IN THE SUPREME COURT OF FLORIDA

PAUL BEASLEY JOHNSON

Appellant,

vs. **CASE NO. 90,743**

STATE OF FLORIDA,

Appellee.

_____/

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
Florida Bar No. 0445071
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO.:

TABLE OF CITATIONS. iii

CERTIFICATE OF TYPE SIZE AND STYLE viii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 5

SUMMARY OF THE ARGUMENT 34

ARGUMENT 36

ISSUE I 36

WHETHER THE LOWER COURT DENIED APPELLANT A FULL AND FAIR EVIDENTIARY HEARING ON HIS PUBLIC RECORDS REQUESTS AND WHETHER APPELLANT WAS DENIED ACCESS TO RELEVANT PUBLIC RECORDS.

ISSUE II 53

WHETHER 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.

ISSUE III 57

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

ISSUE IV 74

WHETHER THE LOWER COURT ABUSED HIS DISCRETION IN DENYING JOHNSON'S CLAIMS THAT TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE OF JOHNSON'S CAPITAL TRIAL.

ISSUE V 81

WHETHER LOWER COURT ERRED IN DENYING JOHNSON'S CLAIM UNDER AKE V. OKLAHOMA.

ISSUE VI 85

WHETHER THE LOWER COURT ERRED IN SUMMARILY DENYING CLAIMS WHICH THE COURT FOUND TO BE EITHER PROCEDURALLY BARRED, LEGALLY INSUFFICIENT OR CONCLUSIVELY REFUTED BY THE FILES AND RECORDS IN THE INSTANT CASE.

ISSUE VII 91

WHETHER THE LOWER COURT ERRED IN RULING THAT VENUE WAS APPROPRIATE IN POLK COUNTY FOR HEARING JOHNSON'S POST-CONVICTION MOTION.

ISSUE VIII 93

WHETHER THE LOWER COURT ERRED IN REFUSING TO CONSIDER JOHNSON'S CLAIM OF CUMULATIVE ERROR.

CONCLUSION 94

CERTIFICATE OF SERVICE 94

TABLE OF CITATIONS

Ake v. Oklahoma,
470 U.S. 68 (1985) 35, 81, 84

Alvord v. State,
396 So.2d 194 (Fla. 1981) 86

Anderson v. State,
627 So.2d 1170 (Fla.1993) 90

Blake v. Kemp,
758 F.2d 523 (11th Cir. 1985) 84

Blanco v. State,
507 So.2d 1377 (Fla. 1987) 86

Blanco v. State,
702 So.2d 1250 (Fla.1997) 65, 74

Brady v. Maryland,
373 U.S. 83, 83 S.Ct. 1194,
10 L.Ed.2d 215 (1963) 34, 57, 63, 65-67, 73

Bryan v. Dugger,
641 So.2d 61 (Fla.1994) 70

Buenoano v. State,
708 So.2d 941 (Fla. 1998) 49

Buford v. State,
492 So.2d 355 (Fla. 1986) 70, 73

Christopher v. State,
416 So.2d 450 (Fla. 1982) 86

Clark v. Dugger,
834 F.2d 1561 (11th Cir. 1987) 81

Correll v. State,
698 So.2d 522 (Fla.1997) 53

Diaz v. Dugger,
719 So.2d 865 (Fla. 1998) 90

Downs v. State,
24 Fla. Law Weekly S231 (Fla. May 20, 1999) 48, 49, 51

Dragovich v. State,
492 So.2d 350 (Fla.1986) 53, 54

Duest v. Dugger,
555 So.2d 849 (Fla. 1990) 66

Engle v. Dugger,
576 So.2d 696 (Fla. 1991) 54, 73

Ferguson v. State,
593 So.2d 508 (Fla.1992) 73, 77, 79, 84

Giglio v. United States,
405 U.S. 150, 92 S.Ct. 763,
31 L.Ed.2d 104 (1972) 64, 65, 67, 73

Gilliam v. State,
582 So.2d 610 (Fla.1991) 53

Green v. State,
538 So.2d 647 (Fla. 1991) 65

Grossman v. Dugger,
708 So.2d 249 (Fla. 1997) 74, 76

Haliburton v. Singletary,
691 So.2d 466 (Fla. 1997) 49

Harris v. Reed,
489 U.S. 255, 109 S. Ct. 1083,
103 L. Ed. 2d 308 (1989) 87

Hegwood v. State,
575 So.2d 170 (Fla.1991) 63

Henderson v. Dugger,
522 So.2d 835 (Fla.1988) 73

Jackson v. State,
599 So.2d 103 (Fla.1992) 53, 54

James v. State,
453 So.2d 786 (Fla. 1984) 66

Jennings v. State,
583 So.2d 316 (Fla. 1991) 86

Johnson v. Florida,
__ U.S. ___, 113 S.Ct. 2366,
124 L.Ed.2d 273 (1993) 4

Johnson v. Singletary,
695 So.2d 263 (Fla. 1996) 93

Johnson v. State,
438 So.2d 774 (Fla.1983),
cert. denied, 465 U.S. 1051,
104 S.Ct. 1329, 79 L.Ed.2d 724 (1984) 1, 9

Johnson v. State,
608 So.2d 4 (Fla. 1992) 4, 8, 71, 87, 91

Johnson v. State,
536 So.2d 1009 (Fla. 1988) 87

Johnson v. State,
593 So.2d 206 (Fla.),
cert. denied, ___ U.S. ___,
113 S. Ct. 119 (1992) 86

Johnson v. Wainwright,
498 So.2d 938 (Fla.1986),
cert. denied, 481 U.S. 1016,
107 S.Ct. 1894, 95 L.Ed.2d 500 (1987) 1

Lane v. State,
388 So.2d 1022 (Fla. 1980) 92

McCrae v. State,
437 So.2d 1388 (Fla. 1983) 86

Medina v. State,
573 So.2d 293 (Fla. 1990) 66, 86

Meeks v. State,
382 So.2d 673 (Fla. 1980) 86

Melendez v. State,
612 So.2d 1366 (Fla. 1992) 70

Melendez v. State,
718 So.2d 746 (Fla. 1998) 63, 65, 93

Mendyk v. State,
707 So.2d 320 (Fla. 1997) 48

Mills v. State,
684 So.2d 801 (Fla. 1996) 48

Provenzano v. Dugger,
561 So.2d 541 (Fla. 1990) 79, 80, 84

Ragsdale v. State,
720 So.2d 203 (Fla. 1998) 52, 56, 89

Raulerson v. State,
420 So.2d 517 (Fla. 1982) 86

Remeta v. Dugger,
622 So.2d 452 (Fla. 1993) 73

Rivera v. State,
717 So.2d 477 (Fla. 1998) 53, 54, 92

Roberts v. State,
568 So.2d 1255 (1990) 66, 86

Robinson v. State,
707 So.2d 688 (Fla. 1998) 49, 64, 65

Rolling v. State,
695 So.2d 278 (Fla. 1997) 92

Rutherford v. State,
24 Fla. L. Weekly S3 (Fla. 1998) 70

San Martin v. State,
705 So.2d 1337 (Fla. 1997) 91

Scott v. State,
717 So.2d 908 (Fla. 1998) 54

State v. Bolender,
503 So.2d 1247 (Fla.1987) 70

State v. Sireci,
502 So.2d 1221 (Fla. 1998) 84

State v. Spaziano,
692 So.2d 174 (Fla.1997) 65

Steinhorst v. State,
412 So.2d 332 (Fla. 1982) 91

Steinhorst v. State,
498 So.2d 414 (Fla.1986) 89

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984) 67, 68, 70-72, 76, 79, 83

