IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,743

PAUL BEASLEY JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Mr. Johnson's motion for postconviction relief by Circuit Court Judge E. Randolph Bentley, Tenth Judicial Circuit, Polk County, Florida, following an evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

"PC-R1." – record on appeal in the instant proceeding;

"Supp. PC-R1." – supplemental record on appeal;

Supp. Vol. III. PC-R1 - supplemental record on appeal, volume III;

This brief was prepared using Courier 12 point.

REQUEST FOR ORAL ARGUMENT

Mr. Johnson has been convicted and sentenced to death. The resolution of the issues involved in this action will therefore determine whether he receives a new trial or sentencing and/or 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. Johnson, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Eighth Judicial Circuit in Alachua County, Florida entered the judgments of convictions and sentences under consideration. Mr. Johnson was charged by Indictment in Case No. 88-448-CF-A dated March 6, 1981 with three counts of first-degree murder, two counts of robbery, kidnapping, arson and two counts of attempted first-degree murder. He pled not guilty.

Mr. Johnson's original trial was held in September, 1981 in Polk county. A jury returned a verdict of guilty on all counts. The jury recommended death and the trial court sentenced Mr. Johnson in accordance with that recommendation. On direct appeal, this Court affirmed the convictions and sentences. Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984).

Mr. Johnson petitioned this Court for writ of habeas corpus after a death warrant was signed. Mr. Johnson was granted a new trial on the grounds that the jury was allowed to separate after it began deliberations. Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986), cert denied, 481 U.S. 1016 (1987).

The second trial began in October 1987, also in Polk County, and ended in mistrial. Subsequently, the trial judge disqualified himself upon a defense motion to disqualify judge. A change of venue was granted to Alachua County due to excessive pre-trial publicity in the case.

As a result, trial was held in Alachua County in April 1988. Mr. Johnson was prosecuted by the Thirteenth Judicial Circuit State Attorney's Office (Hillsborough County) and tried by a jury which rendered a guilty verdict on all counts (R. 3350-3351).

The jury recommended a death sentence by a vote of eight to four on Count I, nine to three on Count II and nine to three on Count III (R. 3616).

On April 28, 1988, the trial court imposed death sentences on Count I, II and III. The court further sentenced Mr. Johnson to life for Count IV (Robbery), 15 years for Count V (kidnapping), 15 years for Count VI (arson), life for Count VII (robbery), Count VIII (first degree attempted murder) 30 years, Count IX (first degree attempted murder) 30 years. A sentencing order was entered on the same date (R. 3647).

This Court affirmed Mr. Johnson's convictions and sentences on direct appeal. State v. Johnson, 608 So. 2d 4 (Fla. 1992).

On August 1, 1994, Mr. Johnson timely filed his initial Rule 3.850 motion in Alachua county. The State filed a motion to transfer the case from Alachua County to Polk County on August 10, 1994. The States motion to transfer was granted on September 22, 1994 (amended by order dated October 25, 1994).

The lower court ordered the State on November 7, 1994 to show cause why Mr. Johnson should not be afforded an evidentiary hearing. On November 22, 1994 the State filed its response and on December 12, 1994 the lower court dismissed Mr. Johnson's Rule

3.850 motion as legally insufficient and without prejudice. Mr. Johnson appealed to this Court.

Mr. Johnson amended his post-conviction motion on May 17, 1995. The lower court dismissed Mr. Johnson's motion which was subsequently reinstated by this Court on August 29, 1995. On January 11, 1996, this Court ruled venue was proper in the Tenth Judicial Circuit (PC-R. 13).

Mr. Johnson sought the assistance of the lower court to compel disclosure of documents pursuant to Chapter 119 et. seq., Florida Statues. Out of an abundance of caution, Mr. Johnson's counsel informed the lower court of agencies outside the Tenth Judicial Circuit as well as those within the circuit that had not complied with Chapter 119.[1] The lower court held hearings on the public records issues and entered orders on April 17, 1996, June 10, 1996, and a "final order" on July 22, 1996. Mr. Johnson then filed his amended Rule 3.850 motion on September 14, 1996. The State filed an answer on October 10, 1996. The case was then transferred to the Honorable E. Randolph Bentley. On November 22, 1996, Judge Bentley scheduled a hearing for January 9, 1997, pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). On December 9, 1996, Judge Bentley scheduled an evidentiary hearing to be held March 3, 1997.[2]

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[1]At that time, Fla. R. Crim. P. 3.852 (1996) had not been adopted and the Florida Supreme Court specifically ruled that Hoffman v. State, 613 So. 2d 405 (Fla. 1992) was controlling.

[2]Mr. Johnson amended his Rule 3.850 motion on December 24, 1996. The Court dismissed that motion on December 31, 1996.

On December 24, 1996 counsel for Mr. Johnson filed a *Motion to Hold Proceedings in Abeyance*.[3] In that motion, Mr. Johnson informed the lower court that additional public records had only recently been disclosed. CCR received those records on January 3, 1997 (six days before the scheduled Huff hearing). Mr. Johnson had previously requested these records but they were not provided. The records in question were records of the State Attorney for the Thirteenth Judicial Circuit, Hillsborough County (prosecuting agency). These records were found in the possession of the Attorney General's Office, Tampa, Florida.[4]

The lower court held a hearing on January 9, 1997 on Mr. Johnson's *Motion to Hold Proceedings in Abeyance* and a "Huff"

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[3]The *Motion to Hold Proceedings in Abeyance* also included a *Memorandum in Support of Evidentiary Hearing*. The lower court ordered such *Memorandum* to be submitted by December 27, 1996.

[4]Counsel for Mr. Johnson informed the lower court during the hearings on public records that she believed that records existed that had not been provided including records from the State Attorney's Office for Hillsborough County. A subpoena duces tecum for Karen Cox, Assistant State Attorney was issued in Polk County to appear at the July 17, 1996, hearing. Ms. Cox did not appear at that hearing. Ms. Cox was aware of the proceedings and stated over the telephone to CCR that she would not appear at the hearing in person but that she was willing to appear by telephone. Counsel informed the lower court of her willingness to do so, which the court rejected. The lower court ruled that CCR waived any right it had to further investigation by failing to serve the subpoena on Ms. Cox. Counsel for Mr. Johnson informed the court that Ms. Cox's subpoena duces tecum was issued in Polk County and, according to the Polk County Clerk's Office, forwarded to Hillsborough County for service. At the January 9, 1997 hearing, counsel informed the court of the foregoing and attempted to introduce an affidavit from the Clerk's Office establishing those facts which the court refused to consider or accept into the record. Mr. Johnson included this affidavit in his Proposed Amended Motion to Vacate filed January 28, 1997, which is part of this record on appeal (See, PC-R.472-630).

hearing. At this hearing, the lower court allowed counsel for Mr. Johnson to issue a subpoena duces tecum for then assistant state attorney Karen Cox regarding the records. Ms. Cox's testimony was limited and Mr. Johnson filed a *Motion for Leave of Court to Conduct Depositions* (PC-R. 467) which was denied (PC-R. 891-892).

The lower court ordered counsel for Mr. Johnson to provide the court with 1) a list detailing the new matters discovered as a result of the new documents, 2) a memorandum detailing the relevance of the new matters, 3) a copy of any newly discovered document supporting the new matters and 4) a proposed amendment to the Rule 3.850 motion filed in September, 1996. The lower court provided 20 days in which to do so. Mr. Johnson timely filed the proposed motion on January 28, 1999 (PC-R. 472-630). On the same date, Mr. Johnson filed a *Motion to Disqualify Judge* (PC-R. 455-463) requesting Judge Bentley to recuse himself based upon the fact that Judge Bentley sentenced James Leon Smith in connection with the bargain Smith had with the State in exchange for Smith's testimony against Mr. Johnson[5]. Judge Bentley denied

[5]Smith's Motion to Mitigate Sentence was originally denied on October 6, 1981 (See, Defense Exhibit # 15) then reset by Judge Bentley's Order dated November 16, 1981 (See, Defense Exhibit # 16) after communication from Smith to the prosecutor in Mr. Johnson's case and communication from the prosecutor to Judge Bentley. Judge Bentley then entered an order Suspending Smith's sentence to probation on December 17, 1981. (See, Defense Exhibit # 17). Collateral counsel became aware of these facts through a review of the public records that were originally not provided and were subsequently released 6 days before the Huff hearing when they were discovered in the possession of the Attorney General. Some of the records pertaining to Smith were withheld and claimed exempt. Judge Bentley conducted an *in*

the *Motion to Disqualify Judge* on January 31, 1999 (PC-R. 889-890).

On January 22, 1997, the lower court entered an order setting the parameters of the evidentiary hearing (PC-R. 449-453). The lower court summarily denied claims I, II*, III, IV, VI, VII*, IX, XII, XIV, XVI, XVIII, XX, XXI, XXII, XXIII, XXIV, XXV and XXVII and granted an evidentiary hearing on the remaining claims.[6]

The evidentiary hearing was held March 3-5, 1997. The lower court entered an order denying Mr. Johnson's postconviction motion on March 19, 1997 (PC-R. 919-935). Motion for Rehearing was filed (PC-R. 1252-1257) and denied (PC-R. 1256-1257). This appeal follows.

Robert A. Norgard, testified at the evidentiary hearing that he assisted in the representation of Mr. Johnson during the mistrial held in 1987 and the retrial trial held in 1988 (PC-R. 11). He recalled the charges that Mr. Johnson faced and that Larry Shearer was Mr. Johnson's lead attorney (PC-R. 12). Mr. Norgard reviewed his files pertaining to his representation of Mr. Johnson, Mr. Johnson's postconviction motion, and the lower court's order regarding the issues to be reviewed in preparation for the evidentiary hearing (PC-R. 12). He and Mr. Shearer divided up responsibilities as to Mr. Johnson's case and Mr.

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camera review and determined the records were exempt.

[6]Claims marked with an "*" were given a hearing on the ineffectiveness of counsel allegations of the claim.

Shearer was responsible for the preparation and presentation of mental health experts (PC-R. 13).

Mr. Norgard recalled that the State presented the testimony of James Leon Smith at trial and that he, Mr. Norgard, handled Mr. Smith's testimony (PC-R. 13). Mr. Norgard identified the *Demand for Discovery* (See, Defense Exhibit No. 1) filed by Mr. Shearer in 1981 and renewed in the 1988 trial (PC-R. 14). He also identified a *Demand for Disclosure of Material Favorable Evidence* (See, Defense Exhibit No. 2) filed in 1981 and renewed in 1988 (PC-R. 14). Mr. Norgard also identified the "*Notification of Exercise of Rights*" signed by Mr. Johnson and filed in the case (See, Defense Exhibit No. 3). Mr. Norgard explained the purpose of the notification as follows:

> to make sure that the client is protected from law enforcement as far as any statements or anything related to physical evidence, search of his property, and is basically an indication that the client intends to fully exercise their constitutional rights.

(PC-R. 16).

Mr. Norgard explained that the notification was to protect Mr. Johnson from attempts to elicit statements from him:

> it indicates, "I do not consent to be interviewed by any agent of the State of Florida." And that would include people recruited for purposes of getting jailhouse statements or people of that nature.

(PC-R. 16-17).

Mr. Norgard and Mr. Shearer had concerns about James Leon Smith's allegations that Mr. Johnson had made incriminating statements to him while in jail (PC-R. 17). Mr. Norgard

identified a *Motion to Suppress* (See, Defense Exhibit No. 4) that Mr. Shearer had filed in 1981 and renewed in 1988 regarding the statements allegedly made by Mr. Johnson to Mr. Smith. The theory of the *Motion to Suppress* was that Mr. Smith worked as an agent for law enforcement when attempting to elicit incriminating statements from Mr. Johnson (PC-R. 18-19). At trial, the motion was denied.

Mr. Smith told the judge and jury at trial that he was not made any specific promises in exchange for his testimony against Mr. Johnson (PC-R. 19), that he was not encouraged by the State to get statements from Mr. Johnson and that he, Mr. Smith, was "doing it without any hope or reward or that he was not acting as an agent for law enforcement" (PC-R. 19-20). Mr. Norgard further recalled that Mr. Smith's testimony against Mr. Johnson did not reveal that Mr. Smith was specifically asked to talk to Mr. Johnson and that Mr. Smith said he was not given any information related to Mr. Johnson's case (PC-R. 20). Mr. Norgard would have used information that Mr. Smith was promised help with his legal problems in exchange for his testimony if it had been available. Mr. Norgard believed the *Motion to Suppress* would have been granted with this additional information (PC-R. 20-21).

At trial, the State told the judge and jury that Mr. Smith was not promised anything, that Mr. Smith did not want to testify and that the State had to take steps to force Mr. Smith's testimony (PC-R. 21-22). Mr. Norgard identified a letter (See, Defense Exhibit No. 5) to Mr. Shearer signed by Hardy Pickard

(state attorney who prosecuted Mr. Johnson at the 1981 trial) regarding Mr. Smith and Larry Brockelbank (an alleged jailhouse snitch used at the 1987 trial but not used at the 1988 trial)(PC-R. 22). Mr. Norgard testified that the only disclosure of promises made by the State was that Mr. Smith's cooperation "would be made known to the parole commission" and "no other promises were made to the witnesses" (PC-R. 22-23).

Mr. Norgard remembered that Smith testified that Mr. Johnson allegedly confessed to him certain details of the offense and that Mr. Johnson supposedly told Smith that he, Mr. Johnson, would "act crazy in order to beat the charges" (PC-R. 23).

The defense theory at the 1988 trial was an insanity defense established by drug-induced psychosis (PC-R. 24). Mr. Norgard identified a copy of notes handwritten by Mr. Smith that were contained in Mr. Norgard's file (See, Defense Exhibit No. 6). Mr. Norgard remembered these notes having been entered into evidence at the 1988 trial and that Smith said at trial that these notes were merely a "log" of Mr. Johnson's statements.

Mr. Norgard testified that if he had had evidence that the State was feeding the details of the offense to Mr. Smith, he would have "done a whole lot" with it (PC-R. 25). He explained that he would have impeached the credibility of Mr. Smith, the integrity of the investigation, conducted significant discovery, and presented the issue to the jury in the guilt phase as well as the penalty phase as to the aggravating factors relied upon (PC-R. 26). Mr. Norgard also stated that he would have wanted to use

evidence that would have shown that Mr. Smith was using the information he received from police to write the notes, and that Smith was using Mr. Johnson's legal materials to further develop the notes (PC-R. 26-27). He would have wanted to use any evidence indicating that the police were instructing Smith to get Mr. Johnson to confess (PC-R. 27-28). He also would have wanted to know and use evidence that the State instructed Smith not to testify about the promises made to him in exchange for his testimony against Mr. Johnson (PC-R. 28). Mr. Norgard testified that he would have wanted to know and use evidence that showed that Mr. Johnson had never made the incriminating statements attributed to him by Smith (PC-R. 29) and explained how he would have used the information (PC-R. 29).

On cross examination, Mr. Norgard testified that in the past, Mr. Smith had given the same story regarding law enforcement's involvement in his testimony and that he was not acting as a state agent (PC-R. 32). Mr. Norgard testified that he had no knowledge of Mr. Smith saying anything different and that he had suspicions and circumstantial evidence he used in an attempt to impeach Mr. Smith at trial (PC-R.33). Mr. Norgard testified that he presented the evidence he did have, including assistance Mr. Smith received regarding custody of his children (PC-R. 34). Mr. Norgard testified that he was aware that Mr. Smith had seen reports regarding the offenses and cross examined him on those. Mr. Norgard had not been shown any documents regarding Mr. Smith's recantation. He further testified that the

insanity defense was chosen at trial because of evidence of drug use indicating insanity at the time of the offense (PC-r. 36-37). He stated that Mr. Johnson was evaluated and information regarding drug induced psychosis was developed in 1988 (PC-R. 37). He had two other trials using the insanity defense prior to Mr. Johnson's trial and stated that juries do not like that defense (PC-R. 38). Mr. Norgard testified that Mr. Smith had some information that would lend support to the insanity defense including that Mr. Johnson stated he was crazy at the time, and had been on drugs and that there were things that would be argued against insanity (PC-R. 40). He testified that he knew that if he got into Smith's notes that the statement attributed to Mr. Johnson, i.e. that he "would act crazy", would come out and felt that he would argue against Smith's credibility and that the truth was that Mr. Johnson was insane (PC-R 39-40).

