's Song. I guess, actually, you know, there's some similarity between them, between the deeds of Gary Gillmore [sic] and those which Mr. Terrell Johnson was found guilty of. So, I thought the Executioner's Song was a long story, but compared to this, I don't know.

(R. 1995).

The State's attack on the credibility of Mr. Johnson's appellate attorney was an improper attempt to prejudice him in the eyes of this Court and interfere with the diligent and zealous representation of Mr. Johnson.

In its Reply to and Motion to Strike Sham Pleadings, filed December 29, 1982, the State suggested that the Petitioner's appellate counsel had violated Disciplinary Rules DR 7-102 and 107, by filing motions in other than good faith. This misconduct offends fundamental fairness contrary to due process of law.

Meyer v. State, 415 So. 2d 70 (5th DCA 1982), notes that DR6-101 and DR7-101(A), Fla. Code of Prof. Resp., require a lawyer to not neglect a matter entrusted to him, and to diligently and competently pursue it. "Implicit in the concept of a 'guiding hand' [of counsel, guaranteed to all criminal defendants] is the assumption that counsel will be free of State control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." Meyer v. State, 415 So. 2d 70 (5th DCA 1982); citing Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963); and Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L.Ed. 426 (78). In Mr. Johnson's case, following the State's attack on his character, appellate counsel failed to pursue available remedies to secure proper relief. Mr. Johnson was prejudiced by counsel's ineffectiveness.

State appellate counsel, Mr. Menser, continued in his answer brief to personally attack Mr. Johnson's appellate counsel, Mr. Zimmet. The following are some examples:

> "The State shall rely upon the appendixed order entered by the Honorable Judge Baker for the relevant findings of fact (App. 103).

> After almost a year on remand, no one who attended the trial, including Terrell Johnson himself, offered a single significant correction to the trial transcript. In an especially commendable display of candor, both defense counsel (Jones) and Johnson could not offer any significant correction.
>
> Only Mr. Zimmet, an appellate lawyer who had no connection with the trial, presupposed significant error, despite his lack of any basis in fact for his wishful proposals.
>
> The State submits that the only person to claim error (Mr. Zimmet) was the only person sub judice unqualified to question the events of a trial he did not attend."

(Appellee's Answer Brief, p. 1)[38]

> It is indeed curious that the Appellant was able to submit a 70 page brief containing detailed allegations of error from a transcript which he alleges cannot be read.
>
> It is equally curious that every time the Appellant drafts a pleading he comes up with semantic "errors" (mostly "suspected"), but every time he is compelled to "put up" a significant error affecting his ability to appeal, he cannot do so! Instead he begs off and files another frivolous pleading."

(Appellee's Answer Brief, p. 9)

> "During one solid year of remand defense counsel made no effort to order these transcripts or supplement the record. Counsel examined Judge Powell and defense counsel - and no problem with the jury instructions, as read, was mentioned.

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[38]Interestingly, the State attacked appellate counsel's handling of the reconstruction hearing because he was "unqualified to question the events of a trial he did not attend" when Mr. Johnson who did attend those portions of the trial conducted in open court was excluded from the reconstruction hearing and not even available to appellate counsel during the reconstruction hearing. See Claim IX.

> In yet another key "omission" of fact, appellate counsel also failed to call this Court's attention to (R 318), where defense attorney Jones placed on the record, for purposes of appeal, every objection he had of any kind to the jury instructions. Again, Johnson was not prejudiced.
>
> This entire argument by the Appellant, including his slanderous attack on Rose Wheeler (especially the spurious "this is not the first time" tirade) is without legal or factual merit."

(Appellee's Answer Brief, p. 14)

> "This ludicrous argument is not raised seriously and should be disregarded.
>
> In his "Point IX" Johnson falsely accused the court of permitting the jury to consider 'non-statutory aggravating factors', those being the 'threat of future conduct.'"
>
> This is a gross misrepresentation and the State highly resents the Appellant's lack of ethical candor.
>
> The Court never instructed this jury on any non-statutory aggravating circumstance."

(Appellee's Answer Brief, p. 41).

This State interference with appointed counsel's representation is a "circumstance that [is] so likely to prejudice the accused that the cost of litigating [its] effect in [this] case is unjustified." U.S. v. Cronic, 466 U.S. 648 (1984). This is especially so when viewed together with the blatant effort to induce this Court to affirm Mr. Johnson's conviction by "unfairly prejudicing" it against his appellate counsel. See, Jackson v. State, 421 So. 2d 15 (3d DCA 1982) rehearing denied (jury was asked if it would buy a used car from defendant's lawyer). See also, Adams v. State, 192 So. 2d 762

(Fla. 1966) (lawyer accused of twisted statement, perverted, distorted, and disgusting argument, violation of ethics).

To the extent appellate counsel failed to raise this issue on direct appeal, appellate counsel was ineffective. Habeas relief is warranted.

CLAIM XIV

MR. JOHNSON'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY THE JURY'S AND THE JUDGE'S CONSIDERATION OF NON-STATUTORY AGGRAVATING FACTORS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

The prosecutor at the sentencing phase of the trial improperly told the jurors that they could consider the conviction of Mr. Johnson for the second degree murder of Charles Himes, to support the existence of the "avoiding or preventing arrest" aggravating factor, the "cold, calculated and premeditated" aggravating factor, and the "prior violent felony" aggravating factor (R. 482-86, 497-98, 503, 506-09). The impermissible argument during the penalty phase of Mr. Johnson's trial for first degree murder of James Dodson, linking the death of Charles Himes to the aggravating factors should have been identified by appellate counsel and cited to this Court for review.

Mr. Himes' death had no proper bearing on the "cold, calculated and premeditated" aggravating factor, 921.141(5)(i), and the jury should never have heard the prosecutor argue that it did. The effect was that the jury considered a non-statutory aggravating factor.