Swafford v. Dugger,
569 So.2d 1264 (Fla. 1990) 86

Torres-Arboleda v. Dugger,
636 So.2d 1321 (Fla. 1994) 86

Tucker v. State,
417 So.2d 1006 (Fla.App. 3 Dist. 1982) 92

United States v. Meros,
866 F.2d 1304 (11th Cir.1989) 63

Wainwright v. Sykes,
433 U.S. 72, 97 S. Ct. 2497,
53 L. Ed. 2d 594 (1977) 87

Walton v. Dugger,
634 So.2d 1059 (Fla. 1993) 48

Walton v. State,
481 So.2d 1197 (Fla. 1985) 54

Wilisch v. Wilisch,
335 So.2d 861 (Fla. 3DCA, 1976) 54

Wilson v. Wainwright,
474 So.2d 1162 (Fla.1985) 70

OTHER AUTHORITIES

§119.011, Florida Statutes 51

§119.072, Florida Statutes 51

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE

Procedural History

In 1981 a jury convicted Johnson of three counts of first-degree murder, two counts of robbery, kidnapping, arson, and two counts of attempted first-degree murder. The trial court sentenced him to death, and this Court affirmed the convictions and sentences. Johnson v. State, 438 So.2d 774 (Fla.1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984). Johnson petitioned this Court for writ of habeas corpus and was granted a new trial based on his claim of ineffective assistance of appellate counsel for not challenging the trial court's allowing his jury to separate after it began deliberating his guilt or innocence. Johnson v. Wainwright, 498 So.2d 938 (Fla.1986), cert. denied, 481 U.S. 1016, 107 S.Ct. 1894, 95 L.Ed.2d 500 (1987). During Johnson's retrial in Polk County in October 1987, the judge granted Johnson's motion for mistrial based on juror misconduct. Johnson's motions to disqualify the trial judge and for a change of venue was granted and the case then proceeded to trial in Alachua County in April 1988 with a retired judge assigned to hear it.

The jury rejected Johnson's insanity defense and found him guilty as charged of three counts of first-degree murder, two counts of armed robbery, kidnapping, arson, and two counts of attempted first-degree murder. After a penalty phase hearing, the jury recommended that he be sentenced to death for each of the

murders. The trial court agreed with that recommendation and imposed three death sentences.

Johnson then took an appeal to this Court raising the following claims:

ISSUE I

THE TRIAL COURT ERRED BY STRIKING PROSPECTIVE JURORS DANIELS AND BLAKELY FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO HAVE INDIVIDUAL VOIR DIRE OF PROSPECTIVE JURORS WHO ADMITTED TO HAVING READ PREJUDICIAL PRETRIAL PUBLICITY.

ISSUE III

APPELLANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S REPEATED INTERJECTIONS AND REBUKES OF DEFENSE COUNSEL BEFORE THE JURY.

ISSUE IV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS WHICH WERE OBTAINED BY JAILHOUSE INFORMANT JAMES LEON SMITH IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

ISSUE V

THE TRIAL COURT ERRED BY ALLOWING STATE WITNESS JAMES SMITH TO TESTIFY ABOUT JOHNSON'S SPECULATION IF AN INSANITY DEFENSE WAS ACCEPTED BY THE JURY.

ISSUE VI

THE TRIAL COURT ERRED BY SUSTAINING THE STATE'S OBJECTION TO APPELLANT'S EXAMINATION OF ROY GALLEMORE IN REGARD TO HIS

RECOMMENDATION CONTAINED IN THE PRE-SENTENCE INVESTIGATION OF INFORMANT AND KEY STATE WITNESS JAMES SMITH.

ISSUE VII

THE TRIAL COURT ERRED BY NOT PERMITTING TESTIMONY FROM DEFENSE WITNESS DWIGHT DONAHUE UNLESS APPELLANT WAIVED HIS ATTORNEY-CLIENT PRIVILEGE AND PROVIDED THE STATE WITH DISCOVERY OF PRIVILEGED COMMUNICATIONS.

ISSUE VIII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON THE LIMITED USE OF COLLATERAL CRIME EVIDENCE.

ISSUE IX

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE JOHNSON'S PRIOR CRIMINAL RECORD WHILE CROSS-EXAMINING DEFENSE WITNESSES BECAUSE UNDER THE CIRCUMSTANCES IT HAD NO PROPER RELEVANCE AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR.

ISSUE X

THE TRIAL COURT ERRED BY REFUSING TO ADMIT APPELLANT'S PROFFERED ALLOCUTION INTO EVIDENCE BEFORE THE PENALTY JURY.

ISSUE XI

THE SENTENCING JUDGE ERRONEOUSLY WEIGHED IMPROPER AGGRAVATING CIRCUMSTANCES AND FAILED TO WEIGH ESTABLISHED MITIGATING CIRCUMSTANCES.

ISSUE XII

APPELLANT WAS DENIED HIS RIGHT TO PREPARATION OF THE ENTIRE RECORD OF THE CONVICTION AND SENTENCE FOR REVIEW BY THIS COURT.

This appeal was denied. Johnson v. State, 608 So.2d 4, 6 (Fla. 1992). A subsequent petition for writ of certiorari was also denied. Johnson v. Florida, ___ U.S. ____, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993)

Johnson filed the instant motion to vacate on August 1, 1994 in Alachua County. After the case was transferred to Polk County, an evidentiary hearing was held on March 3-5, 1997. Relief was subsequently denied on March 19, 1997. (PC-R6: 919-935)

STATEMENT OF FACTS

A. Trial

In the opinion affirming Johnson's original conviction and sentence, this Court set forth the salient facts as follows:

> The following evidence was presented at the new trial. The evening of January 8, 1981 Johnson and his wife visited their friends Shayne and Ricky Carter. During the evening they all took injections of crystal methedrine and smoked marijuana. Johnson left the Carters' home later in the evening, and Ricky testified that Johnson said he was going to get more drugs and that he might steal something or rob something. Shayne testified that Johnson said that he was going to get money for more drugs and that "if he had to shoot someone, he would have to shoot someone."
>
> A taxicab company dispatcher testified that driver William Evans went to pick up a fare at 11:15 p.m. on January 8 and called in to confirm the fare fifteen minutes later. Around 11:55 p.m. a stranger's voice came over the radio. Among other things, the stranger said that Evans had been knocked out. He stayed in touch with the dispatcher off and on until about 2:00 a.m. The dispatcher did not hear Evans after 11:30 p.m., and workers in an orange grove found Evans' body on January 14. Evans had been robbed and shot twice in the face. Searchers found his taxicab, which had been set on fire, in an orange grove about a mile from Evans' body.
>
> When she got off work in the early hours of January 9, 1981, Amy Reid and her friend Ray Beasley went to a restaurant for breakfast. Johnson approached them in the parking lot and asked for a ride, claiming that his car had broken down. Beasley agreed to drive Johnson to a friend's house. During the drive, Johnson asked Beasley to stop the car so that he could urinate. While out of

the car, Johnson asked Beasley to come to the rear of the car. When Reid looked back, she saw Johnson holding a handgun pointed at Beasley. She then locked the car's doors, moved to the driver's seat, and drove away to look for help.

Reid telephoned the sheriff's department from a convenience store, and deputies Clifford Darrington and Samuel Allison responded to her call around 3:45 a.m. The deputies drove Reid back to where she had left Johnson and Beasley, but found no one there. Back in the patrol car they heard a radio call from another deputy, Theron Burnham, advising that he had seen a possible suspect on the road. When they arrived at Burnham's location, they found his patrol car parked with the motor running, the lights on, and a door open, but could not see Burnham. Johnson, however, walked in front of their car, spoke to them, and then began firing at them with a handgun. The deputies returned Johnson's shots, and he ran across a field and disappeared among some trees. Allison then found Burnham's body in a roadside drainage ditch. He had been shot three times, and his service revolver was missing.

Later that day, Beasley's body was found seven-tenths of a mile from where Burnham was killed. He had been shot once in the head, and his body was in a weedy area and could not be seen from the road. Although there were some coins in his pockets, his wallet was gone.