Mr. Norgard deferred to Mr. Shearer with regard to an intoxication defense, and Mr. Shearer dealt with the doctors pretrial (PC-R. 42). He stated that the insanity defense in Mr. Johnson's case was based upon drug intoxication (PC-R. 43).

Lawrence Shearer represented Mr. Johnson as lead attorney in 1981, 1987, and 1988, reviewed his trial files, and was responsible for preparation of mental health experts and family members (PC-R. 45-47). He recalled the charges and identified the *Demand for Discovery*, *Brady* demand, and *Notification of Exercise of Rights Form* filed in Mr. Johnson's 1981 case and renewed at the 1988 trial (PC-R. 48-51). The *Notification of*

Rights Form was to ensure Mr. Johnson's fifth and sixth amendment rights were not violated (PC-R. 51). Mr. Shearer had concerns regarding State witness James Leon Smith in that Mr. Smith was acting as a State agent at the time he was in contact with Mr. Johnson and Mr. Smith was lying or fabricating all or part of his testimony regarding the alleged statements to him by Mr. Johnson (PC-R. 52). The State represented to Mr. Shearer that Smith had coincidental contact with Mr. Johnson, that Smith initiated contact with police, there was no purposeful movement of Smith to be near Mr. Johnson's cell, and that no promises had been made to Smith other than to tell probation and parole of his cooperation (PC-R. 53-54). Mr. Shearer identified a letter written to him by Mr. Pickard dated June 8, 1981 representing that the only promise made to witnesses was that the parole board would be notified of Smith's cooperation (PC-R. 55). Mr. Shearer testified that he had reviewed Smith's testimony and recalled that Smith testified that he was first in a holding area and then assigned a cell next to Mr. Johnson, that Mr. Johnson made incriminating statements to him and that Smith said Mr. Johnson said he would just "act crazy" to beat the charges (PC-R. 57).

The theory of defense at the 1988 trial was insanity based on temporary psychosis induced by drugs (PC-R 57-58). Mr. Shearer identified the *Motion to Suppress* filed in 1981 and renewed in 1988 (PC-R. 58). Mr. Shearer explained that he had reason to believe that both state witnesses Brockelbank and Smith were acting as state agents at the time they allegedly collected

information from Mr. Johnson (PC-R. 59). Mr. Shearer testified that he would have wanted to know of evidence that showed the State promised Mr. Smith help with his legal problems and sentence in exchange for his testimony and that he would have fully investigated and developed the evidence for impeachment of Smith and his motivations for testifying, as well as use it in the penalty phase regarding aggravating factors if he had possessed it (PC-R. 60-61). Mr. Shearer identified a copy of a written statement of James Leon Smith purporting to be Smith's recollections of Mr. Johnson's statements and recalled that it was used at trial (PC-R. 62). At trial, an issue was brought up that by using Mr. Smith's notes, the defense had opened the door, letting into evidence the alleged statement that Mr. Johnson said he would act crazy (PC-R. 63). He further recalled that in the 1987 retrial a motion was filed regarding whether this statement would come in if the defense referred to Smith's statements about Mr. Johnson's drug use and the ruling was at that time that the statements would not necessarily come in unless the defense opened the door (PC-R. 64). Mr. Shearer recalled that Smith said his notes were merely a log and that he would have wanted to know of evidence showing that the State was feeding Mr. Smith with details about Mr. Johnson's case (PC-R. 65). He testified that he would have further developed discovery, impeachment, and motivation to fabricate (PC-R. 65). Mr. Shearer gave Mr. Johnson legal papers during the course of preparing for the trial, and had there been evidence that Mr. Smith was using the papers to

formulate his notes, he would have wanted to know it and would have used that information (PC-R. 65-67). He stated that Smith had denied using Mr. Johnson's legal papers as a source of his "log" (PC-R. 68). He also testified that he would have wanted to use evidence showing that the State gave Smith information on how to get Mr. Johnson to confess and evidence showing the State instructed Mr. Smith not to reveal that he would get a deal in exchange for his testimony (PC-R. 69-70). Mr. Shearer elaborated on how he would have used that evidence including bolstering the *Motion to Suppress*, impeachment, and bad faith on the part of the State (PC-R. 70-71). He also testified that if he had evidence that Mr. Johnson in fact, did not make the incriminating statements to Smith he would have used it pre-trial and during both the guilt and penalty phases (PC-R. 71-72).

Mr. Shearer called three family members during the penalty phase at trial including Mr. Johnson's Aunt and Uncle, Clora and Alcus Johnson (PC-R. 72-73). He testified that he did not call Jane Cormier (Mr. Johnson's mother) and that his efforts to reach her were through the public defender's investigator and Mr. Johnson. He testified that after reviewing his file, one unfruitful attempt at a phone call was made and that he was unaware whether other attempts were made, that his file did not document that further attempts were made, and that he had no strategic reason for not pursuing, finding, and developing information from Mr. Johnson's mother (PC-R. 73-72). He testified that if he had had evidence that Mr. Johnson's mother

suffered extreme physical and emotional abuse while pregnant with Mr. Johnson, he would have presented it both at the guilt and penalty phases, including providing the information to mental health experts (PC-R. 76-77). He also testified that he would have used information that Mr. Johnson's mother did not want to have a child, her husband beat her weekly, knocked her unconscious, and that she abandoned Mr. Johnson when he was a child (PC-R. 77-78). He further testified that he would have used information that Mr. Johnson's mother could have testified to that Mr. Johnson was a dependable, loving and compassionate person while in California (PC-R. 78).

Mr. Shearer then reviewed mental health records, forensic and court related mental health records of Mr. Johnson's father, Ommer Johnson (PC-R. 79)(See Defense Exhibit No. 7)[7]. He testified that there was no attempt to secure those records at trial and that if there was evidence to show that Mr. Johnson's father had a history of mental health problems and alcohol abuse that he would certainly have wanted to know of it and use it (PC-R. 80).

Mr. Shearer also could not recall any efforts to locate Mr. Johnson's aunt, Joyce Kihs, and there was no strategic reason for not pursuing her as a witness (PC-R. 81-82). He further testified that he would have certainly used evidence that Ms. Kihs could have offered showing that Mr. Johnson's mother

[7]The Record on Appeal was compiled by the clerk in such a way as to include Defense Exhibit No. 7 within Defense Exhibit No. 10).

suffered extreme physical and mental abuse and sufferings as well as illnesses of Mr. Johnson as an infant child and beatings Mrs. Johnson received while pregnant with Paul (PC-R. 82-83).

No investigation was done to locate Mr. Johnson's brother, Steve Johnson, and there was no strategic reason for not doing so. Mr. Shearer would have used evidence that Steve Johnson could have presented that Mr. Johnson was a loving, dependable, compassionate person (PC-R. 83-84).

Mr. Shearer also testified that he did not recall any investigation being done to locate Joan Soileau and that he would have used evidence that she could have offered that Mr. Johnson was a loving dependable and compassionate person (PC-R. 85).

During the guilt phase of Mr. Johnson's trial, Mr. Shearer presented the testimony of Thomas McClain, psychiatrist, Walter Aifield, psychiatrist, and Thomas Muther, professor in toxicology. (Mr. Shearer later testified that Dr. Muther never actually met with Mr. Johnson (PC-R. 91)). He presented Dr. McClaine and Gary Ainesworth, psychiatrist (who testified for the State at guilt phase) during the penalty phase (PC-R. 87). The experts were not presented any of the evidence that he failed to develop (PC-R. 88).

Mr. Shearer testified that he could not find anything in his notes to establish a strategic reason for not using a voluntary intoxication defense (PC-R. 89).

Mr. Shearer never knew that Mr. Johnson was a brain damaged individual and would have presented and developed that

information with the mental health experts and at trial. Further, he would have wanted and used expert evidence demonstrating that the use of drugs by a brain damaged individual dramatically enhances the affect upon behavior (PC-R. 89-90).

Mr. Shearer testified that he reviewed the State's penalty phase closing argument, that he did not make any objections to it, and that he had no strategic reason for not doing so (PC-R. 91-93). He testified that he filed a pretrial motion regarding the prosecutor's argument and that he felt this preserved the issue (PC-R. 93-94). Mr. Shearer testified that the prosecutor's arguments demanding a death recommendation, that death was the only sentence to give, measuring Mr. Johnson's life on a scale with the lives of the deceased -- that the deceased's lives were more precious -- were among the improper arguments the prosecutor made to which he did not object and had no strategic reason for not objecting (PC-R. 97-99).

He recalled that the aggravating factors of "committed for pecuniary gain" and in the commission of a robbery were given and that he would have made a request for a specific jury instruction on improper doubling but could not recall the judge's ruling (PC-R. 94-95) and felt that a pretrial motion would have preserved the issue (PC-R. 95) and would have no strategic reason for not objecting to the doubling of these factors (PC-R. 94).

Mr. Shearer identified his *Motion to Record All Proceedings* filed in Mr. Johnson's case to ensure all portions were recorded (PC-R. 96).

On cross-examination, Mr. Shearer testified that he had read Mr. Johnson's post-conviction motion but that CCR did not suggest or argue any of the points to him (PC-R. 99). He also testified that he thought the *Motion to Record All Proceedings* was granted but that he did not read the entire record on appeal so he could not say whether everything was included (PC-R. 100). Mr. Shearer testified regarding the insanity defense and a voluntary intoxication defense. He testified that the two defenses concern different issues of mental state, and that with the insanity defense could be a defense even if the defendant had the capacity to specifically intend and carry out certain actions. Mr. Shearer testified that they could have explored organic brain damage due to the fact that Mr. Johnson had used an extensive amount of drugs, and that at one point Mr. Johnson was *Baker Acted* due to his psychotic state (PC-R 103).

Regarding his failure to present family members, Mr. Shearer testified that he made no effort in locating them beyond those that he testified to on direct (PC-R. 104). Mr. Johnson gave him whatever information he had, but due his incarceration, his ability to give information was limited (PC-R. 104).

Regarding the voluminous amount of mental health records concerning Mr. Johnson's father, Mr. Shearer testified that he only presented through testimony of others that Mr. Johnson's father was an alcoholic and that some of the witnesses down played the father's violence (PC-R. 105). He testified that some

evidence was given at trial that Paul was abandoned as a child and the experts had that information (PC-R.107).

Mr. Shearer testified that at trial James Leon Smith was cross examined regarding benefits he received and that he had access to details of the offense (PC-R. 109). Mr. Johnson told Mr. Shearer that he never made the statements that James Leon Smith said he did, and Mr. Smith read his legal paperwork to him (PC-R. 111). Mr. Shearer was unable to develop the facts in his motions to show that Mr. Smith in fact was lying (PC-R. 112).

In 1981, the defense was reasonable doubt and that five of the penalty phase jurors were persuaded by the mitigation to vote for life, and thus, in the 1988 trial an insanity defense was attempted and one doctor found Mr. Johnson was legally insane (PC-R. 114-115).

On redirect, Mr. Shearer testified he knew that Mr. Johnson had lived in California in the 1970's. Mr. Johnson never refused to give any information asked of him. Mr. Shearer had no reason for not investigating Mr. Johnson's brain damage (PC-R. 117).

Joan Soileau testified that she was a licensed registered nurse and knew Mr. Johnson (PC-R. 124-125). She met Mr. Johnson in Ventura, California in 1978 at an apartment complex in which they both lived. She and Mr. Johnson dated and she observed Mr. Johnson to have a good personality, was a warm and attentive person, caring with an innocent quality enjoying simple things in life (PC-R. 126). When they lived together, Mr. Johnson was working steadily as a laborer and he helped her father in his

construction business (PC-R. 127). She testified that Mr. Johnson would make dinner for her, was neat and kept the household clean, and that he never had any altercations with anyone (PC-R. 128). Mr. Johnson helped others in the apartment complex and was well liked by everyone, and he treated her then four and half year old son kindly (PC-R. 128). Ms. Soulieu testified that her relationship with Mr. Johnson lasted somewhat over a year and that they were engaged to be married (PC-R. 129). She testified that Mr. Johnson did not use illegal drugs and would only drink occasionally in a social setting (PC-R. 129) and that he was never abusive to her (PC-R. 130). Mr. Johnson returned to Florida to complete his divorce from his wife from whom he was separated (PC-R. 131). When Mr. Johnson returned to Florida, he saw his infant son and could not leave him (PC-R. 131). Mr. Johnson cried during this time and could not leave his son because he had been raised without a father himself and did not want his own son to suffer as he did. Mr. Johnson did not return to California (PC-R. 131-132). During Mr. Johnson's 1988 trial Ms. Soulieu was living in Connecticut, had a telephone, driver's license, and had been in contact with Mr. Johnson's family including Paul's brother, Steve Johnson, had his mother's address as well as his aunt's (PC-R. 133). She kept in contact with the family and asked about Paul, however none of them knew how he was doing and she did not know that Paul was ever on trial or sentenced to death (PC-R. 133). Neither Mr. Johnson's attorneys or his investigator contacted her, if they

had contacted her, she would have definitely talked to them and testified on Paul's behalf (PC-R. 134).

On cross examination, Ms. Soulieu testified that she moved from California in 1983 to New York and then to Connecticut until 1991 and that she kept in touch with Steve Johnson who kept her informed about his mother and aunt (PC-R. 136). She testified that she did not have contact with Mr. Johnson's relatives in Polk County, Florida however she did write a letter to Wallace Ward (who did testify at trial)(PC-R. 137). She testified that there was no drug use or indication of drug abuse (PC-R. 138).

Janie Cormier testified that she was Paul Johnson's mother, that he was the middle child, with an older sister and younger brother. Paul was born in Samson, Alabama in 1949 (PC-R. 140). She testified that she was married to another man when she was sixteen and then married Ommer Johnson when she was twenty and working as a waitress in Panama City, Florida (PC-R. 141).

Collateral counsel attempted to ask Ms. Cormier about the abusive circumstances surrounding the breakup of her first marriage and subsequent marriage to Ommer Johnson. The State's objection was sustained (PC-R. 141-143).

Ommer Johnson worked in a paper mill, he and Janie had known each other for two months before getting married (PC-R. 143). Janie's mother died when she was fifteen and she had been on her own working for $15 a week, supporting an infant child. Her marriage to Ommer was more of convenience than love (PC-R. 144). She testified that Ommer was very jealous, beat her, quit his

job, and watched her from across the street while she was working and would give her a "whipping" if she smiled at others (PC-R. 144). Ommer drank most of the time and beat her on a weekly basis. She tried to leave him and stay with family but Ommer would threaten her and her family if she did not return (PC-R. 145). She became pregnant with Paul right after her marriage to Ommer but being pregnant did not stop Ommer from beating her and knocking her out (PC-R. 145). Ommer did not bring money home and spent the money she earned on alcohol (PC-R. 146-147). Janie was very sickly and her sister, Joyce Kihs, stayed with her. They had no running water or plumbing, had an outhouse and no electricity. Janie did get some help from Ommer's brother, Alcus and his wife (PC-R. 146-147). She was not happy about being pregnant with Paul, did not want to get pregnant and she drank illegal "moonshine" during her pregnancy with Paul to ease the pain from being beat. She had no pre-natal care (PC-R. 148). She was an unhealthy pregnant woman and at times would try to defend herself from Ommer but he would use his fist on her and knock her out when she tried. She would wake up on the floor and not know how long she had been unconscious (PC-R. 149-150). When she was giving birth to Paul she had a midwife and Paul was being delivered breech. A doctor was ultimately called in and when Paul was born he was blue and did not look well. Janie testified that for months they tried to shape Paul's head back to normal (PC-R. 150-151).

