IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,019

DAVID EUGENE JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Litigation Director
Florida Bar No. 0754773

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 south Monroe Street
Tallahassee, FL 32301
(904) 407-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

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

The following symbols will be used to designate references to the record in this appeal:

"R. ____" -- record on direct appeal to this Court;

"PC-R. ____" -- record on 3.850 appeal from Circuit Court to this Court.

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE AND FACTS

Mr. Johnston was indicted on December 12, 1983 for first-degree murder (R. 1918). At a jury trial, Mr. Johnston was convicted of first degree murder (R. 2382). The penalty phase was conducted and the jury recommended death by an 8 to 4 vote (R. 2403). The judge imposed a death sentence, finding three (3) aggravators: prior violent felony; offense committed in the course of a felony; and especially heinous, atrocious, or cruel (R. 2412-15). Mr. Johnston's conviction and sentence were affirmed on appeal. Johnston v. State, 497 So. 2d 863 (Fla. 1986). In 1988, a warrant was signed setting Mr. Johnston's execution. Mr. Johnston filed a motion pursuant to Fla. R. Crim. P. 3.850. The trial court granted a stay of execution and granted an evidentiary hearing on several claims. The evidentiary hearing was held in June, 1989. Following the hearing, the Circuit Court denied all relief (PC-R. 1678-88). Mr. Johnston appealed to this Court which affirmed the denial of 3.850 relief and denied Mr. Johnston's petition far state habeas corpus relief. Johnston v. Dugger, 583 So. 2d 657 (Fla. 1991).

Mr. Johnston then filed a federal Petition for a Writ of Habeas Corpus, which was granted on September 16, 1993 as to Mr. Johnston's sentence of death and denied as to the guilt determination. Specifically, the district court granted the Writ on Claim VII (the instruction on the statutory aggravating circumstance "heinous, atrocious or cruel" violated the Eighth Amendment) and Claim XXI (Florida's overbroad death penalty

statute was applied to Mr. Johnston in violation of the Eighth Amendment) and denied the remaining claims.

The Writ was conditional, giving Florida sixty (60) days to initiate appropriate proceedings in state court. Appropriate proceedings included: (1) resentencing Mr. Johnston; (2) performing appellate reweighing or harmless error analysis; or (3) imposition of a life sentence.

In December, 1993, the State of Florida sought to cure the Eighth Amendment error identified by the district court by filing a motion in this Court requesting this Court to "open a case" and perform either an appellate reweighing or harmless error analysis (Johnston v. Sinsletarv, et. al, Movant, Motion, Sept. 28, 1993). Mr. Johnston filed a Response questioning the basis of this Court's jurisdiction to "open a case" and suggesting that the court reopen the direct appeal and grant full briefing and oral argument (Johnston v. Singletary, FSC No. 82,457, Response, Oct. 13, 1993). This Court issued an order stating it would "consider the Motion for Expedited Reweighing or Harmless Error Analysis Pursuant to Espinosa v. Florida" and directed the State of Florida to file a brief by Dec. 30, 1993; Mr. Johnston to file a brief by Jan. 14, 1994, and the state to file a reply brief by Jan. 24, 1994 (Johnston v . Singletary, FSC No. 82,457, Dec. 10, 1993 order).

Mr. Johnston sought reconsideration and/or clarification of this order, or dismissal of the State's motion, on the grounds that the order failed to rule on the motion, failed to indicate

what rules of court applied, failed to state whether the court was re-opening the direct appeal, and failed to comport with due process. Mr. Johnston further objected that the court lacked jurisdiction to "open a case" (Johnston v. Sincfletarv, FSC No. 82,457, Motion, Dec. 17, 1993). Mr. Johnston's motion was denied without prejudice "to raise jurisdictional questions on the merits." Mr. Johnston was directed to file an "Appellant's answer brief" by Feb. 1, 1994. Mr. Johnston's Motion to Correct and Designate Caption filed Dec. 17, 1993 was also denied (Johnston v. State, FSC No. 82,457, Jan. 24, 1994, order).

The State filed an "Initial Brief of Respondent." Before filing his brief, Mr. Johnston filed a Motion to Determine Record, again asserting his due process right to notice of what proceeding was taking place and what constituted the record. This Court issued an order on the motion stating only that: "the record in the above cause is the record that was before the court" (Johnston v. Sinsletarv, FSC No. 82,457, March 2, 1994 order). Mr. Johnston filed his "Brief on Motion Filed by Harry K. Singletary" on March 21, 1994. The State filed a reply brief. Mr. Johnston renewed his request that the court reopen his direct appeal (Johnston v. State, FSC No. 65,525, Motion, April 7, 1994), but never received a ruling. On June 23, 1994, this Court issued an opinion holding the Eighth Amendment error harmless and procedurally barred. Johnston v. Sinsletarv, 640 So. 2d 1102 (Fla. 1994). Mr. Johnston filed a petition for writ of certiorari in the United States Supreme Court. On February 27,

1995, the Supreme Court denied certiorari, Johnston v. Singletary, 115 S. Ct. 1262 (1995), and Mr. Johnston's death sentence thus became final.

On March 7, 1995, Mr. Johnston timely filed a state postconviction motion pursuant to Fla. R. Crim. P. 3.851 which directs that a motion to vacate judgment of conviction and sentence of death be filed by the prisoner within one (1) year after the judgment and sentence become final. Also filed on that date was a Motion to Disqualify Judge Powell. The Motion to Disqualify was granted and the case reassigned to Judge MacKinnon. Thereafter, on March 29, 1995, a Supplemental Motion to Vacate was filed and on July 3, 1995 an Amended Motion to Vacate was filed. On December 21, 1995, the Circuit Court dismissed Mr. Johnston's Motion, his Supplemental Motion and his Amended Motion to Vacate Judgment and Sentence without prejudice as well as a Motion to Admit Counsel Pro Hac Vice which had been filed by then co-counsel, K. Leslie Delk. In denying the pro hac vice motion, the trial court stated that Ms. Delk had filed a motion raising matters which were clearly successive and abusive and omitted a description of the conditional nature of the grant of habeas relief. In its order, the Circuit Court granted undersigned counsel ten (10) days to file a new motion. A Rehearing Motion was filed on January 4, 1996 requesting reconsideration of Mr. Johnston's Amended Motion to Vacate Judgment and Sentence. That motion was granted and a hearing pursuant to Huff v. State, 622 So. 2d 982 Fla. 1993) was set for

February 29, 1996. On March 6, 1996, the Circuit Court summarily denied Mr. Johnston's Amended Rule 3.850 motion stating that the motion was time-barred and constituted an abuse of process in that the claims were or should have been raised on appeal **or** in a previous collateral proceedings. On March 18, counsel filed Mr. Johnston's Motion for Rehearing from Order Denying Amended Motion to Vacate which was denied March 21, 1996. On April 18, 1996, Mr. Johnston timely filed a notice of appeal.

SUMMARY OF ARGUMENT

1. The trial court erred in denying Mr. Johnston's Amended Motion to Vacate Judgment and Sentence as time barred and successive. The trial court denial of a full and fair postconviction proceedings constituted a denial of due process. Mr. Johnston's sentence of death was vacated by the federal district court in 1993. This Court reimposed a death sentence in 1994. When Mr. Johnston's petition for certiorari review was denied in 1995, Mr. Johnston's death sentence became final. The circuit court erred when it failed to recognize the federal district court's grant of relief. The circuit court also failed to correctly determine when Mr. Johnston's sentence became final. Mr. Johnston's 1995 Motion to Vacate was timely filed and this Court should remand this case for full consideration of the claims raised.

2. Mr. Johnston is entitled to access to public records withheld by state agencies under Chapter 119 of the Florida Statutes and the Eighth and Fourteenth Amendments. An evidentiary on this issue is required. Mr. Johnston has received conflicting letters from representatives of the State Attorneys Office and a factual dispute exists as to whether that office has destroyed its files from this case. The Orange County Sheriff's Office and Orlando Police Department have not fully complied with chapter 119. Moreover, Mr. Johnston's investigation into his claims has been interfered with by non-compliance on the part of

several other agencies. Mr. Johnston is entitled to compliance and to then amend his 3.850 Motion.

3. Mr. Johnston wa snot competent at the time of the offense, during all phases of this trial and when this court sentenced him to death in 1994. Mr Johnston was convicted and sentenced to death while incompetent in violation of the Eighth and Fourteenth Amendments.

4. Mr. Johnston did not receive effective assistance of counsel at the penalty phase of his trial. In this Court's 1994 opinion reimposing a death sentence, this Court relied upon a jury recommendation tainted by ineffective assistance of penalty phase counsel. A wealth of mitigation not presented at trial should have been considered in evaluation whether the jury's death recommendation was sufficiently reliable under the Eighth Amendment to support a death sentence.

5. In sentencing Mr. Johnston to death, this Court gave great weight to the jury's recommendation, yet failed to consider that the jury recommendation was tainted with many errors. The jury instruction and prosecutor's comments and/or argument unconstitutionally shifted the burden to Mr. Johnston to prove that death was an inappropriate sentence. Mr. Johnston's sentence rests upon an unconstitutionally automatic aggravating circumstance in violation of the Sixth, Eighth, and Fourteenth Amendments. The trial court and prosecutor unconstitutionally mislead the jury as to its sense of responsibility toward the sentencing of Mr. Johnston. Aggravating circumstances were

overbroadly and vaguely argued by the state in violation of the Eighth and Fourteenth Amendment. The jury instruction on the heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague in violation of the Sixth, Eighth and Fourteenth Amendments. Mr. Johnston did not receive the mental health assistance as contemplated by Ake v. Oklahoma in violation of the Sixth, Eighth and Fourteenth Amendments. Florida's capital sentencing scheme is unconstitutional.

6. Mr. Johnston was denied an adversarial testing at the guilt/innocence phase of his trial. Mr. Johnston did not receive full chapter 119 compliance and was precluded from fully investigating the adequacy of the adversarial testing at his guilt. Once chapter 119 compliance is provided, Mr. Johnston is entitled to amend his 3.850 Motion.

7. Newly discovered evidence shows that a forensic expert relied upon by a state witness had misrepresented credentials and training. This evidence demonstrates that confidence in Mr. Johnston's conviction is undermined. This evidence material to the credibility of a key state witness was withheld by the state at trial.

8. Mr. Johnston's sentencing order does not comply with Florida law and he is entitled to a new sentencing.

9. Mr. Johnston has alleged abuse while in the custody of the Orange County Jail. His allegations either demonstrate a violation of his Fifth and Fourteenth Amendment rights or further proof of his delusional mental disorder.

10. Mr. Johnston is innocent and the state failed to satisfy its burden in this case which consists exclusively of circumstantial evidence.

11. Cumulative error in this case resulted in a fundamentally unfair proceeding.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. JOHNSTON'S AMENDED MOTION TO VACATE JUDGEMENT AND SENTENCE AS TIME BARRED AND BUCCESSIVE. TEE TRIAL COURT'S DENIAL OF A FULL AND FAIR POST-CONVICTION PROCEEDING CONSTITUTED A DENIAL OF DUE PROCESS.

The federal court granted federal habeas corpus relief to Mr. Johnston and vacated his death sentence. Relief was granted because Florida's imposition of a death sentence on Mr. Johnston was found to violate the Eighth Amendment. Mr. Johnston was not granted habeas relief as to his conviction.'

Mr. Johnston's was sentenced to death again when this court held that the Eighth Amendment error was harmless. Mr. Johnston's current death sentence became final on February 27, 1995 when the United States Supreme Court denied certiorari review of this Court's June 23, 1994 opinion. Johnston v. Sinsletarv, 115 S. Ct. 1262 (1995).

Mr. Johnston's Motion to Vacate was timely filed on March 7, 1995 pursuant to the one (1) year time limit of Rule 3.850 applicable to cases becoming final after January 1, 1994. The state conceded as much in it Response to Mr. Johnston's motion to vacate (PC-R. 189; 204). The state specifically argued that under Rule 3.850, Mr. Johnston was entitled to only one (1) year

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'It is not uncommon for a federal court to grant a writ of federal habeas as to sentence but deny habeas relief as to conviction. See Parker v. Dugger, 498 U.S. 308 (1991); Hitchcock v. Dusser, 481 U.S. 393 (1987); Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993); Middleton v. Dusser, 849 F.2d 491 (11th Cir. 1988); King v. Strickland, 748 F.2d 1462 (1984).

from when his judgment and sentence became final to file a motion to vacate.