The following afternoon Johnson's wife was still at the Carters' home. They saw a police sketch of the suspect in the night's events in a newspaper and discussed whether it looked like Johnson. Johnson telephoned the Carters' home, and, after speaking with him, his wife became very upset. Ricky Carter asked Johnson if he had done the killings reported in the newspaper, and Johnson replied: "If that's what it says." Carter went to pick up Johnson, taking a shirt that

Johnson changed into. Johnson threw the shirt he had been wearing, which had been described in the newspaper, out the car's window. While driving home, Carter heard Johnson's wife ask, "You killed him, too?" to which Johnson replied, "I guess so." At the Carters' home Johnson told them that he hit the deputy with his handgun when told to place his hands on the patrol car and then struggled with him, during and after which he shot the deputy three times.

The authorities arrested Johnson for the Beasley and Burnham murders on January 10 and charged him with Evans' murder the following week. Reid, Allison, and Darrington identified him, and his fingerprints were found in Evans' taxicab.

While Johnson was in jail awaiting trial, inmate James Leon Smith was in a cell near him. At trial Smith testified that Johnson told him that he killed a taxicab driver and set the taxicab on fire to destroy his fingerprints, that he shot Beasley while Beasley was on his knees and stole one hundred dollars from Beasley, and that he shot the deputy.

Johnson's defense was that, at the time of these killings, he was insane because of his drug use. To this end he presented numerous witnesses, including a pharmacologist, who testified about the effects of amphetamines on the human nervous system, and several acquaintances, who testified about his drug use. Thomas McClane, a psychiatrist, examined Johnson in 1987 and testified that, at the time of these crimes, Johnson was so intoxicated by drugs that he was suffering from an amphetamine psychosis which rendered him temporarily insane. Another psychiatrist, Walter Afield, examined Johnson in both 1981 and 1987 and opined that Johnson suffered from a toxic psychosis that made him insane. On cross-examination, however, Afield acknowledged that he relied only on Johnson's statements regarding his

> drug use and that someone can be psychotic but still know right from wrong and still know what he or she is doing.
>
> Two psychiatrists testified in rebuttal for the prosecution. In Gary Ainsworth's opinion Johnson was not insane when he committed these crimes. Johnson had been committed to a psychiatric unit because of drug abuse in 1980, and Ainsworth testified that Johnson was not as intoxicated when he committed the instant crimes as he was during the 1980 episode. Robert Coffer's opinion was similar, and he found significant differences between the 1980 incident and these crimes. He testified that, although intoxicated, Johnson did not have a toxic psychosis and was sane while committing these crimes on January 8 and 9, 1981.
>
> After hearing all of the evidence, the jury rejected Johnson's insanity defense and found him guilty as charged of three counts of first-degree murder, two counts of armed robbery, kidnapping, arson, and two counts of attempted first-degree murder.
>
> In the penalty phase Johnson presented testimony from his aunt and two uncles and from three of the psychiatrists who testified during the guilt phase. The jury recommended that he be sentenced to death for each of the murders. The trial court agreed with that recommendation and imposed three death sentences.

Johnson v. State, 608 So.2d 4, 6-8 (Fla. 1992)

B. Collateral Proceedings

On August 1, 1994 appellant filed his initial 3.850 in Alachua County. After the case was transferred to Polk County a series of evidentiary hearings were held on appellant's public records claims: April 15, 1996 (Supp.PC-R1: 42-54); May 31, 1996 (Supp.PC-

R1: 74); July 17, 1996 (Supp.PC-R2: 152-57, 177, 183); January 9, 1997 (Supp.PC-R3: 236).

An evidentiary hearing was held on Johnson's 3.850 Motion on March 3-5, 1997. Johnson's former defense attorney, Robert Norgard testified at the hearing concerning his representation of Johnson in his second and third trials. (PC-T8: 10-11) He was not involved in the 1981 trial. He was assisted in the presentation of the case by Attorney Larry Shearer. Shearer was the lead attorney on the case. He and Mr. Shearer divided up responsibilities regarding representation of Johnson. Shearer was the one who was responsible for the preparation of mental health experts. They filed a motion to suppress statements made by Johnson to James Leon Smith as well as to another inmate by the name of Larry Brockelbank. Norgard notes that this issue was dealt with on the 1983 direct appeal, was affirmed and there was no relief granted on this particular issue. evidence. [Johnson v. State, 438 So.2d 774, 776 (Fla. 1983).] Nevertheless, they renewed the motion when he had been granted a new trial and it was denied. (PC-T8: 18)

Accordingly, Smith testified as to statements made by Mr. Johnson regarding the incident involving the cab driver, Mr. Beasley and the trooper. Smith also said that Johnson had told him something to the effect of he was going to act crazy in order to beat the charges. (PC-T8: 23) Norgard conceded that as far as he knows Smith's story has been maintained from day one until now that

he was not working as an agent for law enforcement and that the statements were statements he obtained from Mr. Johnson. Smith said that in the 1981 trial, at the suppression hearing before the 1981 trial, at depositions in preparation for the 1981 trial, at the 1987 trial and at the 1988 trial and at the suppression hearings and depositions taken in preparation for the 1987 and 1988 trials. (PC-T8: 31-33) The only evidence he had that contradicted Smith was circumstantial evidence which was used to impeach his testimony at trial and was presented to the court in the suppression hearings. (PC-T8: 33) In fact, in the 1987 mistrial and the 1988 trial he was able to raise during cross-examination that Smith had gotten some assistance in regard to a custody dispute with his children. (PC-T8: 34) He also was able to present evidence that Smith had gotten some benefit that occurred before the 1988 trial in terms of his own sentencing. He conceded that they always looked very closely at the situation involving jailhouse informants and what access they have to information from other sources than the client, so Norgard was aware that he had seen the reports that related at the 1988 trial as well as before then. (PC-T8: 35) He also conceded that he has not seen any documents to date that were not provided to him in preparation for the 1988 trial. (PC-T8: 36)

Norgard testified that they decided to use an insanity defense in 1987/88 because the reasonable doubt defense used in 1981 was

unsuccessful. As there was evidence that indicated he may have possibly been insane at the time of the offense, they went with the insanity defense, instead. It was supported by earlier examinations of the doctors in preparation for the 1981 trial and was further developed in preparation for the re-trial. They had Dr. Afield, Dr. McClane and Dr. Muther. (PC-T8: 37) He had several trials where he had investigated the possibility of using the defense but had actually used it in two trials prior to Johnson. His experience with using the insanity defense is that the jurors just generally do not like the insanity defense. (PC-T8: 38-40)

Tactically, they decided that there were going to be negative things coming out from Smith. They felt that regardless of what tactics they took on cross-examination, Smith was going to say things damaging to Johnson's case. Nevertheless, they felt that there were certain items of evidence he could testify to that would have been supportive of the insanity defense. Accordingly, even though they knew that if they got into those statements Johnson's other statements about faking being crazy would be admitted, they knew they had to take the bad with the good in order to get the good in terms of their case. (PC-T8: 41)

Norgard deferred to Shearer as to their position on the intoxication defense. (PC-T8: 42) His experience with intoxication as a defense is similar to insanity except that it is even harder for juries to understand when it is based on voluntary drug use

versus something such as paranoid schizophrenia or some other mental illness of that nature. (PC-T8: 43)

Lawrence Shearer was called as the next witness. (PC-T8: 45) He represented Johnson in 1981, 1987 and 1988. There were different attorneys assisting him; in the 1988 period was Assistant Public Defender Robert Norgard, but Shearer was always the lead attorney. (PC-T8: 46) Shearer was responsible for the preparation of the mental health experts as well as the family members. (PC-T8: 47)