Paul was a very sick child, they used goat milk for him and could not afford medicine (PC-R. 151). When Paul was about two years old, she left him with his grandparents and she became pregnant again (PC-R. 151). She stated that Steve was born normally and in good health and she was healthier also (PC-R. 152). She testified that when she left Paul with his grandparents she was trying to get away from Ommer, that she felt she had no choice in abandoning Paul. Paul's grandparents were poor and his grandfather sold liquor (PC-R. 153-154). She stated she moved after leaving Paul, gave birth to Steve, that Ommer had gone to prison, and that she later remarried (PC-R. 154-155). She stated that her last husband was in the military so she moved to Japan with Steve and her daughter to be him, and that she was never able to give Paul what he needed (PC-R. 155). She testified that after living in Japan she moved to California in 1958 and stayed there for the remaining 32 years. She testified that she did not know how to contact Paul's grandparents in 1958 to check on Paul. The one time she tried to contact authorities in Alabama, the effort was fruitless (PC-R. 157). She stated she first saw Paul in 1976 in Florida where he lived with his wife on her first trip back to Florida (PC-R. 158). She convinced Paul and his wife to return to California with her, that Paul's wife was not happy in California and that she returned to Florida. Paul returned to Florida for a short while but then moved to California for two years. She stated that she lived with Paul for part of that time and nearby the remainder of time (PC-R.

159). She testified that she saw Paul regularly, that he was a loving son, treated her very nicely, and did not treat her poorly even though she had abandoned him as a baby (PC-R. 160). She testified that she worked shifts and that Paul would make her dinner, make her bed, clean her house, showed her that he loved her and worked (PC-R. 160). She testified that Paul returned to Florida in 1978 to be with his wife and baby because he wanted to be with his wife and son (PC-R. 161). She stated that it was important for Paul to be a father to his son since Paul did not have a father or mother of his own (PC-R. 162). She testified that she had not seen Paul since 1978 and that she did not know that he had been convicted of murder and sentenced to death, that no one told her until collateral counsel's investigator contacted her (PC-R. 162). She stated that after Paul left California she had no luck in contacting anyone (PC-R. 163). She testified that while in California she had no indication of Paul using drugs. She further stated that she was living in Oxnard, California in 1988, had a phone, driver's license, and was a registered voter (PC-R. 164-165). She stated that she remained in contact with her son Steve and her sister, Joyce Kihs. She testified that neither Paul's trial attorneys or investigator contacted her in 1988, that she would have talked them if they had contacted her and that she would have testified at Paul's trial (R. 165-166).

On cross examination, Ms. Cromier testified that she lived in the country outside of Samson, Alabama and that other people living there may not have had an indoor toilets either (PC-R.

168). She stated that Paul did not have insects around him, rashes, or unchanged diapers (PC-R. 169). She stated that during the time Paul lived in California she never saw indications of drug or alcohol abuse (PC-R. 169-170). She stated he was not violent, that she tried to find Paul after then, that she did not stay in contact with his relatives in Florida but that she did stay in contact with other relatives (PC-R. 172-173).

Joyce Kihs testified that she was Paul's aunt and that she was present when he was born. She was living with Paul's mother and Ommer at that time (PC-R. 175). She stated that they lived in a shack with no running water, electricity, or indoor plumbing. She was about fifteen years old at the time and in school until her sister became sick during her pregnancy with Paul (PC-R. 176). She testified that Ommer was a very mean, vicious man and that she was scared of him as was her sister (PC-R. 177). She stated that she observed marks on her sister, heard the fighting and scuffling and heard her sister beg Ommer not to beat her, that she herself asked Ommer to stop beating Paul's mother and that Ommer threatened her when she did (PC-R. 178). She testified that Ommer sold "moonshine", that he made her sell it for him, and that he did not provide for his family well (PC-R. 179). She testified that from the beginning of her pregnancy, Paul's mother had problems and drank, that Ommer beat her while pregnant with Paul, that he knocked her out and was very abusive, that there was no money to go to a doctor, and that she was present when Paul was born (PC-R. 180-181). She testified that

her sister was in terrible pain during the delivery, that there was panic from the midwife, and that Paul was coming breech. When Paul was born he was red and blue and his head was shaped horribly odd (PC-R. 183). She stated that she had seen other babies born, including Paul's brother Steve, and they did not have the irregularities like Paul (PC-R. 183). She testified that she remained with the Johnson's for about a year and that Paul was a very sickly child, that he required special milk and accommodations and that Ommer would not provide for them (PC-R. 184-185). Paul's mother abandoned Paul because she could not provide for him or his needs (PC-R. 185). She testified that she had contact with Paul in California and that Paul was very loving and affectionate, would do anything asked of him for her and did not see him under the influence of drugs (PC-R. 189-191). She stated that Paul was concerned about his son and returned to Florida, that she did not know that he stood trial in 1988, that she had a phone and was in contact with Paul's mother and brother. Paul's trial attorneys and investigator did not contact her and she would have talked to them if they had contacted her and testified on Paul's behalf (PC-R. 192-193).

On cross examination, Ms. Kihs testified that Paul was in California for two years, did not see drug or alcohol abuse, violence, and that Paul worked consistently (PC-R. 195-196). She further testified that she was unaware of the murder convictions and did not know that Paul had drug problems two and half years after he left California (PC-R. 98).

Steven Lee Johnson testified that he was Paul's younger brother, that they did not grow up in the same household, that he was approximately sixteen when he learned that he had an older brother, that he was living in California with his mother, half sister and stepfather (PC-R. 199-200). He stated that he was somewhat shocked to learn of his brother, and that Paul was sickly and lived with grandparents, that he, Steve, has never met his father Ommer (PC-R. 200). He further testified that he spoke to Ommer once in 1976 when Ommer called him and revealed that he had lived only an hour away from him when Steve was a child, knew that Steve lived near him and never tried to contact him (PC-R. 201-202).

Steve Johnson testified that he first met Paul when Paul returned to California with his mother and aunt, that upon meeting Paul he was struck by their physical similarities as well as the differences (PC-R. 203). He stated that he lived near Paul while in California, that Paul did not use illegal drugs, drink to excess, and that Paul did have steady work (PC-R. 204-205). He also testified that Paul returned to Florida in 1978 to be with his wife and son, and that Paul wanted to be a good father, especially since they did not have one themselves (PC-R. 206). Steve testified that after Paul returned to Florida he did not have further contact with him, did not know that he stood trial for murder or that he was on death row (PC-R. 207). Steve stated that in 1988 he was living in Idaho, had a telephone, was in contact with his mother, aunt, and Joan Soileau, Paul's ex-

girlfriend. None of Paul's trial attorneys or investigators ever contacted him and he would have talked to them if they had. He also would have testified at Paul's trial if asked to do so (PC-R. 208-209).

On cross examination, Steve Johnson testified that he and Paul shared the same birth parents and that he did not see a predilection for drug use on Paul's part (PC-R. 209). Over defense objection, Steve was permitted to testify that he has never been treated for substance abuse (PC-R. 210).

James Leon Smith testified that he was incarcerated in the Polk County jail in 1981 for a list charges and while in the Polk County jail he met Paul Johnson (PC-R. 219-220). Mr. Smith testified that originally he was housed in a cell behind Mr. Johnson and then a detective moved him to a cell directly around to the side of Mr. Johnson's cell (PC-R. 220). He stated that he testified against Mr. Johnson in 1981 and at the re-trial in 1988 (PC-R. 220). Mr. Smith also testified that he gave depositions regarding Mr. Johnson's case, and that he, Mr. Smith, had given testimony that Mr. Johnson had made incriminating statements to him (PC-R. 221). He testified that those statements regarded details of the death of a cab driver, Mr. Beasley, and a Polk County Sheriff's deputy (PC-R. 221). He also stated that his testimony at trial against Mr. Johnson included an allegation that Mr. Johnson stated that "he would play crazy to beat the charges" (PC-R. 221). Mr. Smith stated that he testified at the trial that Mr. Johnson voluntarily told him these statements (PC-

R. 221). He also stated that he testified that there was no encouragement from the police and/or State to him to get Mr. Johnson to say those things, and that he had testified that the State did not give him any details about the offense (PC-R. 222). Mr. Smith then asked to speak to the judge:

> [MR. SMITH]: The only thing I was concerned about, I've carried this inside of myself now for a few years, and what I want to make sure of is do I need to speak to a lawyer or what, because I don't want to get in any trouble for changing my statement. But there were certain things that the State Attorney during those trials and before each trial and Detective Wilkerson that was said to me, you know, from those guys. And I don't want to -- I don't know what you call it, be caught in between a thing here. Because Detective Wilkerson and the State Attorney, and they're going to say that they, still to this day, that they didn't say anything. And I've carried this inside of me for a while.
>
> [THE COURT]: I'm sorry, it's your concern to tell the truth today.
>
> [MR. SMITH]: Right. That's what I want to do is tell the truth. But you know, I'm concerned about --I don't know how the system works about the --
>
> THE COURT: Sir, are you asking me for legal advice?
>
> [MR. SMITH]: I don't know. But if --
>
> THE COURT: I'm not sure what -- if you have a question, then, fine, I would like to hear it. If not, we need to proceed in a question and answer format.
>
> I'm not sure where we're going here, but we've had a long series of leading questions and a kind of say what you want questions.
>
> MS. BREWER: I'm just trying to lay the -- primarily the basis, Your Honor.

> MR. CERVONE: If I may interject? I think I know abundantly well where we're going.
>
> This man is about to put himself in a position where he is about to face perjury charges, and I think that that's what counsel is alluding to and he's alluding to. I suggest to the Court to so advise him of his rights, and if necessary appoint a Public Defender.

(PC-R. 223-224). The lower court then advised Mr. Smith of his rights and allowed Mr. Smith to consult his lawyer and proceeded with the next witness (PC-R. 224-228).

Dr. Brad Fisher graduated from Harvard University, Cum Laude, Southern Illinois University, and from the University of Alabama. His field of expertise was in clinical psychology, his doctorate in the prediction of dangerous behavior, internship at The Ohio University and Ohio Department of Corrections, worked as a clinical forensic psychologist, evaluating behavior and personalities specifically in forensic settings, courts, prisons and jails (PC-R. 232).

Dr. Fisher has testified on a continuous basis since 1976 in approximately thirty states, including Florida. He worked as an appointed expert doing an evaluation of the juvenile correctional system in Florida, accepted by various courts of law as an expert in clinical forensic psychology (PC-R. 233). Dr. Fisher's Curriculum Vitae was entered into evidence (See Defense Exhibit No. 9). The lower court found Dr. Fisher to be an expert in clinical forensic psychology (PC-R. 236).

Dr. Fisher testified that he performed an evaluation of Mr. Johnson. His evaluation consisted of personal interviews,

psychological testing, and records review. He saw Mr. Johnson on two separate occasions, interviewed his mother, aunt and brother. Dr. Fisher reviewed relevant records having a bearing on his opinions, including previous evaluations by other doctors, reports, depositions, testimony from 1981 and 1988, and a large amount of material on Paul's father Ommer Johnson (PC-R. 236-237)(Defense Exhibit 7). He also reviewed other testimony from trial, records of Paul Johnson's Polk County Hospital *Baker Act* admission in 1980, school records, police records concerning the offenses, and prison records. Dr. Fisher identified the materials reviewed and relied upon, and acknowledged that the materials were of the of the type routinely relied upon in making an evaluation (PC-R. 239)(See Defense Exhibit 10).

Dr. Fisher testified that in addition to interviewing Mr. Johnson and his family, he conducted a series of tests, neurological screenings, learned of Mr. Johnson's extensive developmental and neurological history, using portions of the *Halstead – Reitan Battery*, *Wechsler Adult Intelligence Scale*, *Bender Visual Motor Gestalt Test*, *House Tree Person*, cards from a Thematic Apperception Test, a Neurological History Questionnaire and series of questions to determine malingering and deception (PC-R. 240). Dr. Fisher found that Mr. Johnson was not malingering or being deceptive. He also discovered that doctors in the past who evaluated Mr. Johnson never addressed the issue of malingering and the one who did (Dr. McClane) said that Paul was not malingering (PC-R. 240-241).

None of the experts used at trial conducted the type of tests Dr. Fisher did and Dr. McClane performed a mental status related to only to memory. Dr. Fisher made primary findings that Mr. Johnson suffered at the time of the crime from both toxic psychosis **and** neurological damage (PC-R. 241-242). The two findings were based on at least four components, and he learned about Paul's earliest history from his aunt and mother, including his troubled birth and that Paul was left with his grandparents. Paul's developmental history was supported by records of Paul sniffing *Testers* glue and inhalants at sixteen to seventeen years of age which is linked in professional literature to be connected with a strong likelihood of brain damage. While incarcerated prior to the offenses, Paul sniffed furniture stripping agents contained in 55 gallon drums to the point where Paul would blackout. Dr. Fisher testified that neurological damage is expected from this continued pattern of abuse even taking into account the two year period while Paul was in California away from the setting of drug use. Dr. Fisher testified that Ommer's (Paul's father) history also included a long history of alcohol abuse, substance abuse and incarcerations (PC-R. 243-244).

Paul showed signs of neurological damage in the testing, in the *Bender Gestalt*. The problems were extensive, including sizing, completions, and in attempting to connect angles he persevered. On the *Wechsler Adult Intelligence Scale*, Paul scored disproportionately low on the digit symbol test which is indicative of neurological brain damage.

A blatant example was that when he first saw Paul in 1995 in the morning, left for lunch then returned, Paul could not remember his name. The same thing happened in Dr. Fisher's most recent visit and Paul could not remember his own mother's name. This was indicative of someone with significant intermediate and long-term problems (PC-R. 244-245).

Dr. Fisher testified that Paul abused significant amounts of drugs and admitted to his admission to Polk County Hospital in 1980 due to drug use. Paul was not someone who would just take cocaine, but specifically he inhaled glues, paint thinners, gas and paint strippers over a long period of time. Dr. Fisher testified that Paul suffered from toxic psychosis at time of crime and a psychotic break due to the different drugs ingested as well as misfiring of the brain (PC-R. 246).

Dr. Fisher's review of the background materials revealed that Dr. Muther (one of the experts used at trial) did not see or evaluate Mr. Johnson in person (PC-R. 247). Dr. Fisher explained Mr. Johnson's two year period in California as remission. He also explained that some children will suffer and others do not, despite having the same parents. Dr. Fisher testified that Paul was brain damaged to some degree by 1976 and that his good behavior was not inconsistent with brain damage. He further explained that Paul continued to deteriorate once he went back to drugs, and that nature versus nurture is also involved and explains why one son's behavior is one way and another son's behavior is different (PC-R. 250).

Dr. Fisher also found that Mr. Johnson was suffering from an extreme emotional or mental disturbance at the time of the crime based upon the screening showing neurological damage, that Paul suffered from toxic psychosis, and that Mr. Johnson's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the crime (PC-R. 251-252).

On cross examination, Dr. Fisher testified that he agreed with testimony given at trial that extreme mental or emotional disturbance existed, however the testimony was different. He also agreed that Paul suffered from toxic psychosis (PC-R. 252-253). Dr. Fisher however, found Paul's organic brain damage that the experts used and presented at trial never examined for or discovered (PC-R. 253). Dr. Fisher explained that Paul's abstinence from drug use for a two year period was not inconsistent with his findings (PC-R. 254).

James Leon Smith then returned and testified that after consulting with his attorney, he was willing to resume his testimony at the evidentiary hearing (PC-R. 261). Mr. Smith testified regarding his previous statements and testimony he gave at Mr. Johnson's trial and stated:

> It was true so far as to the fact that some of the things in there I was told specifically what to ask and -- by Detective Wilkerson.
>
> On a periodic basis I would see Mr. Wilkerson. He would come and call me down under the pretense of seeing a lawyer, and we would go into a little room on the first floor in the sheriff's department area and he

> would talk to me in there. And then I would go back up to the cell and ask questions that he would ask me to ask.