The prosecutor argued:

> How did Terrell Johnson murder Charlie Himes? What were the circumstances of that murder? Remember his walking back there in the bathroom putting him out of his misery. I submit to you, ladies and gentlemen, the kind of mentality that would come up with that is precisely cold, calculated premeditated, without pretense of legal or moral justification.

(R. 508-9).

Regarding the "avoiding or preventing arrest" aggravating factor, the prosecutor argued the following:

> You can believe or disbelieve Terrell Johnson's statements that he went back there as an act of mercy to put Charlie Himes out of his misery. You can believe that if you will. It's also consistent with and points to the fact that he was engaged in a determined effort to rid himself of witnesses.
>
> Ladies and gentlemen, I submit to you that the crime, the murder of Jim Dodson was committed for the purpose of avoiding or preventing a lawful arrest by eliminating witness.

(R. 503).

The prosecutor also argued the "in the course of a felony" aggravator. However, the jury acquitted Mr. Johnson of felony murder when it convicted Mr. Johnson of second degree murder as to Mr. Himes.

When then faced with a challenge to Florida's capital sentencing scheme, the United States Supreme Court found it passed constitutional muster:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them,

> the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judges and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be outweighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Gregg v. Georgia, 428 U.S. 242, 250 (1976). Thus, aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

This court, in Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977) stated:

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Miller, 373 So. 2d at 885. See also Riley v. State, 366 So. 2d 19 (Fla. 1979), and Robinson v. State, 520 So. 2d 1 (Fla. 1988).

"Florida is a weighing state; the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances." Parker v. Dugger, 111 S. Ct. 731, 738 (1991). "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." Stringer v. Black, 112 S. Ct. 1130 (1992). The prosecutor's introduction and use of, and the sentencers' reliance on wholly improper and unconstitutional non-statutory aggravating factors violated of the Eighth Amendment.

Appellate counsel failed to raise this issue and denied Mr. Johnson effective assistance of counsel. To the extent that this Court arbitrarily imposed a seventy (70) page limitation and to the extent that the record is incomplete and inaccurate, Mr. Johnson was deprived of his right to a meaningful appeal and his Sixth, Eighth, and Fourteenth Amendment rights. Habeas relief is warranted.

CLAIM XV

MR. JOHNSON'S SENTENCE OF DEATH VIOLATES THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY BECAUSE THE TRIAL COURT USED THE DEATH OF CHARLES HIMES TO SUPPORT ITS FINDING OF THE AGGRAVATING CIRCUMSTANCE "AVOIDING OR PREVENTING ARREST" AND "IN THE COURSE OF A FELONY" IN THE SENTENCING OF MR. JOHNSON FOR THE DEATH OF JAMES DODSON AFTER THE JURY HAD ACQUITTED MR. JOHNSON OF FIRST DEGREE MURDER IN THE DEATH OF HIMES. MR. JOHNSON'S DEATH SENTENCE IS IN VIOLATION OF THE EIGHTH AMENDMENT. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Mr. Johnson received a death sentence for the death of the bar owner, James Dodson. In finding that the aggravating circumstance "for the purpose of avoiding arrest or preventing a lawful arrest" existed as to the death of the Dodson, the trial court found that "the evidence was clear that the Defendant intended to eliminate the bar owner victim and patron as witnesses by killing them so as to avoid detection and arrest" (R. 806). The death for which Mr. Johnson has been sentenced to death resulted from a single gun shot. The trial judge also found the killings occurred in the course of a felony.

As to the death of the patron, Charles Himes, Mr. Johnson was acquitted of first degree murder when the jury returned a verdict of guilty of second degree murder. Mr. Johnson was acquitted of both premeditated and felony murder as to Himes. The only explanation is that the jury did not believe that the homicides occurred in the course of a felony, and believed that the patron was shot without premeditation when he lunged at Mr. Johnson, and then Mr. Johnson had simple premeditation when he

shot the bar owner. Yet, the trial court relied on the evidence rejected by the jury that Mr. Johnson after shooting both men heard the patron moaning and went and finished him off. Based on this evidence alone as to the death of Himes, the judge found that the death of Dodson was "for the purpose of avoiding or preventing arrest" (R. 806). To prove this aggravator, the State must prove an element of intent. The State must show that the killing was for the dominant motive of "avoiding or preventing arrest". In Mr. Johnson's case however, the jury had found that the state had failed to show that Mr. Johnson had any intent whatsoever to cause the death of Himes.

The jury also had determined that the homicide did not occur in the course of a felony, nor was there a pre-existing plan to kill. The trial judge ignored the verdict. The fact that Mr. Johnson had no intent to cause the death of Himes was an issue of ultimate fact resolved in Mr. Johnson's favor in the guilt phase of Count II of the indictment. Similarly, the verdict determined as a matter of necessity that Mr. Johnson was not guilty of felony/murder. In violation of the prohibition under the Florida and United States Constitution, the trial court forced Mr. Johnson to relitigate the issue. Shiro v. Farley, 114 S. Ct. 783, 790 (1994). Contrary to the jury's finding on the issue and in violation of Mr. Johnson's rights, the trial court ignored the verdict and relied upon elements that the jury determined were not present in reaching a decision to sentence Mr. Johnson to death.

In Mr. Johnson's case the court's use of the death of Himes to support Mr. Johnson's sentence of death also amounted to a successive prosecution of Mr. Johnson for the intentional murder of Mr. Himes in violation of Mr. Johnson's Fifth Amendment rights against double jeopardy.

Appellate counsel rendered ineffective assistance in failing to present this issue on direct appeal. To the extent that this Court's arbitrary page limit or the inaccurate and incomplete record interfered with counsel's ability to litigate this issue, Mr. Johnson's Sixth, Eighth and Fourteenth rights were trampled. Habeas relief is warranted for this error in the appellate process.