In 1988 he had tried approximately twenty-five first degree murder cases, probably as many as thirty. There were twelve to fifteen penalty phases, so he had considerable experience even at that point in time with phase two preparation. His experience in the 1981 trial had a big impact on the preparations for the 1988 trial. (PC-T9: 113) In the 1981 trial guilt-innocence phase the defense presented a defense of reasonable doubt attacking the State's ability to prove that Johnson was the perpetrator in each of the nine charges. The defense was unsuccessful, that was one lesson he learned. The second lesson is that in the penalty phase, five out of the twelve jurors were persuaded by the mental mitigation to vote for a life sentence. That gave them an indication that the jury might appreciate the mental evidence. (PC-T9: 114) As a result in 1987 and 1988, they filed a notice of intent to rely on the defense of insanity which was not done in

1981 and ask the court to appoint a committee of experts to examine Johnson for purposes of the insanity defense. In 1988 he also had the benefit of the appellate rulings from the 1981 proceedings plus additional years' experience. (PC-T9: 116)

Shearer explained his concerns regarding Smith's testimony and the challenges they made to Smith's credibility. (PC-T9: 52) He added that in 1981, the State's information was the same as what Smith was reporting at deposition, to wit that Smith had a coincidental contact with Johnson in jail during which time Johnson allegedly made some incriminating responses. He remembered that the evidence showed that Smith had made contact with a Sheriff's detective that he knew by the name of Ben Wilkerson to report this information and that Det. Wilkerson thereupon informed him to collect any such additional information that Johnson might report to him during their contact and that this was all done from that point on with the Sheriff's Department becoming informed as far as what information was obtained. As far as the State Attorney was concerned, there was no purposeful movement of Smith to the cell next to Johnson. The State only had information which was what Smith and the Sheriff's Department were reporting to the effect that it was coincidental that Sheriff jail personnel placed Smith in an adjacent cell to Johnson. (PC-T9: 53) The State reported as far as any promises or rewards, that none had been made in the early stages to Smith; subsequently the only thing that had been

told to Smith is that it would be made known to the Court and Probation and Parole authorities the fact of his cooperation but that no definitive promises of any specific gains or rewards were made to him other than that. (PC-T9: 54) Assistant State Attorney Hardy Pickard sent him letter in 1981 stating that the only promises to Smith for the favorable information was "I have told him his cooperation would be made known to Parole Commission." (PC-T9: 55) With regard to Johnson's claim that he was ineffective for opening the door to Smith testifying about Johnson saying he would act crazy, Shearer testified that although Judge McDonald had ruled that it would not necessarily be admissible unless the defense opened the door, they had a strategic reason for opening the door. (PC-T9: 63) He said that they opened the door in order to obtain all the portions of Smith's account of Johnson's testimony about the killing. (PC-T9: 64) Further, they were able to cross-examine Smith about the access he had to Johnson's legal papers. Shearer testified that Johnson denied ever making those statements to Smith and said that James Leon Smith was a liar. Johnson told Shearer that he had given Smith access to legal papers, police reports, etc. and asked him to help him read them. (PC-T9: 111) Shearer noted that Smith admitted during his deposition that Johnson had shown him the papers. (PC-T9: 66) Smith denied using Johnson's legal papers as a source for his report. They did not have any information that the State was supplying this information. (PC-T9:

67) He had no other evidence to support a belief or theory that he had used these notes for the purpose of fabricating information. The motions to suppress filed in 1981 and 1988 were both denied and he was unable to develop any facts to support his suspicions as to what may have happened. (PC-T9: 112)

Shearer's recollection of the preparation for the penalty phase is that he called two or three family members. There was an aunt and an uncle and there was a third individual by the name of Ward. (PC-T9: 73) Shearer denied Johnson's position that there was no effort to locate people other than the three who testified. (PC-T9: 104) He did not call Johnson's mother, Jane Cormier, to testify because he couldn't find her. (PC-T9: 73) He made a request of the investigators to try to develop information on her location. They asked Johnson what information he had, but they were unable to find her. (PC-T9: 74) He remembers time to time asking the investigators if they had any luck locating Johnson's mother or father. What additional efforts were made he couldn't say, but he knows that other efforts were requested. There would have been no reason for not pursuing trying to develop information from Johnson's mother. (PC-T9: 76) He did not believe they ever attempted to get Johnson's father's mental health history, but they were able to present Johnson's father's alcoholism and abusiveness through other witnesses. However, at least one of the relatives downplayed that Ommer was a violent person (PC-T9: 106) (PC-T9:

80) In short, he was simply unable to track down any other people and went with what he had. (PC-T9: 105) The evidence they produced at trial showed that Johnson had been abandoned at an early age by his father and his mother and basically, they were no parents to him at all. Shearer noted that any bad acts committed by Johnson's parents after they had abandoned Johnson, would not have been relevant except in a genetic way. (PC-T9: 108) Accordingly, they presented evidence about the custodial grandparent's alcoholism. (PC-T9: 109)

Shearer recalled that during the guilt-innocence phase of the trial the defense called Dr. Thomas McClane, a psychiatrist, Dr. Walter Afield, a psychiatrist, Dr. Thomas Muther, a professor of toxicology. During the penalty phase the defense call Dr. McClane and Dr. Afield as expert witnesses in psychiatry. In the penalty phase, they also called Dr. Ainsworth, a psychiatrist who testified for the prosecution during the guilt-innocence phase (PC-T9: 87)

With regard to Johnson's assertion that counsel should have presented an intoxication defense, Shearer testified that he did not recall the specific reasons for not pursuing the defense, but they had considered that possibility during trial preparation. (PC-T9: 89) One of the considerations he had was although an insanity defense can be presented without having the defendant testify, the defendant usually needs to testify to carry out the voluntary intoxication defense and they had decided not to put Mr.

Johnson on the stand. (PC-T9: 101) Shearer further reasoned that an intoxication defense is more difficult to pull off in front of the jury than the insanity defense because intoxication and insanity actually look at different issues of the mental state, and even though it may have been founded upon the same factual basis as an intoxication causing mental state, intoxication deals with a person's capacity to make a specific intent. (PC-T9: 102)

As for the failure to make certain objections during the closing arguments, Shearer testified that generally there are always strategic or tactical decisions to be made somewhere along the line and depending on the egregiousness of the improper prosecutorial argument, he may have decided that he should not object. (PC-T9: 92, 100)

As far as his motion to record all proceedings, it was granted. Further, since he was not the appellate lawyer, he never read the whole transcript and, therefore, he is probably not in the best position to say if there was something omitted. (PC-T9: 100)

The next witness presented by Johnson was Joan Carol Soileau. She is a nurse who lived with Paul Beasley Johnson in California in 1978. At that time he was a hard worker. They moved in together after dating for three months. He was neat, he cooked steaks, loved to barbeque, listen to music and never had any problems, kept a low profile. He helped out people in the complex. She had a four and one-half year old son who got along great with Paul. He

was great with her little boy. (PC-T9: 124-128) During that time Paul did not use drugs and only drank socially. (PC-T9: 129) He left to go back to Florida to get a divorce, so he could come back and marry her. When he got to Florida he called her and told her he was not coming back because he met his son, little Paul. He told her it tore him up to see little Paul because, “He is the spitting image of me, I can’t leave him”, and she understood because she was a mother. (PC-T9: 131) He said he was going to be there for his boy, that his dad wasn’t there for them and that he was going to be there for his boy. She told him “I love you but I understand, be a dad, do what you have to do,” and he never came back to California. She wrote to some relatives and kept in touch with his family over the years. She was living in Connecticut in 1988 when Paul went to trial (PC-T9: 132) She was in contact with Paul’s brother, Steve. She also had the address for his mother and his aunt, Joyce. (PC-T9: 133) In 1983 she moved to Massapequa, New York. She lived there for less than a year, then moved to New London, Connecticut and stayed there until 1991. (PC-T9: 135) She was in touch with Steve, who was in California, Idaho and Colorado. He kept moving around but he always called and kept in touch. However, she was not in touch with the defendant after 1978. (PC-T9: 136) On cross she admitted that the defendant was in fact married at the time they were cohabitating and at the time there was no hint of drug use, drug dependency or alcohol dependency.