(PC-R. 261-262).

Mr. Smith was specifically asked if Mr. Johnson told him "I will just act crazy to beat the the charges" to which Mr. Smith answered "NO" (PC-R. 262). Mr. Smith also stated that Mr. Johnson did not make incriminating statements about the offenses:

> . . . Paul had some legal papers, a big stack of them, and between what Mr. Wilkerson would instruct me to ask and the legal papers is how most of the answers was determined.

(PC-R. 262).

Mr. Smith also testified that his previous testimony regarding police never having instructed him on getting the details from Mr. Johnson was not true:

> They instructed me that I wasn't to say that they asked me to say anything.

(PC-R. 263). Mr. Smith was asked to tell the lower court what the police did as far as giving him instructions to get Mr. Johnson to say incriminating statements and he answered:

> They was going to, supposedly, I thought, help me in Court with the custody of my three kids, and at a later time when I went to court they was going to speak on my behalf to --
> to the sentencing judge and see if there could be a reduction in my sentence.

(PC-R. 263-264).

Mr. Smith identified a letter he wrote to the state attorney on September 18, 1981 (received into evidence as Defense Exhibit 11) and explained:

> This letter was basically to see if Mr. Pickard was going to hold up his part of the deal.

(PC-R. 264). Mr. Smith also identified another letter (received into evidence as Defense exhibit 12) he wrote to Mr. Pickard "to see where he was standing and if he was, in fact, going to go before the judge on my behalf" (PC-R. 265). Mr. Smith then identified another letter (received into evidence as Defense Exhibit 15) he wrote to his sentencing judge at that time which was Judge Bentley - the judge presiding over the instant proceedings and the subject of this appeal[8] (PC-R. 265-266). Mr. Smith explained that the purpose of his letters to the state attorney was to see if the state attorney was going to speak to Judge Bentley on his behalf in exchange for his testimony against Mr. Johnson (PC-R. 266). Mr. Smith identified hand written notes (received into evidence as Defense Exhibit 6) he wrote while he was in the cell next to Mr. Johnson. Mr. Smith testified that he referred to these notes at Mr. Johnson's trial as merely a log of Mr. Johnson's statements to him and told the lower court:

> Like I stated previously, Mr. Wilkerson would tell me what to ask. And in between Mr. Wilkerson and the papers, we just wrote it down, Mr. Wilkerson told me to write it down because I couldn't remember everything that he was telling me to ask Mr. Johnson. So he come up with the idea that I needed to start writing and keeping notes.

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[8]Mr. Johnson filed a *Motion to Disqualify Judge* based upon this ground. Judge Bentley denied the motion. (PC-R. 889-890).

(PC-R. 267). Mr. Smith explained to the court what he did with Mr. Johnson's legal papers:

> I read them. Paul said he couldn't read real well. And we read them for -- it took a while to read them to him. We was pretty close, side-by-side, just a little steel wall separating us.

(PC-R. 269). Mr. Smith was reminded of his previous trial testimony against Mr. Johnson and asked "what is the truth?" Mr. Smith responded "I'm telling the truth now" when asked what is that truth he responded:

> The truth is exactly what I'm saying today. I was under extreme pressure from the detective that was speaking with me. And I was instructed very well not to say anything, that they was instructing me about what to say because the case would crumble. But today I'm telling the truth.

(PC-R. 269). Mr. Smith testified that he worked for Mr. Wilkerson in the past on arson cases wearing body wires (PC-R. 270). He identified a *Motion for Mitigation of Sentence* (received into evidence as Defense Exhibit No. 14) dated October 6, 1981 and stated that he was trying to get his sentence mitigated, that he also filed appeals, that he thought Mr. Pickard told him to file the motion to reduce his sentence and that Mr. Pickard would help him out. Smith testified that the *Motion to Mitigate Sentence* was denied (denial order received into evidence as Defense Exhibit No. 15) and that he went back into court. He identified Defense Exhibit 16, *Order Resetting Hearing* dated November 16, 1981 and Defense Exhibit No. 17 *Order Suspending Sentence* and remembered that his sentence was then

changed to probation as ordered by Judge Bentley on December 17, 1981 (PC-R. 275-276). Mr. Smith explained:

> I think I filed an appeal first and then I spoke with Mr. Pickard, and he said that -- anyway, one come before the other one and I had it wrong. And then when one was denied and the other one was denied, that's when I got hold of Mr. Pickard and told him that -- actually, I thought he was going to do something and he hadn't, and then I guess he took over from there.
>
> [Q]. And what was your understanding that the State was going to do for you in exchange for your testimony against Mr. Johnson?
>
> [A]. I would go back to court and try to get my sentence reduced.

(PC-R. 274-275).

Regarding Mr. Johnson's retrial, Mr. Smith testified that "I didn't want nothing else to do with the trial" (PC-R. 275). He identified a letter (entered into evidence as Defense Exhibit No. 18) dated July 7, 1987 that he wrote when he found out that he would be needed to testify against Mr. Johnson again:

> I had wrote back and told him that I didn't want nothing else to do with the trial and that I didn't want to testify.
> And he basically said that, you know, you're going to testify. We're going to writ you or whatever, bring you back, and you're going to testify whether you want to or not.

(PC-R. 275-276). Mr. Smith testified that he came forward at the evidentiary hearing because he did not want to carry his false trial testimony inside of him for the rest of his life and that he was testifying freely and voluntarily, and had nothing to gain by coming forward (PC-R. 276-277).

On cross-examination, Mr. Smith testified that he did not want to have any part of someone dying, that he had big reservations about testifying in 1988 as he wrote in his letter to the State Attorney, that he testified in 1987, that it was something that had to be done (PC-R. 278) and stated regarding his 1987 statements:

> I think that was after my conversation with the State Attorney Pickron (phonetic) or Lee Atkinson in a room right before I went into the trial. And I think I was versed pretty good before I went in there.
>
> [Q]. What are you talking about?
>
> [A]. Excuse me?
>
> [Q]. Tell me what you're claiming happened?
>
> [A]. Yeah, before I went into the courtroom the State Attorney had talked to me by myself out there, and he told me to carry on with the trial like I was supposed to, and I did.

(PC-R. 280).

Mr. Smith stated that he could not remember the exact words the State Attorney used, that he used drugs in the past, and that he did not have the same concerns in 1987 about testifying as he did at the evidentiary hearing because "a person changes a lot as they get older." (PC-R. 280-281). He testified that he did not know that Mr. Johnson had a death warrant signed against him in 1987 (PC-R. 281-282). He testified that he was rehearsed about his prior testimony (PC-R. 283), that he did not tell law enforcement that he had testified falsely, that the first person he told about his false trial testimony was his stepfather (PC-R.

284), that he did not tell Mr. Wilkerson or the State Attorney's office that it was false, and that he may have told his lawyer (PC-R. 286). He stated that he was not under prosecution at the time of the instant evidentiary hearing, that he did have charges pending against him during the time frame he previously testified against Mr. Johnson, that he testified in 1981, 1987 and 1988 that no one had made promises to him:

> . . . because I was specifically told that if I did say that anything was promised me or anything, that it could bring another trial and possibly no conviction.

(PC-R. 286-288), and "Before I went into the court he told me that I had to stick to exactly what I said." Smith testified that he previously testified that the police did not put him up to anything and that it was his idea to write things down. Regarding the fact that he was testifying at the evidentiary hearing that those statements were lies, he stated:

> There's just a point in your life that you've got to do what's right". . ."I guess I've carried it inside for a long time, for a lot of years.

(PC-R. 289). Mr. Smith testified:

> I wrote the information down -- like I was telling this lady over here a while ago, Mr. Wilkerson would ask me -- tell me things to ask him and I would ask him. And then when I read Paul's papers with Mr. Wilker --What Mr. Wilkerson said in the papers, I would write it down and give it to Mr. Wilkerson. About every two or three days he would come and get the papers and then he would tell me some other things to ask.

(PC-R. 290). Regarding where he got specific information, Mr. Smith stated he could not say exactly where he got each piece but that some of the information came from television newscasts (PC-R. 291), Paul's legal papers, Mr. Wilkerson, and Paul (PC-R. 294).

Mr. Smith testified that his trial testimony that Paul was concerned about his son and family was correct (PC-R. 293). Mr. Smith stated that Mr. Johnson did not give him a lot of details and could not recall if Mr. Johnson made admissions (PC-R. 294-295). He recalled that Mr. Wilkerson told him that Mr. Johnson shot a deputy with his own gun and "that he was pretty pissed off because he was -- seemed like, if I remember right, that he was hollering when we was in the attorney's booth down there." (PC-R. 296).

Mr. Smith testified that in the past he was concerned about being a snitch and suffered retaliation, that he was not concerned now and was "just trying to do the right thing." (PC-R. 298).

The State then announced for the first time that in response to Mr. Smith, they would call Mr. Hardy Pickard as witness. Mr. Pickard's name was not on the State's witness list. Collateral counsel objected, arguing that the State had known for over a year that Mr. Smith was going to be a witness and that the late notice was improper (PC-R. 300). The lower court overruled the objection, finding that Mr. Pickard would be proper "rebuttal" (PC-R. 300).

Mr. Johnson then called Dr. Roswell Lee Evans, Jr. Dr. Evans testified that he received a bachelor's degree in pharmacy from the *University of Georgia*, a Doctorate in pharmacy from the *University of Tennessee*, performed his residency at the *Medical University of South Carolina*, that he had been a faculty member at the *University of Tennessee*, *University of Missouri School of Pharmacy*, and in the Department of Psychiatry at the *Medical School of the University of Missouri*, developed a residency in fellowship training program for post doctoral psychopharmacy specialists, managed a clinical practice with psychiatric patients, taught psychiatric residents, assumed deanship at *Auburn University School of Pharmacy*, was a board certified pharmacotherapy specialist in psychiatry, and testified in courts of law in capital cases as an expert as a clinical psychopharmacy specialist (PC-R. 309-311). Dr. Evans was accepted as an expert in his field by the court (PC-R. 312). He explained his expertise as the behavioral aspects of drug therapy and behavioral aspects of people in relation to psychiatric illness (PC-R. 312). He testified that his field was set apart from psychology in that psychology focuses on behavior not necessarily associated with drug interaction, and that psychopharmacy is set apart from pharmocolgy in that pharmacology is a basic science usually done with something other than human models, and that psychiatry's primary focus is diagnostic and treatment, and that his specialty included aspects of illness and evaluation of the affects of drug therapy (PC-R. 312-313).

Dr. Evans testified that he evaluated Mr. Johnson, including interviews and review of records. Dr. Evans testified that he reviewed Defense Exhibit No. 10, and that it was the type of material reasonably relied upon in his field for conducting evaluations and forming opinions (PC-R. 314). Dr. Evans testified that it was his expert opinion within a reasonable degree of scientific certainty that Mr. Johnson was a life long substance abuser with intermittent periods of no abuse, that Mr. Johnson has significant brain damage, that he was acutely intoxicated at the time of the offenses to the point of drug-induced psychosis, that his intoxication had an affect on his ability to cooly reflect on his actions, and make reasonable judgments (PC-R. 315). Dr. Evans testified that the basis of his findings was that Mr. Johnson had a standing and progressing substance abuse history, using stimulants in combination with others substances such as marijuana and Quaaludes, and became characteristic of someone in the late phase of amphetamine or stimulant abuse. Dr. Fisher testified that Paul was at the height of substance abuse at the time of the offense, that the drugs perpetuate hostility, and that it is well known that amphetamines produce such hostility and violence. The evidence in Mr. Johnson's case supported his findings from eyewitness reports of Mr. Johnson's behavior (PC-R. 316).

Dr. Evans testified that the use of stimulants on a normal brain is that the user seeks euphoria and experiences a grandiose feeling and of being invincible, that the user will begin to

shoot the drug because of the tremendous rush, that as the dose increases the affects last for a very long time, and the person continues to repeat the use for the rush, that the typical dose of injected amphetamine would have a clinical affect for 12 to 24 hours, and as the person continues to use, they remain toxic. The drug is particularly reinforcing so that the behavioral affects are experienced for a very long time, during withdrawal depression and sleepiness sets in to the point of sleeping it off or seeking more of the drug, and that once someone begins to inject it may go on for several days or two weeks, and can continue toward death from pure exhaustion. (PC-R. 318). Dr. Evans testified that individuals lose perception of reality due to the intoxication, that they know they are seeking more of the drug but have no choice and their actions become involuntary because they must have more of the drug, he testified that their actions become very impulsive in order to replenish the drug and that their actions are not well thought out or planned (PC-R. 319). Dr. Evans testified that the violence aspect is impulsive, that something very trivial may set off the violent act and that the person becomes very paranoid (PC-R. 320).

Dr. Evans testified that the materials he reviewed and his own investigation revealed that Mr. Johnson was into a long bout of amphetamine use in a long strain. (PC-R. 320). Dr. Evans testified that Mr. Johnson was not very good in recalling his history due to his brain damage, and that he was of borderline

intelligence. He testified that amphetamines will have an enhanced affect due to the brain damage (PC-R. 321).

Dr. Evans testified that the fact that Mr. Johnson was a brain damaged individual using amphetamines was a significant factor that should have been considered before regarding mitigating circumstances and the inability to clearly form intent and doing something very impulsive as a result (PC-R. 321). Dr. Evans also testified that Mr. Johnson's situation was exacerbated by the fact that he used multiple drugs (PC-R. 322). Dr. Evans testified that Mr. Johnson was in the lower range of intelligence which also affected his coping skills (PC-R. 322). He testified that Mr. Johnson's school records were poor, with a possible indication of another disorder that went unnoticed. Dr. Evan's testified that it was his opinion that due to the drug-induced psychosis Paul was under extreme duress at the time of the offense and that he was not able at the time to conform his conduct to standards, that he was unable to control his behavior and that his ability to do so was substantially impaired (PC-R. 323-324).

On cross-examination, Dr. Evans testified that he did not disagree with the defense expert's trial testimony regarding intoxication, that Mr. Johnson's acts may have been purposeful but that he did not have the intent to kill (PC-R. 325-326).

On redirect, Dr. Evans explained that a purposeful act is not necessarily cognitively controlled, that the actor was driven by an impulse, not able to cooly reflect, that there is a

difference between purposeful behavior driven by intent and purposeful behavior driven by impulse, and the affects on a brain damaged individual are much more severe as with multiple substance abuse (PC-R. 327).

The defense rested (R. 328).

The State then called Lee Atkinson. Mr. Atkinson testified that he was a state attorney for Hillsborough county and prosecuted Mr. Johnson's case in 1987 and 1988. He handled the hearings on the defense *Motion to Suppress Statements* concerning James Leon Smith at trial (PC-R. 332-333). Mr. Atkinson testified that he spoke to Mr. Smith and that he provided Mr. Smith with copies of Smith's testimony given in 1981 and met with the investigator (PC-R. 335). Mr. Atkinson stated Smith's testimony was consistent and nothing was said to him that indicated Smith was given directions (PC-R. 335). He rejected using Brockelbank as a witness because he was not credible and stated that he talked to Smith about telling the truth, listening and understanding (PC-R. 337), that any deals would be disclosed (PC-R. 338) and told Smith that he did not need his testimony (PC-R. 339). Mr. Atkinson recalled that the defense had alleged that Smith was a plant and told what to say. He testified that he told Smith if that happened he needed to know (PC-R. 340).

Mr. Atkinson could not recall any correspondence or whether Mr. Smith expressed that he did not want to testify (PC-R. 341). He stated that he did not rehearse questions (PC-R. 342), that he had no hesitation of using Smith as a witness (PC-R. 343), stated

that other witnesses placed Mr. Johnson as the murderer (PC-R. 343) that Mr. Johnson's wife's story lacked common sense (PC-R. 344) and that the case did not rest upon Smith (PC-R. 344)

Mr. Atkinson testified that the new testimony about Paul being loving would not have affected the case (PC-R. 344) and would have helped his case because it contradicted the defense experts (PC-R. 344 345).