The Circuit Court erred in denying Mr. Johnston's Amended Motion to Vacate Judgement and Sentence as time barred and successive. The Circuit Court came to this erroneous conclusion through a series of faulty determinations, each built upon the last, and each wrong.

First, the Circuit Court refused to recognize that Mr. Johnston's death sentence was vacated by the federal district court when it issued its order of habeas corpus relief in 1993. In refusing to recognize that the grant of relief vacated Mr. Johnston's death sentence, the Circuit Court relied on the fact that the writ was "conditional."

Second, the Circuit court then failed to recognize the effect of this Court's 1994 decision reimposing the death penalty.

Third, the Circuit Court erroneously calculated the final date of Mr. Johnston's death sentence and erroneously held that Mr. Johnston's Rule 3.850 motion was untimely.

Fourth, as a result of its prior errors, the Circuit Court failed to consider the merits of the motion.

A. THE CIRCUIT COURT ERRED WHEN IT FAILED TO RECOGNIZE THE FEDERAL DISTRICT COURT'S GRANT OF RELIEF.

The United States Supreme Court has explained that:

> The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner, or in a capital

> case a similar conditional order vacating the death sentence.

Herrera v. Collins, 113 S. Ct. 853, 862 (1993). Conditional or not, the effect of the grant of federal habeas corpus relief to Mr. Johnston was to vacate his sentence of death. Yet the Circuit Court refused to recognize it as such, instead stating that:

> "[T]he federal district court did not is **fact** issue a writ of habeas corpus or even a conditional writ, which misht have vacated Mr. Johnston's judgement or sentence. On the contrary, the federal court originally held:
>
> > The writ of habeas corpus will be conditionally granted, within sixty (60) days of the date of this order, unless the State of Florida initiates appropriate proceedings in state court. Because a new sentencing hearing before a jury is not constitutionally required, the State of Florida may initiate whatever state court proceedings it finds appropriate, including seeking a life sentence or the performance of a reweighing or harmless error analysis by the Florida Supreme Court.

(PC-R2. 420) (emphasis added). With all due respect, this is a conditional grant of the writ. Moreover, if it was not a conditional grant of the writ, then it would not have had any effect on Mr. Johnston or his state court proceedings whatsoever. The federal courts do not have the authority to simply order Florida courts in death cases around, absent the grant of habeas relief. Rather, what the federal court did was something it has the authority to do, something federal courts have been doing for over one hundred (100) years; it issued what is the most common

habeas corpus remedy today - a conditional writ - first recognized by the United States Supreme Court in 1894 in In re Bonner, 151 U.S. 242 (1984). The Circuit Court simply made a horrendous legal error in this case when it ruled that "the federal district court did not in fact issue a writ of habeas corpus or even a conditional writ, which might have vacated Mr. Johnston's judgement or sentence."

Originally, courts were confined to only the ultimate relief available in habeas corpus proceedings - orders requiring the petitioner's unconditional discharge from custody. If the legal error proved by the petitioner did not render his current custody illegal, no other remedy was available. However now the courts rely on more flexible remedies such as "conditional" orders, like the one issued in Mr. Johnston's case, which only require release in the event that a retrial or other action sufficient to cure the constitutional violation does not occur within a period of time specified in the order granting the writ, usually 30, 60, 90 or 120 days. James Liebman, Federal Habeas Corpus Practice and Procedure § 33.3 (1996).

Following a grant of a conditional writ, if the state fails to act within the time set by the writ, then the petitioner must be immediately released. See, e.g., Smith v. Lucas, 16 F.3d 638, 641 (5th Cir. 1994) (per curiam) (immediate release from death sentence, which court vacated upon state's failure to retry sentence within specified time); Capps v. Sullivan, 13 F.3d 350, 353 (10th Cir. 1994); Foster v. Lockhart, 9 F.3d 722, 727-28 (8th

Cir. 1993) (release appropriate but state "may . . . rearrest and reprosecute"); Burton v. Johnson, 975 F.2d 690, 692-93 (10th Cir. 1992), cert. denied, 113 S. Ct. 1879 (1993); Moore v. Zant, 972 F.2d 318, 320 (11th Cir. 1992), cert. denied, 113 S. Ct. 1650 (1993); Tifford v. Wainwrisht, 588 F.2d 954, 957 (5th Cir. 1979); United States ex rel. Schuster v. Vincent, 524 F.2d 153, 160-61 (2d Cir. 1975); Grasso v. Norton, 520 F.2d 27, 37-38 (2d Cir. 1975); United States ex rel. Brown v. Rundle, 427 F.2d 223, 224 (3d Cir. 1970); United States ex rel. Miller v. Pate, 299 F. Supp. 418, 420 (E.D. III. 1969), rev'd on other grounds, 429 F.2d 1001 (7th Cir. 1970), cert. denied, 401 U.S. 924 (1971). See also Powers v. Schwartz, 448 F. Supp. 54, 57 (S.D. Fla. 1978), vac'd as moot, 587 F.2d 783 (5th Cir. 1979) (ordering petitioner released on own recognizance when state ignored order to hold bond hearing); Cave v. Singletary, 971 F.2d 1513, 1520, 1530 (11th Cir. 1992) (affirming conditional release order that provided for imposition of sentence of life imprisonment if state fails either "to hold a new sentencing hearing within said 90 day period ... [or to obtain] an order from this Court extending said time for good cause'); Smith, 16 F.3d at 641; Haves v. Lockhart, 881 F.2d 1451, 1451-52 (8th Cir. 1989), cert. denied, 493 U.S. 1088 (1990) (granting writ and "remand[ing] the case to the district court with directions to reduce Hayes' punishment to life imprisonment without parole unless the state, within such reasonable time as the district court may fix, commences proceedings to retry the question of punishment"); Hammontree v.

Phelas, 605 F.2d 1371, 1380-81 (5th Cir. 1979) ("We suggest that the state be given a reasonable time, say ninety days, within which to retry the petitioner; otherwise, it mush permanently discharge him from custody.").

The Circuit Court further failed to recognize that the federal court vacated Mr. Johnston's sentence of death. This was again simply error. In this case, what the federal district court did was to say to the State of Florida in no uncertain terms: if you can cure the death sentence within sixty (60) days, you can impose it, if you fail to do so, you may not. In either instance, you may not carry out the sentence you imposed in 1986. Yet the Circuit Court held that "Mr. Johnston's original sentence and judgment were never vacated nor was he 're-sentenced' by the Supreme Court in Johnston III." (PC-R2. 421-22). This Circuit Court's order should be reversed and this case remanded.

B. THIS COURT'S 1994 DECISION HOLDING THE EIGHTH AMENDMENT ERROR HARMLESS REIMPOSED A DEATH SENTENCE ON MR. JOHNSTON. THAT SENTENCE THUS BECAME FINAL WHEN THE SUPREME COURT DENIED CERTIORARI REVIEW IN 1995.

As noted above, the Circuit refused to acknowledge that this Court in its 1994 decision, re-sentenced Mr. Johnston to death when it held that the Eighth Amendment error infecting Mr. Johnston's sentencing proceedings was harmless error.

A death sentence is no more final without the completion of the appellate review process, than it is without the jury recommendation or judge sentencing calculus. In cases where the state court conducts a new sentencing proceeding before a new

jury in order to cure constitutionally invalid sentencing, the death sentences in those cases have not been final until the direct appeal process following the resentencing was over. The same logic applies here. In Mr. Johnston's case, this Court opted to conduct new appellate proceedings in order to cure the Eighth Amendment error instead of remanding for a new jury sentencing or imposing a life sentence. Meaningful appellate review by this Court is a required before a sentence of death may be carried out. Proffitt v. Florida, 96 S. Ct. 2960 (1976). It is an essential step in the process of the death penalty in Florida, and no death sentence in this State is final or can be carried out until this Court affirms that sentence. See Rule 3.851, Fla. R. Crim. P. ("a judgment is final: (a) upon the expiration of the time permitted to file a petition for writ of certiorari in the United States Supreme Court seeking review of the decision of the Supreme Court of Florida affirming a judgment and sentence of death.") Mr. Johnston's sentence was not affirmed until 1994. The prior sentence of death imposed on him was null and void, vacated and prohibited.

When faced with other cases in similar procedural postures, Florida has either sought resentencing or filed motions in this Court to reopen direct appeal proceedings to subject the error to appellate harmless error analysis. See Parker v. State, 643 So. 2d 1032 (Fla. 1994); Hill v. State, 643 So. 2d 1071 (Fla. 1994). In those cases where a resentencing was conducted, there is no question that the sentence was not final until the direct appeal

affirming the sentence was finalized. This logic has also applied in cases where this Court conducts new appellate proceedings.

In Parker v. Dugger, 111 S. Ct. 731 (1991), the 8th Amendment error occurred when this Court after striking two aggravating circumstances, affirmed Parker's sentence without considering the mitigating circumstances. The United States Supreme Court granted the Writ and this Court was directed to conduct an adequate harmless error analysis. This Court reopened Parker's case, conducted a harmless error analysis and concluded that a life sentence should be imposed. Parker, 643 So.2d 1032. Johnston's situation is identical except that this Court imposed death instead of imposing life.

Likewise, in Sochor v. Florida, 112 S. Ct. 2114 (1992), the Supreme Court found Florida's harmless error analysis deficient. Thereafter, this Court issued a new opinion affirming the death sentence. In Sochor's currently pending state postconviction proceedings, Florida has never argued that Sochor's sentence was final before this Court issued that opinion.

Here, there was no valid sentence in place until this Court affirmed the sentence in 1994 and certiorari review was denied Feb. 27, 1995. Johnston's sentence did not become final until that date. See Richmond v. Lewis, 113 S. Ct. at 535 ("Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new

sentencing calculus, if the sentence is to stand."). Since certiorari review was denied on February 27, 1995, Mr. Johnston's sentence of death did not become final until that date. There was no valid death sentence in place until this Court's finally affirmed the sentence. That it took until 1993 for the Eighth Amendment error in Mr. Johnston's case to be correctly ruled upon is no reason to deny him the benefit of that ruling.

This Court imposed Mr. Johnston's death sentence in 1994. Johnston v. Singletary, 640 So. 2d 1102 (Fla. 1994). On February 27, 1995, the United States Supreme Court denied certiorari. Johnston v. Singletary, 115 S. Ct. 1262 (1995). Mr. Johnston's death sentence thus became final. The Circuit Court was in error when it concluded that Mr. Johnston's death sentence was final upon the June 22, 1986 filing of the mandate affirming the judgment and sentence. (PC-R2. 420).

In Teague v. Lane, 489 U.S. 288 (1989), the Supreme Court adopted the language in Allen v. Hardy, 478 U.S. 255 (1986), as defining the term "final". In Allen v. Hardy, 478 U.S. at 258 n.1, the Court quoting Linkletter v. Walker, 381 U.S. 618 (1965), stated: "'By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed'".

Similarly, Florida law provides a definition of "final" in capital cases in Rule 3.851, Fla. R. Crim. Pro.: "For purposes of this rule, a judgment is final: (a) upon the expiration of the time permitted to file a petition for a writ of certiorari in the

United States Supreme Court seeking review of the decision of the Supreme Court of Florida affirming a judgment and sentence of death (90 days after the opinion becomes final), or (b) upon the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."

The Circuit Court failed to properly determine on what date Mr. Johnston's sentence became final. On September 16, 1993, the district court entered its order granting habeas relief as to two of Mr. Johnston's claims after finding Eighth Amendment error tainted Mr. Johnston's sentence of death. Habeas relief was granted on Claim VII, which alleged that the sentencing jury had received a constitutionally inadequate instruction on the heinous, atrocious or cruel aggravating circumstance, and Claim XXI, which alleged Eighth Amendment error under Richmond v. Lewis, 113 S. Ct. 528 (1992), because nether the sentencing nor the appellate court had actually applied an adequate narrowing construction of the heinous, atrocious or cruel aggravator rendering the aggravator vague and overbroad as applied. Having found relief was required on both of the claims, the district court outlined the options available to the State of Florida to cure the Eighth Amendment error.