CLAIM XVI

THE PROSECUTOR'S INFLAMMATORY, EMOTIONAL, AND IMPROPER ARGUMENT TO THE JURY AT SENTENCING RENDERED MR. JOHNSON'S SENTENCING PROCEEDING AND RESULTANT DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MR. JOHNSON WAS DEPRIVED OF MEANINGFUL REVIEW BECAUSE THE RECORD IS INCOMPLETE AND INACCURATE.

The prosecutor's argument to the jury at Mr. Johnson's sentencing proceeding was misleading, prejudicial, and violative of the Eighth Amendment. Fraught with blatant appeals to emotional considerations irrelevant to sentencing, expressions of personal opinion, assertions of expertise, appeals to patriotism and law and order, and irrelevant personal attacks and insults against both Mr. Johnson and his counsel, the prosecutor's

misconduct rendered the sentencing proceeding fundamentally unfair and violative of due process.

Trial counsel objected to the argument as improper (R. 298, 498). The prosecutor's comments were further challenged on direct appeal. However, this Court denied the claim on the merits without elaboration. Review of this claim was and is limited, however, by the accuracy of the transcript.[39]

Mr. Johnson's jury was prejudiced by the prosecutor's repeated and inflammatory personal opinions. The prosecutor spoke of the "two parties in this courtroom." "One is Mr. Johnson, and he has rights. He has a lot of rights. You've seen him in talking [sic]; about confessions; and not bringing in evidence of other convictions to determine the verdict" (R. 484). Clearly, the prosecutor was asking the jury to hold Mr. Johnson's exercise of his rights against him. This was constitutionl error. Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991).

The prosecutor belittled mitigation and the constitutional requirement of an individualized sentence:

> Ladies and gentlemen, you are going to have to weigh, weigh these factors. And when you weigh them I want you to as] yourselves, is there some sorry a species, man of humanity or animal on the face of God's green earth that he can't get somebody in here to say something in his behalf? No.

(R. 490). As for the mitigating factor of under the influence of extreme mental or emotional disturbance, the prosecutor stated:

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[39]For example, an Orlando television station videotaped part of the State's closing argument and a comparison of this tape to the transcript revealed material inconsistencies.

> I'm going to suggest to you all this talk of extreme emotional and mental disturbances, number one, on its face is a bunch of eyewash [sic]. Number two, to the extent that there is emotional and mental disturbance to the extent that it's there, it's self evident. Wouldn't you be a little surprised if it wasn't there? Would you be a little surprised if you didn't see any problem whatsoever in a person who would commit the kind of act that we discussed last week?

(R. 488).[40]

As for the mitigating factors of under extreme mental or emotional disturbance and capacity to appreciate criminality was the prosecutor stated:

> Relating to both item F and item B, you're not looking at somebody who's running around awry and in circles, can't do a thing. Can't get a thing done.
>
> * * *
>
> [L]adies and gentlemen, was he running around awry incapable of doing anything? No.
>
> * * *
>
> This is not some raving idiot, ladies and gentlemen.

(R. 490). And the prosecutor had this to say about the mitigating factor that ensures an individualized sentencing as required by Lockett, Eddings, and Penry:

> Because the legislature has determined that we are not to restrict the Defendant from proving anything under the sun. It's not like the State. I have got to go -- I have got to go by these nine factors. I want you to understand I'm not complaining about that. I'm just telling you that's the way it is.

---

[40]Certainly the reference to "eyewash" reflects on the accuracies of the transcript.

> We go by these nine. And they go by these seven. And then the legislature says anything in the world you want to prove up. Anything. And I think we just about had the whole smorgasbord here today.

(R. 492).

The prosecutor continued to prejudice Mr. Johnson's jury by misconstruing the law and its legal standards. As for drinking to excess, the prosecutor stated:

> Ladies and gentlemen, you can sit here in this court all day long from until, until doomsday and you will not hear drinking used as a formal legal defense. I was drunk so it can't be first degree murder. I was drunk so you ought not find me, find for the death penalty.

(R. 494). After the above misstatement, the prosecutor stated:

> [I]f you are going to go back there and consider a drinking problem in that direction don't consider while he's under the influence of alcohol, ladies and gentlemen. Consider it in the context of a person who knows he has a drinking problem, who checks into a hospital, who gets out of that hospital and knowing that his Jekyll and Hyde personality undergoes a great change gets out of the hospital, starts drinking, with the idea he's going to go get his gun back.

(R. 494-95).

The prosecutor also permeated Mr. Johnson's trial with a misconstruction of the premeditation standard:

> Sometimes, it's even said, intent can follow the bullet.

(R. 298), and the reasonable doubt standard:

> Ladies and gentlemen, all this talk about reasonable doubt boils down to this. A settled belief in your heart. If you believe in your heart that Terrell Johnson is guilty

> of first degree murder, then I have satisfied my burden,

(R. 294). Premeditation also was used and argued as an aggravating factor. "Ladies and gentlemen, I brought it out to you in the verdict [sic] phase" (R. 506). The prosecutor argued future dangerousness, an aggravator not enumerated in Florida's exclusive list of aggravating factors:

> That is, it shows a pattern. It shows a pattern without hope. 1968, attempted robbery. 1980 armed robbery. 1980 attempted murder. 1980 the second degree murder of Charlie Himes. All of those convictions. The Defendant previously convicted before today shows a pattern. They show a pattern since age 22. And they show a pattern this year.
>
> I submit to you that there is a pattern of violence in the life of Terrell Johnson that will continue as long as he lives. As long as he lives. And you should consider that.

(R. 498). The prosecutor later stated:

> In weighing it, God forbid that Terrell Johnson ever see the light of day. Is your recommendation to be life? Is he suitable for such a risk? Can you convince yourself if weighing these factors that he's suitable risk simply to put behind bars?

(R. 510).