(PC-T9: 138)

Johnson's mother, Jane Cormier, testified that Johnson was one of three children. She recounts being abused by Paul's father while she was pregnant with Paul. She notes that they had no money and the father drank all the time. When she was pregnant with Paul she moved to Alabama. (PC-T9: 139-146) She had her sister, Joyce Kihs, come stay with her. They had no running water, indoor plumbing or electricity. (PC-T9: 147) She did not want to be pregnant because she was being abused. She drank to ease her pain. She had no pre-natal care. (PC-T9: 148) Her house was searched many times for moonshine. She was not a healthy pregnant woman, she was sickly. (PC-T9: 149) Paul was delivered by a midwife and a doctor named Dr. Beasley. When Paul was born, his head was out of shape and they tried for months to shape his head. (PC-T9: 150) He was a sick child when she got pregnant with Paul's brother Steve, so she decided to leave Paul with his grandparents. (PC-T9: 152) She felt bad about abandoning him because she loved him dearly. It wasn't a choice she made easily but it was a choice she thought might keep him alive because they could take better care of him and she had to leave him with a babysitter and try to work. The grandparents weren't rich, they were poor people but were better able financially to take care of Paul. (PC-T9: 153) Cormier testified that when she remarried and moved to Japan she did not take Paul with her because he had been with his grandmother and it

would have broken Mrs. Johnson's heart to give up the baby. (PC-T9: 156) When she came back from Japan she moved to California. She tried hard to get hold of Paul but she could never reach him. (PC-T9: 157) She saw Paul again in 1976. He was living in Florida with his wife, Cheryl (PC-T9: 158) She got Paul, his wife and the baby to fly out to California. Cheryl was unhappy out there so she came back and Paul stayed for awhile until he went back to see his baby. (PC-T9: 159) He was a loving and wonderful son. He didn't cause any problems in California. (PC-T9: 161) He showed no indication of any drug use while he was in California. He was a healthy, strong person. (PC-T9: 164)

In 1988, she was living in the same town where Paul lived with her in California which would have been Oxnard. She had the same phone she'd had for thirty-two years. (PC-T9: 164) She was in contact with Steve and Joyce. (PC-T9: 165) She would have been willing to come here in 1988. She would have loved it.

During the two years he was in California, she did not see anything that he did that was out of the ordinary. What she saw was exactly what people would think was perfectly normal. He was perfectly normal, he didn't get violent, he wasn't assaultive, he didn't have any sort of habits that would compel him to go out and try to rob anybody. He didn't rob anybody. (PC-T9: 170) When he returned to Florida she gave him her telephone number, she had his telephone number. She stayed in the same part of town. She moved

several times in the Oxnard area but he never contacted her after he left the area. She was not in contact with anybody from the Johnson side of the family during those years. (PC-T9: 173)

Johnson's aunt, Joyce Kihs testified that she lived with Paul Beasley Johnson when he was a baby. (PC-T9: 175) They lived in a shack; she was about fifteen or sixteen years old. (PC-T9: 176) Johnson's father was mean, vicious and violent. (PC-T9: 177) She was afraid of him. He sold moonshine and they had little money for food. (PC-T9: 179) Jane drank while she was pregnant with Paul. He knocked her around. Kihs kept the kids in the room because she did not want them hurt. (PC-T9: 180)

She remembers the delivery. There was a black lady, a midwife. (PC-T9: 181) Ommer came home, he was drunk. She told him "you better get your wife a doctor." He went and got a doctor. Jane was in labor for a long time. (PC-T9: 182) When Paul was born he red and blue. He had a funny shaped head. (PC-T9: 183) When she took Paul to his grandparents', Ommer was probably in jail. (PC-T9: 186) Paul came out to California in 1976 with his wife and his baby. They got tickets for them. (PC-T9: 188) When Paul was in California he was good, he was loving. (PC-T9: 189) He seemed happy, she never saw him using drugs, he was not arrested. (PC-T9: 190) He was never violent (PC-T9: 196) He was consistently able to work, function well in his family unit. He was a healthy looking person, engaged in normal relationships. (PC-T9: 197)

She did not know that some two-and-a-half years later he had committed three murders. She would have never seen it coming from the way he acted because he was “healthy as a buck.” (PC-T9: 198)

Johnson’s brother, Steven Lee Johnson testified that he was sixteen or seventeen years old before he found out he had a brother. (PC-T9: 199) Paul acted fine when he was in California. (PC-T9: 204) He didn’t use drugs. He drank beer, but not to excess. He worked, he was in the labor union, steadily employed, had a steady girlfriend. (PC-T9: 205) He never tried to get in touch with him after he left. He would ask his mother a couple of times if she knew and she said I haven’t heard anything from him. (PC-T9: 207) He was living in Idaho in 1988, had a phone, was in contact with his mother. Nobody contacted him. (PC-T9: 208) He did not see any predilection towards substance abuse. (PC-T9: 209) As far as a substance abuse problem, he has not had a problem with it other than “a weekend warrior sort of thing.” He has never been treated for substance abuse, never been arrested for it. (PC-T9: 210)

Forensic psychologist, Brad Fisher, did an extensive developmental and neurological history including the Halstead Battery, the Wechsler Adult Intelligence Scale, the Bender Visual Motor Gestalt Test, the House Tree Person, some cards from Thematic Apperception Test, the Neurological History questionnaire. There was no evidence of malingering. (PC-T10: 228-32, 240) Dr. McClane

had done a mental status. Psychologists do not usually do the Bender Gestalt Test. He believes that Johnson was suffering at the time of the crime from toxic psychosis and neurological damage. (PC-T10: 241) There is a strong likelihood that the defendant's sniffing glue and inhalants as a teenager would produce brain damage later. (PC-T10: 243)

The Wechsler Adult Intelligence Scale shows indications of significant intermediate and perhaps long-term problems. Some sort of organic brain damage is not inconsistent with a person who has toxic psychosis. (PC-T10: 246) He hypothesizes that there were no problems while Johnson was in California because Johnson may have been in remission. (PC-T10: 247) Even though when he was in California and demonstrating non-destructive behavior, at some level there was still brain damage. (PC-T10: 249) Fisher finds the two statutory mitigating factors of extreme mental or emotional disturbance and capacity to conform in conduct substantially impaired. (PC-T10: 251)

On cross-examination Dr. Fisher admits that he has no disagreement with the experts on the bottom line. (PC-T10: 252) His only supplement would be the suggestion of organic brain damage. (PC-T10: 252) He says that despite a fifteen or so year history of huffing and sniffing, Johnson was capable of abstaining from that kind of abuse for two years. (PC-T10: 254) The doctor says that Johnson is capable of abstaining from abusing drugs or

alcohol by choice. Therefore, in 1981 he would have also been capable of making the decision not to abuse amphetamines and other narcotics. (PC-T10: 255-56)

James Leon Smith testified against Johnson in 1981, 1987 and 1988 and also gave depositions before each of these trials. (PC-T9: 220) He testified at the evidentiary hearing that when he testified that Johnson had made certain incriminating statements regarding, the testimony was true. He claimed, however, that he was told specifically what to ask by Detective Wilkerson and that he was intentionally placed in the cell next to Johnson in order to ask him questions. (PC-T10: 261) Smith claimed that periodically Wilkerson would tell him questions to ask Johnson.

