IN THE SUPREME COURT OF FLORIDA

NO. 85,028

TERRELL M. JOHNSON,

Petitioner,

v.

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

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The Petitioner, Terre11 M. Johnson, hereby replies to Respondent Singletary's Response. Failure to reply to any claim contested by the Respondent is not a waiver of that claim. Mr. Johnson's replies first to Respondent's repeated arguments that his petition is time barred, abusive and constitutes "piecemeal" litigation of ineffective assistance of appellate counsel.

A. MR. JOHNSON'S PETITION FOR A WRIT OF HABEAS CORPUS IS TIMELY FILED.

This is Mr. Johnson's first state habeas petition. Respondent has argued that Mr. Johnson's claims are time barred and that his petition is not timely filed. Respondent has urged this Court to institute a restriction on the time in which one may file a petition for writ of habeas corpus with this Court' (Response at 1-2). Such a rule would be antithetical to the very nature of the writ. In addition, to apply a newly-created time bar to Mr. Johnson, without notice, would violate his due process rights. See Ford v. Georgia, 111 S. Ct. 850 (1991). For the

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'In adopting Fla. R. Crim. P. 3.851 (1994), this Court adopted a timetable for filing petitions for writ of habeas corpus. Under this new rule, petitioners must file for habeas corpus upon filing their initial brief on appeal of the circuit court's ruling on their Rule 3.851 motion. Fla. R. Crim. P. 3.851(2). This new rule applies only to cases of death-sentenced individuals whose conviction and sentence becomes final after January 1, 1994, and thus does not apply to Mr. Johnson. Petitioner suggests that this Court's promulgation of a timetable of indeterminate period rather than a fixed period of time acknowledges that habeas corpus should not be restricted by hard and fast procedural rules. See Anglin v. Mayo, 88 So. 2d 918 (Fla. 1956). In any event, Rule 3.851 clearly does not apply to Mr. Johnson.

reasons discussed herein, Mr. Johnson urges this Court to reject Respondent's suggestion.

Respondent attempts to draw a parallel between the time limitations of Fla. R. Crim. P. 3.850 and 3.851, suggesting a similar one- or two-year limitation should apply to habeas corpus. This suggestion misapprehends the significant differences between a motion for postconviction relief pursuant to Rule 3.850/3.851 and the writ of habeas corpus.

Rule 3.850 was created following the United States Supreme Court's decision in Gideon v. Wainwrisht, 372 U.S. 335 (1962). The Rule was intended to prevent a flood of habeas petitions from inundating the Florida Supreme Court by requiring defendants to apply first to the trial court in which they were convicted and sentenced, thus placing the fact-finding function in the circuit courts. Rov v. Wainwright, 151 So. 2d 825 (Fla. 1963); Gerald Kogan & Robert Craig Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1151, 1261 (1994). It is clear, however, that Rule 3.850 was not intended to supplant habeas corpus. Postconviction issues remain which are cognizable only in habeas corpus. Errors at issue in this petition regarding ineffectiveness of appellate counsel and errors in the appellate review process may be brought only in a petition for habeas corpus. Smith v. State, 400 So. 2d 956, 960 (Fla. 1981); Martin v. Wainwright, 497 So. 2d 872, 874 (Fla. 1986).

This Court knows well the history of the writ of habeas corpus. The Constitution of the State of Florida guarantees

that, "The writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. Its constitutional guarantee imbues habeas corpus with special status, which this Court has long recognized.

> The writ of habeas corpus is a high prerogative writ of ancient origin designed to obtain immediate relief from unlawful imprisonment without sufficient legal reason. . . . The writ is venerated by all free and liberty loving people and recognized as a fundamental guaranty and protection of their right of liberty.

Allison v. Baker, 11 So. 2d 578, 579 (1943). In fact, habeas corpus is a centuries-old right, deserving of more protection than even a constitutional right. A lower court has written:

> The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It is more than a privilege with which free men are endowed by constitutional mandate; it is a writ of ancient right.

Jamason v. State, 447 So. 2d 892, 894 (Fla. 4th DCA 1983), approved 455 so. 2d 380 (Fla. 1984), cert. denied, 469 U.S. 1100 (1985). Regarding the application of procedural rules to petitions seeking the writ, this Court explained:

> [H]istorically, habeas corpus is a high prerogative writ. It is as old as the common law itself and is an integral part of our own democratic process. The procedure for the granting of this particular writ is not to be circumscribed by hard and fast rules or technicalities which often accomganv our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of

> the procedure are not anvwhere near as imsortant as the determination of the ultimate uuestion as to the legality of the restraint.

Anglin v. Mayo, 88 So. 2d 918, 919-20 (Fla. 1956) (emphasis added). Most recently this Court has said:

> The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice and not bound by technicality.

Haaq v. State, 591 So. 2d 614, 616 (1992). The obvious relationship between habeas corpus and the constitutional guarantee of liberty explains why habeas corpus is the only writ specifically guaranteed by the Declaration of Rights of the Constitution of Florida. Gerald Rogan & Robert Craig Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1151, 1258 (1994). As the history of habeas corpus makes clear, imposing a time limit on the filing of petitions for habeas corpus would frustrate the writ's ancient purpose and subvert its constitutional guarantee.

This Court's consideration of Mr. Johnson's habeas petition "may avoid unnecessary constitutional adjudication and minimize federal-state tensions." Giles v. Maryland, 386 U.S. 66, 81-82 (1967). "[A]ffording the state courts the opportunity to decide in the first instance is a course consistent with comity, cf. 28 U.S.C. Sec. 2254, and a full and fair hearing in the state courts would make unnecessary further evidentiary proceedings in the federal courts." Id. at 81. See also Ex parte Rovall, 117 U.S.

241, 251 (1886) (state courts "bound" to protect rights secured by the federal constitution),

Respondent alleges that Mr. Johnson is raising issues that should have been brought before this Court eight years ago. However, Respondent seems to concede that there has been no provision of law which required Mr. Johnson to file eight years ago. Instead, Respondent seeks a new law to be announced and applied retroactively to prohibit Mr. Johnson's past behavior which was not illegal at the time. This would seem to violate prohibitions against ex post facto application of the law. See Ford v. Georsia, 111 S. Ct. 850 (1991).