The prosecutor made improper references to the State of Florida "and the society" being the plaintiffs and the State of Florida having rights (R. 484). The prosecutor even unconstitutionally hinted that it had more evidence to suggest Mr. Johnson should die but the State has "to go by these nine factors" (R. 492). The prosecutor also commented on the improper

aggravator of lack of remorse by stating that Mr. Johnson told his "chilling, cool" story unemotionally (R. 292-93). The prosecutor also told the jury to weigh the spoils of the crime "against two lives" (R. 285).

The prosecutor infested Mr. Johnson's trial with his own "passion or prejudice" instead of "reason and []understanding of the law" in violation of Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). As to heinous, atrocious, and cruel, the prosecutor argued that the factor was present and should be considered by the jury. The prosecutor concluded saying "there is only one sentence in this case and it's the same sentence that Jim Dodson and Charlie Himes [the victims] received on the 4th of December 1979" (R. 511).

The state's argument, from beginning to end (R. 481-511), was replete with inflammatory and emotional remarks which were deliberate and highly prejudicial. Far beyond the "dramatic appeal to gut emotion."

The prosecutor knew or should have known better. His argument was deliberately, powerfully, and admittedly aimed at getting the jury to return a death recommendation based on impermissible sentencing considerations and gut emotion.

Although a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977) (Opinion of Stevens, J.), here, because of the prosecutor's unchecked, inflammatory argument, death was imposed based on emotion,

passion, and prejudice. See Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991).

Arguments such as those presented in Mr. Johnson's case have been long-condemned as violative of due process and the Eighth Amendment. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(en banc). Such arguments render a sentence of death fundamentally unreliable and unfair. Drake, 762 F.2d at 1460 ("[T]he remark's prejudice exceeded even its factually misleading and legally incorrect character ...."); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984)(because of improper prosecutorial argument, the jury may have "failed to give its decision the independent and unprejudiced consideration the law requires"). See also Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989), quoting Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986)("'[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances ... and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law'") (citations omitted).

The prosecutor's arguments also violated the Fourteenth Amendment, and the due process violation requires relief:

> Considering the prosecutor's penalty argument in light of the totality of the circumstances, we find that Newlon was unfairly prejudiced by the prosecutor's improper argument. As the district court concluded, the prosecutor's argument:

> infect[ed] the penalty proceeding with an unfairness that violates due process. The remarks were neither isolated nor ambiguous * * * By contrast, the jury was subjected to a relentless, focused, uncorrected argument based on fear, premised on facts not in evidence, and calculated to remove reason and responsibility from the sentencing process. This constitutional error requires that the sentence of death be vacated.

Newlon v. Armontrout, 885 F.2d at 1338, quoting Newlon v. Armontrout, 693 F. Supp. 799, 808 (W.D.Mo. 1988)(emphasis added).

In Mr. Johnson's case, basic Eighth Amendment requirements were flouted. The prosecutor's arguments demonstrate that Mr. Johnson's death sentence was based upon "factors that are constitutionally impermissible or totally irrelevant to the sentencing process," Stephens, and upon "caprice or emotion," Gardner, rather than upon a reasoned, individualized or particularized assessment of Mr. Johnson's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982).

In Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983), where defense counsel was found to be ineffective for failing to object to the introduction of certain testimony, the Court explained:

> We have no difficulty concluding that counsel's ineffectiveness "resulted in actual and substantial disadvantage to the cause of [Vela's] defense." Strickland, 693 F.2d at 1262. Indeed, given the extremely prejudicial effect of this testimony, we fail to see how anyone could conclude otherwise. Faced with the task of assessing Vela's punishment, the jury was informed that the man he had killed was kind, inoffensive, a star athlete, an usher in his church, a member of its choir, a

> social worker with under-privileged children of all races, a college student holding down two jobs while he attended classes and played on the championship football team, and the father of a three-year-old child. The truth of these statements is, of course, not in issue; the point is that they are irrelevant to the severity of Vela's sentence, and should not have been considered by the jury.
>
> ....
>
> We cannot in reason conclude that the jury did not consider this inadmissible, improper, highly prejudicial testimony in determining Vela's sentence. The sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus. Each item of testimony has an incremental effect; large segments of highly prejudicial, inadmissible testimony have a considerable effect, skewing the calculus and invalidating the result reached.

Vela, 708 F.2d at 966 (emphasis added). Likewise, in Mr. Johnson's case, the factors urged by the prosecutor's arguments were "irrelevant" and "should not have been considered." Also as in Vela, the interjection of these impermissible factors into the sentencing decision was prejudicial--no one "could conclude otherwise." But these factors were the heart of the State's case for death in Mr. Johnson's case.

The prosecutor's highly improper argument was not corrected by the jury instructions. This prevented Mr. Johnson's jury from providing Mr. Johnson the "particularized consideration" the Eighth Amendment requires. Undeniably, the presentation of evidence in mitigation of punishment involves the jury's human, merciful reaction to the defendant. See Peek v. Kemp 784 F.2d 1479, 1490 and n.12 (11th Cir. 1986)(en banc)(the role of

mitigation is to present "factors which point in the direction of mercy for the defendant"); see also Tucker v. Zant, 724 F.2d 882, 891 (11th Cir.) vacated for reh'g in banc, 724 F.2d 898 (11th Cir. 1984), reinstated in relevant part sub nom. Tucker v. Kemp, 762 F.2d 1480, 1482 (11th Cir. 1985)(en banc). Allowing the jury to believe that "mercy" may not enter their deliberations negates any evidence presented in mitigation, for it forecloses the very reaction that evidence is intended to evoke, and therefore precludes the sentencer from considering relevant, admissible (even if nonstatutory) mitigating evidence, in violation of Hitchcock v. Dugger; Skipper v. South Carolina, 475 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio and the Eighth and Fourteenth Amendments.