Specifically, the federal district court stated: "because only the Florida courts can determine the proper approach to Petitioner's sentencing, the writ of habeas corpus will be conditionally granted, within sixty (60) days from the date of this order, unless the State of Florida initiates appropriate

proceedings in state court." Thus according to the federal district court's ruling, Mr. Johnston's sentence of death was not constitutionally valid and could not be carried out. Mr. Johnston's "sentencing" was up to the State of Florida to approach.

Following the issuance of the September 16, 1993 order, Florida petitioned this Court to "open a case" and cure the error identified by the federal district court. Specifically, the State asked this Court to "grant expedited review, with an accelerated briefing schedule and reweigh or perform the requisite harmless error analysis required by the September 16, 1993, order of the district court" (Motion for Expedited Reweighing or Harmless Error Analysis at 3.) This Court granted Florida's request and ordered briefing. When Mr. Johnston complained about inadequate procedural due process and lack of notice of what rules governed the proceedings, the State filed a reply brief saying:

> If the state has chosen the wrong vehicle to invoke this court's jurisdiction, then it would ask that the court reopen Johnston's direct appeal on this narrow issue alone and consolidate this case under the appellate case number. The state has no preference as to which case number this case will fall under since the issue to be reviewed remains the same and residual jurisdiction still attaches.

(Reply Brief of Respondent, March 31, 1994 at 2). Clearly, the State recognized at that point that a final death sentence was not in place and would not be in place until this Court conducted either an appellate reweighing or harmless error analysis.

No final sentence was in place once the federal court found that Eighth Amendment error had infected Mr. Johnston's sentencing proceeding. His death sentence was constitutionally infirm and was vacated. The federal court directed Florida to re-approach Mr. Johnston's sentencing and it suggested options. The Circuit Court was wrong to refuse to recognize that this Court's act of "curing" the constitutionally invalid sentencing proceeding held below in 1986, resulted in the imposition of a death sentence which thus became final when certiorari review was denied in 1995.

C. MR. JOHN&TON'S 3.850 NOTION WAS TIMELY FILED.

Rule 3.851 of the Florida Rules of Criminal Procedure directs that a motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within one (1) year after the judgment and sentence become final. Rule 3.851 defines a final judgement and sentence as follows: "For purposes of this rule, a judgment is final: (a) upon the expiration of the time permitted to file a petition for a writ of certiorari in the United States Supreme Court seeking review of the decision of the Supreme Court of Florida affirming a judgment and sentence of death (90 days after the opinion becomes final), or (b) upon the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed." Mr. Johnston's judgment and sentence became final on February 27, 1995 when the United States Supreme Court denied certiorari review of this Court's affirmance of his death sentence.

Pursuant to Rule 3.851, on March 7, 1995, Mr. Johnston timely filed a Motion to Vacate Judgement and Sentence with Special request for Leave to Amend in the Circuit Court in and for Orange County, Florida, seeking relief from his now final conviction and sentence. During the course of those proceedings the state argued that the one (1) year time limit of Rule 3.851, applicable to cases which became final Jan. 1, 1994, applied in this case (State's Response at PC-R. 189; 204). The state specifically argued that Mr. Johnston was entitled to only one year for the date his conviction and sentence became final. Yet, on March 6, 1996, the state Circuit Court summarily denied Mr. Johnston's Amended 3,850 motion. The Circuit Court erred when it held that Mr. Johnston's claims are time barred (PC-R2. 420). Mr. Johnston's Motion to Vacate was timely filed. This case should be remanded for consideration of the claims raised.

D. THIS COURT SHOULD REMAND THIS CASE FOR FULL CONSIDERATION OF THE CLAIMS RAISED.

Having now shown that his Motion to Vacate was timely filed, Mr. Johnston is entitled to a remand of his case for consideration of the merits of the claims raised. Mr. Johnston is entitled to an evidentiary hearing on his claims as summary denial would be inappropriate. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Sireci

v. State, 502 So. 2d 1221, 1227 (Fla. 1987); Mason v. State, 489 so. 2d 734, 735-37 (Fla. 1986). A trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Withersnoon v, State, 590 So. 2d 1138 (Fla. 4th DCA 1992). See Hoffman v. State, 571 So. 2d 49 (Fla. 1990). The court below failed to exercise of either of these options, instead erroneously denied the motion as time barred and abusive. This Court must reverse and remand.

ARGUMENT II

MR. JOHNSTON IS ENTITLED TO ACCESS TO PUBLIC RECORDS WITHHELD BY STATE AGENCIES UNDER CHAPTER 119 OF THE FLORIDA STATUTES AND THE EIGHTH AND FOURTEENTH AMENDMENTS. AN EVIDENTIARY HEARING ON THIS ISSUE IS REQUIRED.

This Court has made it clear that a prisoner whose conviction and sentence of death has become final on direct review is generally entitled to criminal investigative public records as provided in Chapter 119. See Anderson v. State, 627 So. 2d 1170 (Fla. 1993); Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993); Walton v. Dugger, 621 So. 2d 1357 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 so. 2d 541 (Fla. 1990). See also Mendvk v, State, 592 So. 2d 1076 (Fla. 1992). When agencies fail to comply with public records requests, an evidentiary hearing is required. Ventura v. State, 673 So. 2d 479 (Fla. 1996). If any agency claims that

files in their possession are exempt under Chapter 219, then an in camera inspection must be conducted by the court. See Kokal; Walton. Further, this Court has extended the time period for filing Rule 3.850 motions after disclosure of Chapter 119 materials. Ventura; Jenninss v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano. In these cases, a period of sixty (60) days was afforded to litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials. Mr. Johnston should have been permitted to secure Chapter 119 compliance and allowed to amend once the requested records were disclosed.

Post-conviction litigation is governed by principles of due process. See Holland v. State, 503 So. 2d 1250 (Fla. 1987). Thus, Mr. Johnston's request for leave to amend should have been granted because that request is integral to his rights in the post-conviction process. This Court encourages circuit courts to allow amendment of Rule 3.850 motions. See Brown v. State, 596 So. 2d 1026 (Fla. 1992); Woods v. State, 531 So. 2d 79 (Fla. 1988). The lower court's order should be reversed, and an evidentiary hearing on the Chapter 119 issues should be ordered. Additionally, Mr. Johnston is entitled to any exculpatory materials in the possession of prosecutorial agencies.

The record with regard to this claim evinces the need for a hearing. Mr. Johnston has been denied complete access to public records and possible exculpatory materials from several state agencies. Moreover, this is an Orange County case involving both

the Orange County sheriff and the Orlando Police Department. As became known and conceded by the state during the Jerry White and Pedro Medina cases, the Orange county Sheriff and police in the past have failed to comply with public records requests and have withheld material which is public record as well as material which may be exculpatory.

In early 1995, prior to the due date of Mr. Johnston's Motion to Vacate, chapter 119 requests were made to the agencies involved in the prosecution of Mr. Johnston. One of those requests was to the Office of the State Attorney for the Ninth Judicial Circuit, Orange County. That office now claims that their file in this case was destroyed. Initially, on May 30, 1995, Assistant State Attorney Paula Coffman replied to this request for records by stating that the closed office file in State v. Johnston, CR 83-5401, the file from this case, was available for inspection and/or copying and that according to their records, there were no other files in the possession of the State Attorney in which Mr. Johnston was either an accused, witness or victim. This letter was attached to the state's September 1, 1995 response to Mr. Johnston's Motion to Vacate (PC-R. 273).

However, on June 12, 1995, the Chief Assistant State Attorney, William C. Vose, also replied to this request for records. In his letter, he stated that records on several cases which involved Mr. Johnston, including the files from this case, had been destroyed. He attached two (2) pages of destruction

documentation for closed felony cases to his letter and a one (1) page interoffice memorandum.

The destruction documentation shows cases from January 2, 1979 to December 31, 1985 were either authorized to be destroyed or that requests for that authorization were made. The interoffice memorandum attached, dated January 31, 1995, is from Julie Swinarski of the Office of the State Attorney to Mike Offut and Luis Rodriquez regarding Mr. Johnston's request. In it Swinarski states, "all of these may be destroyed, however, I need to at lease make an attempt to find out if they are out there anywhere, although I highly doubt it. All are State v. David Eugene Johnston." The memo then provides seven (7) case numbers, including CR 83-5401, which is the file number for this case. See Attachment A. A note written on the memorandum seems to indicate that this check was again requested on June 1, 1995. Thereafter, on September 5, 1995, Ms. Coffman sent a package to CCR containing presumably the only records which the State Attorney was conceding still existed. The package contained only copies of three (3) 1995 post-conviction pleadings and another copy of Coffman's May 30, 1995 letter. This letter and its attachments demonstrate the need for a hearing on this matter as there is a factual dispute as to whether these files have been destroyed or are being withheld. No hearing on this matter was conducted below.

It is clear that chapter 119 compliance did not occur. The State's only assertion that Mr. Johnston's counsel failed to

inspect the available files warrants an evidentiary hearing. Ventura v. State, 673 So. 2d 479 (Fla. 1996). This is particularly true where here the State has sent conflicting letters and provided copies of records which are clearly not the complete file. As this Court stated in Ventura, "[t]he state cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act." Id. at 481.

The Orlando Police Department in response to Mr. Johnston's request produced materials on March 10, 1995. Thereafter, Mr. Johnston sent requests to every individual law enforcement officer associated with the investigation. A file was then received on April 14, 1995 which purported to be the file of Officer Robert Mundy. With regard to requests made of several other individual officers, the Police Department failed to forward requests to officers no longer employed there and refused to provide collateral counsel with current addresses of formerly employed officers. Additionally, the Orlando Police Department has failed to produce the files of any other individual officer. No other file has ever been provided. Other individual officers were closely involved with this investigation, including Officers Dupuis, Stickley, Ostermeyer, Hitechen, Farmer, Rey and Keefe. Mr. Johnston has alleged that he has not received the complete files. The Police Department has claimed only that they would have expected to find all investigation information in their

records search. Here as in Walton, a hearing is required to determine the existence of any records or files in the possession of those officers.

Non-compliance by Orange County law enforcement has been conceded by the State in other cases. In the White case, during the Circuit Court proceedings, Ms. Coffman represented the state and specifically conceded:

> And I will candidly admit that the existing record in this case does not refute the allegations that prior public record demands have been made and if they have been made, that these six or seven items that they're now claiming they've never seen before were not included in those prior disclosures.

(State of Florida v. Jerry White, T. 11/27/95 hearing at 32-3). Additionally, more recently during the oral argument in State v. Medina before this Court last month, Assistant Attorney General Kenneth Nunnelley also conceded that Orange County had failed to comply with prior public records requests.

Mr. Johnston has also attempted to investigate the role of Judith Bunker, a purported blood spatter expert, in the investigation of this case. These efforts have been hindered by chapter 119 non-compliance on the part of numerous state agencies.[2] This issue was recently briefed and argued before

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[2] Those agencies include: State Attorney, 9th Judicial Circuit; State Attorney, 15th Judicial Circuit; State Attorney, 11th Judicial Circuit; State Attorney, 16th Judicial Circuit; State Attorney, 1st Judicial Circuit; State Attorney, 5th Judicial Circuit; State Attorney, 6th Judicial Circuit; State Attorney, 8th Judicial Circuit; State Attorney, 7th Judicial Circuit; State Attorney, 13th Judicial Circuit; State Attorney, 17th Judicial Circuit; State Attorney, 18th Judicial Circuit; (continued...)

this Court in State v. Correll and counsel would refer the Court to that record.

This Court must remand for further proceedings to allow Mr. Johnston to present his evidence that he has not received full chapter 119 compliance, he must be then allowed to amend. Walton; Ventura.

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[2](. ..continued)
State Attorney, 19th Judicial Circuit; Public Defender, 5th Judicial Circuit; Public Defender, 7th Judicial Circuit; Medical Examiner, District 1; Medical Examiner, District 6; Medical Examiner, District 11; Medical Examiner, District 14; Medical Examiner, District 15; Medical Examiner, District 16; Medical Examiner, District 17; Medical Examiner, District 23; Orlando Police Department; Florida Department of Law Enforcement; Florida Prosecuting Attorney Association; Criminal Justice Institute; Alachua County Sheriff; Bradford County Sheriff; Citrus County Sheriff; Clay County Sheriff; Collier County Sheriff; Metro-Dade Police Department; DeSoto County Sheriff; Dixie County Sheriff; Duval County Police Department; Escambia County Sheriff; Flagler County Sheriff; Franklin County Sheriff; Gilchrist County Sheriff; Glades County Sheriff; Gulf County Sheriff; Hamilton County Sheriff; Hardee County Sheriff; Hendry County Sheriff; Hernando County Sheriff; Highlands County Sheriff; Hillsborough County Sheriff; Lafayette County Sheriff; Lake County Sheriff; Lee County Sheriff; Manatee County Sheriff; Martin County Sheriff; Monroe County Sheriff; Nassau County Sheriff; Okeechobee County Sheriff; Osceola County Sheriff; Palm Beach County Sheriff; Pasco County Sheriff; Pinellas County Sheriff; Polk County Sheriff; St. Lucie Sheriff; Santa Rosa Sheriff; Sarasota County Sheriff; Sumter County Sheriff; Suwanee County Sheriff; Taylor County Sheriff; Volusia County Sheriff; Wakulla County Sheriff; Washington County Sheriff).