This Court has acknowledged that CCR has been unable to represent properly all death penalty inmates in postconviction, and that inability caused substantial delays in cases of inmates represented by CCR. See In re Rule of Criminal Procedure 3.851, 626 So. 2d 198, 199 (Fla. 1993)(Commentary). "It is no secret that the Office of the Capital Collateral Representative has been underfunded and without the necessary resources to meet the legal needs of the 300-plus inmates on Florida's Death Row." Id. at 200 (Barkett, C.J., dissenting). This Court has made an express finding that underfunding of CCR caused delays in cases of CCR's clients. In the face of that finding, any alleged delay in Mr. Johnson's case cannot be deemed unreasonable. Based upon the law which did not require Mr. Johnson to file his habeas petition sooner, counsel faced with concrete deadlines in other cases, did not file Mr. Johnson's habeas petition. The reason is clear:

Mr. Johnson's lawyers were underfunded, understaffed, and overworked. Counsel had no way of knowing that Respondent would not waive exhaustion in federal court, but would insist upon it. Respondent's effort now to seek a retroactive application of a time bar would violate Mr. Johnson's rights to due process under both the United States Constitution and Florida law.

Respondent's suggestion that this Court adopt a time limitation for the filing of petitions for habeas corpus is a radical suggestion wholly out of proportion with the perceived problem. There has been no sweeping change in law, as was Gideon v. Wainwrisht, prompting a restriction of habeas corpus. This Court has never held that petitions for habeas corpus must be filed within a certain time; indeed such a rule would be anathema to the very nature of habeas corpus.'

This Court recently rejected a similar argument raised by the Attorney General in Groover v. State, 20 Fla. L. Weekly S151 (April 6, 1995) (declining to consider or discuss the state's arguments that Mr. Groover's first petition for habeas corpus was untimely filed and time barred). The same result should issue here.

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[2]In a Florida case nearly on point, petitioner sought a writ of error coram nobis to set aside a criminal conviction. The circuit court found the petition untimely filed. This Court held that, unlike Rule 3.850, there is no time limitation for filing a petition for writ of error coram nobis. This Court held further that the petition was not barred by laches because the State had not been prejudiced by the delay. Malcolm v. State, 605 So. 2d 945 (Fla. 3rd DCA 1992). The same result is required here.

B. MR. JOHNSON HAS NOT RAISED IN HIS INEFFECTIVENESS OF APPELLATE COUNSEL CLAIMS IN A PROSCRIBED "PIECEMEAL" FASHION AS ALLEGED BY RESPONDENT. RESPONDENT'S ARGUMENT THAT MR. JOHNSON'S PETITION CONSTITUTES AN ABUSE OF THE WRIT IS ALSO ERRONEOUS.

Respondent misleadingly relies on Jones v. State, 591 So. 2d 911 (Fla. 1992) throughout his response for the proposition that Mr. Johnson has attempted to litigate "on a piecemeal basis" his claims of ineffective assistance of appellate counsel by filing successive post-conviction motions (Response at 12). Jones is inapposite to the present proceeding. In Jones, this court rejected a claim that trial counsel was ineffective because it was contained within a second Rule 3.850 motion. This Court ruled that a defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive Rule 3.850 motions. The present proceeding is a petition for a writ of habeas corpus not a Rule 3.850 proceeding. In fact, appellate ineffectiveness cannot be raised in a Rule 3.850 motion. A petition for writ of habeas corpus is not a successive appeal anymore than a Rule 3.850 motion is a second trial. The fact that a claim of ineffective assistance of appellate counsel and inadequate appellate review is raised or considered on direct appeal does not preclude exercise of the right to raise ineffective assistance of appellate counsel claims by petition for writ of habeas corpus.[3]

[3] If Respondent really believes that these matters were raised and decided on direct appeal then why was a contrary position taken in federal court. Perhaps, the change can be explained by the change in counsel for Respondent.

Respondent fails to explain, and indeed cannot explain, how Mr. Johnson could have adequately raised all his ineffective assistance of appellate counsel claims during trial or on appeal. Contrary to appellant's argument that Mr. Johnson is raising his ineffective assistance of appellate counsel in an impermissible "piecemeal" fashion, the only way Mr. Johnson can raise these claims is by this petition for writ of habeas corpus. Appellate counsel did argue that the incomplete record rendered counsel ineffective. This Court responded: "However, he is unable to point to any omission, inconsistency or inaccuracy which prejudices the presentation of his case." "In the absence of some clear allegation of prejudicial inaccuracy we see no worthwhile end to be achieved by remanding for new trial." Johnson v. State, 442 So. 2d 193, 195 (Fla. 1983). Appellate counsel's failure in this regard was ineffective assistance. See Attachment A. Specific inconsistencies and inaccuracies were abundant had appellate counsel simply talked to his client and thoroughly discussed the law and the case. Simply relying upon Mr. Johnson to instinctively know and tell him what was important was woefully inadequate.[4] Mr. Johnson was relying upon counsel as is his right, to tell him what the law is and what facts are important.

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[4] Appellate counsel did seek to have Mr. Johnson present for the reconstruction proceeding. However, the request was denied, and appellate counsel failed to investigate and plead the resulting prejudice. See Geders v. United States, 425 U.S. 80 (1976).

The ineffectiveness of Mr. Johnson's appellate counsel is a violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the principal claim of his petition. Evitts v. Lucey, 469 U.S. 387 (1985). The criteria for proving a claim of ineffective assistance of appellate counsel mirror the standard set out *for* similar claims dealing with trial counsel. Mr. Johnson must point to specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and that the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985), citing Johnson v. Wainwriaht, 463 So. 2d 207 (Fla. 1985).

Mr. Johnson has presented to this Court a petition alleging that he was denied the effective assistance of counsel on direct appeal of his convictions for first degree murder and his sentences of death. In this petition, as required by Wilson, he has set out "specific errors and omissions!' which show that his appellate counsel's performance fell well below the range of professionally acceptable performance. These failures of direct appeal counsel seriously undermine any confidence in Mr. Johnson's convictions and sentences of death. The performance of counsel compromises the appellate process to such a degree as to

undermine confidence in the fairness and correctness of the appellate result. Wilson; Johnson.

Respondent did not explain how acceptable performance of appellate counsel can be reconciled with the failure to present to the Florida Supreme Court fundamental issues of law when a man's life rests in the balance. This Court has stated:

> The propriety of the death penalty is in every case an issue requiring the closest scrutiny.

Wilson v. Wainwrisht, 474 So. 2d at 1164. This Court cannot maintain its close scrutiny when counsel fails to point out significant violations of state and federal law that have led to the imposition of the death sentence.

This Court has admitted that its own review of any case 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 v. Wainwright, 474 So. 2d at 1164. Mr. Johnson was deprived of this type of zealous advocacy on direct appeal. Because he was deprived of effective representation numerous errors in Mr. Johnson's case were not pointed out to the Florida Supreme Court on direct appeal. The deficient performance of appellate counsel has prejudiced Mr. Johnson to such a degree that there is no longer any confidence in the convictions and sentences of death.