On direct appeal, this Court considered this issue but erroneously found no merit to Mr. Johnson's claim that the prosecutor's argument violated the Eighth and Fourteenth Amendments. To the extent that appellate counsel failed to properly raise this issue on direct appeal, appellate counsel was ineffective. To the extent that the record was incomplete and inaccurate, this Court could not conduct meaningful review. As a result, Mr. Johnson was denied his right to meaningful review, and his rights under the Sixth, Eighth and Fourteenth Amendments. Habeas relief is warranted.

CLAIM XVII

MR. JOHNSON'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

The proceedings resulting in Mr. Johnson's sentence of death violated the constitutional mandate of Eddings v. Oklahoma, 455 U.S. 104 (1982). Sentencing judges are required to specifically address nonstatutory mitigation presented and/or argued by the defense. Campbell v. State, 571 So. 2d 415 (Fla. 1990). The failure to give meaningful consideration and effect to the evidence in mitigation requires reversal of a death sentence. Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

At the opening of Mr. Johnson's penalty phase, the State offered only a stipulation regarding Mr. Johnson's prior convictions (R. 434-37). Thereafter, in regards to the penalty phase, the state rested (R.437). At the close of Mr. Johnson's case in mitigation, the State presented nothing in rebuttal (R. 474).

During penalty phase, Mr. Johnson presented three witnesses each of whom presented evidence of mitigation and each of whom went unrefuted by the state.

"When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). See Maxwell v. State, 17 F.L.W. S396, S397 (Fla., June 25, 1992).

Yet the trial court's sentence of death stated that the court found that:

> H) Other evidence relating to the character of the Defendant was offered as a mitigating circumstance: his traumatic childhood; his periodic separation from and neglect by his alcoholic parents; the somewhat recent loss of his mother and brother over which he had feelings of guilt and depression; his recognition of need for treatment; his completion of a treatment program and return for after-care; his gentle, considerate nature when not drinking or when he was not reacting to being" put down" by other persons.
>
> 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.
>
> The Court now being fully advised of the facts and circumstances surrounding the Defendant and the offense, and the Court having given the Defendant an opportunity to offer matters in mitigation of sentence....

(emphasis added) (R.807). Apparently the Court perceived that its duty extended only to "offering" the defendant an opportunity to present mitigation. This Court has recognized that trial courts "continue to experience difficulty in uniformly addressing mitigating circumstances." Campbell, 571 So. 2d 415, 419 (Fla. 1990).

Moreover, this Court has noted that the failure to set forth specific findings concerning all aggravating and mitigating circumstances could prevent it from adequately carrying out its responsibility of providing the constitutionally required

meaningful appellate review, including proportionality review. Campbell, 571 So. 2d 419-20; State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Indeed, lack of uniformity in the application of aggravating and mitigating circumstances invariably would result in the arbitrary and capricious imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972); see Grossman v. State, 525 So. 2d 833, 850 (Fla. 1988) (Shaw, J., concurring). In Campbell this Court set out the requirements on sentencing courts in making findings with respect to mitigating circumstances:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. . . . The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence . . . . The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

Campbell, 571 So. 2d at 419-20 (footnotes and citations omitted)(emphasis added).

A court cannot refuse to acknowledge the presence of mitigating evidence and then refuse to weigh it:

> As this case demonstrates, our state courts continue to experience difficulty in uniformly addressing mitigating circumstances under Section 921.141(3), Florida Statutes (1985), which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances." Federal caselaw additionally states that
>
> > [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . . The sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982)(emphasis and footnote omitted). We provide the following guidelines to clarify the issue.

Campbell, 571 So. 2d at 419-20 (emphasis added). Here, the mitigating factors established by the record were not properly weighed.

The court in Eddings, by a 5-4 majority, reversed a death sentence. Justice O'Connor writing separately explained why she concurred in the reversal:

> In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. State., Tit. 21, Section 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. . . consider the fact of this young man's violent background." App.

> 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605, 98 S. Ct., at 2965.
>
> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings, 455 U.S. at 119-20. Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor. See Parker v. Dugger, 111 S. Ct. 731 (1991).

Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect.

> [T]he requirements of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); and Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), which upheld the imposition of the death sentence where there

> were standards and the sentence of death was not arbitrarily or capriciously imposed become only parts of a litany without practical meaning [if a court can] find that mitigating circumstances do not exist where such mitigating circumstances clearly exist [and] returns us to the state of affairs which were found by the Supreme Court in Furman v. Georgia to be prohibited by the Constitution.

Magwood v. Smith, 608 F. Supp. 218, 228 (D.C. Ala. 1985).

The trial court's inadequate consideration of Mr. Johnson's unrefuted mitigation leaves no way for this Court to tell whether the court found 1) that the proposed mitigating factors were not sufficiently mitigating, or 2) that the proposed mitigating factors were not the greater weight. Meaningful appellate review was denied. The lack of any factual findings or reasons for the court's conclusions regarding any of the proposed nonstatutory mitigating factors falls far short of the requirements set forth in Campbell that a trial court must make specific findings concerning each proposed mitigating circumstance, including the weight to be accorded to each mitigating factor. Campbell, 571 So. 2d at 419-20. The result is that there is no way to know whether the trial court properly considered all the relevant mitigation advanced by Mr. Johnson and no way for this Court to have performed meaningful review of Mr. Johnson's death sentence. Mr. Johnson is entitled to habeas relief. Appellate counsel was ineffective for failing to present this issue on direct appeal.

CLAIM XVIII

MR. JOHNSON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. JOHNSON TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. JOHNSON TO DEATH. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

A capital sentencing jury must be:

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

<u>State v. Dixon</u>, 283 So. 2d 1 (Fla. 1973)(emphasis added). To the contrary, the burden was shifted to Mr. Johnson on the question of whether he should live or die.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of <u>Dixon</u>, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating <u>Caldwell v. Mississippi</u>, 472 U.S. 320 (1985), <u>Hitchcock v. Dugger</u>, 107 S. Ct. 1821 (1987), and <u>Maynard v. Cartwright</u>, 108 S. Ct. 1853 (1988).