ARGUMENT III

MR. JOHNSTON WAS NOT COMPETENT AT THE TIME OF THE *OFFENSE*, DURING ALL PHASES *OF* HI8 TRIAL, AND WHEN THIS COURT SENTENCED HIM TO DEATH IN 1994. MR. JOHNSTON WAS CONVICTED AND SENTENCED TO DEATH WHILE INCOMPETENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A defendant must be competent at the time of his plea, trial and sentencing; otherwise, his conviction violates due process. Bishop v. United States, 350 U.S. 961 (1956); Dusky v. United States, 362 U.S. 402 (1960). If doubt exists as to a defendant's competency, the court must hold a hearing. Pate v. Robinson, 383 U.S. 375 (1966); James v. Singletary, 957 F.2d 1562 (11th Cir. 1992). Similarly, if a question arises during the proceedings as to a defendant's competency, due process requires the court conduct a hearing. Drope v. Missouri, 420 U.S. 162 (1975).

A claim that a defendant was incompetent at the time of his plea or trial can be proven by the subsequent presentation of collateral evidence as to actual competency. Nathaniel v. Estelle, 493 F.2d 794, 796-97 (5th Cir. 1974); Moran v. Godinez, 40 F.3d 1567 (9th Cir. 1994). It is insufficient that a defendant is aware of the ongoing legal proceedings; rather he must also have a "rational understanding" of the proceedings. Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991) cert. denied, 112 s. ct. 1942 (1992).

Mr. Johnston was incompetent when he was sentenced to death by this Court in 1994, as well as at every other stage of his proceedings. Additionally, Mr. Johnston did not receive an

adequate competency evaluation, either in the form of the evaluations conducted by persons appointed by the court, or during the proceeding in which the court ruled on the issue. Moreover defense counsel failed to advise the court of Mr. Johnston's mental deterioration at trial. Had trial counsel done so, the court would have been required by Pate to hold another competency hearing. Mr. Johnston was denied his rights under Pate by trial counsel ineffectiveness in this regard.

Expert testimony would show that Mr. Johnston was incompetent at the time of the offense and at the time of trial (PC-R. 1380-92). Moreover, Mr. Johnston's Motion to Disqualify the Judge contained an affidavit from Mr. Johnston stating that he had been attacked by Judge Powell in chambers following his evidentiary hearing. Judge Powell has granted the motion but has stated "[t]hese claims are patently false and perjurious. It is ludicrous to believe that any judge would be alone in their chambers with a defendant whom he or she has sentenced to death much less strike that person." After reviewing these documents and conducting an evaluation of Mr. Johnston, a mental health professional has found that Mr. Johnston's claims if considered untrue, are further evidence of his previously diagnosed delusional disorder. If untrue, (1) the allegations against Judge Powell are typical of a delusional disorder of the persecution type; (2) Mr. Johnston believes he is being malevolently treated by Judge Powell and was kicked and beaten by him; (3) it is not unusual for people with this type of disorder

to repeatedly take their complaints of being mistreated to legal authorities; and (4) Mr. Johnston's preoccupation with a number of systematic delusions just further substantiates his incompetence due to his severe mental illness.

Department of Corrections psychiatrist, F.O. Alcantara, has similarly concluded that Mr. Johnston is delusional; suffers from organic delusional syndrome; and has brain damage. Other corrections department personnel have also concluded that Mr. Johnston's apparently delusional perceptions are a result of his mental and emotional instability.

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of this claim.

Moreover, it is clear that Mr. Johnston has not received full compliance with his chapter 119 requests for records, documents, files, and other evidence and that is entitled to a hearing on those allegations and time to amend his Rule 3.850 motion once he has received full compliance.

ARGUMENT IV

MR. JOHNSTON DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL. IN ADDITION, TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE ACTION OF THE TRIAL COURT AND STATE.

In this Court's 1994 opinion reimposing a death sentence, this Court relied upon a jury recommendation tainted by

ineffective assistance of penalty phase counsel. A wealth of mitigating evidence not presented at trial should have been considered in evaluating whether the jury's death recommendation was sufficiently reliable under the Eighth Amendment to support a death sentence.

Under Strickland v. Washington, 466 U.S. 668, 698 (1984), a defendant must identify particular acts and/or omissions of counsel outside the range of reasonable competent attorney performance, and demonstrate a reasonable probability the errors could have had some impact on the proceedings, *in* that confidence in the result of the proceedings is undermined because of counsel's errors. Mr. Johnston's penalty phase counsel failed to adequately investigate, develop and present mitigating evidence and failed to know the law and adequately object to constitutional violations. Johnston was denied his 8th Amendment right to individualized sentencing.

Trial counsel has a duty to investigate mitigation before deciding whether or not it should be presented. Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). Moreover, Johnston's trial counsel failed to investigate, obtain and present a mental health expert at penalty phase. An ordinarily competent attorney conducting a reasonable penalty phase would have presented expert testimony to explain the relevance of Mr. Johnston's mental illness the existence of which is supported by abundant documentation. An ordinarily

competent attorney conducting a reasonable penalty phase would also have presented expert testimony to testify to the existence of statutory and non-statutory mental health mitigation. Counsel's failure constituted ineffective assistance at the penalty phase. Counsel also failed to ensure that Johnston received effective mental health assistance. Ake v. Oklahoma, 470 U.S. 68 (1985); Agan v. Singletary, 9 F.3d 900 (11th Cir. 1993).

Trial counsel did not sufficiently investigate, develop, and/or present mitigating evidence during Mr. Johnston's penalty phase. No mental health experts testified on Mr. Johnston's behalf as to either statutory or non-statutory mitigating factors. Expert testimony is available to show that Mr. Johnston suffers from organic brain damage and/or syndrome and schizophrenia undifferentiated with paranoid features (PC-R. 252; 363-367). This testimony was presented at a 3.850 hearing in 1989. Expert testimony also shows Mr. Johnston met the criteria for two statutory mitigating circumstances. First, Mr. Johnston was under the influence of an extreme mental or emotional disturbance at the time of the offense (PC-R. 228; 3887); and (2) Mr. Johnston's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (PC-R. 228; 3887-88). The jury did not hear this evidence.

At the penalty phase, there was no effort to present compelling mental health evidence, investigate for further

evidence, or have an expert explain the evidence. Johnston's life and psychiatric history was never evaluated by an expert for mitigation. The failure to present a mental health expert to explain mental mitigation was unreasonable and deficient. Moreover, counsel failed to investigate, develop and present background information to court-appointed experts.

The 11th Circuit Court of Appeals has stated: "we have difficulty envisioning a case in which counsel's failure to alert the trial court to the manifest inadequacy of an expert's psychiatric assistance would not violate the defendant's right to effective assistance of counsel under the 6th Amendment." Clisby v. Jones, 960 F.2d 925, 934 n.12 (11th Cir. 1992)(en banc). The Court has also explained:

> Uncounseled jailhouse bravado should not deprive a defendant of his right to counsel's better-informed advice. (citations omitted). This principle especially holds true where a possible mental impairment prevents the client from exercising proper judgment, id. at 1451 (omission), or where an attorney foregoes a defendant's only plausible line of defense, (citations omitted).

Foster v. Dugger, 823 F.2d 402, 407 n.16 (11th Cir. 1987). See Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989); Hull v. Freeman, 932 F.2d 159 (3rd Cir. 1991). "An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment." Thompson v. Wainwrisht, 787 F.2d 1447, 1451 (11th Cir. 1986). Purported "tactical decisions" of counsel deserve deference only when: 1) counsel in fact bases trial conduct on strategic decisions; 2) counsel makes informed decision based on investigation; and 3) decision appears

reasonable under circumstances. Huvnh v. King, 95 F.3d 1052 (11th Cir. 1996); Thompson v. Calderon, 86 F.3d 1509 (9th Cir. 1996). None of these conditions is met here.

At the Rule 3.850 hearing in 1989, Johnston presented evidence of two statutory mitigating factors: 1) Johnston was under influence of extreme mental or emotion disturbance (PC-R.228); and 2) his capacity to appreciate criminality of his conduct or conform conduct to requirements of law substantially impaired (PC-R.228, 388). Fla. Stat. § 921.141(6)(b, f). Evidence was also presented of his difficult upbringing and untreated mental illness (R.254). Both have been recognized as nonstatutory mitigation which may warrant a life sentence in Florida. All this was available at trial. Counsel knew Johnston's mental health history and attempted to present some evidence of Johnston's bizarre behavior having Cotter and Mrs. Johnston testify. This testimony in no way presented the full picture of Johnston, a schizophrenic who is the product of an abusive and dysfunctional family. He suffered abuse at the hands of his mother, father and siblings (PC-R.1282-95). His mother almost drowned him when he was a year and a half for "messing" his pants (PC-R.1285). She smacked his head against the bathtub so hard his baby teeth were knocked out (PC-R.1285, 1290-91). Johnston suffers organic brain damage and it is likely these injuries contributed or even caused that damage (see Merikangas and Fleming, PC-R.214-438). Defense counsel failed to present this evidence. Presentation of some evidence does not preclude a

finding of ineffectiveness where counsel's performance is deficient and additional mitigation is not presented. Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991).

Postconviction mental health mitigation experts, Merikangas and Fleming relied on family historical information that was not fully presented at trial. Charlene Benoit, David's aunt had been available for trial but inexplicably was not called by defense counsel. Yet, at least an affidavit could have been obtained and presented to the jury under Florida law. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). She has since told of Johnston's harsh upbringing:

> When David was young we all lived in New Orleans. I spent a lot of time visiting David's home. I was a witness to the abuse David received. The worst thing I saw was one time when David was about a year and a half old my mother and I were visiting at Albert and Mary's. David was not successful at potty training, and this time David messed himself. Mary took David and submerged him in the sink for a long time. David turned black under the water. Finally, my mother made Mary stop drowning David when Mary finally stopped, David seemed to be gone. Mary shook David very hard and he started breathing and came back to us. My mother and I were very scared, Mary was out of control. I don't know if she did this David other times [sic].
>
> Also, when David was less than 2 years old Mary beat his head on the side of the bathtub so hard she knocked all of David's teeth out. He was hurt badly. My brother Harvey tryed [sic] to make Albert and Mary take David to the Hospital to get the injuries to his mouth and head looked at, but they wouldn't take him to the doctor. This beating was so severe it could have killed him.
>
> From birth until David left Mary's house he received beatings and all the time. Mary had something against David from the start, I never could figure out why she had it out for him. Mary did not treat any of her children well, but she was very mean to David. Mary would allow the other children to beat David. On Holidays the other kids would receive presents and

> David wouldn't get any. David would be left out when Mary bought ice cream and sweets for the other kids.
>
> Sometimes when I would visit Mary would make David sit in front of the blank T.V. screen for hours on end while the other kids played if David cryed [sic] or moved, Mary would beat him. All David's childhood his parents told him he was crazy and retarded. David was in special education classes in school and had to take medicine to control his behavior. I don't believe Albert and Mary did a good job at keeping David on his medicine

(PC-R.1284-86). Benoit further described the difficulties Johnston had in school and how he was eventually sent to a school for the retarded and how as David got older, his bizarre behavior got him frequently committed to the "Special Unit" of Conway Memorial Hospital in Monroe, Louisiana (PC-R.1286). Benoit thought it very odd for a mother to totally disown a child like Mary did with David-when he was 10 (PC-R.1286-87), but to her knowledge, mental health problems seemed to run in Mary's family.