Mr. Johnson has presented to this Court fundamental violations of the federal Constitution by which he was denied the basic right of effective assistance of counsel on direct appeal. This Court stated in Wilson, at 1164:

> . ..the basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law.

Here, Mr. Johnson was left to his own devices. He had no reliable transcript. And he received no adequate guidance from his appellate attorney as to what events at the trial may have been important. Mr. Johnson who had not been at the sidebars did not know that what trial counsel reported to him about those sidebars was significant. Mr. Johnson was not present for the reconstruction hearing and was not able to consult with counsel during that hearing. This Court denied Mr. Johnson's direct appeal simply because appellate counsel failed to investigate and present the abundant prejudice suffered by Mr. Johnson.

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.

In its Response, the state argues that the Florida Rule of Appellate Procedure 9.210(a)(5) provide that an initial brief shall not exceed fifty pages (Response at 15), yet concedes that "an exception has been carved out for capital appeal cases in which this Court has routinely allowed a hundred page brief limit" (Respondent's Motion to Require the Filing of an Amended Petition for Writ of Habeas Corpus at 1).

Further, the state maintains that Mr. Johnson's initial brief on direct appeal and his brief which was stricken on direct appeal "both contain the exact same 10 points on appeal" (Response at 14 and 17; emphasis in original)[5] and therefore appellate counsel was not rendered ineffective by this court's imposition of a seventy (70) page limit on Mr. Johnson's initial brief on direct appeal. However, despite this concession, Respondent seized upon the deletions in federal court to argue that Mr. Johnson had not challenged the jury instructions

[5]Of course, this Court's decision to affirm was based upon appellate counsel's failure to argue how Mr. Johnson was prejudiced by the error in his case. Thus, appellate counsel lost the case because his elaboration of the claims was insufficient. The page limits served to reduce the elaboration.

regarding the definition of reasonable doubt nor those instructions setting forth the aggravating circumstances.

In response to Mr. Johnson's argument that this Court's imposition of a seventy (70) page limit on his initial brief on direct appeal limited the number of issues he could effectively raise, Respondent again advances the position that both briefs contain the exact same issues (Response at 17), yet in its Response to Petitioner's Motion for Summary Judgement filed in the United States District Court, Middle District of Florida (filed February 3, 1994), Respondent argued that Mr. Johnson's brief on direct appeal failed to raise and argue certain claims. Mr. Johnson's position is that he was forced to abbreviate or shorten claims to abide by this court's imposition of a seventy (70) page limit to his direct appeal brief, and hence any failure to raise or argue claims was a result of an act by this Court which interfered with his right to effective representation. See Wilson v. Wainwrisht, 674 So. 2d 1162 (Fla. 1985). Mr. Johnson also asserts that the page limitation precluded elaboration upon the claims that were argued, including the prejudice Mr. Johnson suffered.

The simple truth is that this Court for no valid reason struck Mr. Johnson's initial brief and did not consider it because it exceeded seventy pages in length.[6] Had this Court

[6]Respondent has pointed to no other capital defendant who was forced to reduce a brief on direct appeal from ninety-five pages down to sixty-nine pages.

considered that brief, Mr. Johnson would now be entitled to a new trial and a new penalty phase.

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 INSTRUCTIONB 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.

Respondent argues that no objection to the vagueness of the jury instructions on aggravator circumstances was raised at trial or on direct appeal. For this proposition, Respondent relies upon an incomplete record which was discussed by the trial judge as follows:

> I <u>am almost confident</u> 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. <u>But I have no specific recollection</u>.

(R. 1413)(emphasis added). Since the record is unreliable as a representation of what objections were made at trial, Mr. Johnson does attest to the fact that his counsel did object to the vague wording of the instructions on aggravating circumstances. <u>See</u> Attachment A.

To Respondent's argument that the jury instruction was never challenged on direct appeal, Mr. Johnson notes that his initial brief did raise the issue. Mr. Johnson cited Godfrev v. Georgia, 446 U.S. 420 (1980), in the brief which this Court struck. As explained in Glock v. Sinaletary, 36 F.2d 1014, 1027 (11th Cir. 1994), Godfrey dictated Essinosa v. Florida, 112 S. Ct. 2926 (1992). Citation to Godfrey as establishing that laymen received inadequate guidance was sufficient to raise the meritorious issue discussed in Espinosa. Mr. Johnson argues additionally that accepting Respondent's argument that both Mr. Johnson's initial brief and the brief that was stricken when this Court imposed a page limit ruling raised exactly the same issues, then no serious argument can be made that Mr. Johnson failed to attack the constitutional sufficiency of the jury instructions on aggravating circumstances. Mr. Johnson clearly argued that Godfrey established that Mr. Johnson's jury received inadequate guidance.

Mr. Johnson did object to the jury instructions on the aggravating circumstances. Mr. Johnson, who was not present at the bench conferences, was advised by trial counsel that he had specifically objected to the instructions on each aggravating circumstance for the same reasons he had set forth in pretrial motions including the fact that the language defining the aggravating circumstances was "impermissibly vague and overbroad" (R. 687). Counsel also objected to instructing the jury on aggravating circumstances inapplicable as matters of law. Had

the court reporter not been in the midst of some mental collapse, the record would show that the challenge to the vagueness of the jury instructions regarding each aggravating circumstance had been preserved.

Respondent's argument that there was no trial objection is premised entirely upon a reconstructed record that the trial judge conceded may not include all of Mr. Johnson objections. Mr. Johnson's trial attorney also recognized that the reconstructed record did not include all of the objections made at bench conferences. Specifically, the trial judge said:

> My own impression was that there was not much important of a legal nature 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). Respondent is trying to obtain a strategic advantage from an incomplete record. To the extent that appellate counsel failed to prove the prejudice from the incomplete record, his performance was deficient; but of course, he was seriously hampered by Mr. Johnson's absence from the reconstruction hearing, Geders v. United States, 425 U.S. 80 (1976), and by appellate counsel's absence from the ex parte reconstruction conference where the record was altered in "unrecalled" ways, Gardner v. Florida, 430 U.S. 349 (1977).

Here, the State of Florida failed to produce a reliable and complete record, but argued incompleteness as evidence of a procedural bar. Surely, this violates due process. It was not Mr. Johnson's fault that the court reporter had a mental collapse

and failed to accurately and completely report the trial proceedings. Mr. Johnson's jury undeniably received unconstitutional instructions. Jackson v. State, 648 So. 2d 85 (Fla. 1994).[7]

The jury instructions defined the aggravating circumstances in vague terms as Mr. Johnson complained at trial and on direct appeal. Habeas relief is required. Moreover, a procedural bar will be defeated by ineffective assistance of counsel which caused the issue not to be raised in a timely manner. Starr v. Lockhart, 23 F.3d 128 (8th Cir. 1994).