Smith also testified that Johnson never told him that he would just act crazy to beat the charges or anything about the individual offenses. Smith testified that his testimony was based on what Mr. Wilkerson would instruct me to ask and what he was able to gleam from Johnson's legal papers. (PC-T10: 261) He also said that he was instructed that he wasn't to say that they asked him to say anything. In exchange Smith claimed that they were going to help him in court with the custody of his three kids and at a later time, when he went to court, they were going to speak on his behalf to the sentencing judge. (PC-T10: 263-269) He explained that after Johnson's trial he wrote to ASA Pickard, who told him that he would have to file a motion for mitigation before Pickard could do

anything for him. (PC-T10: 272) After he filed the motion for mitigation, they had a hearing before Judge Bentley on December 17, 1981. (PC-T10: 273)

When it came time for his retrial in 1987 or 1988 he did not want anything to do with the trial, so told them he did not want to testify. Smith claimed the ASA Atkinson told him, "You're going to testify. We're going to writ you or whatever back and you're going to testify whether you want to or not." Smith claimed that he was testifying now because he does not want to carry this inside of him for the rest of his life and he doesn't want to have any part of somebody dying on his behalf. (PC-T10: 276)

On cross-examination Smith was impeached with his prior trial testimony from 1988 and 1987. He admitted that at the trial in 1988 he testified that "it was something that had to be done and that's why he was testifying." When he was confronted with his testimony from 1987, which said, "Really what it boils down to is I came forward because at first I didn't want to come forward because I didn't want anything to do with the State Attorney's Office or the Public Defender's Office. I guess that maybe part of it is because I still got things I live by in my heart." (PC-T10: 278-279) Smith claimed that he made this statement after his conversation with the Assistant State Attorney, Pickard or Lee Atkinson in a room right "before I went into trial and I think I was pretty versed pretty good before I went in there. Before I

went in the courtroom, the State Attorney 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. I don't remember exactly what it's been. It's been years, but I did a lot of drugs since then. I don't remember exactly, not that many years ago."

Smith could not remember exactly who or what was said to him. He didn't think he was threatened, although he may have said some things out of the way. "Like I say, I don't remember the exact conversation that took place, it's been a few years." He also was not sure if he was intimidated. He didn't think the prosecutor came out and told him to lie.

He said that the State Attorney brought in a copy of the transcript from the prior trial and went over it with him and told him that he was supposed to testify accordingly. He did not tell the State Attorney that the testimony was not the truth. (PC-T10: 284) He doesn't think he was under any sort of prosecution at the time of the last trial in 1988. (PC-T10: 286) Despite the fact that he had already received his mitigation and any other help he claimed to have been promised and despite the fact that Hardy Pickard had nothing to do with the retrial, Smith claimed Pickard told him that he had to testify to things he had already testified to and that legally he couldn't say that he was promised anything. (PC-T10: 288) After Cervone gives him a copy of his deposition to refresh his recollection (PC-T10: 293), he admits that he did get

some stuff from Johnson. He does not recollect if Johnson admitted committing the crime. (PC-T10: 294) Johnson may have admitted any of the killings, he doesn't recall. He may have admitted specific things like having any of the victims on their knees. (PC-T10: 295) He did not recall if Johnson said anything about an exchange of gunfire. (PC-T10: 296) He admitted that he told the State Attorney back then as a result of him testifying against Johnson he was shot at, knocked off his motorcycle and some other things and he suffered consequences while he was in prison. Nevertheless, he claimed that he was just trying to do the right thing now by changing the story so he no longer faced that rather than protecting himself. (PC-T10: 297)

Dr. Roswell Lee Evans, Jr., a pharmacotherapy specialist in psychiatry, testified that after reviewing the data on Johnson, he determined that Johnson is a lifelong substance abuser and that he had significant brain damage as a result of some of his substance abuse disorders. (PC-T10: 309-315) It indicates that Johnson was acutely intoxicated at the time of the crimes, to the point of drug-induced psychosis and that his intoxication had an effect on his ability to coolly reflect on his actions. (PC-T10: 315) He stated that Johnson's I.Q. is 82. (PC-T10: 322) In his opinion Johnson was under extreme mental and emotional disturbance and he could not conform his conduct to the requirements of the law. (PC-T10: 323)

On cross-examination he admitted that he is in agreement with the previous experts concerning Johnson's toxic psychosis. (PC-T10: 324) He also agrees with their decisions as to intoxication and that Johnson's focus was on getting his hands on more drugs. He agreed that what he did was purposeful in terms of acquiring substances and that he knew that he was going out to acquire more drugs. He also agreed that Johnson was capable of purposely committing a robbery to get drugs, but claimed that he was not capable of purposely committing a murder. (PC-T10: 325) He was aware that the two cases involved bullets to the head. He wouldn't say that Johnson didn't intend or didn't mean to kill somebody but his primary intent was to obtain drugs. He also admitted that it was a purposeful act when he put the gun to their heads and that he meant to kill them. (PC-T10: 326) He explained that in his opinion, the fact that it's purposeful behavior is something that is not necessarily cognizantly controlled. (PC-T10: 327)

At the close of the defense's case, Judge Bentley inquired of Johnson as to whether he wanted to testify. He says he wants to consult with his lawyers about it. After having consulted with his lawyers he tells the court that it's his decision not to testify today. (PC-T10: 329-330)

The State's first witness was former Assistant State Attorney Lee Atkinson. Atkinson was the prosecutor on the instant case. (PC-T10: 333) He testified that there were no significant

differences between the testimony presented in 1987/1988 from the 1981 trial including the pre-trial suppression hearings.

Atkinson testified that he was a lecturer for both the National College of District Attorneys, the Justice Department, several State prosecutor associations, on trials in capital cases and one of the great concerns is the use of jailhouse informants because of the tendency those witnesses have five to ten years later to say something different than they did at trial. (PC-T10: 334) So in this case, the first thing he did was read the opinions of the Florida Supreme Court on Johnson's appeals from the 1981 convictions. Atkinson then got the record and went through the transcript. Before he met and spoke with Smith, he provided Smith with copies of his former testimony. He had met with the lead investigator and those other police officers who he had reason to believe might know about the question of what Smith's involvement was and how it came about. Everything that was said to him was consistent with the evidence that had come out in the suppression hearing. He did not give Smith any direction as to what to do. (PC-T10: 335) There had originally been two jailhouse sources. He had already rejected using the other witness, Larry Brockelbank. Based on what he learned from the file even if Brockelbank had convinced him that he was telling the truth, he wouldn't have used him because he felt he would have been a detriment to the trial, that he had no credibility. When Atkinson met with Smith, he made

the decision to put him on the stand at Johnson's trial. (PC-T10: 336) Atkinson testified that he had a practice which he engaged in with every witness he used and that he used it with Smith. "The first thing is that they tell the truth, the whole truth and nothing but the truth. If they don't know something, they are to say so. If they don't remember something, they are to say so and if they are not sure about their answers, not to give an answer they are uncertain of, to stick with what they know is truth. Second I tell them the most important thing a witness can do is listen carefully, make sure he understands the questions." (PC-T10: 337) Additionally he tells them if there is any kind of deal for cooperation he wants to be the one to disclose it to the court rather than wait for the defense to do it and that if any kind of deal is entered into, it will be kept. (PC-T10: 338) He testified that he warned Smith that on Friday morning before the start of the trial that he "was not going to pick up the phone and call me and tell me you want something in return for the testimony you now think I need to try this case." He explained to Smith that he would not be blackmailed by him and that even though he could use his testimony at trial, he could convict Johnson without it. (PC-T10: 339) Then he gave Smith a copy of his transcript and asked him if the testimony he had given was true. He said it was. Atkinson specifically went over with Smith the issues the defense is now raising. He specifically questioned him concerning the

allegation that Smith had been planted and told what he should try and find out from Johnson. He also questioned him as to whether what he was saying Johnson had told him was suggested by the police. He made it clear to Smith that if anything had happened that he needed to know it and he needed to know it before the trial started. He told Smith that if it had happened and he lied about it, he could tell Atkinson the truth now and he would not suffer any consequences for telling the truth. (PC-T10: 340-342) He also told him that if he did lie and he showed up ten years later and testified that he had lied, that if it was within his power, he would prosecute him for perjury. (PC-T10: 352) Smith assured him that everything he had said before was truthful, that in fact there was no subterfuge or plan by the Sheriff's Department, that the things he claimed Johnson told him, Johnson had told him and they were not suggested to him by the police. (PC-T10: 340-342)