Johnston's uncle, Harvey Johnston, was also available at time of trial but was not called. At least an affidavit could have been obtained. Harvey remembered a great deal of Johnston's family history. Fleming and Merikangas relied on his recollection (PC-R.1292). Fleming and Merikangas both concluded Johnston suffered organic brain damage with aphasia (indicating left hemisphere brain damage effecting language functions); schizophrenia with 1st order symptoms of hallucination, delusion, thought disorder, paranoid features; and substance abuse (PC-R. 243-2).

The story of this brutally abused young man and his struggle with mental illness was never fully revealed because counsel

acquiesced to Johnston's desires **(PC-R.lOO). Yet, counsel** believed Johnston was not competent. Counsel's performance was deficient. Clisby, 960 **F.2d** at 934 n.12. Both attorneys made clear in postconviction their concerns about Johnston's competency and yet at trial acquiesced to the wishes of their mentally ill client and failed to investigate and present his long-term mental illness. This was not reasonable. Huvnh, 95 **F.3d** 1052.

Counsel further failed to know penalty phase law and object to inadmissible evidence, improper instructions, and misleading prosecutorial argument. The State was permitted to present the testimony of **a** mental health expert (Pollack) who examined Johnston for **a** competency determination. This expert examined Johnston pursuant to Rule 3.211, of which subsection (e) provided:

> (e) The information contained in any motion by the defendant for determination of competency or in any report of experts filed under this section insofar as such report relates to the issues of competency to stand trial and involuntary hospitalization, and any information elicited during a hearing on competency or involuntary hospitalization held pursuant to this Rule, shall be used only in determinins the mental competency to stand trial of the defendant or the involuntary hospitalization of the defendant.
>
> The defendant may waive this provision by using the report or parts thereof for any other purpose. If a part of the report is used by the defendant, the State may request the production of any other portion of that report which in fairness ought to be considered, Cf. section 90.108, Florida Statutes (1976), Rule 1.330(6). Florida Rules Civil Procedure. Adopted July 18, 1980, effective July 1, 1980 (389 So.2d 610).

Johnston presented no psychiatric evidence at the penalty phase. Yet, the State called Pollack to give opinions premised on unwarned statements of Johnston. Pollack was specifically asked by the State whether mitigation was present (R.1170). Pollack said no mitigating factors were present. This testimony violated Esteble v. Smith, 451 U.S. 454, 467 (1981). Johnston was never told his statements to Pollack could be used against him. Counsel's failure to object on the basis of Estelle was deficient performance which prejudiced Johnston. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991). Counsel had a reasonable chance of succeeding on these objections and Johnston was prejudiced. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Johnston received ineffective assistance of counsel at his penalty phase proceedings, and habeas relief is warranted.

Counsel also failed to object to the foundation for introduction of an alleged prior conviction. Counsel without conducting adequate investigation stipulated to the foundation only to learn later that the State could not prove it (R.1095). Counsel failed to abandon the stipulation and object. This was deficient performance. Johnston is entitled to relief.

Mr. Johnston's Motion to Disqualify the Judge contained an affidavit from Mr. Johnston stating that he had been attacked by Judge Powell in chambers following his evidentiary hearing. Judge Powell has granted the motion but has stated "[t]hese claims are patently false and perjurious. It is ludicrous to believe that any judge would be alone in their chambers with a

defendant whom he or she has sentenced to death much less strike that person."

After reviewing these documents and conducting an evaluation of Mr. Johnston, a mental health professional has found that Mr. Johnston's claims if considered untrue, are further evidence of his previously diagnosed delusional disorder. If untrue, (1) the allegations against Judge Powell are typical of a delusional disorder of the persecution type; (2) Mr. Johnston believes he is being malevolently treated by Judge Powell and was kicked and beaten by him; (3) it is not unusual for people with this type of disorder to repeatedly take their complaints of being mistreated to legal authorities; and (4) Mr. Johnston's preoccupation with a number of systematic delusions just further substantiates his incompetence due to his severe mental illness.

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This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of this claim.

Moreover, it is clear that Mr. Johnston has not received full compliance with his chapter 119 requests for records, documents, files, and other evidence and that is entitled to a hearing on those allegations and time to amend his Rule 3.850 motion once he has received full compliance.

ARGUMENT V

IN SENTENCING MR. JOHNSTON TO DEATH, THE FLORIDA SUPREME COURT GAVE GREAT WEIGHT TO THE JURY'S RECOMMENDATION, YET FAILED TO CONSIDER TEAT THE JURY RECOMMENDATION WAS TAINTED BY NUMEROUS ERRORS.

In its 1994 opinion reimposing a sentence of death, this Court gave great weight to a jury recommendation tainted by Eighth Amendment error and failed to consider the cumulative effect of the numerous constitutional errors infecting the recommendation.

A. THE JURY INSTRUCTIONS AND PROSECUTOR'S COMMENTS AND/OR ARGUMENT UNCONSTITUTIONALLY SHIFTED THE BURDEN TO MR. JOHNSTON TO PROVE THAT DEATH WAS AN INAPPROPRIATE SENTENCE.

Under Florida law, 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 circumstances.</u>

<u>State v, Dixon,</u> 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Johnston's capital proceedings. To the contrary, the burden was shifted to Mr. Johnston 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 Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, 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 Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Shell v. Mississippi, 111 S. Ct. 313 (1990). Mr. Johnston's jury was unconstitutionally instructed, as the record makes abundantly clear (R. 1099, 1215, 1217).

At the penalty phase of trial, prosecutorial argument informed Mr. Johnston's jury that death was the appropriate sentence unless "mitigating factors outweigh the aggravating factors" (R. 1195). Moments later, the prosecutor reemphasized the same point:

> . . . you must see if there has been evidence presented to your satisfaction, that mitigating circumstances exist, and that they outweigh the aggravating circumstances. And I submit to you the important part of that definition is the mitigators have to outweish the assravators.

(R. 1201)(emphasis added). Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the Eighth and Fourteenth amendments because they were misstatements of Florida law.

The jury instructions here employed a presumption of death which shifted to Mr. Johnston the burden of proving that life was the appropriate sentence. As a result, Mr. Johnston's capital sentencing proceeding was rendered fundamentally unfair and unreliable.

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 v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Here, the jury was in essence told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Johnston proved that the mitigating circumstances outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same

time understanding, based on the instructions, that Mr. Johnston had the ultimate burden to prove that life was appropriate. This was error under Florida law.

The jury was effectively instructed 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. Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. Dixon, 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. Johnston is entitled to relief in the form of a new sentencing hearing due to the fact that his sentencing was tainted by improper instructions.

The United States Supreme Court has held in Walton v. Arizona, 110 s. ct. 3047 (1990), that the eighth amendment does not preclude a state from placing the burden on the defendant to prove mitigation outweighs the aggravation. However, unlike the situation in Walton, Florida law in fact requires the aggravation to outweigh the mitigation. Arango v. State, 411 So. 2d 171 (Fla. 1982). Thus the jury instruction in Mr. Johnston's case conveyed inaccurate information to the jury when it indicated the

question was whether the mitigation outweighed the aggravation. Caldwell v. Mississippi, 472 U.S. 320 (1985), established:

> that the need for reliable sentencing in capital cases required a new sentencing proceeding because false prosecutorial comment created an "unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously,'"

472 U.S. at 343 (opinion of O'Connor, J.).

Section 921.141(3)(b) of the Florida Statutes, the jury instructions, and the prosecutor's comments and/or argument unconstitutionally shifted to Mr. Johnston the burden of showing death was an inappropriate penalty (R. 1099; 1195; 1201; 1215; 1217; 1251). See, Mullaney v. Wilbur, 421 U.S. 684 (1975); Simmons v. South Carolina, 114 S. ct. 2187 (1994). Mr. Johnston had to prove mitigating circumstances outweighed aggravating circumstances in order to show his innocence of the death penalty. Mr. Johnston's rights under the Sixth, Eighth, and Fourteenth Amendments were violated. To the extent counsel did not properly preserve this claim, Mr. Johnston received ineffective assistance of counsel.

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of the claims raised.

B. **MR. JOHNSTON'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

The trial court found as an aggravating circumstance that Mr. Johnston had previously been convicted of a violent felony and that the offense was committed during an enumerated felony (R. 2412-15). The consideration and finding of these aggravating circumstances was tainted by an unconstitutionally vague statute and instructions. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of these aggravating factors rendered the aggravating circumstances illusory. Strinser v. Black, 112 s. ct. 1130 (1992). The trial court considered and found automatic statutory aggravating circumstances; therefore Mr. Johnston entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not, These automatic aggravating factors did not channel and narrow the sentencer's discretion or the class of persons eligible for the death penalty. Porter v. State, 564 So. 2d 1060 (Fla. 1990). In violation of the Sixth, Eighth, and Fourteenth Amendments, Mr. Johnston did not receive a reliable and individualized sentencing determination. To the extent trial counsel did not properly preserve this claim, Mr. Johnston received ineffective assistance of counsel.

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be

remanded to the Circuit Court for proper consideration of this claim.

C. THE TRIAL COURT AND PROSECUTOR UNCONSTITUTIONALLY MISLEAD THE JURY AS TO ITS SENSE OF RESPONSIBILITY TOWARD TEE SENTENCING OF MR. JOHNSTON.

A capital sentencing jury may not be misled as to its role. Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). Mr. Johnston's jury was misled into believing its determination meant very little. Throughout Mr. Johnston's trial, the court and prosecutor made statements about the difference between jurors' responsibility at guilt phase and their non-responsibility at sentencing (R.159, 187-8, 216-17, 235, 242, 250-51, 320-23, 352-53, 370, 382, 409-10, 1098-99, 1187-88).

In instructing the jury at the outset of trial the Court stated: "The Court is not bound to follow the advice of the Jury. Therefore, the jury does not impose the punishment if a verdict of murder in the first degree is rendered. The imposition of punishment is the function of the court and is not the function of the jury" (R.15). In preliminary instructions at penalty, the judge said the decision of punishment was his alone (R.1098-99). After closing, the judge reminded the jury of the instruction about their lack of responsibility, but noted the "formality" of their recommendation was required (R.1187-88). Earlier the court had said: "the final decision as to what punishment shall be imsosed rests solely with me . . . However, the law requires that you, the jury, render to the court an advisory sentence as to

what punishment should be imposed upon the defendant" (R.1098-99).

The State in its closing fortified this impression: "And, also, remember that as we talked about at the beginning of the trial, the jury isn't responsible for the sentence that is ultimately imposed in this case or any other case, That's up to the Court" (R.1187-88). The state must demonstrate the comments and instructions had "no effect" on the jury sentencing. The mitigation in the record provided more than a "reasonable basis" for a life sentence. See Hall, 541 So.2d 1125; Brookings v. State, 495 so. 2d 135 (Fla. 1986); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). The errors effected the jurors and infected the sentencing because of the great weight given the jury verdict. Relief is proper.

Prospective jurors and the jury were told and/or instructed the ultimate responsibility for sentencing Mr. Johnston rested with the trial court; thus, diminishing the jury's responsibility for Mr. Johnston's sentence (R. 15; 159; 187-188; 216-217; 235; 242;250-251; 320-323; 352-353; 362; 366; 369-371; 382; 409-410; 413; 1098-99; 1187-1188). The statements and instructions were incorrect because the jury is a co-sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). These comments, arguments, and instructions violated Caldwell v. Mississippi, 472 U.S. 320 (1985); Simmons v. South Carolina, 114 S. Ct. 2187 (1994); Mann v. Dusser, 844 F.2d 1446 (11th Cir. 1988)(en banc); and Harich v. Dusser, 844 F.2d 1464 (11th Cir. 1988). Mr. Johnston's rights

under the Sixth, Eighth, and Fourteenth Amendments were also violated. To the extent trial counsel did not properly preserve this claim, Mr. Johnston received ineffective assistance of counsel.

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of this claim.

D. AGGRAVATING CIRCUMSTANCES WERE OVERBROADLY AND VAGUELY ARGUED BY COUNSEL FOR THE STATE, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, SOCHOR V. FLORIDA, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

During closing argument, counsel for the State's arguments urged the jury to apply aggravating circumstances in a manner inconsistent with this Court's narrowed interpretation of those circumstances. Specifically, the prosecutor argued for application of the especially heinous, atrocious, or cruel aggravating circumstance (R. 1187-1203). Such argument(s) urged the jury to apply this aggravating factor in a vague and overbroad fashion. Mr. Johnston's rights under the Eighth Amendment were violated. Richmond v. Lewis, 113 S. Ct. 528 (1992); Espinosa v. Florida, 112 S. Ct. 2926 (1992).