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[7]Respondent tries to argue that the defective jury instruction regarding cold, calculated and premeditated was harmless in any event because Mr. Johnson allegedly went back and intentionally shot the patron to finish him off. Respondent relies upon the sentencing judge's findings, ignoring the jury's verdict acquitting Mr. Johnson of first degree murder as to the patron. Clearly, the jury rejected evidence of such an intentional and planned murder as incredible. The jury found no premeditation as to the patron. This Court on direct appeal in fact described the homicide much differently than Respondent: "Johnson told police that he took Dodson and a customer, Charles Himes, into the men's room at the end of the bar, intending to tie them up with electrical cord. The customer lunged at Johnson and he began firing wildly, shooting both men." Johnson v. State, 442 So.2d at 195. These facts do not constitute heightened premeditation.

As to heinous, atrocious or cruel, the jury was erroneously instructed to consider this aggravator which did not apply as a matter of law. This Court has held that to be error. Onelus v. State, 584 So. 2d 563 (Fla. 1991).

As to the avoiding arrest aggravator, Respondent makes the same argument he made as to cold, calculated and premeditated relying upon exactly the same passage in the sentencing judge's findings. This underscores that aggravators were not merged as the law requires. But more importantly, it ignores the fact that the jury acquitted of premeditation as to the patron and thus ruled the evidence of premeditation was incredible. This violates the Double Jeopardy Clause. Ashe v. Swenson, 397 U.S. 436 (1970).

CLAIM III

MR. JOHNSON'S JURY RECEIVED AN UNCONSTITUTIONAL INSTRUCTION REGARDING REASONABLE DOUBT AND THE ERROR WAG COXPOUNDED BY IMPROPER PROSECUTORIAL COMMENT IN VIOLATION OF RR. JOHNSON'S CONSTITUTIONAL RIGHTS. RR. 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 WAG INEFFECTIVE FOR FAILING TO PROPERLY RAISE HIS ISSUE.

Respondent argues that no objection to the reasonable doubt instruction was raised at trial or on direct appeal. For this argument, Respondent again relies upon the admittedly incomplete and inaccurate transcript. However, since the record is unreliable as a representation of what occurred at trial, Mr. Johnson does attest that his counsel did object to the wording of the reasonable doubt instruction. See Attachment A.

To Respondent's argument that the instruction was never challenged on direct appeal, Mr. Johnson maintains that his stricken initial brief did raise the issue. Mr. Johnson argues additionally that accepting Respondent's argument that both Mr. Johnson's initial brief and the brief that was stricken when this Court imposed a page limit ruling raised exactly the same issues, then no serious argument can be made that Mr. Johnson failed to attack the constitutional sufficiency of the jury instruction on reasonable doubt. Mr. Johnson's initial direct appeal brief argued that:

> 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).

(Appellant's Rejected Initial Brief on Direct Appeal at 94). This argument is directed at the reasonable doubt instruction which Mr. Johnson continues to argue was unconstitutional.

CLAIM IV

> RR. JOHNSON WAS DENIED HIS CONSTITUTIONAL AND STATUTORY RIGHT TO THE INDEPENDENT AND COMPETENT ASSISTANCE OF A RENTAL HEALTH EXPERT, IN VIOLATION OF HI8 FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. THE JUDGE APPOINTED AN EMPLOYEE OF THE SHERIFF'S OFFICE TO INTERROGATE RR. JOHNSON AND TO REPORT WHAT RR. JOHNSON SAID TO THE JUDGE AND THE STATE. THIS VIOLATED RR. JOHNSON'S FIFTH AND SIXTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

The state attempts to recharacterize trial counsel's Motion for Psychological Testing (R.704) as a request for a "recent profile" of Mr. Johnson (Response at 43). Nothing in the record supports this mischaracterization, instead the record shows that trial counsel's motion requested an order directing Cassady to conduct a "battery of tests to determine the personality traits" of Mr. Johnson.

Respondent ignores Harich v. State, 542 So. 2d 980, 981 (Fla. 1989), wherein this Court found a trial attorney's status as a special deputy sheriff warranted a hearing to determine whether the status "affected his ability to provide effective legal assistance." Here, the mental health expert appointed to assist the defense was an employee of the Sheriff's Office. Moreover, he submitted his confidential report straight to the

judge and to the State. This violation of the Fifth and sixth Amendments is so clear an evidentiary hearing is not necessary. The record conclusively establishes the violation. Respondent does not contest that the sentencing judge relied upon Cassady's report in imposing a death sentence. Respondent explicitly acknowledges that the supposedly confidential report was used to cross-examine a witness at trial.

Disclosure of Cassady's report to the State was no different from any other member of the defense team breaching the privilege and providing confidential evidence straight to the State.[8] See Maine v. Moulton, 474 U.S. 159 (1985). The State and the judge used this evidence. Appellate counsel was ineffective in not raising this issue on direct appeal. Starr v. Lockhart, 23 F.2d 1280 (8th Cir. 1994).

Respondent's contention is that Mr. Johnson cannot rely upon the principles espoused in Ake v. Oklahoma, 470 U.S. 68 (1985). Ake was not new to Florida in 1985; it already was the law. In Pouncy v. State, 353 So. 2d 640 (Fla. 1977), this Court recognized that mental health experts designated to assist the defense in a capital murder trial were within the attorney-client privilege and not subject to discovery. Under Pouncy, it was error for the judge and the State to obtain Cassady's report and

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[8]Respondent, perhaps intentionally, misconstrues the word "loyal." Mr. Johnson was entitled to a loyal expert, i.e., one bound by confidentiality. Neither Martin v. Wainwright 770 F.2d 918 (11th Cir. 1985), nor Henderson v. Dugger, 925 F.2d 1309 (11th Cir. 1991), are to the contrary.

use it against Mr. Johnson absent a knowing and intelligent waiver. Appellate counsel should have raised this issue.

Moreover, the principles of Estelle v. Smith, 451 U.S. 454 (1981), are within the scope of Pouncy. Mr. Johnson's conversations with Cassady were privileged just as much as his conversations with trial counsel. Mr. Johnson was never advised otherwise. The trial judge's use and consideration of what he learned from Cassady violated the Fifth, sixth, Eighth and Fourteenth Amendments. Counsel was ineffective. Habeas relief must issue.

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.