Atkinson further denied going over his questions and answers with Smith. He explained that particularly with witnesses who had testified before, he finds it useful to make sure they have the opportunity to review police reports but his way of preparing a witness was to sit down and ask them to tell him what they know about the case. (PC-T10: 340-342) He never expressed any change in his testimony. (PC-T10: 342) He didn't have any hesitation at that point in using Smith as a witness, but he was not essential to the case because basically there were a couple of friends of Johnson's

who could provide critical evidence that suggested he was the one that committed the murders. Additionally, he noted that there were three eyewitnesses to the murders as well as substantial circumstantial evidence, including Johnson's own conduct after the murders. He felt that the case could be tried tomorrow without Smith's testimony and the result would be the same. (PC-T10: 343-344)

Atkinson also testified concerning Smith's letter expressing his reluctance to testify. The concerns in the letter were the general concerns of someone who was currently incarcerated about being known by other prisoners to in fact have been a witness against somebody, particularly in a capital case, a concern many people have in that situation and some concern about just having to go through the ordeal again of being cross-examined and having his credibility questioned. (PC-T10: 354) While he may have expressed some unwillingness to testify previously, at no time did Smith express to Atkinson any unwillingness to testify on the grounds that what he had to say would not be true. (PC-T10: 351)

With regard to the penalty phase, if there were additional testimony that had been presented from the mother to the effect of his having good behavior during the two year period in California, it probably would have helped his case that there was nothing wrong with Johnson because it would have contradicted some of the very basic information that the experts for the defense were relying on

in forming their opinions. (PC-T10: 344) It was the same regarding the brother's testimony. (PC-T10: 345) With regard to the evidence of some brain disorder from drug abuse, it would have had no impact. In his experience, the key to the insanity defense and defending against it is to look at the facts of the crimes themselves, then look at the behavior of the defendant and the opinions of the psychiatrists and you can almost always demonstrate that the actual behavior is inconsistent with the defense psychiatrist's opinion. (PC-T10: 346)

The last witness was Hardy Pickard, Assistant State Attorney for Polk County, who prosecuted Paul Beasley Johnson in 1981. He is familiar with James Leon Smith. (PC-T10: 356) There were no other agreements other than his cooperation would be made known to the Parole Commission. Pickard vaguely remembers that Smith filed a motion of mitigation. There was a hearing on it but he has almost no recollection of it. He thinks it would have been after Johnson's trial was all over. He can recall no agreements by him or law enforcement that were not disclosed to the defense. (PC-T10: 357) The only thing he told Smith is that he would be required to testify truthfully. (PC-T10: 358)

SUMMARY OF THE ARGUMENT

Appellant's first claim is that the lower court denied him a full and fair evidentiary hearing on his public records requests and that the lower court erred by denying his claim regarding state agency non-compliance. The record shows that the trial court held numerous hearings in order to allow Johnson to obtain the records he was entitled to obtain. No error has been shown.

Appellant alleges next that Judge Bentley erred in denying the Motion filed by Johnson to disqualify him based on the allegation that Judge Bentley had taken the plea on state witness James Leon Smith. Judge Bentley correctly denied the motion as legally insufficient to merit relief.

The basis of Johnson's claim that the state withheld material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), concerning jailhouse informant James Leon Smith who testified on behalf of the state at all three of Johnson's trials. It is the state's position that this claim was properly denied as Johnson has failed to establish that any material information was actually withheld.

Johnson next claims that the lower court abused his discretion in denying his claims that trial counsel was ineffective in his preparation and presentation of the penalty phase. This claim was properly rejected after an evidentiary hearing where Johnson failed to establish either prejudice or deficient performance.

Johnson's claim of error under Ake v. Oklahoma, 470 U.S. 68 (1985), was properly denied as Johnson was evaluated by a number of mental health experts and presented an insanity defense at trial. Accordingly, there simply is no violation of Ake.

The lower court did not err in summarily denying claims which the court found to be either procedurally barred, legally insufficient or conclusively refuted by the files and records in the instant case.

Johnson's claim that venue was not proper in Polk County is procedurally barred as it was not argued to the court below.

Johnson's next claim asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. This cumulative error claim is contingent upon Johnson's demonstrating error in at least two of the other claims presented in his motion. For the reasons previously discussed, he has not done so. Thus, the claim must be rejected because none of the allegations demonstrate any error, individually or collectively.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT DENIED APPELLANT A FULL AND FAIR EVIDENTIARY HEARING ON HIS PUBLIC RECORDS REQUESTS AND WHETHER APPELLANT WAS DENIED ACCESS TO RELEVANT PUBLIC RECORDS.

Appellant's first claim is that the lower court denied him a full and fair evidentiary hearing on his public records requests and that the lower court erred by denying his claim regarding state agency non-compliance. This claim is not supported by the record or the law. After the lower court held numerous hearings on Johnson's public records claims, the only documents which Johnson asserted were still outstanding were files from the Hillsborough County State Attorney's Office. Despite the trial court's repeated attempts to afford Johnson the opportunity to locate the files, Johnson repeatedly failed to timely avail himself of those opportunities. Moreover, when the files were ultimately obtained by Johnson, the court gave Johnson additional time to review the files and amend the motion to raise any new claims. When Johnson failed to assert any new claims and simply demanded more time, the court noted that Johnson would be allowed to present any newly discovered evidence at the upcoming evidentiary hearing. Accordingly, it is the state's position that the failure to timely and properly seek the records, coupled with the absence of any prejudice from that failure, precludes Johnson's claim of relief.

Nevertheless, Johnson asserts that the court's denial of his untimely request to depose additional employees of the Hillsborough State Attorney's Office deprived him of his right to access public records under Article 1, 24 of the Florida Constitution and Chapter 119 et seq. Fla. Stats. As the following shows, Johnson's claim that he should have been able to question additional employees is based solely on speculation that additional documents existed and does not support a claim of relief.

On April 15, 1996, at the first in a series of hearings held on appellant's public record's claims before the Honorable Robert L. Doyel, Circuit Judge, collateral counsel outlined those agencies that had not complied with their public records requests and was allowed to examine records custodians from those agencies who appeared at the hearing. (Supp.PC-R1: 42-54) Although Johnson had not asserted that any records remained outstanding from the Attorney General's Office, the state noted that despite the Attorney General's Office's standing offer to collateral counsel to inspect the files and records of the Attorney General's office at any time, the records had not been reviewed as of that time.[1] (Supp.PC-R1: 61) The hearing was continued in order to allow Johnson to obtain any outstanding records, to set forth which records were outstanding and to subpoena any agency who had not

[1] The files were not inspected until eight months later.

complied with their requests for records. (Supp.PC-R1: 60-3)

On May 31, 1996 a second hearing was held on Johnson's public records requests before Judge Doyel. Counsel for Johnson represented that she had issued several subpoenas duces tecum that had been returned by the clerk as unauthorized. (Supp.PC-R1: 74) The court noted that a local administrative order requires court approval of any subpoena duces tecum. (Supp.PC-R1: 75) Argument was then heard again concerning what records remained outstanding and what efforts had been made to obtain those records. The court granted the motion to compel the Polk County Sheriff's Office and authorized subpoenas duces tecum to the Hillsborough County Sheriff's office and to Karen Cox of the Thirteenth Judicial Circuit State Attorney's Office. (Supp.PC-R1: 127-28) The hearing was continued until July 17, 1996.