The state did not argue to the jury the limiting construction applied to that aggravator by this Court. See Stein v. State, 632 So. 2d 1361 (Fla. 1994). To the extent Mr.

Johnston's trial counsel did not properly preserve this claim, Mr. Johnston received ineffective assistance of counsel.

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of this claim.

E. TEE JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR WAS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Johnston's jury was given the same instruction on the especially heinous, atrocious, or cruel aggravating circumstances found unconstitutional in Espinosa v. Florida, 112 S. Ct. 2926 (1992). Mr. Johnston's jury was not instructed to consider whether Mr. Johnston intended to inflict a high degree of pain and suffering upon the victim in considering whether the heinous, atrocious, or cruel aggravator was proven beyond a reasonable doubt. This Court has applied this limiting construction to the heinous, atrocious, or cruel aggravating circumstance. See Stein v. State, 632 So. 2d 1361 (Fla. 1994). Nor did the state address this narrowed construction in its presentation of evidence or argument (R. 1187-1203). At trial, the state did not show the jury why this offense was different from any other murder.

The evidence at trial did not show beyond a reasonable doubt any intent on the part of Mr. Johnston to inflict a high degree of pain. The medical examiner testified the victim died as the result of being stabbed (R. 728). She suffered three stab wounds

all as the result of a single stabbing effort (R. 721-722). Strangulation of the victim occurred before she died and prior to or simultaneous with the stabbing (R. 735). she bled to death within three to five minutes of being stabbed, but lapsed into unconsciousness prior to her death (R. 733). Strangulation hastened the victim's death because the pressure caused more bleeding (R. 734).

The record is devoid of any evidence indicating any suffering on the part of the victim or any evidence of any intent to inflict a high degree of pain. In fact, the evidence is to the contrary - she was unconscious during most, if not all, of the acts that caused her death, This aggravator did not apply as a matter of law. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989).

The especially heinous, atrocious, or cruel aggravating circumstance and instruction are both vague under the Eighth and Fourteenth Amendments and the state failed to narrow and limit its application.

Mr. Johnston is entitled to a new sentencing before a newly empaneled jury. Elledge v. State, 346 So. 2d 998 (Fla. 1977). If Mr. Johnston does not receive a new sentencing before a newly empaneled jury, he is denied equal protection and due process of the law, and his death sentence is imposed in an arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments. To the extent Mr. Johnston's trial counsel did not properly preserve this claim, Mr. Johnston received ineffective assistance of counsel.

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of this claim.

F. MR. JOHNSTON DID NOT RECEIVE MENTAL HEALTH ASSISTANCE AS CONTEMPLATED BY AKE V. OKLAHOMA, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

> Ake v. Oklahoma, 470 U.S. 68 (1985), is one in a line of due process cases requiring that an indigent defendant be supplied with the basic tools necessary for an effective defense. [citation omitted] Ake establishes that one of the basic tools to which due process entitled indigent defendants is the services of court-appointed experts to '[conduct . . . appropriate examination and to assist in evaluation, preparation, and presentation of their defense.' [citation omitted] Ake also explains that, when appropriate, the right to expert assistance extends to the sentencing phase of capital proceedings. [citation omitted]

Starr v. Lockhart, 23 F.3d 1280, 1288 (8th Cir. 1994).

"[T]he ability to subpoena a state examiner and to question that person on the stand does not amount to the expert assistance required by Ake." Starr, 23 F.3d at 1289. Additionally, a court-ordered competency examination "...does not suffice to cover everything a defendant might raise as a 'mental defect' in mitigation and for which an Ake expert is required." Starr, 23 F.3d at 1289. "[This] issue [is] crucial because in our system of justice acts committed by a morally mature person with full appreciation of all their ramifications and eventualities are considered more culpable than those committed by a person without

that appreciation." Starr, 23 F.3d at 1290. At the trial level, Mr. Johnston was evaluated only to determine his competency at the time of the offense and his competency to stand trial (PC-R. 1055; 1168).

"Like appointed counsel, experts appointed under Ake are to aid the defendant and function as a 'basic tool' in his or her defense. [citation omitted] To so function, they must be available to 'assist in evaluation, preparation, and presentation of the defense.'" Starr, 23 F.3d at 1291. The experts who evaluated Mr. Johnston at the trial level, did so only for competency purposes. Mr. Johnston was not evaluated for purposes of statutory and non-statutory mitigation. Mr. Johnston did not receive the expert assistance contemplated by Ake. Mr. Johnston did not receive competent expert assistance. Mr. Johnston's rights under the Sixth and Fourteenth Amendments were violated. Additionally, expert testimony shows Mr. Johnston was incapable of making a knowing and intelligent waiver of any of his rights due to his mental condition (PC-R. 1388-1392). Mincey v. Arizona, 437 U.S. 385 (1978); Miranda v. Arizona, 384 U.S. 436 (1966).

Mr. Johnston also alleges during his time of confinement in the Orange County jail he was subjected to abuse by those holding him in custody. Furthermore, Mr. Johnston alleges he was subjected to abuse by the presiding judge during his trial proceedings. The foregoing has been the subject of a civil lawsuit filed in the federal district court for the middle

district of Florida. If the claims of Mr. Johnston are valid, he is entitled to relief. If the claims are unfounded, they are evidence of his mental condition and support this and other claims regarding Mr. Johnston's competency and mental health. To the extent trial counsel did not properly preserve this claim, Mr. Johnston received ineffective assistance of counsel.

This claim bears upon Mr. Johnston's ability to formulate the intent necessary to support a finding of the especially heinous, atrocious, or cruel aggravating circumstance.

Mr. Johnston's Motion to Disqualify the Judge contained an affidavit from Mr. Johnston stating that he had been attacked by Judge Powell in chambers following his evidentiary hearing. Judge Powell has granted the motion but has stated "[t]hese claims are patently false and perjurious. It is ludicrous to believe that any judge would be alone in their chambers with a defendant whom he or she has sentenced to death much less strike that person."

After reviewing these documents and conducting an evaluation of Mr. Johnston, a mental health professional has found that Mr. Johnston's claims if considered untrue, are further evidence of his previously diagnosed delusional disorder. If untrue, (1) the allegations against Judge Powell are typical of a delusional disorder of the persecution type; (2) Mr. Johnston believes he is being malevolently treated by Judge Powell and was kicked and beaten by him; (3) it is not unusual for people with this type of disorder to repeatedly take their complaints of being mistreated to legal authorities; and (4) Mr. Johnston's preoccupation with a

number of systematic delusions just further substantiates his incompetence due to his severe mental illness.

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of this claim.

Moreover, it is clear that Mr. Johnston has not received full compliance with his chapter 119 requests for records, documents, files, and other evidence and that is entitled to a hearing on those allegations and time to amend his Rule 3.850 motion once he has received full compliance.

G. FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY. IT ALSO VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT,

Florida's capital sentencing scheme denied Mr. Johnston his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. It did not prevent the arbitrary imposition of the death penalty and narrow the application of the death penalty to the worst offenders. Proffitt v. Florida, 428 U.S. 242 (1976). A sentence of death and execution by electrocution imposes physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Furman v. Georgia, 408 U.S. 238 (1972).

The capital sentencing statute in Florida fails to provide any standard of proof for insuring that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution. Richmond v. Lewis, 113 S. Ct. 528 (1992).

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony murder case, and in nearly every premeditated murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so

abundant as to outweigh the aggravating factor. This presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Because of the arbitrary and capricious application of Florida's death penalty, the statute as it exists and as applied, is unconstitutional under the Eighth and Fourteenth Amendments. Blackmun dissenting, Callins v. Collins, No. 93-7054 (February 22, 1994). To the extent trial counsel did not properly preserve this claim, Mr. Johnston received ineffective assistance of counsel.

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of the claims raised.

ARGUMENT VI

MR. JOHNSTON WAS DENIED AN ADVERSARIAL TESTING AT THE GUILT/INNOCENCE PEASE OF HIS PROCEEDINGS; MR. JOHNSTON'S PROCEEDINGS WERE MATERIALLY UNRELIABLE DUE TO THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, IMPROPER RULINGS AND CONDUCT OF TEE TRIAL COURT, IMPROPER STATE CONDUCT, INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR ALL *OF THE* FOREGOING, IN VIOLATION OF MR. JOHNSTON'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Johnston did not receive full Chapter 119 compliance and was thus precluded from fully investigating the adequacy of the adversarial testing at his guilt determination.

The United States Supreme Court has explained:

> a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment."' United States v. Baslev, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Failure to disclose impeachment evidence also results in a violation of Brady, Giglio v. United States, 405 U.S. 150, 154 (1972), as does the failure to disclose evidence which supported the theory of defense. United States v. Spagnoulo, 960 F.2d 995 (11th Cir. 1992). The State is obligated to correct any false testimony. Nasue v. Illinois, 360 U.S. 264

(1959). For purposes of finding a due process violation there is no difference between any of these types of evidence; their disclosure is equally important to ensuring a fair trial. See Kyles v. Whitley, 115 S. Ct. 1555, 1565 (1995). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.@' Strickland, 466 U.S. at 685. Where either the state, the defense, or both fail in their obligations, a new trial or sentencing proceeding is required if the cumulative effect of these errors undermines confidence in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); see Kyles, Jones v. State, 591 so. 2d 911 (Fla. 1991). See also Scott v. State, 657 so. 2d 1129 (Fla. 1995).

Mr. Johnston raised allegations below regarding constitutional errors in the guilt phase of his trial. He plead that counsel failed to file and/or argue a motion to suppress Mr. Johnston's statements, counsel did not sufficiently and/or properly object to collateral acts evidence, counsel did not raise a mental health defense, counsel did not effectively argue Mr. Johnston's motion for new trial, counsel did not arrange for the appointment of forensic and/or other experts, and counsel did not effectively challenge jurors during voir dire. These claims were not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of the claims raised. Moreover,

it is clear that Mr. Johnston has not received full compliance with his chapter 119 requests for records, documents, files, and other evidence and that is entitled to a hearing on those allegations and time to amend his Rule 3.850 motion once he has received full compliance.

ARGUMENT VII

NEWLY DISCOVERED EVIDENCE SHOWS THAT A FORENSIC EXPERT RELIED UPON BY A STATE WITNESS HAD MISREPRESENTED CREDENTIALS AND TRAINING, THUS COUNSEL WAS UNABLE TO PROPERLY PREPARE FOR CROSS EXAMINATION.

At Mr. Johnston's trial, the State called Richard Dupuis as a purported blood splatter expert witness (R. 536). Mr. Dupuis explained that his training in blood stain analysis consisted of a 1 week school several years ago, and 4 or 5 other week-long programs conducted by Judith Bunker. Dupuis testified that Bunker was "the authority in this area with regard to blood stains having trained under McDonald who is the authority" (R. 539). Collateral counsel recently discovered new evidence which shows that Ms. Bunker's "authority" in Orange County courts was premised upon misrepresented of her expertise of which the state was aware.[3] Ms. Bunker's status as a bloodstain pattern expert in Orange County was a direct result of her employment, support, and endorsement by the State. Through State employment which lasted from 1970 until 1982, Ms. Bunker established her credentials and reputation as a bloodstain pattern expert through

[3] Collateral counsel has not obtained full compliance with Chapter 119 and needs the opportunity to amend this claim once compliance occurs.

the sponsorship and endorsement from the Medical Examiner and the State Attorney for the Ninth Judicial Circuit. In 1974, the Medical Examiner's office paid for Ms. Bunker to attend a brief workshop on bloodstain pattern analysis given by Mr. Herbert MacDonnel in Birmingham, Alabama, a workshop which offered only four hours of continuing education credit for attendance. Upon her return to Orlando, Ms. Bunker was promoted to Medical Examiner's Assistant. With only this minimal experience, Ms. Bunker immediately began instructing local law enforcement personnel, such as Richard DuPuis, on the interpretation of bloodstain pattern evidence. This instruction was sponsored by the Medical Examiner's Office and within the scope of Ms. Bunker's employment. With the imprimatur of the Medical Examiner's Office, Ms. Bunker transformed herself from a secretary into the Medical Examiner's leading authority and expert on bloodstain pattern evidence. Training by bunker constituted the bulk of Dupuis "education":

> Q Did you have any particular purpose for coming in contact with Mr. Johnston at that particular time?
>
> A At that particular time, I was asked to look at his clothing and attempt to render an opinion as to whether or not there were any blood stains on the clothing.
>
> Q Have you had any education or training in blood stain analysis?
>
> A Yes, I have.
>
> Q Could you tell us what that is?
>
> A I attended a one-week school put on several years ago with regard to blood stain

analysis. Since that period of time, I have attended four or five other week long programs conducted by Judy Bunker.