Respondent asserts that the "fatal bullet was strategically aimed into the head" (Response at 55) yet this Court rejected that characterization of the crime for which Mr. Johnson was convicted when it wrote that "the customer lunged at Johnson and he began firing wildly, shooting both men." Johnson v. State, 442 So. 2d 193 (Fla. 1983).[9] The record does not support

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'Respondent ignores this Court's holding on direct appeal and the jury's acquittal of premeditation as to the patron: "Even accepting Johnson's theory that he shot the customer because he lunged at him, that does not explain why he coldly murdered the bartender lying on the bathroom floor" (Response at 56). "Cold, calculated and premeditated" requires more, it requires heightened premeditation.

Respondent/s characterization or that Mr. Johnson's statement said he "fired at close range." Respondent's whole argument is premised upon his false assertions in this regard. Habeas relief is required.

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'8 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.

The report of Police Chief Richard A. Montee (PC-R 1218) states:

> 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 siven to me earlier about crimes in Jefferson County, Oreaon, and California. Johnson did not respond during this period of

> time and at about 2:37 a.m. on January 6, 1980, Johnson asked if he could rest because he didn't feel very good. At this point in time the interview ended and arrangements were made to transport Johnson to Primeville to be lodged as there was no room at the Jefferson County Jail to provide any type of isolation lodging. Johnson was then transported to the Primeville/Crook County jail by Deputy Chuck Duff and me where he was lodged. Following this lodging I returned to Jefferson County and made arrangements to meet with Lt. Peterson at 1:00 p.m. on January 6, 1980, to reinterview Johnson.

Yet at no time during the trial or pre-trial hearings did any officer including Montee testify that Mr. Johnson invoked his right to silence and refused to answer questions in the pre-dawn hours of January 6, 1980 (R.195-200 testimony of Montee)."

During the pre-trial hearing regarding the admissibility of statements made by Mr. Johnson, Montee did not mention Mr. Johnson's invocation of silence (R.342). Montee did testify that at noon that day, Mr. Johnson was taken to be interviewed by the police psychiatrist and then around 2:00 p.m. again interviewed by police officers (R. 370-371).

At trial, during Chief Montee's testimony, counsel approached the bench (R.202) and an unreported bench conference took place. Obviously, an objection to the introduction of Mr. Johnson's statement as a violation of the Fifth and Sixth Amendments was made. Counsel argued that Mr. Johnson had invoked

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[10] Of course as Mr. Johnson has repeatedly noted, the transcript is neither accurate or complete. If Montee testified consistent with his report that Mr. Johnson invoked his right to silence, the record does not include that testimony and then neither this Court nor appellate counsel were aware of the testimony during the direct appeal.

his right of silence. However, the court reporter due to her mental collapse failed to report this bench conference. The record reflects that counsel then objected to admission of the Statements citing grounds previously raised (R.204), grounds which do not appear in the transcript, because it is incomplete and unreliable and fails to report this bench conference. Counsel then approached the bench again (R.205) to raise additional grounds:

> MR. JONES: (Interposing) Excuse me, before we go into that I object to the admissibility of any statements Mr. Johnson gave the officer on the grounds therefore previously stated at an earlier time, I'd like to renew that objection, at this time.
>
> THE COURT: All right. Mr. Johnson, would you like to have a standing objection for each and all, each and every statement made by the defendant which might be offered, at this time, on the grounds that you have previously stated in your written motions directed to those points?
>
> MR. JONES: Yes, if the Court would allow me a standing objection, otherwise I will object before each and every statement.
>
> THE COURT: Well, I think so that we can move along, you may have a standing objection as to each and every ground raised in the two previously written motions which you filed with the Court.
>
> MR. JONES: Okay.
>
> THE COURT: Any additional objections, you can raise at the time you feel they are appropriate.
>
> MR. JONES: Your Honor, one thing, if we may approach the bench on this?

(Whereupon, counsel approached the bench and conferred out of the hearing of the court reporter and Jury.)

(R.204-205).

Mr. Johnson was prejudices by the incomplete and inaccurate transcript. Police reports establish that Mr. Johnson invoked his right of silence. All subsequent interviews were the result of reinitiated interrogation by the police. When this Court reviewed the record on direct appeal, this Court had an incomplete record which did not include the fact that "Johnson did not wish to answer any questions" and the interview thereupon ended on January 6, 1980 at about 2:37 a.m.

Clearly, Mr. Johnson was prejudiced by the incomplete and inaccurate record on appeal. Had this Court been aware of this fact not included in the record, a reversal would have been required. Edwards v. Arizona, 451 U.S. 477 (1981).

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.

Respondent's argument centers on the contention that no improprieties occurred during the reconstruction proceedings except that the judge who recused himself from presiding over the

proceedings should not have done so. Appellate counsel filed a Motion to Disqualify Judge Powell on June 10th, 1981 citing as grounds that because an evidentiary hearing had been ordered by this Court, persons present during the trial court events would be material witnesses as to the accuracy of any transcription of the events and may be called to testify as the accuracy of any proposed reconstructed record (R. 1745). Judge Powell recused himself on June 25, 1981 for the reasons stated in the Motion to Disqualify, that he would be a witness at the evidentiary hearing (R.1752). Judge Baker was assigned to preside over the reconstruction proceedings on February 26, 1982. Respondent argues that it was error for Judge Powell to recuse himself from presiding over the record reconstruction in this case and therefore there was no impropriety when Judge Baker wrote a letter to Judge Powell on March 30, 1982.

Although aware that he would be called to testify at the evidentiary hearing regarding the accuracy of the record of Mr. Johnson's trial transcript, Judge Powell, sometime between December 1981 and May 1982, participated with two other individuals who were also to be witnesses at the evidentiary hearing (Gerald Jones and Bruce Hinshelwood) in an ex parte meeting with Judge Baker. This session was ex parte because it was held without notice to or the presence of Mr. Johnson or his then counsel of record. Judges should not have ex parte contact with witnesses in a court proceeding. See Rogers v. State, 630 so. 2d 513 (Fla. 1993); Inquiry Concernins Judge Perry, 586 So.

2d 1054 (Fla. 1991). Respondent alleges that at this ex parte session, Mr. Johnson was represented by Gerald Jones, yet from at least December, 1980, Mr. Johnson's counsel of record was the Public Defender for the Seventh Judicial Circuit (R.1736) and not Gerald Jones."