Jury instructions at Mr. Johnson's capital penalty phase required that the jury impose death unless mitigation was not

only produced by Mr. Johnson, but also unless Mr. Johnson proved that the mitigation he provided outweighed and overcame the aggravation (R. 525). This standard obviously shifted the burden to Mr. Johnson to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated state law. According to this standard, the jury could not "full[y] consider[]" and "give effect to" mitigating evidence. Penry, 109 S. Ct. at 2951. The instructions given to the jury were inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

As explained below, the standard upon which the judge instructed Mr. Johnson's jury is a distinctly egregious abrogation of Florida law and therefore Eighth Amendment principles. In this case, Mr. Johnson, the capital defendant, was required to establish (prove) that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

In his instructions to the jury, the judge explained that once aggravating circumstances were found the jury was to recommend death unless the mitigating circumstances outweighed the aggravating circumstances:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the

> first degree. As you have been told, the final decision as to what punishment shall be imposed is a responsibility of the Judge; however, it is your duty to follow the law which will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as too whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your verdict should be based upon the evidence which you have heard while trying the guilt or innocence of the Defendant and evidence which has been presented to you in these proceedings.

(R. 522). See also (R. 525).

The instructions violated Florida law and the Eighth and Fourteenth Amendments. The jury was not instructed in conformity with the standard set forth in Dixon.

In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. Dixon v. State, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the

level of "outweighing" aggravation need be considered. Therefore, Mr. Johnson is entitled to relief in the form of a new sentencing hearing, due to the fact that his sentencing was tainted by improper instructions.

It is improper to shift the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances. Thus, the court injected misleading and irrelevant factors into the sentencing determination. The trial court then employed the same standard in sentencing Mr. Johnson to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988), cert. denied, 112 S. Ct. 390 (1991)(trial court is presumed to apply the law in accord with manner in which jury was instructed). It is clear the burden was on Mr. Johnson to show that life imprisonment was the appropriate sentence since consideration of mitigating evidence was limited to only those factors proven sufficient to outweigh the aggravation.

Mr. Johnson received ineffective assistance of appellate counsel as a result of counsel's failure to raise this issue on direct appeal. Habeas relief is warranted.

CLAIM XIX

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. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

This Court has held that this claim should have been raised on direct appeal. Johnson v. State, 593 So. 2d 206, 208 (Fla.

1992). Appellate counsel was ineffective in failing to raise this claim on direct appeal. To the extent that the transcript is incomplete and inaccurate, appellate counsel was rendered ineffective.

A capital sentencing jury must be properly instructed as to its role in the sentencing process. Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert denied, 109 S.Ct. 1353 (1989). Therefore, even instructional error not accompanied by a contemporaneous objection warrants reversal. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991); Hall v. State, 541 So. 2d 1125 (Fla. 1989).

Mr. Johnson does not have to show that the effect of the inconsistent instructions was to unconstitutionally dilute the jury's sense of responsibility. In Boyde v. California, 110 S.Ct. 1190, the United States Supreme Court held that where there was a reasonable likelihood that a jury had understood an instruction to preclude them from considering mitigating evidence in violation of Lockett v. Ohio, 438 U.S. 586 (1978), then relief was warranted. In this case there was much more than a reasonable likelihood that Mr. Johnson's jury misunderstood the effect of its decision in the Florida sentencing calculus. The overall effect of this was to create a grave danger that the sentence that emerged from Mr. Johnson's trial did not represent "a decision that the State had demonstrated the appropriateness of the defendant's death." Caldwell, 472 U.S. at 332.

From the beginning of voir dire to the final instructions, the trial court misled the jury about the significance attached to its sentencing verdict. When the venire members entered the courtroom they were told that they had nothing to do with sentencing.[41] In the trial judge's preliminary instructions to the venire, prior to voir dire dealing with issues of imposing death, he informed them as to his conception of their role at sentencing:

> THE COURT: Including aggravating or mitigating circumstances. The State and the defendant then present argument for or against the sentence of death and the jury renders an advisory sentence. 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 a majority vote of the jury. The Court then sentences the defendant to life imprisonment or to death. The Court not being required to follow the advice of the jury. Thus, the jury does not impose punishment if such a verdict is rendered.
>
> The imposition of punishment is the sole function of the Court rather than the function of the jury.

(R. 1032)(emphasis added). See also (R. 313, 1035, 1042, 1048, 1049, 1082, 1083, 1109, 1110, 1115, 1134, 1136, 1187, 1286, 1289-90, 1315, 1328, and 1338-39).

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[41]To the extent that bench conferences at which jurors were questioned but Mr. Johnson did not attend were never recorded, the full degree of this error remains unreviewable. Mr. Johnson is prejudiced.

The prosecutor also provided an erroneous characterization of the jury's sentencing function (R. 1083, 1108, 1117, 1160, 1316, 1336, and 1337). The State asked a juror if she could impose the death penalty, but the court asked for the erroneous characterization of the jury's sentencing function:

> MR. SMALL: But, if we get to that phase and you hear evidence of aggravating factors and mitigating factors and the Judge's instructions; are you saying that you could impose the death penalty?
>
> MS. CARRAFIELLO: I certainly could.
>
> THE COURT: Advise or recommend.
>
> MR. SMALL: Excuse me, could advise or recommend the death penalty?
>
> MS. CARRAFIELLO: Mm-hmm.

(R. 1055).

Of course, the record is incomplete. Individual voir dire conducted at the bench is not included. Defense counsel's objections at the bench are not included. The transcript which is before this Court is filled with mistakes, erroneous insertions and erroneous omissions. As a result, meaningful review is impossible.