Q Who is Judy Bunker?

A She is the authority in this area with regard to blood stains having trained under McDonald who is the authority. She was a student of his.

Q Have you read books and had any other courses in furtherance of your training?

A I have read Mr. McDonald's book on blood stain analysis and also did the workbook produced by Ms. Bunker in concert with the schooling.

Q All right. To your knowledge, are those both recognized as authorities in this field?

A Yes, sir.

Q Okay. Can you explain to the jury what blood analysis is?

A It is the reviewing of blood as it sets on a target in determination as to trying to describe how the blood got on that target. The place where the blood would stick on a target, you could tell whether it was dropped or cast off or projected. It would depend on the way the blood was deposited.

Q I believe you mentioned cast off. What does that mean? What does that mean when you are talking about blood stain analysis?

A There is a phenomenon when blood is accumulated either on a weapon or a hand or whatever the instrument might be and the instrument is in motion. Then the blood is cast off of it.

Q I believe you mentioned projected. What do you mean by that?

A That occurs when blood is accumulated as it is struck with force. At varying degrees, the blood is projected outward.

(R. 538-40).

Dupuis testified that based upon his "experience and training" it was his opinion that stains on Mr. Johnston's right sock between the knee and ankle and on his shoe and shorts were blood (R.540-41). Yet, Dupuis had performed no chemical testing of any of the stains:

Q Okay. When you observed Mr. Johnston's clothing, what type of room were you in?

A It is the general office area where there is an accumulation of desks and chairs in the CID section.

Q What, if anything, did you observe when you examined Mr. Johnston and his clothing?

A I observed on the right sock of Mr. Johnston a stain between the knee and the ankle to the inside of the sock. It was real reddish in color. The sock is of porous type material and the stain was in a downward motion. On his brown shoes there was a stain, a dark stain. On his red shorts in the area of the groin, there was a single red stain also.

Q All right. Did you observe anything unusual about the person of Mr. Johnston, not the clothing, but any part of his body that you recall?

A No, sir.

Q All right. How long did you look at Mr. Johnston and his clothing?

A Several minutes. He was standing there speaking with the other investigators, and I walked around him once or twice.

Q Okay. In you experience and opinion, experience and training, do you have an opinion as to what those stains were?

A They appeared to be blood.

Q You did not do any testing, test any chemical content of the stain, did vou?

A No, sir.

(R. 540-41).

Dupuis then provided testimony, based upon his "background and training" that the stains were deposited on Mr. Johnston's clothes because the clothes were a "target for the blood" (R. 541) which was either "projected or cast-off" (R. 540):

Q Now, Sergeant, did vou form this opinion from examining Mr. Johnston based on your backsround and training as to how these stains were deposited upon Mr. Johnston's clothing?

A I rendered the opinion that the clothing was a target for the blood.

Q When you say a target, could you explain what you mean by that?

A The blood, while it is either projected or cast off, came in contact with the clothing.

Q All right. Do you have an opinion as to whether this blood would have had to be in motion at the time it came in contact with Mr. Johnston's clothing?

A Yes, sir.

Q What is that opinion?

A That the blood would have had to have been in motion. It is not a smear type pattern. That blood was in flight and not a smear type pattern.

Q It was not smeared?

A No, sir.

Q It is a pattern consistent with blood that is in flight and is deposited on the clothing?

A Yes, sir.

(R. 541-42).

Dupuis also testified provided testimony analyzing blood spatter at the scene:

A I entered the residence through the front door. I made just a general observation of the living room area. It was in a state of disarray. Furniture was turned over and such. I then proceeded to go upstairs to where the second floor bedroom was at.

Q When you first went into the bedroom, what did you observe?

A As you walk into the bedroom, you are walking in a southerly direction. There was a bed partially to the south wall, and a woman upon the bed.

Q All right.

A To my left would have been the east, and there was a dresser and the drawers had been pulled out. To my right which was the westerly direction, the drawers had been somewhat pulled out.

Q Okay.

A I am labeling as the head of the bed as the direction in which the woman's head was facing. There was a night stand and a telephone, and the drawers on the night stand had been pulled out.

Q All right. What condition was the victim in when you first observed her?

A She appeared to be dead.

Q Did you see any staining in this room?

A Yes.

Q Where did you observe the staining in the bedroom?

A There was stains on the bed itself. There was staining on the south wall and also on the west wall.

Q All right. When you say staining, what do you mean? What was it that you saw?

A The staining on the bed was a large accumulation of blood and the majority of it was dried up and coagulated. The heavy pool areas, there was smearing of blood along on the top sheet of the bed.

Q Okay.

A On the night stand, there was blood observed on the lamp shade itself. There was blood on the night stand table and blood that dropped on the night stand and the telephone and on the south wall. There were at least three arches of staining on the west wall.

Q Okay.

A There were corresponding three or more occasions where blood had struck the wall.

Q All right. Now, where was the majority of the blood staining that you observed? Where was it located?

A The majority of the blood was on the bed.

Q All right. Now, did you observe any blood on the floor area of the bedroom?

A Later when the body was removed, we had the opportunity to pull the bed away from the wall. It initially had been only several inches from the wall. The blood that had impacted on the wall had gone down and was there in the carpet.

Q That was behind the bed next to the south wall?

A Yes.

Q Did you observe any blood stains on the carpet in any other part of the floor of the bedroom?

A No, sir.

Q All right. Now, you stated, I believe, sir, that you saw what appeared to be blood staining in arching patterns on the south wall.

A Cast off stains, yes, sir.

Q Again, cast off stains, what do you mean by cast off stains?

A That is where you have a bloody object in motion where it makes that particular type of pattern.

Q How many of those patterns did you observe?

A I detected at least three such patterns.

Q Okay. Where were they in relation to where the victim's body was located?

A It would have been to the right side.

Q All right. Now, did you observe any staining anywhere in the bedroom that appeared to be to you projected staining?

A Yes, sir.

Q Where did you observe those types of stains?

A The stains were observed on the south wall which the bed was parallel to as well as on the night stand and on the side of the telephone.

(R. 538-46).

Given what is now known about Judith Bunker, it is now apparent that Dupuis, whose training constituted primarily of classes given by Bunker, could not possess the expertise necessary to make a valid blood splatter analysis. Collateral counsel has obtained expert opinion affirming that formal academic training is indispensable to competent bloodstain pattern interpretation. In particular, collateral counsel has obtained expert opinion that Ms. Bunker currently lacks the skills and training necessary to perform complex bloodstain pattern analysis. Moreover, she clearly lacked the expert credentials and qualifications to train other individuals in techniques of blood splatter analysis given what is now known about the truth of her background and experience.

The State Attorney's Office for the Ninth Judicial Circuit was responsible for establishing Ms. Bunker as a court qualified bloodstain pattern expert in Orange County. As early as 1977, the State Attorney's Office began vouching for Ms. Bunker's credentials and qualifications as a bloodstain pattern expert in court. Ms. Bunker first qualified as an expert witness by testifying for the prosecution in the Ninth Judicial Circuit. With the State Attorney's Office continued vouching for Ms. Bunker's expertise she was repeatedly qualified as an expert witness in the Ninth Judicial Circuit. During this time, Ms. Bunker was also an employee for the District Nine Medical Examiner. Only after four years of testifying for the State did Ms. Bunker qualify as an expert in another judicial circuit.

Ms. Bunker also misrepresented her educational background on her employment application in order to obtain her employment at the Medical Examiner's Office. Collateral counsel recently learned that Ms. Bunker has never graduated from high school. However, on her employment application she represented that she received her high school diploma from "Decatur High - Howe High" in Indianapolis, Indiana in 1953. Notably Ms. Bunker's employment application stated the following:

> I hereby represent that each answer to a question herein and all other information otherwise furnishes is true and correct. I further represent that such answers and information constitutes a full and complete disclosure of my knowledge with respect to the questions or subject to which the answer or information relates. I understand that any incorrect, incomplete, or false statements or information furnished by me will subject me to discharge at any time.

Despite this oath of honesty signed by Ms. Bunker, she falsely stated that she did graduate from high school. Ms. Bunker misrepresented to Mr. Johnston's trial counsel that she had graduated from high school. Ms. Bunker has only recently admitted that she was a drop out. In fact, Ms. Bunker did not graduate from high school and has never obtained her equivalency diploma. From the beginning of her secretarial career, Ms. Bunker has built her reputation as a blood stain expert on false statements. Ms. Bunker was classified as a secretary at the Medical Examiner's Office from November 30, 1970 through June 2, 1974. During this time period there is no evidence in her employment records that she had any opportunity or occasion to

perform any crime scene investigations whatsoever, not to mention develop any expertise in performing blood stain pattern analysis outside of her becoming aware of the field through a State Attorney sponsored general homicide investigation seminar. Ms. Bunker was only classified as a "Medical Examiner's Assistant" from July 14, 1974 through September 27, 1981. Only from December 6, 1981 until April 30, 1982 did Ms. Bunker actually occupy the position of "Technical Specialist." And during those five brief months, that position only entailed a twenty-four hour work week.

In addition, Ms. Bunker made false statements throughout her curriculum vitae. These included, inter alia, the following:

> Assistant Instructor, 1977 Bloodstain Institute, conducted by Herbert L. MacDonnel, leading authority on flight characteristics and stain patterns of human blood, sponsored by Elmira College, Elmira, New York.
>
> Attendee, 1974 Bloodstain Institute, a one week course conducted by Herbert L. MacDonnel, sponsored by University of Birmingham, Birmingham, Alabama.

Ms. Bunker was neither Mr. McDonnel's assistant at the 1977 workshop nor has she ever been his assistant in any capacity. Mr. MacDonnel did have two assistants at his 1977 but Ms. Bunker was not one of them. Further, as to the 1974 course, it spanned three days, not one week, and did not render Ms. Bunker an "expert". Ms. Bunker has recently even admitted that the class was less than a week. This notwithstanding, the State immediately began holding Ms. Bunker out as an expert upon returning from this course.

Ms. Bunker's curriculum vita is replete with more false statements and misrepresentations than reliable ones. By way of example, Ms. Bunker's vita claimed that she was a consultant to each and every prosecutor's office throughout the State of Florida. However, several State Attorney Offices across the State of Florida have never consulted Judith Bunker for any reason. Similarly, Ms. Bunker falsely claimed that she has performed her services for medical examiners statewide. Most medical examiners in the state reported via responding to Chapter 119 requests made by Mr. Johnston that they have never utilized Ms. Bunker's services.

The result was a fundamental denial of due process and Mr. Johnston was denied his Constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, and confidence is undermined in the reliability of the Mr. Johnston's conviction and sentence. Brady v. Maryland, 373 U.S. 83 (1963), Napue v. Illinois, 360 U.S. 264 (1959), and Giglio v. United States, 405 U.S. 150 (1972); Craig v. State, 21 Fla. L. Weekly S417 (Oct. 3, 1996). In essence, the prosecutor was cast "in the role of an architect of a proceeding that [did] not comport with the standards of justice." Brady, 373 U.S. at 88.

Dupuis should never have been qualified as an expert at Mr. Johnston's trial. He lacked the scientific training, knowledge, and skills to perform bloodstain pattern analysis. His conclusions cannot withstand scientific scrutiny. He engaged in pseudoscientific analysis without the benefit of a rigorous

methodology. The admission of his materially inaccurate testimony undermined the reliability of Mr. Johnston's convictions. There is a reasonable possibility that had Mr. Johnston's jury known that Ms. Bunker's testimony was false and/or misleading, that she was not an expert in any field, and that her conclusions were without any scientific basis, that the jury could have reached a different result. Basley; Gislio; Brady; i g .

This claim was not considered because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of the claims raised.

Moreover, it is clear that Mr. Johnston has not received full compliance with his chapter 119 requests for records, documents, files, and other evidence and that is entitled to a hearing on those allegations and time to amend his Rule 3.850 motion once he has received full compliance.