Respondent argues that Judge Powell's recusal is not contemplated in Fla. R. App. P. 9.200(b)(3) (1977) and therefore was improper. Respondent further argues that otherwise, the proceedings convened for the reconstruction of the transcript of Mr. Johnson's trial were performed in compliance with 9.200(b)(3). However, 9.200(b)(3) (1977) was not applicable to the record supplementation and reconstruction ordered by this Court. Yet Respondent argues that because 9.200 does not contemplate participation of the original trial judge as a witness in record reconstruction evidentiary hearings, Judge Powell's participation in the ex parte meeting was not improper. Respondent's invocation of 9.200(b)(3) and its complaint that the procedures its provides used to reconstruct the record were not followed in this case is misplaced. Respondent asserts that the ex parte meeting was in full accord with 9.200(b)(3) yet does not

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"For purposes of the reconstruction proceeding Gerald Jones was a witness, just as Judge Powell was a witness. This meeting was between the presiding judge (Judge Baker) and three witnesses. Such conduct was highly improper. Just imagine if prior to a criminal trial (for example the O.J. Simpson trial), the presiding judge got together with the witnesses in order to get their stories straight (say Rosa Lopez and Kato Kaelin). There is no question but that it would violate due process. Yet, that is exactly what occurred here.

explain how.[12] The rule itself does not provide for any meetings or ex parte sessions. Were the rule to even be applicable, the fact that it provides for the service of a statement of evidence by the appellant and the service of objections to the statement by the appellee and the submission of both to the court for settlement and approval would indicate rather that proceedings under 9.200(b)(3) are to be conducted on the record.

Appellate counsel filed a motion in this Court requesting a temporary relinquishment of jurisdiction to the trial court for an evidentiary hearing to supplement and reconstruct the record on appeal because the transcripts were "so riddled with omissions and inaccuracies that adequate appellate review" (R.1754) was impossible and on the grounds that the United States and Florida Constitutions guaranteed Mr. Johnson a meaningful appeal, a complete transcript and the right to be present at the evidentiary hearing (R.1766-7). This Court granted Mr. Johnson's motion and the case was remanded on May 14, 1981. Appellate counsel did not invoke any rule of appellate procedure in his

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[12] It is shocking that Respondent believes that due process is irrelevant to the reconstruction proceeding. Respondent's argument is premised upon his belief that neither Mr. Johnson nor his counsel (counsel of record at the time) were necessary participants to this proceeding. Matters were decided between the four witnesses (the trial judge, the trial prosecutor, the trial defense attorney and the court reporter) and the presiding judge. Changes were made in the record, but no record was kept of those changes or what was said in this meeting. Again imagine, Judge Ito and the witnesses in the Simpson trial getting together to talk over their testimony off the record, without either Simpson's counsel or Simpson present.

motion to this Court because no rule provided a mechanism for the reconstruction of the record which he and this Court deemed were necessary to provide Mr. Johnson with his constitutional rights to an appeal. This Court granted the motion on its own authority to issue orders as it deems necessary to promote the administration of justice. Red Top Baggage Co. v. Dorner, 31 So. 2d 409 (Fla. 1947).

Regardless of Rule 9.200(b)(3), Rule 9.200(f) may have has some limited application to the reconstruction of the record in Mr. Johnson's case. 9.200(f)(1) provides that an error or omission in the record may be corrected by stipulation of the parties or by order of the appellate court. 9.200(f)(2) allows the parties to supplement the record if it appears that material portions were omitted. However, to the extent that either of these provisions are applicable, neither authorize the holding of ex parte off the record meetings by trial participants to change the transcript. The rule cannot trump due process.[13] Further,

[13]Respondent says: "As far as Mr. Johnson's appellate counsel not being present, so what? Appellate counsel was not present at the trial, so how could he contribute to reconstruction of an event he was not present at? He couldn't" (Response at 69). Opposing counsel's naivete shows in this statement. In a capital murder trial, trial counsel was not at the scene of the homicide which is the subject of the proceedings. Nevertheless, the United States Constitution guarantees that the accused has the right to be present and to be represented by counsel. Here, Mr. Johnson who had been at the trial was not permitted to attend any of the reconstruction proceedings. Rose v. State, 617 So. 2d 291 (Fla. 1993) ("A defendant has a due process right to be present at any stage of the proceeding that is critical to its outcome, if his presence would contribute to the fairness of the proceedings."); Kentucky v. Stincer, 487 U.S. 730 (1987). Moreover, his counsel of record (continued...)

at the hearings where appellate counsel was present, his efforts to utilize this procedure to reconstruct the voir dire were denied by the Court. Appellate counsel was denied access to Mr. Johnson during the reconstruction proceedings. See Geders v. United States, 425 U.S. 80 (1976) (criminal defendant has a right to consult with counsel during court proceedings). Had counsel been able to consult with his client who had been present during the trial, he would have learned of other matters to ask the witnesses about during the reconstruction proceedings. Habeas relief is required.

CLAIM VIII

MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WREN APPELLATE COUNSEL FAILED TO MOVE TO DISQUALIFY JUDGE BARER, 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.

Respondent bases its argument here on the supposition that Judge Powell did not have to recuse himself once he was on notice that he would be a witness at the evidentiary hearing ordered by this Court. Respondent again misleadingly invokes 9.200(b)(3). The fact is that Judge Powell did recuse himself. The state seems to be arguing that despite Judge Powell recusal, a

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[13] (. ..continued)
was not permitted to attend the proceeding where the witnesses got together to get their stories straight and alter the record in some unrecorded fashion. United States v. Cronic, 466 U.S. 648, 653 (1984) ("Lawyers in criminal cases 'are necessities, not luxuries'").

defendant's continuing right to an impartial tribunal is waived whenever the state disagrees with whether a recusal was appropriate. See Porter v. Sinaletarv, F.3d (11th Cir., March 31, 1995). Respondent argues that Mr. Johnson was not entitled to even one recusal and under no circumstances was he entitled to another one. This is the only construction of Respondent's argument which Petitioner can discern, yet Respondent argues that it is Petitioner's argument which is circuitous.

Respondent blames Mr. Johnson for the improprieties committed by Judge Baker and the ineffectiveness of Mr. Johnson's appellate counsel for failing to move to recuse Judge Baker upon notice of the improprieties. Because it is Judge Baker's erroneous rulings which this court relied upon in finding that the record was adequate to provide Mr. Johnson with a constitutional appeal, the prejudice to Mr. Johnson as a result of this ineffectiveness is apparent. Judge Powell's improper contact with Judge Baker warranted Judge Baker's removal. See Rogers v. State, 630 So. 2d 513 (Fla. 1993); Inquiry Concerning Judae Perry, 586 So. 2d 1054 (Fla. 1991). Habeas relief is warranted.

CLAIM IX

MR. JOHNSON WAS NOT PERMITTED TO ATTEND RECORD RECONSTRUCTION HEETINGS 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. JOBNSON 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.