The jurors, who sat in judgment of Mr. Johnson, clearly understood the court's and the State's message: they were only along for the ride at the sentencing phase. One juror stated:

> THE COURT: Vote an advisory sentence?
>
> MS. STEWART: Yes, advise --
>
> THE COURT: Advise the Court of that?
>
> MS. STEWART: Yes, sir.

(R. 1043). See also (R. 1329, 1336).

This misinformation was one of the last things the jury heard from the judge, just as it had been one of the first. While instructing them prior to their sentencing deliberations, the judge (mis)informed them one last time as to their superfluous role:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment should be imposed is a responsibility of the Judge; however, it is your duty to follow the law which will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 522). See also (R. 528-29). This was a false and misleading statement, in violation of due process and the Eighth Amendment, and rendered the death sentence fundamentally unfair and unreliable. The jurors' recommendation and role in the sentencing process is critical and crucial. Sentencing does not rest solely with the court.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a capital habeas corpus petitioner presenting a claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the Eighth Amendment in the same way in which the comments and instructions discussed below violated

Mr. Johnson's Eighth Amendment rights. Terrell Johnson is entitled to relief under Mann. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and would violate Eighth Amendment principles.

In Hitchcock v. Dugger, 481 U.S. 393 (1987), the United States Supreme Court held that instructions for the sentencing jury in Florida were governed by the Eighth Amendment. 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. As the court stated in Mann: "[t]o give effect to the legislature's intent that the sentencing jury play a significant role, the Supreme Court of Florida has severely limited the trial judge's authority to override a jury recommendation of life imprisonment. In Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), the court held that a trial judge can override a life recommendation only when 'the facts [are] so clear and convincing that virtually no reasonable person could differ'." Mann, 844 F.2d at 1450-51. Mr. Johnson's jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer was erroneously instructed.

The state must demonstrate the comments and instructions at issue had "no effect" on the jury's sentencing verdict. Caldwell, 472 U.S. at 341. If the jurors had not been misled and

misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden. The evidence of non-statutory mitigation in the record provided more than a "reasonable basis" that would have precluded an override. See Hall v. State, 541 So. 2d 1125 (Fla. 1989); Brookings v. State, 495 So. 2d 135 (Fla. 1986); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). The Caldwell violations in this case had an effect on the jurors, and also infected the sentencing judge because of the great weight given to the jury's recommendation. Espinosa.

Mr. Johnson's appellate counsel was ineffective for failing to raise this issue on direct appeal. To the extent that the record is incomplete and/or inaccurate, Mr. Johnson was deprived his right to meaningful review and his rights under the Sixth, Eighth, and Fourteenth Amendments. Habeas relief must issue.

CLAIM XX

MR. JOHNSON'S DEATH SENTENCE MUST BE VACATED BECAUSE THE TRIAL COURT'S WRITTEN SENTENCING ORDER FAILED TO DEMONSTRATE A REASONED JUDGMENT REGARDING THE PENALTY, AND AS A RESULT, THIS COURT CONDUCTED AN INADEQUATE REVIEW ON DIRECT APPEAL, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND IN VIOLATION OF MR. JOHNSON'S RIGHT TO A RELIABLE WEIGHING OF AGGRAVATING AND MITIGATING FACTORS.

Florida law provides that for a death sentence to be constitutionally imposed there must be specific written findings of fact in support of the penalty. Section 921.141(3) Fla. Stat. The legislature has mandated that the imposition of the death

penalty cannot be based on a mere recitation of the aggravating or mitigating factors present, but must be supported by written findings regarding the specific facts giving rise to the aggravating and mitigating circumstances. The Florida legislature has provided as part of the capital sentencing scheme:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

Section 921.141(3) Fla. Stat.; see also Christopher v. State, 583 So. 2d 642 (Fla. 1991); Patterson v. State, 513 So. 2d 1263 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986).

The duty imposed by the legislature directing that a death sentence may only be imposed when there are specific written findings in support of the penalty serves to provide for meaningful review of the death sentence and fulfills the Eighth Amendment requirement that a death sentence not be imposed in an arbitrary and capricious manner. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The specific written findings allow the sentencing body to demonstrate that the sentence has been imposed based on an individualized determination that death is appropriate. Cf. State v. Dixon, 283 So. 2d 1 (1973).

The Florida Supreme Court has held that a death sentence may not stand when "the judge did not recite the findings on which the death sentences were based into the record." Id. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific findings of fact." Van Royal, 497 So. 2d at 628. The written findings serve to "assure [] that the trial judge based the [] sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6)."

> [The] written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it.

Id.

The findings in support of Mr. Johnson's death sentence comport with neither the statutory mandate set out in sec. 921.141(3) Fla. Stat., nor with Gregg, Proffitt, or Woodson. The trial court based the death sentence merely on a written recitation of the aggravating factors applicable under the statute (R. 806). For example, in finding the "cold, calculated and premeditated" aggravating circumstance, the trial court fails to cite any facts in its sentencing order:

> (I) The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justifications. This is an aggravating circumstance.

(R. 806). The court's order reflects a lack of "well-reasoned application" of aggravating factors that are to be weighed

against mitigating factors and is not of "unmistakable clarity."[42]

On direct appeal, this Court simply found that all the aggravators relied upon by the trial court were proper. On direct appeal, the Florida Supreme Court was required to conduct a review of the application of aggravating circumstances. However, it failed to do so. The trial court's sentencing order and this Court's opinion demonstrate that no "well-reasoned application" of aggravating circumstances occurred in Mr. Johnson's case. The trial court's weighing process in imposing death was skewed and unreliable, and this Court failed to conduct a meaningful review on direct appeal. Parker v. Dugger, 111 S.Ct. 731 (1991).

The trial court and Florida Supreme Court failed in their duties to assure that Mr. Johnson's death sentence was based upon a reasoned judgment. Appellate counsel was ineffective in failing to raise this issue on direct appeal. That sentence is thus unreliable and arbitrary. Accordingly, habeas relief should now be accorded.