ARGUMENT VIII

MR. JOHNSTON'S SENTENCING ORDER DOES NOT COMPLY WITH PERRELL V. STATE; THUS MR. JOHNSTON IS ENTITLED TO A NEW SENTENCING ORDER.

This Court has Ferrell v. State, 653 So. 2d 367 (Fla. 1995) provides, in relevant part:

> The sentencing judge must expressly evaluate in his or her written sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant. This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating

> circumstance is truly of a mitigating nature. A mitigator is supported by the evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

Id., at 371.

The trial court's sentencing order did not comply with Ferrell in the following respects: In evaluating the non-statutory mitigating circumstances proposed by Mr. Johnston, the court did *not* determine if they were supported by the evidence, and if they were of a truly mitigating nature, nor what relative weight should be given each mitigator. Also, evidence of statutory mitigating circumstances introduced at Mr. Johnston's postconviction evidentiary hearing should be evaluated and weighed by this Court.

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of this claim.

ARGUMENT IX

MR. JOHNSTON ALLEGES HE WAS ABUSED WHILE INCARCERATED AT THE ORANGE COUNTY JAIL BY THOSE HOLDING HIM IN CUSTODY. NR. JOHNSTON ALSO ALLEGES HE WAS ABUSED BY THE PRESIDING JUDGE DURING HIS TRIAL PROCEEDINGS. IF MR. JOHNSTON'S ALLEGATIONS ARE PROVEN, MR. JOHNSTON'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED.

Mr. Johnston adopts by reference the allegations made in the affidavit accompanying his Motion to Disqualify the Judge filed in this court. Mr. Johnston also alleges that during his incarceration during and before trial, he was abused by jail personnel and this abuse was physical, emotional and psychological. If Mr. Johnston's claims are not proven, his allegations bear upon his mental health and support claims regarding Mr. Johnston's competency and mental health.

Mr. Johnston's Motion to Disqualify the Judge contained an affidavit from Mr. Johnston stating that he had been attacked by Judge Powell in chambers following his evidentiary hearing. Judge Powell has granted the motion but has stated "[t]hese claims are patently false and perjurious. It is ludicrous to believe that any judge would be alone in their chambers with a defendant whom he or she has sentenced to death much less strike that person.11 After reviewing these documents and conducting an evaluation of Mr. Johnston, a mental health professional has found that Mr. Johnston's claims if considered untrue, are further evidence of his previously diagnosed delusional disorder. If untrue, (1) the allegations against Judge Powell are typical of a delusional disorder of the persecution type; (2) Mr,

Johnston believes he is being malevolently treated by Judge Powell and was kicked and beaten by him; (3) it is not unusual for people with this type of disorder to repeatedly take their complaints of being mistreated to legal authorities; and (4) Mr. Johnston's preoccupation with a number of systematic delusions just further substantiates his incompetence due to his severe mental illness.

Mr. Johnston cannot more fully plead this claim until he receives full compliance with all of his requests for records, documents, files, and other evidence.

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of this claim.

ARGUMENT X

MR. JOHNSTON IS INNOCENT AND THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE MR. JOHNSTON WAS GUILTY AS CHARGED, IN VIOLATION OF JACKSON V. VIRGINIA, 433 U.S. 307 (1979), IN RE WINSHIP, 397 U.S. 358 (1970), AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State of Florida was required to prove each and every element of the offenses charged against Mr. Johnston. In re Winship, 397 U.S. 358 (1970). The evidence against Mr. Johnston at trial was circumstantial. The state did not eliminate every reasonable hypothesis of innocence. State v. Law, 559 So. 2d 187 (Fla. 1989); Golden v. State, 629 So. 2d 109 (Fla. 1993). Taking

all the evidence in a light most favorable to the State, no rational fact finder could find Mr. Johnston guilty of premeditated and/or felony-murder beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); See also, Skelton v. State of Texas, 795 S.W.2d 162 (1989).

This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of this claim.

Moreover, it is clear that Mr. Johnston has not received full compliance with his chapter 119 requests for records, documents, files, and other evidence and that is entitled to a hearing on those allegations and time to amend his Rule 3.850 motion once he has received full compliance.

ARGUMENT XI

MR. JOHNSTON'S TRIAL 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 GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Johnston did not receive the fundamentally fair proceeding to which he was entitled under the Sixth, Eighth, and Fourteenth Amendments.

The cumulative error that occurred resulted in Mr. Johnston being the victim of a fundamentally unfair proceeding in violation of the Sixth, Eighth, and Fourteenth Amendments.

Mr. Johnston's Motion to Disqualify the Judge contained an affidavit from Mr. Johnston stating that he had been attacked by Judge Powell in chambers following his evidentiary hearing. Judge Powell has granted the motion but has stated "[t]hese claims are patently false and perjurious. It is ludicrous to believe that any judge would be alone in their chambers with a defendant whom he or she has sentenced to death much less strike that person."

After reviewing these documents and conducting an evaluation of Mr. Johnston, a mental health professional has found that Mr. Johnston's claims if considered untrue, are further evidence of his previously diagnosed delusional disorder.
If untrue, (1) the allegations against Judge Powell are typical of a delusional disorder of the persecution type; (2) Mr. Johnston believes he is being malevolently treated by Judge Powell and was kicked and beaten by him; (3) it is not unusual for people with this type of disorder to repeatedly take their complaints of being mistreated to legal authorities; and (4) Mr. Johnston's preoccupation with a number of systematic delusions just further substantiates his incompetence due to his severe mental illness.

Mr. Johnston cannot more fully plead this claim until he receives full compliance with all of his requests for records, documents, files, and other evidence.

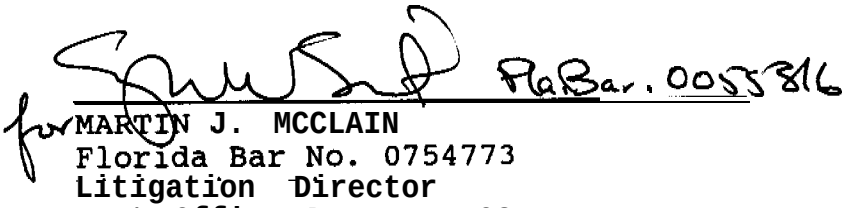
This claim was not considered below because the Circuit Court erroneously held that Mr. Johnston's motion to vacate

judgment and sentence was time barred. This case should be remanded to the Circuit Court for proper consideration of this claim.

CONCLUSION

Based upon the foregoing and the record, Mr. Johnston urges the Court to reverse the lower court and grant him the relief he seeks.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 11, 1997.



for MARTIN J. MCCLAIN
Florida Bar No. 0754773
Litigation Director
Post Office Drawer 5498
Tallahassee, Florida 32314-5498
(904) 487-4376
Attorney for Appellant

Copies furnished to:

Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118

Appendix

Lawson Lamar
State Attorney
Ninth Judicial Circuit of Florida
250 North Orange Avenue
Post Office Box 1673
Orlando, Florida 32802
407-836-2400

William C. Vose
Chief Assistant State Attorney

Dr. Mel Jones
Executive Director

June 7, 1995

Capital Collateral Representative
Attn: Mike Hummil, CCR Investigator
1533 S. Monroe St.
Tallahassee, FL 32301

Re: Records Request

Dear Mr. Hummil:

Sorry for the delay in replying to your January 27, 1995 records request, but these records have been destroyed and I have enclosed for you copies of our-destruction permission forms and a list of all the files that we had had on the defendant David Eugene Johnston. Our policy is to keep felony files for 10 years and as you can see ten years has elapsed since the date of all of these files.

If I can be of any further assistance, please feel free to call me.

Sincerely yours,

William C. Vose

WCV:kat
Enclosures

STATE OF FLORIDA
DEPARTMENT OF STATE
Division of Archives, History
and Records Management
Form DS-RM 107 (Rev. 3-82)

NOTICE OF INTENT TO DESTROY SCHEDULED RECORDS AND DISPOSAL CERTIFICATE

NOTICE NO. 26
PAGE 1 OF 1 PAGES

1 AGENCY. STATE ATTORNEY
NINTH JUDICIAL CIRCUIT

2 DIVISION
ADMINISTRATION

3 BUREAU

4 ADDRESS (Street, City, and Zip Code)
250 NORTH ORANGE AVENUE, SUITE 515
ORLANDO, FLORIDA 32802

5 CONTACT (Name & Telephone Number)
JOYCE COOPER
EXECUTIVE DIRECTOR (305)420-4180

TO:
DEPARTMENT OF STATE
DIVISION OF ARCHIVES, HISTORY
AND RECORDS MANAGEMENT
TALLAHASSEE, FLORIDA 32301

ATTENTION: RECORDS MANAGEMENT SERVICES

6. NOTICE OF INTENTION:
The scheduled records listed in item 8 are to be disposed of in the manner checked below:

☒ a. Destruction ☐ b. Microfilming and Destruction
☐ c. Other

7. SUBMITTED BY:
I hereby certify that the records to be disposed of are correctly represented below and that any audit requirements for the records have been fully satisfied.

Joyce Cooper 9/4/87
Signature Date

JOYCE COOPER, EXECUTIVE DIRECTOR
Type Name and Title

8. LIST OF RECORD SERIES

a. Schedule No.	b. Item No.	c. Title	d. Inclusive Dates	e. Volume	f. Destruction Action and Date Completed After Approval
E-3	1	CY 1983 Closed Felony Case Files	1-1-83 thru 2-31-83	125 Cu.Ft	
E-3	2	CY 1984 Closed Felony Case Files	1-1-84 thru 2-31-84	200 Cu.Ft	
E-3	3	CY 1985 Closed Felony Case Files	1- 1-85 rhru 2-31-85	175 Cu.Ft	

• NOTE: FOR CONTINUATION USE FORM DS-RM 108 •

9. DISPOSAL AUTHORIZATION
Disposal for above listed records is authorized. Any deletions or modifications are indicated.

Director, Division of Archives, History and Records Management — Date

10. DISPOSAL CERTIFICATE
The above listed records have been disposed of in the manner and on the date shown in column f.

Signature — Date

Type Name and Title

Witness

STATE OF FLORIDA
DEPARTMENT OF STATE
Division of Archives, History and Records Management
Form DS-RM 107 (1-72)

NOTICE Of- INTENT TO DESTROY SCHEDULED RECORDS AND DISPOSAL CERTIFICATE

NOTICE NO. 24
PAGE 1 OF , PAGES

1. AGENCY State Attorney
10th Judicial Circuit

2. DIVISION
Administration

3. BUREAU

4. ADDRESS (Street, City and Zip Code)
30 North Orange Avenue, Suite 515
rlando, Florida 32802

5. CONTACT (Name & Telephone Number)
Joyce Cooper
Executive Director (305) 420-3485

TO
DEPARTMENT OF STATE
DIVISION OF ARCHIVES. HISTORY
AND RECORDS MANAGEMENT
TALLAHASSEE, FLORIDA 32300

6. NOTICE OF INTENTION:
The scheduled records listed in Item 8 are to be disposed of in the manner checked below:

[X] a. Destruction [ ] b. Microfilming and Destruction

[ ] c. Other _____

7. SUBMITTED BY:
I hereby certify that the records to be disposed of are correctly represented below and that any audit requirements for the records have been fully satisfied.

Signature 8/9/84 Date

Joyce Cooper, Executive Director
Type Name and Title

8. RECORD SERIES LIST

182 ft³

a. Schedule No.	b Item NO.	c. Title	d. Inclusive Dates	e. Volume	f. Destruction Action and Date Completed After Approval
3	1	CY 1979 Closed Felony Case Files	1-1-79 thru 12-31-79	40 Cu.Ft.	
E-13	2	CY 1980 Closed Felony Case Files	1-1-80 rhru 12-31-80	44 Cu.Ft.	
E-13	3	CY 1981 Closed Felony Case Files	1-1-81 thru 12-31-81	48 Cu.Ft.	
E-13	4	CY 1982 Closed Felony Case Files	1-1-82 thru 12-31-82	50 Cu.Ft.	

9. DISPOSAL AUTHORIZATION
Disposal for above listed records is authorized. Any deletions or additions are indicated in red.

Randall Kelley AUG 24 1984
Director, Division of Archives, History and Records Management — Date

10. DISPOSAL CERTIFICATE
The above listed records have been disposed of in the manner and on the date shown in column f

Signature Date

Type Name and Title

Witness