Mr. Johnson was denied the right to be present at an evidentiary hearing ordered by this court. The motion filed seeking the evidentiary hearing specifically requested that Mr. Johnson be present at the evidentiary hearing. This Court granted that motion and during the reconstruction proceedings in which appellate counsel participated, he repeatedly raised an objection that the court was not complying with this Court's order regarding the presence of Mr. Johnson. It is clear that Geders was violated. Habeas relief is warranted.

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.

By Respondent's own concession, the best that can be said of the record and the fact that numerous bench conferences at which Mr. Johnson was not present were unrecorded is that according to

the trial judge, "not much important of a legal nature" was discussed at the bench conferences that didn't later appear at some place in the record (Response at 78).[14] Relying simply on Mr. Johnson rememberence of the things he was told occurred at these bench conferences, it is clear that "not much" is really "plenty." See Attachment A. Even without the benefit of Mr. Johnson's limited knowledge of what occurred at the bench conferences, it is clear that in this case his absence from them did result in a constitutional deprivation because it rendered review impossible. Sonser v. Wainwright, 733 F.2d 788 (11th Cir. 1984); Hardwick v. State, so. 2d , No. 75,556 & 78, 024 (September 8, 1994). Mr. Johnson's presence at the bench conferences was clearly necessary in order for him to consult with his counsel about jury selection. Moreover, Mr. Johnson is unquestionably prejudiced as a result of his absence because he can now only provide information about what occurred at the bench if his attorney told him about it at the time. If he had been present, he could have made a meaningful contribution to the reconstruction.

Therefore Mr. Johnson is also prejudiced because as a result of his absence and therefore his limited ability to help his appellate counsel during the reconstruction of his record, he is

[14]Respondent asserts that the court reporter's failure to transcribe was a result of a failure to request reporting. The testimony at the reconstruction hearing established that is patently false. Trial counsel testifies he specifically recalled being thankful that the court reporter was present and getting everything down. This testimony was unrefuted and uncontested.

left with inadequate and incomplete knowledge of what occurred at his trial and a record which does reflect for him what occurred.

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.

Unrecorded bench conferences occurred prior to the Court's granting of for cause challenges against potential juror Horne (R. 1099) and Bowman (R. 1322). Horne and Bowman were struck because of their beliefs about the death penalty yet questioning of these jurors at the bench and counsels' objections and arguments made at the bench regarding these potential jurors was not recorded. Since the record is unreliable as a representation of the questioning of these jurors and the arguments of counsel, Mr. Johnson must attest to the fact that his counsel told him that these jurors had stated that despite their reservations about the death penalty, they could follow the law. Mr. Johnson was assured by his counsel that these jurors were improperly challenged and improperly removed for cause. See Attachment A. To the extent that appellate counsel failed to show on direct appeal that these jurors attestment that they could follow the law had been stated at the unrecorded bench conferences, his

performance was deficient; but of course, he was seriously hampered by Mr. Johnson's absence from the reconstruction hearing, and by appellate counsel's absence from the ex parte reconstruction conference where the record was altered in "unrecalled" ways.

Unrecorded bench conferences also took place just immediately before jurors Stewart, Moeller, Young, Zinicola, Suggs, Depaiva, Connolly, Phillips, Smith, Yavorske, Simmons, and Cooper were sworn (R.1044, 1051, 1084, 1110-1111, 1118, 1137, 1161, 1189, 1294, 1317, 1331, 1341).[15] The reconstruction court did not allow reconstruction of what occurred at these bench conferences. Habeas relief is warranted.

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.

Respondent has argued that if Mr. Johnson and his counsel were not present when the jury request to rehear testimony was

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[15] Resondent completely ignores Morgan v. Illinois, 112 S.Ct. 2222 (1992). Since the record does not contain individualized voir dire of numerous jurors, there is no way of knowing whether Morgan was violated.

granted, "Johnson's counsel would have made this known at the reconstruction hearing" and that post-conviction counsel's interpretation of the record is "preposterous" (Response at 81-82). However, Respondent does not explain what inaccuracy Mr. Johnson's appellate counsel could have brought to the reconstruction court's attention given that the record in this instance correctly reflects the fact that neither Mr. Johnson nor his counsel were present. Neither Mr. Johsnon nor any of the witnesses at the reconstruction hearing would or should be expected to point out: "Oh by the way, the record correctly shows that neither Mr. Johnson nor his counsel were present when the jury inquiry was answered." Respondent's position is ludicrous. As to every other claim, he argues that the record is complete enough since no one at the reconstruction hearing specifically recalled an objection that was not contained in the record. As to this claim, Respondent says well clearly the record is wrong because otherwise everyone would have realized that there was error and would have pointed it out.

The error is obvious. It is obvious upon a casual reading of the record. Appellate counsel's failure in regards to this fundamental error was not bringing it to this court's attention on direct appeal. Habeas relief is required.

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.

Not only did the prosecutor improperly argue that the jury should consider the death of Himes and that certain aspects of the death of Himes had a bearing on sentencing, the prosecutor also argued that the jury could "believe or disbelieve" that the death of Himes resulted from an act of mercy on the part of Mr. Johnson (R. 503). The fact is that the jury could do no such thing, they had acquitted Mr. Johnson of first degree murder as to Himes and therefore found that the state had failed to prove any version of the facts other than the version which Mr. Johnson rendered. Respondent argues however that this was nothing more than proper closing argument. The argument was not based upon the evidence or reasonable inferences flowing from it but was an effort to introduce an extraneous and misleading factor into the jury's deliberations which rose to the level of a non-statutory aggravating circumstance.[16]

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[16]Resondent also argues that Zant v. Stephens, 462 U.S. 863 (1983), applies in Florida and authorizes non-statutory aggravating circumstances. Undersigned is aware that opposing counsel is new to capital work, but the law is clear, Zant v. Stephens does not apply to weighing states such as Florida. Stringer v. Black, 112 S.Ct. 1130 (1992). In Florida, aggravators are limited to those set forth in the statute. Miller v. State, 373 So. 2d 882 (Fla. 1979).

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 EAD ACQUITTED RR. 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.

Petitioner replies simply by noting that Respondent does not refute Petitioner's claim that consideration of the death of Himes to support the "avoiding or preventing arrest" and the "in the course of a felony" aggravating circumstance was improper because the Fifth Amendment bars not only successive prosecutions, but also the relitigation of issues previously resolved in a party's favor through the doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436 (1970), Shiro v. Farley, 114 S.Ct. 783 (1994). Failure to raise this claim on direct appeal was ineffective assistance of counsel. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994). Habeas relief is warranted.

CLAIM XVIII

MR. JOHNBON'S SENTENCE OF DEATH VIOLATES TEE 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.