The State's approach against the insanity defense was that Mr. Johnson was making cognitive choices (PC-R. 345) and that a brain disorder would have had no impact because as to insanity one looks at the behavior itself and that opinions of experts almost always can demonstrate that the behavior is inconsistent with the defense expert's opinions (PC-R. 346). He stated this happened in this case (PC-R. 346).

On cross examination, Mr. Atkinson acknowledged that he was not involved in Mr. Johnson's case in 1981, had no dealings with Smith in 1981, and did not review his file in order to recall his role in Mr. Johnson's trial (PC-R. 347).

Mr. Atkinson did not recall Smith having reservations about testifying in 1987 and 1988 (PC-R. 348). Mr. Atkinson was shown Defense Exhibit No. 18, recognized his signature on a letter to Mr. Smith telling him he must testify (PC-R. 349). Mr. Atkinson then read his own letter:

> While I understand and appreciate your position, the State of Florida cannot and will not accept your refusal to assist in convicting a triple murderer who killed a policeman.

(PC-R. 349). After reading the letter, Mr. Atkinson admitted that Smith must have had reluctance about testifying (PC-R. 349). Despite his faulty recollection, Mr. Atkinson stated Smith never told him that he did not want to testify on the grounds that what he said was not true (PC-R. 350). He stated he made it clear to Smith before the 1987 suppression hearing that if it was not the truth he would not prosecute him for lying (PC-R. 351), that he was not giving him legal advice, but advised him that if he showed up 10 years later that he would be prosecuted for perjury (PC-R. 352) because once he said he lied, both statements could not be true (PC-R. 352).

Mr. Atkinson deemed this information important but did not document his file about it and could not say what other important things he did not document his file with. He stated that did not normally make notes to the file about conversations with witnesses (PC-R. 352). Mr. Atkinson admitted he was not involved with Mr. Wilkerson at all in 1981 or the dealings he had with Smith (PC-R. 352).

On redirect, Mr. Atkinson reviewed other documents of his communication with Smith. He stated that Defense Exhibit No. 18, and the July, 1987 letter were generated before he ever met with Smith. Atkinson stated that Smith said he had general concerns about being a witness because he was incarcerated (PC-R. 354). Smith did not say he would not cooperate (PC-R. 355).

The State then presented Hardy Pickard, assistant state attorney in Polk county, who prosecuted Mr. Johnson in 1981. He

interacted with Smith. Mr. Pickard reviewed Defense Exhibit No. 5, (Mr. Pickard's letter written to Mr. Johnson's trial attorney) purporting to reveal any agreements made with Smith. Mr. Pickard had no recollection of any other agreements. Mr. Pickard testified that he had a very vague recollection regarding Smith's mitigation of sentence hearing (PC-R. 357). Mr. Pickard could not recall any other agreements not disclosed to defense (PC-R. 357) and stated he only told Smith to tell the truth (PC-R. 358).

Oral Closing arguments were made (PC-R. 360-381)

The lower court entered its order denying Mr. Johnson's post conviction motion on March 19, 1999. (PC-R. 919-935). This appeal follows.

SUMMARY OF ARGUMENT

Mr. Johnson was denied a full and fair evidentiary hearing based upon the fact that full disclosure of public records was denied him in violation of Chapter 119, Florida Statutes, the Florida Constitution, as well as due process and equal protection as guaranteed by the United States Constitution. He was also denied a full and fair hearing because Judge Bentley refused to recuse himself from Mr. Johnson's postconviction evidentiary hearing despite the fact that he was the judge who suspended the sentence of State witness James Leon Smith. Smith testified at trial against Mr. Johnson presenting unwarned statements allegedly made by Mr. Johnson in violation of his constitutional rights. Smith was a witness at the evidentiary hearing who recanted his testimony and offered evidence that he in fact was

coached by the state to elicit incriminating statements from Mr. Johnson and had an undisclosed deal with the State in exchange for his testimony against Mr. Johnson. Smith's undisclosed deal was relief from his sentence which Judge Bentley granted. Smith also testified that he lied at Mr. Johnson's trial.

Mr. Johnson's claims of Brady, Giglio and ineffective assistance of trial counsel at both the guilt and penalty phases of his capital trial and ineffective assistance of mental health experts were established at the evidentiary hearing. The lower court erred in denying Mr. Johnson's postconviction claims both factually and legally.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. JOHNSON'S CLAIM FOR DISCLOSURE OF PUBLIC RECORDS AS GUARANTEED BY CHAPTER 119 ET.SEQ., FLA. STATS. THEREBY DENYING HIM HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, CORRESPONDING LAW AND PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION UNDER LAW.

Mr. Johnson made timely requests for the disclosure of public records pursuant to chapter 119 et. seq., Fla. Stats. and filed *Motions to Compel Disclosure* (PC-R. 17-23; 24-30). The lower court held hearings on this issue,[9] entered orders for some disclosure (PC-R. 31-34; 57-64) and ultimately entered an order denying further disclosure (PC-R. 118-121).

[9] These proceedings were held by Judge Doyle.

Mr. Johnson's postconviction motion presented a claim regarding state agency non-compliance with public records law. Judge Bentley denied this claim (PC-R. 449). This was error.

The Lower Court Erred in Denying Mr. Johnson's Request for Disclosure of Public Records Known and Proven to Exist.

Postconviction counsel informed the lower court that she believed that certain public records had not been provided even though they had been requested. In particular, counsel informed the lower court during the public records hearing held May 31, 1996 that the Hillsborough County State Attorney's file was missing material generated by prosecutor Lee Atkinson (Supp. PC-R. 111)[10]. The attorney general revealed at this hearing that she believed assistant state attorney Karen Cox was the individual in charge of homicide files in the Hillsborough County State Attorney's Office (Supp. PC-R. 120).

At the July 16, 1996 hearing on public records, postconviction counsel informed the lower court that she obeyed the local rule requiring the judge to approve any subpoena duces tecum. The subpoena duces tecum for Karen Cox was *Federal Expressed* on July 9, 1996 and received by the clerk on July 10, 1996, it was put in the clerk's out-going box for service to be made by the Hillsborough County Sheriff's Department (Supp. PC-R. 174), Ms. Cox did not appear at the hearing. The lower court ruled that Mr. Johnson defaulted as to the subpoena.

[10] Mr. Johnson was originally prosecuted by Hardy Pickard. Lee Atkinson prosecuted the case in 1987 and 1988. The files provided to postconviction counsel did not include materials regarding the last prosecution.

On December 24, 1996 postconviction counsel filed a *Motion to Hold Proceedings in Abeyance and Memorandum In Support of Evidentiary Hearing on Defendant's Motion To Vacate Judgment of Conviction and Sentence of Death* (PC-R-288-293). This Motion was filed in order to comply with the lower court's order to submit memoranda regarding the need for an evidentiary hearing. The motion was also filed however, in order to receive an abeyance of the Huff hearing set for January 9, 1997 due to the fact that public records were produced on January 3. 1997. Counsel informed the lower court that she previously believed (and had told the court) that the State Attorney's Office for the Thirteenth Judicial Circuit had not complied with Florida public records law, that a subpoena duces tecum for Karen Cox, Assistant State Attorney for the Thirteenth Judicial Circuit, was filed in Polk County where the public records issues had been heard, that Ms. Cox did not appear at the hearing, that the previous judge had ruled that CCR had waived any right to further investigation for failure to timely and effectively serve the subpoena, that the subpoena had in fact been filed in Polk County since the local rule of court was applied requiring counsel to obtain the court's permission to issue such a subpoena and that according to the Polk County Clerk's office, the subpoena was forwarded to Hillsborough county for service.

Counsel informed the lower court that her belief that the state attorney files were not produced was in fact the case as those files (***original state attorney files***) were found in the

Attorney General's filing cabinets and that neither the State Attorney or the Attorney General informed postconviction counsel of the records.

Judge Bentley entered his *Order on Motion to Hold Proceedings in Abeyance* on December 31, 1996 (PC-R. 434-436) in which he allowed postconviction counsel to call Karen Cox as a witness at the January 9, Huff hearing.

At the Huff hearing, Karen Cox testified although her testimony was severely limited by Judge Bentley. During questioning by counsel, it became readily apparent that Ms. Cox was not the custodian of the State Attorney's records within the meaning of § 119.021, Florida Statutes. (Supp. Vol. III PC-R. 291-292)("I'm the correspondent, I don't know that I'm the custodian). In fact, Ms. Cox knew very little, if anything, about public records maintenance and procedure for the State Attorney's Office (Supp. Vol. III PC-R. 294)("There are procedures [for record keeping], but I don't know what they are").

During questioning by counsel, Ms. Cox admitted that files from her office regarding Mr. Johnson somehow came to rest in the files of the Attorney General. Despite attempts by counsel to determine how the files came to be transferred, however, Ms. Cox was unable to state how much material from the State Attorney was in the Attorney General's possession, and how the material got there (Supp Vol. III PC-R. 309)(Ms. Cox indicating no knowledge of how State Attorney files transferred to Attorney General). In

fact, Ms. Cox admitted that her office had no procedures for monitoring the whereabouts of public records in its control. (Supp Vol.III PC-R. 300)(stating that no procedures in place for tracking files that leave the office).

Because Ms. Cox was, by her own admissions, was not competent to testify to the public records issue in question, Mr. Johnson had no way to ascertain whether he had received all public records to which he is entitled from the State Attorney. Relevant follow-up was necessary to protect Mr. Johnson's rights to a fair post-conviction hearing. See, e.g., Holland v. State, 503 So.2d 1250, 1253 (Fla. 1987). Accordingly, counsel for Mr. Johnson filed a *Motion for Leave of Court to Conduct Depositions* (PC-R. 467-471). The motion requested the depositions because Ms. Cox could not provide counsel or the Court with relevant information in determining whether her office had complied with the public records requirements of Chapter 119, Florida Statutes. Mr. Johnson requested to take the depositions of the following persons:

a. Frankie Moore;[11]

b. Personal Secretary to Karen Cox;[12]

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[11] Frankie Moore is the secretary to the State Attorney for the Thirteenth Judicial Circuit. At the January 9 hearing, Ms. Cox indicated that she had discussions with Ms. Moore concerning public records relating to Paul Beasley Johnson (Supp. Vol. III PC-R. 302-303).

[12] Ms. Cox did not reveal the name of her personal secretary at the January 9 hearing; she did, however, indicate that she relied heavily on her secretary to conduct the search requested by Mr. Johnson (Supp. Vol III PC-R. 287).

c. Records Custodian for the Office of the State Attorney for the Thirteenth Judicial Circuit;

d. Records Custodian for the Office of the Attorney General; and

e. Personnel in charge of maintaining warehouse files for the Office of the State Attorney, Thirteenth Judicial Circuit.

All of these individuals possess information the discovery of which was necessary for a proper and timely resolution of the public records issues pending before Judge Bentley. It was error for him to deny the request. The lower court denied the motion ruling:

> It is within the court's inherent authority to allow limited discovery in a postconviction proceeding. *State v. Lewis*, 656 So.2d 1248 (Fla. 1994). upon a rule 3.850 motion which sets forth good reason, "the court may allow limited discovery into matters which are relevant and material, and where the discovery is permitted the court may place limitations on the sources and scope." *Lewis*, 656 So.2d at 1250. The court is satisfied that the public records issue has been fully explored.

(PC-R. 891). This was error. Postconviction counsel was requesting records pursuant to Chapter 119. The lower court's reliance upon State v. Lewis was misplaced and deprived Mr. Johnson of his right to access public records under Article 1, Section 24 of the Florida Constitution and Chapter 119 et seq. Fla. Stats.

Mr. Johnson diligently pursued the requested records from the State Attorney. In July 1996, the lower court found that the

State Attorney had disclosed all public records in compliance with Chapter 119, Florida Statutes, despite counsel's contention to the contrary. Of course, counsel's position was proven correct.

Because of the ongoing nature of investigation, counsel for Mr. Johnson was unable to plead new claims until completion of the investigation. The disclosure of records three days before the Huff hearing and the twenty days in which to review those records prejudiced Mr. Johnson and was unsupported by applicable law. The time allotted by Judge Bentley was insufficient to conduct a proper review and investigation.

This Court has allowed capital, post-conviction petitioners 60 days from date of a finding of public records compliance or 60 days from judge's order finding that no public records requests remain unfulfilled to file amended Fla.R.Crim.P. 3.850 motion. See Ventura v. State, 673 So.2d 479 (Fla. 1996). See also, Provenzano v. State, 616 So.2d 428 (Fla. 1993)(affording capital, post-conviction petitioner 60 days from disclosure of State Attorney's file to submit new Fla.R.Crim.P. 3.850 motion asserting any Brady claims arising from the file); Jennings v. State, 591 So.2d 911 (Fla. 1991)(holding that capital, post-conviction petitioner entitled to 60 days from the receipt of State Attorney records in which to amend Fla.R.Crim.P. 3.850 motion).

Access to Attorney General files was prohibited until October, 1995. In October 1995, Assistant Attorney General

Richard Martell then established a schedule for counsel to review public record files in possession of the Attorney General's Office (CCR's Exhibit #1, See, Supp. Vol. III PC-R. 269). This schedule provided for the review of approximately 120 cases. Records were to be reviewed in such a manner so that older cases and warrant cases would be reviewed first. Under Fla.R.Crim.P. 3.850(b), Mr. Johnson was entitled two years to review the files and submit a Motion to Vacate. Mr. Johnson's conviction and sentence were final before January 1, 1994, when Fla.R.Crim.P. 3.850 was amended. See Bolender v. State, 658 So.2d 82 (Fla.), cert. denied, 116 S.Ct. 12 (1995)(recognizing one-year time limitation in Fla.R.Crim.P. 3.850(b), but giving defendant benefit of earlier two-year period that would have applied within which to file an otherwise time-barred claim). But see Mills v. State, 684 So. 2d 801 (Fla. 1996)(indicating that amended version of 3.850(b) applies to defendant who otherwise would have had two years to file claim based on newly-discovered evidence).

Additionally, it is unclear when the State Attorney files were transferred to the Attorney General's Office. The Huff hearing did not reveal any specific date, but clearly, when Mr. Johnson's investigator reviewed the Attorney General files in December 1996, the State Attorney files were there. Thus the lower court could not conclude based on the record in the case that the files in question were in the possession of the Attorney

General prior to December 1996.[13] Therefore, the lower court's assumption that if postconviction counsel would have reviewed the Attorney General files earlier the state attorney files therein would have been discovered, is a fiction. Moreover, the lower court's ruling encourages agencies to act in bad faith by transferring files among agencies, playing a shell game and then holding a requester of records at fault for not finding the records earlier. Such conduct would be unconscionable and in Mr. Johnson's case, a life or death matter.

State Attorney's have an ongoing duty under Chapter 119 to disclose public records in its possession. The agency could not avoid its obligations by somehow transferring its files to another state agency. See Tober v. Sanchez, 417 So.2d 1053, 1054 (Fla. 3d DCA 1982), review denied sub nom., Metropolitan Dade County Transit Agency v. Sanchez, 426 So.2d 27 (Fla. 1983)(holding that official charged with maintenance of public records may not transfer actual physical custody of records to county attorney and thereby avoid compliance with request for inspection under Chapter 119). The lower court's ruling that the public records issue regarding the State Attorney was closed constitutes an open invitation to state agencies to give public records to the custody of a third party until compliance is found, thereby avoiding disclosure. This notion thwarts both the

[13]At the January 9 hearing, Assistant Attorney General Candance Sabella argued that she looked at the files in her possession for the first time in October 1996. (Supp. Vol III PC-R. 246).

letter and intent of Chapter 119. See §§ 119.01, 119.021, Fla. Stat. (1996). See also Barfield v. Ft. Lauderdale Police Dep't, 639 So.2d 1012, 1014 (Fla. 4th DCA 1994)(holding that in light of policy underlying Chapter 119, "the Act is to be construed liberally in favor of openness"); Housing Authority v. Gomillion, 639 So.2d 117, 121 (Fla. 5th DCA 1994)(holding that public records should be accessible); Tribune Co. v. Public Records, 493 So.2d 480, 483 (Fla. 2d DCA 1986)(holding that public records law favors liberal construction).