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[42]To the extent that the trial judge believed this aggravator automaticaly applied upon a conviction of premeditated murder, he applied the wrong standard. See Claim II.

CLAIM XXI

MR. JOHNSON'S SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL JUDGE APPLIED THE FLORIDA CAPITAL SENTENCING STATUTE AS IF IT REQUIRED A MANDATORY DEATH SENTENCE.

In his sentencing order the trial judge applied an erroneous rule that once a sentence judge concludes that aggravating factors outweigh mitigating factors, the death penalty is mandatory and the court cannot exercise mercy.

The 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. 805-807)(emphasis added).

To construe the statute as partially mandatory creates a presumption which eliminates the possibility of mercy, and violates the Eighth Amendment to the United States Construction.

> Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment. The Supreme Court has "emphasized repeatedly ... [that] it is essential that the capital-sentencing decision allows for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." *Roberts v. Louisiana,* 431 U.S. 633, 637, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977)(per curiam).

* * *

> Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in *Proffitt,* the trial judge [applied the statute] in such a manner as virtually to assure a sentence of death. A mandatory death penalty is constitutionally impermissible. *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

To construe the statute as partially limits the discretion of the sentencer. The language of the statute itself does not limit that discretion. According to the statute evidence may be presented in the penalty phase other than that relating to a weighing of the aggravating and mitigating factors.

The statute directs the jury and trial court to make a final decision on death after weighing aggravating mitigating circumstances, implying at the least that some decision making process exists after the weighing of factors. The statutory language is not mandatory.

This issue was raised on direct appeal but erroneously determined by this court in violation of Mr. Johnson's Eighth Amendment rights. This Court cannot apply different rules to particular capital appellants. See Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987). Habeas relief must issue.

CLAIM XXII

MR. JOHNSON'S TRIAL AND APPELLATE COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL AND APPELLATE REVIEW GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Johnson contends that he did not receive the fundamentally fair trial and appellate review to which he was entitled under the Eighth and Fourteenth Amendments. See Ray v. State, 403 So.2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991). It is Mr. Johnson's contention that the process itself failed him. It failed because the sheer number and types of errors involved in his trial and appeal, when considered as a whole, virtually dictated the sentence that he would receive.[43]

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) and Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994) cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

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[43]In his 3.850 proceeding, Mr. Johnson presented his claim regarding the fact that the jury orinally dead-locked six-to-six at the penalty. Deliberations continued in light of the erroneous instruction that the recommendation had to be by a majority vote.

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.
>
> Seaboard Air Line R.R. Co. v. Ford, 92 So. 2d 160, 165 (Fla. 1956) (on rehearing); see also,e.g., Alvord v. Dugger, 541 So. 2d 598, 601 (Fla. 1989) (harmless error analysis reviewing the errors "both individually and collectively"), cert. denied, ____ U.S. ____, 110 S. Ct. 1834, 108 L.Ed.2d 963 (1990); Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986) ("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991).

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

The flaws in the system which sentenced Mr. Johnson to death are many. They have been pointed out throughout this pleading, but also in Mr. Johnson's direct appeal. While there are means

for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution. Repeated instances of ineffective assistance of counsel and error by the trial court at both the original trial and direct appeal significantly tainted the process. The absence of a reliable transcript renders the proceedings hopelessly unreliable. These errors cannot be harmless.

CONCLUSION

Mr. Johnson was prejudiced by this Court's interference with his right to effective assistance of appellate counsel when Mr. Johnson was forced to either drop claims altogether or abbreviate claims to abide by this Court's ruling that he delete twenty four (24) pages from his initial brief. Mr. Johnson was deprived of an accurate record on appeal. Mr. Johnson was sentenced to death and yet was denied effective assistance of appellate counsel as a result of this Court's interference with the presentation of his constitutional claims.

Furthermore, inadequate appellate review in a capital case causes the sentencing to be arbitrary in violation of the prohibition against cruel and unusual punishment. A complete review of all claims of error in appeals from a death sentence must be performed or the appellate court cannot make a reliable individualized determination. Parker v. Dugger, 498 U.S. 308 (1991); Clemons v. Mississippi, 494 U.S. 738 (1990). Whatever

interest in judicial economy this Court has in short briefs, that interest is insignificant in contrast with this Court's duty to provide "meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dugger.

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Johnson. "[E]xtant legal principles...provided a clear basis for ... compelling appellate arguments[s]." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 986). The issues were preserved at trial and available for presentation on appeal. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson, 474 So. 2d at 1164. When "[t]he propriety of the death penalty is in every case an issue requiring the closest scrutiny," Wilson, 474 So. 2d at 1164, appellate counsel's failure to raise any issue regarding the manner in which the penalty phase was conducted demonstrates appellate counsel's "failure to grasp the vital importance of his role as a champion of his client's cause." Individually and "cumulatively," Barclay, 444 So. 2d at 959, the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165. (emphasis in original). In Wilson, this court said:

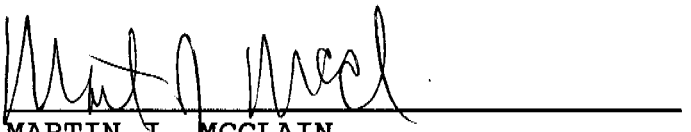
> [O]ur judicially neutral review of so many death cases, many with records running

> to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So. 2d at 1165. Certainly, this Court's arbitrary page limit and the absence of an accurate transcript interfered with appellate counsel's ability to provide effective representation. Mr. Johnson was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise all issues outlined herein. Mr. Johnson is entitled to a new direct appeal.

Moreover, the claims, discussed above, should have resulted in a reversal on direct appeal. Mr. Johnson did not have meaningful appellate review. This Court should grant habeas corpus relief on the basis of the clear violations of Mr. Johnson's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments which Mr. Johnson has presented in these proceedings.

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on **January 18, 1995.**



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