Respondent at one point takes the position that Mr. Johnson's direct appeal brief raised every issue contained in his brief which was rejected. Regarding this claim, however, Respondent takes the position that this issue was not raised on direct appeal. Yet, Mr. Johnson's rejected brief argued the following:

> The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullanev v. Wilbur, 421 U.S. 684 [parallel citations omitted], and does not define "sufficient aggravating circumstances."

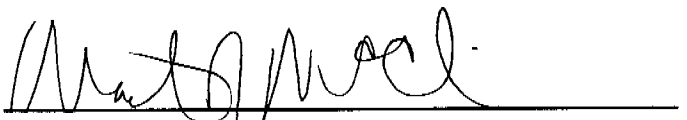
(Appellant's Rejected Initial Brief at 92).

It is difficult to imagine how the state and this Court were not on notice that Mr. Johnson was raising a claim attacking the jury instruction as an improper burden shifting instruction considering the fact that his brief provided a citation to the seminal case of Mullanev v. Wilbur.

CONCLUSION

Regarding all other claims, Mr. Johnson relies on the arguments contained in his initial petition for habeas corpus relief and found elsewhere herein. For those and the foregoing reasons, Mr. Johnson was denied the effective assistance of counsel on direct appeal to the Florida Supreme Court in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Johnson has presented specific errors and omissions by appellate counsel and in the review process, and has demonstrated how each deficiency prejudiced him. He has also shown that confidence in the result is seriously undermined. Mr. Johnson should be given a new trial. This Court should grant habeas relief.

I HEREBY CERTIFY that a true copy of the foregoing Reply to State's Response to Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 12, 1995.



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Attachment A

AFFIDAVIT OF TERRELL M. JOHNSON

STATE OF FLORIDA)
) ss:
COUNTY OF LEON)

I, TERRELL M. JOHNSON, having been duly sworn or affirmed, do hereby depose and say:

1. My name is Terre11 M. Johnson.

2. I am currently on death row. I was convicted and sentenced to death in Orange County after my trial in September of 1980.

3. In my case there were a lot of things missing from the transcript of my trial and there were a lot of mistakes in the transcript.

4. I gave a deposition about what I thought was wrong with the transcript of my trial, but I was not present when they had the hearings about the transcript or talked about changes they were going to make to it to show what happened at my trial. I asked to attend the hearings about the transcript, but I wasn't allowed to go. At my deposition, my appellate attorney did not ask me about certain things that happened at the trial but were not anywhere in the transcript. Without being asked about certain things or told they were important, I did not remember to tell him on my own that they were missing. If he had explained what was important and asked me about it at the deposition I would have told him what had happened. But without being asked, I did not know then that certain things which happened at my trial were important and also that they could be added to the

transcript. I relied upon my attorneys to know the law and advise me.

5. I was never given a chance to get what my attorney told me he said at the bench put into the transcript and I was never asked to help make a record of what happened at the bench conferences based on what my attorney told me he said for me. I was not allowed to go up to the bench when the attorneys did and I was not present at the bench when my attorney went up to the bench to speak for me. But, my attorney did tell me what happened at the bench. However, I never got to remind him of those things during the reconstruction proceedings.

6. Before and during my trial, I had conversations with my attorney about my worries that all my constitutional issues be raised during the trial so that I could have an appeal of those issues. I was particularly concerned with how the jury would be instructed to look at the evidence and my case. I thought it was important to properly instruct the jury about those matters that I myself found confusing.

7. One concern I had was about what the jury would be told about reasonable doubt and whether they would understand it. As a layperson, I knew that movies and TV give what is apparently erroneous information. When my attorney explained the actual law, I found it very confusing. I was worried the jury being laypeople would be confused about what it meant too.

8. I was not at any meetings my attorney had with the prosecutor or the judge about the instructions that were read to

the jury in my case but I told my attorney about my worries that the jury understand the reasonable doubt instruction and I asked him to be sure to say something about it and object at the right time. He told me he made the objection along with the other objections he felt were important. He said he would not and did not waive any objections.

9. In the transcript of my trial, I can't find any record of any meetings my attorney had with the prosecutor or the judge about the instructions and I think maybe they were not recorded like other parts of my trial. I know my attorney said to the judge that he wanted all his objections to the instructions to be in the record, because he told me I could appeal all those issues. He said he objected to the reasonable doubt instruction.

10. I also told my attorney that I thought it was important that he say things in his meetings with the prosecutor and the judge or at the bench about it being unconstitutional for the jury to think about some of the aggravating circumstances that the prosecutor had said they were going to use against me, My attorney and I both thought some of them did not apply and that some of them were vague and would be hard for the jury to understand. We agreed that the jury should not be read any vague instructions or any instructions on aggravating factors which we thought the prosecutor could not fairly say applied to my case. I told my attorney I wanted to appeal these things and he agreed they were important because he had put these things in pre-trial motions which he showed me. He told me that I could appeal all

these issues because he renewed all his pre-trial motions about the instructions and the aggravating factors. He said he had objected to instructions to aggravating circumstances which did not apply and to the vague and confusing wording of the instructions. He said he did not waive any of these objections.

11. There is nothing in the transcript about any meetings my attorney had with the prosecutor or the judge about these instructions and the record doesn't really include objections my attorney told me he made.

12. During my trial, there were a lot of times when the attorneys were picking the jury for the case that they took people up to the bench to talk with them. They also had most of their talks about who they were going to let be on my jury up at the bench where I was not present. My attorney would tell me what the jurors said at these meetings.

13. I had told my attorney that I did not understand why they asked people what their ideas about the death penalty were before they put them on my jury. I asked him to please be sure that he asked the people enough questions to make sure whoever got on my jury was fair. He told me he would ask them questions and would object to the prosecutor keeping people off my jury just because of their ideas about the death penalty. He also said that sometimes jurors who had reservations about the death penalty would say when asked that they would nevertheless follow the law and recommend death where the law indicated they should.

He said it was good to have jurors who were reluctant to impose death, but who said they would follow the law.

14. There were several times that my attorney told me he was upset with the judge for excusing jurors who expressed some reluctance to impose death. He said the judge was committing reversible error because some of the jurors said they would follow the law at these meetings they had at the bench. He said these meetings at the bench should show reversible error if I got convicted.

15. The record shows that neither I nor my trial attorney were present when the jury's question was answered. Since the record correctly reflects that fact, I had no reason to point out that because on that point the record was correct.

Further affiant sayeth naught.

Terrell M. Johnson

Sworn to or affirmed and subscribed before me this

NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires:

RICHARD U. TUCKER, SR.
MY COMMISSION # CC258189 EXPIRES
February 9, 1997
BONDED THRU TROY FAIN INSURANCE, INC.