The lower court gave counsel for Mr. Johnson only twenty days in which to review the disclosed records and to provide the court with 1) a list detailing the new matters discovered as a result of the new documents, 2) a memorandum detailing the relevance of the new matters, 3) a copy of any newly discovered document that supports the new matters and 4) a proposed amendment to the rule 3.850 motion filed September 1996. The time allowed by the lower court was inadequate and contrary to applicable law. See Ventura v. State, 673 So.2d 479 (Fla. 1996). See also, Provenzano v. State, 616 So.2d 428 (Fla. 1993)(affording capital, post-conviction petitioner 60 days from disclosure of State Attorney's file to submit new Fla.R.Crim.P. 3.850 motion asserting any Brady claims arising from the file); Jennings v. State, 591 So.2d 911 (Fla. 1991)(holding that post-conviction, capital petitioner entitled to 60 days from the receipt of State Attorney records in which to amend Fla.R.Crim.P. 3.850 motion). Mr. Johnson was denied due process, equal

protection as well as the effective assistance of post-conviction counsel to which he is entitled. See Spaziano v. State, 660 So. 2d 1363, 1370 (Fla. 1995); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988).

Failure to disclose material in possession of the prosecutor violates basic due process. See Kyles v. Whitley, ____ U.S. ____, 115 S.Ct. 1555, 1565 (1995)(capital case holding that suppression by [the State] of evidence favorable to [a defendant] "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution")(quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). See also State v. Gunsby, 670 So.2d 920, 924 (Fla. 1996)(granting capitally-sentenced post-conviction petitioner a new trial because evidence about key prosecution witnesses discovered in State Attorney file by post-conviction counsel established that trial counsel rendered ineffective assistance); Roman v. State, 528 So.2d 1169, 1171 (Fla. 1988)(awarding capitally-sentenced post-conviction petitioner a new trial because State failed to disclose witness' prior inconsistent statement regarding defendant's state of intoxication at time of offense).

Moreover review of the records that counsel was able to perform revealed that all records had still not been provided. For example, the new records contained very few items generated by Julia Hyman. Ms. Hyman assisted in the prosecution of Mr. Johnson and questioned witnesses at Mr. Johnson's trial.

Records generated by Ms. Hyman that should and routinely exist were not provided. The records also made reference to interviews of witnesses. Documents regarding these interviews had not been provided. Several documents referred to attachments and/or enclosures which had not been provided. Furthermore, material was apparently taken to the State Attorney's Office in Bartow, Florida. Moreover, throughout the two boxes of material turned over late, blank pages appeared with numbering on the bottom.

At the January 9, 1997 hearing, the Attorney General's Office submitted material for an in camera review of items it claimed were exempt. Judge Bentley conducted an in camera review and determined the records were exempt. This was error. Many of the blank pages appeared to pertain to James Leon Smith, the jailhouse informant who testified against Mr. Johnson. The lower court prevented Mr. Johnson from receiving the public materials to which he was entitled.

Postconviction litigation is governed by principles of due process. See Holland v. State, 503 So. 2d 1250 (Fla. 1987). The lower court's ruling prejudiced Mr. Johnson by denying him a full, fair and impartial tribunal as the next argument demonstrates.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. JOHNSON'S MOTION TO DISQUALIFY JUDGE THEREBY DENYING MR. JOHNSON HIS RIGHT TO A FULL AND FAIR HEARING AND HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

Mr. Johnson timely filed a *Motion to Disqualify Judge* in the lower court (PC-R. 455-463). Mr. Johnson's postconviction motion presented the issue that the State used jailhouse informant James Leon Smith to obtain statements from Mr. Johnson in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, and that the State presented false and misleading evidence including Smith's testimony. Legally sufficient grounds were plead in the *Motion to Disqualify* (PC-R. 455- 463) that matters existed from which Mr. Johnson reasonably questioned Judge Bentley's impartiality. Chastine v. Broome, 629 So. 2d 294 (Fla. 4th DCA 1993). Due to the late disclosure of public records that had been previously requested but not provided, postconviction counsel learned that Judge Bentley sentenced Smith regarding the same matter that Mr. Johnson was to present evidence at the evidentiary hearing of the State's undisclosed agreements with Smith in exchange for his testimony against Mr. Johnson.

Mr. Johnson filed a *Motion to Disqualify Judge* (PC-R. 455-463) requesting Judge Bentley to recuse himself based upon the fact that Judge Bentley sentenced James Leon Smith in connection with the bargain Smith had with the State in exchange for Smith's

testimony against Mr. Johnson. Judge Bentley denied the *Motion to Disqualify Judge* on January 31, 1999 (PC-R. 889-890) this was error.

Smith's Motion to Mitigate Sentence was originally denied on October 6, 1981 (See, Defense Exhibit # 15) then reset by Judge Bentley's Order dated November 16, 1981 (See, Defense Exhibit # 16) after communication from Smith to the prosecutor in Mr. Johnson's case and communication from the prosecutor to Judge Bentley. Judge Bentley then entered an order Suspending Smith's sentence from seven years to probation on December 17, 1981. (See, Defense Exhibit # 17).

At trial Smith testified that Mr. Johnson made incriminating statements to him and that he did not have a deal with the state. He testified that he had been in the Polk County jail for approximately three months with Mr. Johnson, that he approached the State first on his own initiative and was not influenced by the State. Smith had been given a prison sentence for grand theft and was awaiting a probation violation charge that was postponed during the time he was in the Polk County Jail. Initially, Smith was not in a cell near Mr. Johnson. Smith was then approached by law enforcement and moved closer to Mr. Johnson on two occasions. While Smith was in jail, he filed a *Motion to Mitigate Sentence* (filed October 6, 1981)[14] that was

[14] Smith's *Motion to Mitigate Sentence* was never introduced at trial. It was discovered through late disclosure of previous postconviction public records demands and can be found at PC-R. 708. Interestingly, the document immediately following Smith's *Motion to Mitigate Sentence* was redacted, left blank and labeled

initially denied (See Defense Exhibit 15) on October 6, 1981[15] He wrote a letter to the State Attorney complaining that he had not been treated properly after providing the State with assistance. Smith's *Motion to Mitigate Sentence* was then reset and granted.[16] Smith was released from prison after serving seven months of a seven year sentence, the charges were vacated and he was placed on probation. Not until the late disclosure of public records material was it learned that in fact, Judge Bentley was the judge who initially denied Smith's motion and then reset the matter and granted it.

The basis behind judicial disqualification emanates from the directive to the Judicial Canons that a judge must avoid even the appearance of impropriety, which includes having personal, prior knowledge of the case at hand:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.

"9a" (See, PC-R. 709). Mr. Johnson was never given an opportunity to fully litigate the withholding of this document as well as many others.

[15] Judge Bentley's order was not previously disclosed and can be found at PC-R. 713. Again, the document immediately following this order was redacted, labeled "9j" and never provided to postconviction counsel (PC-R. 714).

[16] The Order was not previously disclosed until January 3, 1997 and can be found at PC-R. 717. Again, the documents immediately following the order was withheld labeled "9l" and "9m" and never provided to postconviction counsel (PC-R. 718).

Fla. Code Jud. Conduct, Cannon 3E(1)(a).

Canon 3E(1) requires a judge to sua sponte disqualify himself if his impartiality might reasonably be questioned. The Commentary to #E(1) provides: "a judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." See also Porter v. Singletary, 49 F. 3d 1483, 1489 (11th Cir. 1995)(holding that failure to disclose information potentially relevant to issue of disqualification constitutes grounds for disqualification). Judge Bentley **never** disclosed the fact that he sentenced Smith, nor did he acknowledge it even after it was brought to his attention. In capital cases, the trial judge:

> "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter.

Chastine, Id.

Mr. Johnson's motion was legally sufficient because Judge Bentley's action in previous proceedings directly related to his postconviction claims and fully supported Mr. Johnson's fear of prejudice. See, e.g., Fischer v. Knuck, 497 So. 2d 240 (Fla. 1986); Feuerman v. Overby, 638 So. 2d 179 (Fla. 3d DCA 1994).

The United States Supreme Court recognized the basic constitutional precept of a neutral, detached judiciary:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in

> both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Phiphus*, 435 U.S. 247, 259-262, 266-267, 98 S.Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 252, (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319, 344, 96 S.Ct.893,907, 47 L.Ed.2d 18 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951)(Frankfurter, J. Concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). See also Porter v. Singletary, 49 F. 3d at 1487-88 ("The law is well-established that a fundamental tenet of due process is a fair and impartial tribunal"). Due process guarantees the right to a neutral, detached judiciary "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Phipus, 425 U.S. 247, 262 (1978). The United States Supreme Court also explained that in deciding whether a particular judge cannot preside over a litigant's trial:

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

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

A judge must avoid even the appearance of impropriety:

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

> *Aguiar v. Chappell*, 344 So.2d 925 (Fla. 3d DCA 1977).

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

Judge Bentley denied Mr. Johnson's *Motion To Disqualify Judge*:

> . . . accepting the facts alleged in the motion as being true. However, the motion is legally insufficient to merit relief. The court finds that the facts alleged would not prompt a reasonably prudent person to have a well grounded fear that he or she would not receive a fair hearing before the undersigned. *See, Thunderbird, LTD v. Great American Insurance Company*, 566 So.2d 1296 (Fla. ist DCA 1990).

(PC-R. 889-890).

Denial of Mr. Johnson's *Motion to Disqualify Judge* was reversible error. Judge Bentley's reliance on *Thunderbird LTD v. Great American Insurance Company* is inapplicable. *Thunderbird* dealt with a creditor foreclosing to recover on a guaranty in which a motion to disqualify was filed based upon the trial judge's *ex parte* communication with the receiver. The motion expressed concern that the *ex parte* communication with the receiver might make the judge incapable of objectively establishing the value of the property. Thunderbird LTD v. American Insurance Company, 566 So. 2d 1296, 1303 (Fla. 1st DCA 1990). In contrast, Mr. Johnson's case presents a situation where Judge Bentley was a player regarding Smith's undisclosed deal with the State. He was a potential witness, an issue the *Thunderbird* case did not present. Moreover, this is a death case in which Judge Bentley should have been especially sensitive to

as to the basis of the fear. Chastine v. Broome, Id. at 294. The application of *Thunderbird*, a foreclosure action, to Mr. Johnson's death case can hardly be said to be "especially sensitive". Moreover, Mr. Johnson's case was in a posture where he was to present evidence and prove his postconviction claims at an evidentiary hearing. The postconviction claims consisted of factual matters in dispute regarding in part, the mitigation of Smith's sentence and whether Smith received this undisclosed benefit from the State in exchange for his testimony at trial against Mr. Johnson.

Judge Bentely's *Order on [Smith's] Motion To Mitigate Sentence* states in part:

> The court has now received a letter from the office of the State Attorney and feels that a hearing should be granted in this matter
> . . . .

(PC-R. 717)[17]

Judge Bentley's *Order Suspending Sentence* for Mr. Smith was entered December 17, 1981 (PC-R. 720)[18].

At the January 9, 1997 hearing, the State provided documents for Judge Bentley's in camera inspection. As noted through the footnotes in this argument, a substantial amount of that material is likely to have related to James Leon Smith's deal with the State. Mr. Johnson was entitled to have this material inspected

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[17]The document immediately following this order has also been redacted labeled "9l and 9m" and never disclosed (PC-R. 718-719).

[18] The document immediately following this Order has been redacted, labeled "9n", and never disclosed (PC-R. 721).

by an impartial judge. It was not. Moreover, Mr. Johnson was entitled to have his evidentiary hearing held before a full and fair tribunal. It was not

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. JOHNSON'S CLAIM THAT BRADY AND GIGLIO ERROR OCCURRED AND THAT TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF MR. JOHNSON'S CAPITAL TRIAL THEREBY DENYING HIM HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

As to Claim VIII, the lower court denied relief regarding jailhouse informant Smith. As demonstrated in Argument II, this ruling and Judge Bentley's findings are suspect and denied Mr. Johnson a full and fair evidentiary hearing. This is especially so given the fact that Judge Bentley suspended Smith's sentence to probation after first denying Smith's *Motion to Mitigate Sentence* after communication between the State and Judge Bentley occurred, and after communication between Smith and the State occurred during that time regarding Smith's testimony against Mr. Johnson. The lower court also failed to properly and fully analyze the claims under Brady and Giglio and Mr. Johnson's allegation that the State violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by its unconstitutional use of a jailhouse informant to elicit statements from Mr. Johnson[19]. United States v. Henry, 447 U.S. 264 (1980).

[19]The lower court erroneously summarily denied this claim.

Furthermore, Judge Bentley's findings are not supported by competent and substantial evidence. For example, Judge Bentley found in part that Smith answered "leading questions of collateral counsel". However the record demonstrates that leading questions were used to lay a predicate for Smith's substantive testimony.

The record demonstrates that Smith used his own vernacular on both direct and cross examination to describe his false trial testimony, the State's role in coaching his unwarned questioning of Mr. Johnson, communication with the State during Mr. Johnson's trial, and his conscience regarding his false trial testimony:

> On a periodic basis I would see Mr. Wilkerson. He would come and call me down under the pretense of seeing a lawyer, and we would go into a little room on the first floor in the sheriff's department area and he would talk to me in there. And then I would go back up to the cell and ask questions that he would ask me to ask.

(PC-R. 261-262).

Mr. Smith was specifically asked if Mr. Johnson told him "I will just act crazy to beat the the charges" to which Mr. Smith answered "NO". Mr. Smith also stated that Mr. Johnson did not make incriminating statements about the offenses:

> . . . Paul had some legal papers, a big stack of them, and between what Mr. Wilkerson would instruct me to ask and the legal papers is how most of the answers was determined.

(PC-R. 262).

* * * *

> They instructed me that I wasn't to say that they asked me to say anything.

(PC-R. 263).

* * * *

> They was going to, supposedly, I thought, help me in Court with the custody of my three kids, and at a later time when I went to court they was going to speak on my behalf to --
> to the sentencing judge and see if there could be a reduction in my sentence.

(PC-R. 263-264).

Identifying a letter he wrote to the state attorney on September 18, 1981 (received into evidence as Defense Exhibit 11) Smith stated:

> This letter was basically to see if Mr. Pickard was going to hold up his part of the deal.

(PC-R. 264). Mr. Smith also identified another letter (received into evidence as Defense exhibit 12) he wrote to Mr. Pickard "to see where he was standing and if he was, in fact, going to go before the judge on my behalf" (PC-R. 265). Mr. Smith then identified another letter (received into evidence as Defense Exhibit 15) he wrote to his sentencing judge, Judge Bentley, (PC-R. 265-266). Mr. Smith explained that the purpose of his letters to the state attorney was to see if the state attorney was going to speak to Judge Bentley on his behalf in exchange for his testimony against Mr. Johnson (PC-R. 266). Mr. Smith identified hand written notes (received into evidence as Defense Exhibit 6) he wrote while he was in the cell next to Mr. Johnson. Mr. Smith testified that he referred to these notes at Mr. Johnson's trial

as merely a log of Mr. Johnson's statements to him and told the lower court:

> Like I stated previously, Mr. Wilkerson would tell me what to ask. And in between Mr. Wilkerson and the papers, we just wrote it down, Mr. Wilkerson told me to write it down because I couldn't remember everything that he was telling me to ask Mr. Johnson. So he come up with the idea that I needed to start writing and keeping notes.

(PC-R. 267). Mr. Smith explained to the court what he did with Mr. Johnson's legal papers:

> I read them. Paul said he couldn't read real well. And we read them for -- it took a while to read them to him. We was pretty close, side-by-side, just a little steel wall separating us.

(PC-R. 269). Mr. Smith was reminded of his previous trial testimony against Mr. Johnson and asked "what is the truth?" Mr. Smith responded "I'm telling the truth now" when asked what is that truth he responded:

> The truth is exactly what I'm saying today. I was under extreme pressure from the detective that was speaking with me. And I was instructed very well not to say anything, that they was instructing me about what to say because the case would crumble. But today I'm telling the truth.

(PC-R. 269). He identified the *Motion for Mitigation of Sentence* (received into evidence as Defense Exhibit No. 14) dated October 6, 1981 and stated that he was trying to get his sentence mitigated, that he also filed appeals, that he thought Mr. Pickard told him to file the motion to reduce his sentence and that Mr. Pickard would help him out. Smith testified that the *Motion to Mitigate Sentence* was denied (denial order received

into evidence as Defense Exhibit No. 15) and that he went back into court. He identified Defense Exhibit 16, *Order Resetting Hearing* dated November 16, 1981 and Defense Exhibit No. 17 *Order Suspending Sentence* and remembered that his sentence was then changed to probation as ordered by Judge Bentley on December 17, 1981 (PC-R. 275-276). Mr. Smith explained:

> I think I filed an appeal first and then I spoke with Mr. Pickard, and he said that -- anyway, one come before the other one and I had it wrong. And then when one was denied and the other one was denied, that's when I got hold of Mr. Pickard and told him that -- actually, I thought he was going to do something and he hadn't, and then I guess he took over from there.
>
> [Q]. And what was your understanding that the State was going to do for you in exchange for your testimony against Mr. Johnson?
>
> [A]. I would go back to court and try to get my sentence reduced.

(PC-R. 274-275).

Regarding Mr. Johnson's retrial, Mr. Smith testified that "I didn't want nothing else to do with the trial" (PC-R. 275). He identified a letter (entered into evidence as Defense Exhibit No. 18) dated July 7, 1987 that he wrote when he found out that he would be needed to testify against Mr. Johnson again:

> I had wrote back and told him that I didn't want nothing else to do with the trial and that I didn't want to testify.
> And he basically said that, you know, you're going to testify. We're going to writ you or whatever, bring you back, and you're going to testify whether you want to or not.

(PC-R. 275-276). Mr. Smith testified that he came forward at the evidentiary hearing because he did not want to carry his

false trial testimony inside of him for the rest of his life and that he was testifying freely and voluntarily, and had nothing to gain by coming forward (PC-R. 276-277).

Smith stated regarding his 1987 statements:

> I think that was after my conversation with the State Attorney Pickron (phonetic) or Lee Atkinson in a room right before I went into the trial. And I think I was versed pretty good before I went in there.
>
> [Q]. What are you talking about?
>
> [A]. Excuse me?
>
> [Q]. Tell me what you're claiming happened?
>
> [A]. Yeah, before I went into the courtroom the State Attorney had talked to me by myself out there, and he told me to carry on with the trial like I was supposed to, and I did.

(PC-R. 280).

Mr. Smith explained that he did not have the same concerns in 1987 about testifying as he did at the evidentiary hearing because "a person changes a lot as they get older." (PC-R. 280-281). He stated that the first person he told about his false trial testimony was his stepfather (PC-R. 284), He stated that he was not under prosecution at the time of the instant evidentiary hearing, that he did have charges pending against him during the time frame he previously testified against Mr. Johnson, that he testified in 1981, 1987 and 1988 that no one had made promises to him:

> . . . because I was specifically told that if I did say that anything was promised me or anything, that it could bring another trial and possibly no conviction.

(PC-R. 286-288), and "Before I went into the court he told me that I had to stick to exactly what I said." (PC-R.). Smith testified that he previously testified that the police did not put him up to anything and that it was his idea to write things down. Regarding the fact that he was testifying at the evidentiary hearing that those statements were lies, he stated:

> There's just a point in your life that you've got to do what's right". . ."I guess I've carried it inside for a long time, for a lot of years.

(PC-R. 289). Mr. Smith testified:

> I wrote the information down -- like I was telling this lady over here a while ago, Mr. Wilkerson would ask me -- tell me things to ask him and I would ask him. And then when I read Paul's papers with Mr. Wilker --What Mr. Wilkerson said in the papers, I would write it down and give it to Mr. Wilkerson. About every two or three days he would come and get the papers and then he would tell me some other things to ask.

(PC-R. 290). Regarding where he got specific information, Mr. Smith stated he could not say exactly where he got each piece but that some of the information came from television newscasts (PC-R. 291), Paul's legal papers, Mr. Wilkerson, and Paul (PC-R. 294).

Mr. Smith testified that his trial testimony that Paul was concerned about his son and family was correct (PC-R. 293). Mr. Smith stated that Mr. Johnson did not give him a lot of details and could not recall if Mr. Johnson made admissions (PC-R. 294-295). He recalled that Mr. Wilkerson told him that Mr. Johnson

shot a deputy with his own gun and "that he was pretty pissed off because he was -- seemed like, if I remember right, that he was hollering when we was in the attorney's booth down there." (PC-R. 296). Mr. Smith testified that in the past he was concerned about being a snitch and suffered retaliation, that he was not concerned now and was "just trying to do the right thing." (PC-R. 298).

Additionally, Judge Bentley remarked upon prosecutor's Atkinson and Pickard's testimony. Judge Bentley however, completely failed to acknowledge the proof entered into evidence of Smith's letters showing communication between Smith and the prosecutors and the fact that Smith expected help regarding his sentence in exchange for his testimony against Mr. Johnson. Judge Bentley also failed to consider the documentary evidence that showed that Smith in fact had his sentenced suspended which is evidence that Judge Bentley should have recused himself as argued in Argument II.

The evidence presented at the evidentiary hearing established Mr. Johnson's claims based upon Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972) and Strickland v. Washington, 468 U.S. 668 (1984). The lower court's ruling to the contrary was error.

Trial counsel rendered ineffective assistance of counsel in cross examining Smith at trial by opening door to damaging evidence which allowed the alleged statement that Mr. Johnson said he would "act crazy". The evidence presented at the

evidentiary hearing established that trial counsel had suffered the same ruling during the mistrial yet the comment came out again at Mr. Johnson's last trial. Given the theory of defense at trial of drug induced psychosis, this was unreasonable and denied Mr. Johnson the effective assistance of counsel to which he is entitled. Strickland.

As to Claim II regarding ineffective assistance in failing to ensure that the record on appeal was complete, the lower court found that trial counsel testified that he filed a motion to record all proceedings and believed that it was granted and all proceedings were recorded and that he did not read the entire transcript. The lower court found that there was no showing of deficient performance (PC-R. 922).

At the evidentiary hearing, Mr. Shearer testified that he thought the *Motion to Record All Proceedings* was granted but that he did not read the entire record on appeal so he could not say whether everything was included (PC-R. 100).

The files and record on appeal demonstrate that in fact, portions of the record were missing from Mr. Johnson's record on appeal. Specifically, discussions that occurred during bench conferences were not recorded. (R. 925, 938, 939, 954, 1020, etc.). Additionally, the trial judge's procedure for counsel to strike jurors required counsel to hand the judge slips of paper indicating challenges to prospective jurors[20]. This procedure

[20]See also Argument IV, regarding the lower court's summary denial of Mr. Johnson's claim that he was wrongfully denied additional peremptory challenges.

resulted in an incomplete record. As a result, the lower court was, and this Court is unable to determine whether Mr. Johnson's constitutional rights were violated. Mr. Johnson was not present at the bench conferences. He was denied his right to be involved in all critical stages of the proceeding. Postconviction counsel had no way of knowing what occurred during a critical phase of trial without a complete record. Mr. Johnson's former counsel did not read the entire record on appeal and therefore rendered ineffective assistance in failing to ensure that a proper record was provided to the court.

The lower court also erred in denying Mr. Johnson's claim that trial counsel was ineffective for failing to raise a voluntary intoxication claim. Evidence at the evidentiary hearing established that Mr. Norgard deferred to Mr. Shearer with regard to an intoxication defense (PC-R. 42) and that Mr. Shearer testified that he could not find anything in his notes to establish a strategic reason for not using a voluntary intoxication defense (PC-R. 89).

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. JOHNSON'S CLAIMS THAT TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE OF MR. JOHNSON'S CAPITAL TRIAL THEREBY DENYING HIM HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

The lower court's denial of Mr. Johnson's claim that trial counsel rendered ineffective assistance of counsel at the penalty phase was error. At the evidentiary hearing, trial counsel, Mr.

Shearer, testified that was responsible for preparation of mental health experts and family members at trial (PC-R. 45-47). He also testified that he called three family members during the penalty phase at trial including Mr. Johnson's Aunt and Uncle, Clora and Alcus Johnson (PC-R. 72-73). He testified that he did not call Jane Cormier (Mr. Johnson's mother) and that his efforts to reach her were through the public defender's investigator and Mr. Johnson. He testified that after reviewing his file, one unfruitful attempt at a phone call was made and that he was unaware whether other attempts were made, that his file did not document that further attempts were made, and that he had no strategic reason for not pursuing, finding, and developing information from Mr. Johnson's mother (PC-R. 73-72). He testified that if he had had evidence that Mr. Johnson's mother suffered extreme physical and emotional abuse while pregnant with Mr. Johnson, he would have presented it both at the guilt and penalty phases, including providing the information to mental health experts (PC-R. 76-77). He also testified that he would have used information that Mr. Johnson's mother did not want to have a child, her husband beat her weekly, knocked her unconscious, and that she abandoned Mr. Johnson when he was a child (PC-R. 77-78). He further testified that he would have used information that Mr. Johnson's mother could have testified to that Mr. Johnson was a dependable, loving and compassionate person while in California (PC-R. 78).

Mr. Shearer then reviewed mental health records, forensic and court related mental health records of Mr. Johnson's father, Ommer Johnson (PC-R. 79)(See Defense Exhibit No. 7). He testified that there was no attempt to secure those records at trial and that if there was evidence to show that Mr. Johnson's father had a history of mental health problems and alcohol abuse that he would certainly have wanted to know of it and use it (PC-R. 80).

Mr. Shearer also could not recall any efforts to locate Mr. Johnson's aunt, Joyce Kihs, and there was no strategic reason for not pursuing her as a witness (PC-R. 81-82). He further testified that he would have certainly used evidence that Ms. Kihs could have offered showing that Mr. Johnson's mother suffered extreme physical and mental abuse and sufferings as well as illnesses of Mr. Johnson as an infant child and beatings Mrs. Johnson received while pregnant with Paul (PC-R. 82-83).

No investigation was done to locate Mr. Johnson's brother, Steve Johnson, and there was no strategic reason for not doing so. Mr. Shearer would have used evidence that Steve Johnson could have presented that Mr. Johnson was a loving, dependable, compassionate person (PC-R. 83-84).

Mr. Shearer also testified that he did not recall any investigation being done to locate Joan Soileau and that he would have used evidence that she could have offered that Mr. Johnson was a loving dependable and compassionate person (PC-R. 85).

During the guilt phase of Mr. Johnson's trial, Mr. Shearer presented the testimony of Thomas McClain, psychiatrist, Walter Aifield, psychiatrist, and Thomas Muther, professor in toxicology. Mr. Shearer later testified that Dr. Muther never actually met with Mr. Johnson (PC-R. 91). He presented Dr. McClaine and Gary Ainesworth, psychiatrist (who testified for the State at guilt phase) during the penalty phase (PC-R. 87). The experts were not presented any of the evidence that he failed to develop (PC-R. 88).

None of the experts used at trial were a psychologist or an expert in psychopharmacology. The significance of the difference was established through the testimony of Dr. Fisher and Dr. Evans. It is clear that the experts relied upon at trial were not only uniformed, they were not the right type of experts to present the circumstances unique to Mr. Johnson and this case. Consequently the jury was left with the impression that Mr. Johnson did not have a legitimate mental disorder.

Unrebutted evidence presented at the evidentiary hearing in fact established that Mr. Johnson had brain damage at the time of the offense. All of this evidence should have been presented to the judge and jury charged with the responsibility of whether he should live or die. The evidence was readily available, yet defense counsel without a tactic or strategy, as irrefutably proven at the evidentiary hearing, failed to investigate its existence and present it. The trial court erred in completely failing to evaluate the testimony of Dr. Evans in his order

denying relief and failing to address the voluminous record support for Mr. Johnson's family history of mental illness. (See also Argument V). Additionally, contrary to the lower court's contention that "If one's own client cannot provide information on how to contact his own mother, counsel cannot be faulted" (*Order Denying Postconviction Relief* PC-R. 930) is error. Even a defendant's desire to not present any mitigation evidence does not terminate an attorney's constitutional duties during the penalty phase. See Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991); Deaton, 635 So. 2d at 7-9. Lawyers must not blindly follow the decisions of their clients because, while the decision to use mitigating evidence is the client's, "the lawyer first must evaluate potential avenues and advise the client of those offering potential merit." Blanco, 943 F.2d at 1502; see also Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986); Eutzy v. Dugger, 746 F. Supp. 1492, 1499 (N.D. Fla. 1989); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). Moreover, it was established at the evidentiary hearing that Mr. Johnson's mental disorder would have affected his ability to so inform his trial counsel. Mr. Johnson has established deficient performance under Strickland v. Washington, and this Court's precedent. The above identified acts or omissions of penalty phase counsel were deficient and outside the range of professionally competent assistance. See Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995).

The trial court also erred in denying Mr. Johnson's other allegations of ineffective assistance of counsel at penalty

phase. Mr. Shearer recalled that the aggravating factors of "committed for pecuniary gain" and in the commission of a robbery were given and that he had no strategic reason for not objecting to the doubling of these factors. Mr. Shearer also testified that he reviewed the State's penalty phase closing argument, that he did not make any objections to it, and that he had no strategic reason for not doing so (PC-R. 91-93). He testified that he filed a pretrial motion regarding the prosecutor's argument and that he felt this preserved the issue (PC-R. 93-94). Mr. Shearer testified that the prosecutor's arguments demanding a death recommendation, that death was the only sentence to give, measuring Mr. Johnson's life on a scale with the lives of the deceased -- that the deceased's lives were more precious -- were among the improper arguments the prosecutor made to which he did not object and had no strategic reason for not objecting (PC-R. 97-99).

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. JOHNSON'S CLAIM THAT HE WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANTS, ALL IN VIOLATION OF MR. JOHNSON'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant

to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert must also protect the client's rights, and the expert violates these rights when he or she fails to provide adequate assistance. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State. The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37. The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role,

> psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake, 105 S. Ct. at 1095 (citation omitted).

Accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly when they have suffered from head injury, drug addiction, and/or alcoholism.

In Mr. Johnson's case, it is clear that the experts relied upon at trial were not only uniformed (See Argument IV), they were not the right type of experts to present the circumstances unique to Mr. Johnson and this case. Consequently the jury was left with the impression that Mr. Johnson did not have a

legitimate mental disorder. Unrebutted evidence presented at the evidentiary hearing in fact established that Mr. Johnson had brain damage at the time of the offense.

This evidence should have been presented to the judge and jury charged with the responsibility of whether he should live or die. The evidence was readily available, yet defense counsel without a tactic or strategy, as irrefutably proven at the evidentiary hearing, failed to investigate its existence and present it.

Clear indicia of organic brain damage was available to defense counsel and the mental professionals that evaluated Mr. Johnson at the time of his trial. Despite the existence of this indicia, necessary neuropsychological testing that would have revealed this condition was proven at the evidentiary hearing to never have been performed on Mr. Johnson. Had appropriate mental health experts been provided with adequate materials with which to professionally assess this case, they could have testified to the existence of mitigating circumstances. Organic impairment combined with drug usage are the types of serious mental health disabilities from which a jury could determine that mitigation existed. However, the lower court completely dismissed organic brain damage as an important factor. This was error.

Appropriate mental health professionals could also have provided the jury with myriad nonstatutory mitigating circumstances regarding Mr. Johnson's mental health, drug

addiction and abusive childhood had they been provided the background material that existed. Evidence presented at the evidentiary hearing proved that Mr. Johnson has a family history of mental illness and that Paul's father suffered from mental illness. Trial counsel testified he had no strategic or tactical reason for not obtaining this evidence or giving it to the mental health experts. The lower court however, never addressed any of the voluminous materials submitted regarding Ommer Johnson's history of alcoholism and mental illness. This was error.

Trial counsel also failed to present an appropriate and qualified professional to testify to the effects of crystal methadrine upon a brain damaged individual. At trial a pharmacologist was presented. This was ineffective assistance of counsel in two respects 1) a psychopharmacologist is the more appropriate professional to testify regarding the effects of drug use upon an individual with organic brain damage and 2) the pharmacologist at trial was not given the proper background materials, including the fact that Mr. Johnson suffers from organic brain damage.

At the evidentiary hearing, Mr. Johnson presented the testimony of Dr. Roswell Lee Evans who was accepted by the court as an expert in clinical psychopharmacy (PC-R. 309-311). Trial counsel was ineffective for failing to use the right type of expert and had no strategic reason for failing to do so as proven at the evidentiary hearing.

Dr. Evans expertise focused on the behavioral aspects of drug therapy and behavioral aspects of people in relation to psychiatric illness (PC-R. 312). Significantly, he testified that his field was set apart from psychology in that psychology focuses on behavior not necessarily associated with drug interaction, and that psychopharmacy is set apart from pharmocolgy in that pharmacology is a basic science usually done with something other than human models, and that psychiatry's primary focus is diagnostic and treatment, and that his specialty included aspects of illness and evaluation of the affects of drug therapy (PC-R. 312-313). The experts used at trial accordingly, were not the proper experts to effectively explain to Mr. Johnson's jury the enhanced effect drug use has upon a brain damaged individual. Of course, Mr. Johnson's jury never even knew that Mr. Johnson was brain damaged to begin with.

Dr. Evans testified that it was his expert opinion within a reasonable degree of scientific certainty that Mr. Johnson was a life long substance abuser with intermittent periods of no abuse, that Mr. Johnson has significant brain damage, that he was acutely intoxicated at the time of the offenses to the point of drug-induced psychosis, that his intoxication had an affect on his ability to cooly reflect on his actions, and make reasonable judgments (PC-R. 315). Dr. Evans testified that the basis of his findings was that Mr. Johnson had a standing and progressing substance abuse history, using stimulants in combination with others substances such as marijuana and Quaaludes, and became

characteristic of someone in the late phase of amphetamine or stimulant abuse. Dr. Fisher testified that Paul was at the height of substance abuse at the time of the offense, that the drugs perpetuate hostility, and that it is well known that amphetamines produce such hostility and violence. The evidence in Mr. Johnson's case supported his findings from eyewitness reports of Mr. Johnson's behavior (PC-R. 316).

Dr. Evans testified that the use of stimulants on a normal brain is that the user seeks euphoria and experiences a grandiose feeling and of being invincible, that the user will begin to shoot the drug because of the tremendous rush, that as the dose increases the affects last for a very long time, and the person continues to repeat the use for the rush, that the typical dose of injected amphetamine would have a clinical affect for 12 to 24 hours, and as the person continues to use, they remain toxic. The drug is particularly reinforcing so that the behavioral affects are experienced for a very long time, during withdrawal depression and sleepiness sets in to the point of sleeping it off or seeking more of the drug, and that once someone begins to inject it may go on for several days or two weeks, and can continue toward death from pure exhaustion. (PC-R. 318). Dr. Evans testified that individuals lose perception of reality due to the intoxication, that they know they are seeking more of the drug but have no choice and their actions become involuntary because they must have more of the drug, he testified that their actions become very impulsive in order to replenish the drug and

that their actions are not well thought out or planned (PC-R. 319). Dr. Evans testified that the violence aspect is impulsive, that something very trivial may set off the violent act and that the person becomes very paranoid (PC-R. 320).

Dr. Evans testified that the materials he reviewed and his own investigation revealed that Mr. Johnson was into a long bout of amphetamine use in a long strain. (PC-R. 320). Dr. Evans testified that Mr. Johnson was not very good in recalling his history due to his brain damage, and that he was of borderline intelligence. He testified that amphetamines will have an enhanced affect due to the brain damage (PC-R. 321).

Dr. Evans testified that the fact that Mr. Johnson was a brain damaged individual using amphetamines was a significant factor that should have been considered before regarding mitigating circumstances and the inability to clearly form intent and doing something very impulsive as a result (PC-R. 321). Dr. Evans also testified that Mr. Johnson's situation was exacerbated by the fact that he used multiple drugs (PC-R. 322). Dr. Evans testified that Mr. Johnson was in the lower range of intelligence which also affected his coping skills (PC-R. 322). He testified that Mr. Johnson's school records were poor, with a possible indication of another disorder that went unnoticed. Dr. Evan's testified that it was his opinion that due to the drug-induced psychosis Paul was under extreme duress at the time of the offense and that he was not able at the time to conform his conduct to standards, that he was unable to control his behavior

and that his ability to do so was substantially impaired (PC-R. 323-324).

Incredibly, none of this evidence from Dr. Evans was addressed by the lower court. The lower court also failed to address the background materials submitted by collateral counsel regarding Mr. Johnson's father. These materials were never given to any of the experts used at trial nor as evidence to the sentencing jury. Trial counsel testified at the evidentiary hearing that he had no strategic reason for not doing so. Ommer Johnson, Paul's father was an alcoholic who was mentally unable to cope with the birth of a child. Ommer himself was diagnosed as an "imbecile" as early as 1943. (Defense Exhibit 10). Ommer Johnson was discharged from the Army in 1944 because he was declared "incompetent" due to "100 % mental retardation." His discharge from World War II service showed that he was mentally deficient with a mental age between 5-7 years of age. While he was in the service, he experienced a nervous breakdown and was in a wheelchair for three years.

The evidence introduced at the evidentiary hearing demonstrated that Mr. Johnson's constitutional right to the effective assistance of mental health experts was clearly violated. Ake v. Oklahoma.

ARGUMENT IV

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. JOHNSON'S MERITORIOUS CLAIMS. AS A RESULT, MR. JOHNSON HAS BEEN DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

The lower court erroneously denied Mr. Johnson an evidentiary hearing on claims I, II*, III, IV, VI, VII*, IX, XII, XIV, XVI, XVII, XVIII, XIX, XXI, XXIII, XXIV, XXV, and XXVI.[21] Mr. Johnson was 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 734, 735-37 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). Further, a court must "attach to its order the portion or portions of the record conclusively showing that a hearing is not required." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). The files and records in this case do not conclusively rebut Mr. Johnson's allegations. The lower court attached portions from the record, however they fail to conclusively demonstrate that Mr. Johnson is not entitled to relief.

Many of the lower court's findings were premised upon Torres-Arboleda, 636 So. 2d 1321 (Fla. 1994) for the proposition that "issues that could have been raised on direct appeal, but were not, are not cognizable through collateral attack."

Claim I (PC-R. 482) alleged that Mr. Johnson was denied access to the files and records pertaining to his case in the possession of state agencies, that the records were withheld in

[21] Claims delineated with "*" were given a hearing on the ineffective assistance of counsel portion of the claim only.

violation of Chapter 119, et. seq. Fla. Stat., due process and equal protection thereby denying his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding Florida Law. The lower court ruled "This issue has been litigated fully and all further relief is denied." (PC-R. 419). This was error. As demonstrated in Argument I above, Mr. Johnson established that public records remained outstanding despite the fact that requests for the records had been made.

The lower court's ruling prohibiting Mr. Johnson from receiving the records known to be undisclosed was error and prejudiced Mr. Johnson. Mr. Johnson requested an evidentiary hearing on the failure of state agencies to provide the requested public records. The lower court's ruling circumvented Mr. Johnson's right to prove his claim through evidentiary development. The files and records did not conclusively rebut Mr. Johnson's claim. To the contrary, the proceedings that were held regarding public records established that certain public records had not been disclosed (See Argument I).

Claim II (PC-R. 495) raised the fact that Mr. Johnson was denied a proper direct appeal due to omissions in the record thereby denying him his rights under the Sixth, Eighth and Fourteenth Amendments and article 5, section 3 (b) (1)of the Florida Constitution. The lower court ruled "The substantive complaint is not properly raised in a motion for postconviction relief. Additionally, the claim was raised on direct appeal and

decided adversely to the defendant." (PC-R. 450).[22] This was error. This ruling also prohibited Mr. Johnson from presenting his claim that he was wrongfully denied additional peremptory challenges.

Claim VII alleged that Mr. Johnson was denied a reliable sentencing when his jury was improperly instructed that one single act supported two separate aggravating factors (PC-R. 503). The lower court denied stating that on direct appeal, this Court struck the pecuniary gain aggravator as to Beasley and found that the error is only applicable to one of the three death sentences, and that this Court upheld the death sentence for Beasley (PC-R. 450). A hearing was allowed on the ineffective assistance portion of this claim. The lower court's ruling however, denied Mr. Johnson the opportunity to demonstrate through evidentiary development the effect the error had upon Mr. Johnson's sentencing jury. The files and records do not conclusively rebut the claim nor did the lower court attach any part of the record to the summary denial as required by law.

Claim XIV, alleged that the trial court rendered trial counsel ineffective by repeatedly interrupting counsel during jury selection (PC-R. 556), and was denied by the lower court [because it] "was raised on direct appeal and is inappropriately raised in a motion for postconviction relief: (PC-R. 451). Ineffective assistance of counsel claims are cognizable in Fla.

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[22] A hearing was allowed on the ineffective assistance of counsel portion of this claim.

R. Crim. P. 3.850 proceedings. Mr. Johnson properly plead ineffective assistance of counsel by virtue of the trial judge's interference with defense counsel. Therefore, Mr. Johnson was entitled to an evidentiary hearing on this issue for factual development. The lower court's summary denial was in error because 1) the claim is cognizable and appropriate in postconviction proceedings and 2) the lower court failed to attach any portion of the record that conclusively showed that Mr. Johnson was entitled to no relief. Lemon.

Claim XVI, denial of additional peremptory challenges (PC-R. 588) was denied "This is an issue for direct appeal" (PC-R. 452). The lower court's denial of Mr. Johnson's claim that the record on appeal was not complete served to prevent Mr. Johnson from establishing evidentiary development of this claim.

The lower court erroneously denied Mr. Johnson an evidentiary hearing his claims. Mr. Johnson was 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 734, 735-37 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). Further, a court must "attach to its order the portion or portions of the record conclusively showing that a hearing is not required." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). The files and records in

this case do not conclusively rebut Mr. Johnson's allegations.

ARGUMENT VII

THE LOWER COURT ERRED IN RULING VENUE WAS APPROPRIATE IN POLK, COUNTY FOR HEARING MR. JOHNSON'S POSTCONVICTION MOTION.

Mr. Johnson's convictions and sentence were entered in Alachua county due to excessive pre-trial publicity in his case at trial. Mr. Johnson initially filed his postconviction motion in Alachua county in accordance with Florida Rule Criminal Procedure 3.850. The State's motion to transfer the case back to Polk county was granted. Collateral counsel objected to the procedure employed to determine venue (PC-R. 11-12). As demonstrated in Argument II, Mr. Johnson was denied a fair tribunal in Polk County and was prejudiced as a result.

Venue in Polk County was error. Pursuant to Fla.R.Crim. P. 3.850 the proper venue was Alachua County.

ARGUMENT VII

THE LOWER COURT ERRED IN REFUSING TO CONSIDER MR. JOHNSON'S CLAIM THAT DUE TO THE CUMULATIVE ERROR IN MR. JOHNSON'S CASE HE WAS DENIED A FULL AND FAIR ADVERSARIAL TESTING IN BOTH THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL.

The lower court summarily denied Mr. Johnson's claim that the cumulative effect of the errors in his case denied him a full and fair adversarial testing in both the guilt and penalty phases of his capital trial. In summarily denying the claim, the lower court ruled:

> Claim XXVII alleges that all of the errors previously complained of entitled him to a new trial. The claim contains no independent

> grounds for relief. All of the issues raised therein will be addressed by other claims. Claim XXVII is insufficient to warrant further discussion or relief on its own.

(*Order Setting Grounds for Evidentiary Hearing* at PC-R. 453).

Judge Bentley's language is clear in the summary denial of this claim. He refused to conduct a cumulative analysis. This is contrary to governing law and was error.

Furthermore, Judge Bentley's *Order Denying Motion for Postconviction Relief* clearly demonstrates that in fact, Judge Bentley did not conduct the required cumulative analysis after all of the evidence was presented at the evidentiary hearing. Judge Bentley's language in this order denying the claim is a verbatim recitation of the language used in the summary denial of the claim. (Compare, PC-R. 453 and PC-R. 934).

It is abundantly clear from the lower court's language that it did not consider this claim as required to do under the law. Instead the lower court erroneously ruled that "there are no independent grounds for relief". The lower court misapprehended the meaning of a claim based upon cumulative error. The error is the effect of the combination of numerous errors which taken as a whole, denied Mr. Johnson an adversarial testing at his guilt and penalty phases.

The cumulative effects of the errors specified in this claim, based upon ineffective assistance of counsel, Brady violations, prosecutorial use of false, misleading, or perjured testimony, and/or newly discovered evidence, denied Mr. Johnson a full and fair adversarial testing at trial, both during

guilt/innocence and penalty; denied Mr. Johnson an accurate, particularized, and reliable sentencing; denied Mr. Johnson an effective and reliable appeal; and denied Mr. Johnson the possibility of meaningful review by this Court.

Under the circumstances of Mr. Johnson's case, this Court should remand the matter to the lower court for a full and fair postconviction evidentiary hearing to prove his claims and thereafter grant him a new trial and or sentencing. See, State v. Gunsby, 670 So. 2d 920, 923-924 (Fla. 1996); Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993) (the State "...may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts.")

The circuit court failed to consider the cumulative effect of all of the evidence adduced during postconviction that was not presented at Mr. Johnson's trial as required by Kyles v. Whitley, 115 S.Ct. 1555 (1995), and this Court's precedent. See Swafford v. State, 679 So.2d 736, 739 (Fla. 1996) (directing the circuit court to consider newly discovered evidence in conjunction with evidence introduced in the defendant's first 3.850 motion and the evidence presented at trial); In so doing, the court failed to give Mr. Johnson a full and fair evidentiary hearing on his Rule 3.850 motion. In State v. Gunsby, 670 So.2d 920 (Fla. 1996), this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violations, ineffective assistance of counsel in failing to discover evidence, and newly discovered evidence. Had the circuit court considered all of the

evidence presented by Mr. Johnson throughout his capital proceedings, it would have found that confidence in the outcome was undermined. See Gunsby; Swafford.

CONCLUSION

The evidence presented at Mr. Johnson's evidentiary hearing, (including live testimony and documentary evidence) established that State had an undisclosed deal with Mr. Smith, that Mr. Smith illegally elicited statements from Mr. Johnson, that Mr. Johnson's trial attorneys rendered ineffective assistance at both the guilt and penalty phases, and that he did not receive the effective assistance of mental health experts at trial to which he was entitled. Significant mental health issues relevant to both the guilt phase and mitigation was not presented at trial. These errors entitle Mr. Johnson to a new trial.

The lower court also failed to conduct a cumulative analysis of the errors in Mr. Johnson's case. Such an analysis is required.

At the very least, Mr. Johnson is entitled to have his case remanded to the lower court for a new evidentiary hearing to be presided over by a neutral and detached judge. Mr. Johnson established that he was denied a full and fair hearing by virtue of Judge Bentley's refusal to recuse himself despite the fact that he was intricately involved with Smith. Additionally, Mr. Johnson was denied the public records to which he was entitled and depend upon for a full and fair airing of his claims.

I HEREBY CERTIFY that a true copy of the foregoing motion

has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 28, 1999.

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