At the next hearing on July 17, 1996, the state represented that neither Assistant State Attorney Karen Cox of the Hillsborough County State Attorney's Office nor Pat Lawrence of the Hillsborough County Sheriff's Office had received a subpoena for the hearing and that both agencies had fully complied with Johnson' public records requests. The state also produced a third set of copies of photographs from the Polk County Sheriff's Office and certification from the records custodian addressing the photographs and audio tapes. (Supp.PC-R2: 152-57, 177, 183) Counsel for Johnson

conceded that she had not attempted to serve a subpoena on the Hillsborough County Sheriff's Office as they had provided them with the requested records. She further admitted that she had wrongly sent the subpoena duces tecum for the Hillsborough County State Attorney's Office to the clerk in Polk County to be served in Hillsborough County. (Supp.PC-R2: 175) She also conceded that CCR investigator Dorothy Ballew had spoken to Ms. Cox and Ms. Cox informed her that she did not have any records that had not already been provided. (Supp.PC-R2: 184) Even though Johnson had neglected to use the proper procedure to have the subpoena served, he, nevertheless, urged that he should have the right to examine Ms. Cox concerning her record keeping process because he believed the office had additional records. Judge Doyel found that he had given CCR the opportunity to examine Ms. Cox and that they failed to avail themselves of that opportunity by not ensuring that the subpoena was timely and properly served. (Supp.PC-R1: 191-92) The court further found that there was no prejudice in not being able to examine Ms. Cox under oath as she had asserted that all records in the possession of the State Attorney's Office had been supplied to CCR. (Supp.PC-R2: 191) Judge Doyel then noted that the public records issues were complete and the case was being transferred to another judge. (Supp.PC-R1: 196) The court gave Johnson leave to file an amended motion and gave the state 30 days to respond.

Six months later, on January 9, 1997, a Huff hearing was held before the Honorable Randolph E. Bentley. (Supp.PC-R3: 236) Before hearing argument on the post-conviction motion, Judge Bentley noted that he had given CCR permission to subpoena Ms. Cox and that she would be heard before he heard argument on the post-conviction motion. (Supp.PC-R3: 237) Counsel for Johnson reasserted her December 24, 1996 motion to hold the Huff hearing in abeyance. Counsel asserted that a continuance was necessary because the state attorney files had only recently been discovered and more time was needed to review those files. Although the court noted that the motion had been denied, he allowed argument on same. (Supp.PC-R3: 238)

Counsel for Johnson then detailed the history of their search for the files generated by former Assistant State Attorney Lee Atkinson of the Thirteenth Judicial Circuit, who had represented the state during Johnson's second trial in Polk County and third trial in Alachua County. (Supp.PC-R3: 239-40) The missing State Attorney files were ultimately found mixed in with the Attorney General's files. Both the state and Johnson agreed that despite the Attorney General's Office's repeated offers to Johnson's counsel to review the files, that they had not attempted to see the Attorney General's files until months after the public records litigation was closed by Judge Doyel. (Supp.PC-R3: 240-41, 244-48)

The state represented to Judge Bentley that Assistant State Attorney Lee Atkinson had borrowed the Attorney General's appellate records in preparation for the retrial in 1987 and that, evidently, when the files were returned to the Attorney General's Office, Atkinson's notes and files were inadvertently, included with the prior record on appeal. (Supp.PC-R3: 251) The inclusion of these files was not discovered by the state until November of 1996 when Johnson's investigator called to set up an appointment to inspect the files. (Supp.PC-R3: 240) The entire filed was given to counsel for appellant on December 16, 1996. (Supp.PC-R3: 240) Based on this information, Johnson filed a motion to hold the Huff hearing in abeyance on December 24, 1996 in order to have more time to go through the files and determine what, if any, new information may be contained in the files. (Supp.PC-R3: 241)

Upon inquiry by the court, it was determined that the files obtained from the Attorney General's Office including appellate transcripts and records, as well as the State Attorney notes making up a total of two banker's boxes. The state asserted that the bulk of these records were appellate records which collateral counsel already had. (Supp.PC-R3: 252-54) Judge Bentley noted that Johnson's failure to examine the records until after Judge Doyel closed the public records litigation may have constituted a waiver. (Supp.PC-R3: 255, 259)

Karen Cox was then called to testify concerning the Hillsborough County State Attorney's Office's record keeping practices and the steps she took to ensure that all records in the custody of the state attorney's office had been made available to Johnson. (Supp.PC-R3: 279-325) After Ms. Cox was excused, the court returned to Johnson's request for a continuance.

Remarking on Johnson's failure to identify any new and relevant information discovered in the materials obtained from the Attorney General's office, Judge Bentley stated he would have thought when these items were discovered, and in light of Johnson's requests to reopen the public records litigation, that "somebody's shirt tail wouldn't have hit their back getting to these boxes to read them to find some really good stuff to tell the judge about as to why we really got to put things off." (Supp.PC-R3: 328) Although counsel repeated that the file contained very important information, counsel was unable to identify any such information. (Supp.PC-R3: 329-30)

The court made the following findings:

> "Now, first of all, it is the view of the court that documents that are not in the custody of the state attorney when they have not been deliberately transferred to someone else and the state attorney, as far as has been shown here, is unaware of where they were, is not -- does not have the custody and control of those documents. That's not what the -- I believe it's the Turner -- the Tober case that was cited as trying to deal with

that case in view of the court deals with an intentional transfer to get records that remain in Chapter 119.

If the state attorney had known they were there, even if they'd been transferred without the intent to conceal, that might be a different situation, but there's no evidence they knew they were there. They got sent there. CCR and the defendant have slept on its rights, they had the right to examine the attorney general records a long time ago, they chose not to proceed in a timely fashion. This court would be totally and completely justified in denying any relief at this time, but this is a death case and the court is mindful of the very concerns that have lead to almost abolition of all rules and procedures in death cases because of the length of the proceeding that comes after the evidentiary hearing. And I think it's important to have an evidentiary hearing so it's not sent back in six years, let's have another evidentiary hearing, have the court have a full record and do what it wishes to do at that point in time.

So here's what the court is going to do: ***The court will have 20 days from today,*** don't talk to me further about the 60 days from Ventura, ***20 days from today to file a memo. And in that memo I want a list, a specific list, of new matters considered to be relevant, and why, and a copy of the applicable document attached.*** The court can look at it and make its own judgment. But, obviously, counsel may know things about the case I don't know, so I just want an explanation of why. I want a copy of any proposed amendment to the 3.850.

Now, we're going to proceed in a few moments, after I cover a few more things, to hold the Huff hearing today on the grounds that are presently alleged in the motion. ***Now, the court reserves the right to hold a further Huff hearing if the court at a later date permits an amendment and have a further Huff hearing on any new matters alleged. And the court also reserves the right, if it considers it appropriate in fairness to both parties, to postpone the evidentiary hearing***

> ***that's now set.***
>
> In other words, I guess put in plain English, I want to get the details that counsel were unable, because of the time factor, to give me today. These things, Chapter 119, sometimes something really important shows up. If it does, if it justifies a continuance of the evidentiary hearing in the view of the court, then that will happen.
>
> Frequently, particularly attorney's notes, turn out not to be too significant. I've examined boxes and boxes and boxes of stuff in in camera proceedings and wondered, one, why the agency involved didn't turn them over because it wasn't anything of interest in them and there weren't any of their secrets in them; and, secondly, what good is it going to do the other side when they got them.
>
> However, what this is designed to do is reveal to the court whether there is anything that requires us to do anything other than proceed with our evidentiary hearing, an amendment or continue the evidentiary hearing or whatever may be necessary, but I do intend to comply with that 20 day time period, so I think we're now ready to proceed with our Huff hearing.

(Supp.PC-R3: 332-35)

Despite the court's offer to Johnson to add any additional claims, no new claims were raised in the amended motion. Johnson did, however, request additional time. Although this request was denied, the court, as set forth in the following Order, noted that counsel would be allowed to present any additional evidence discovered in support of the claims raised. The court stated:

> On February 10, 1997, the court received the defendant's memorandum regarding new claims for postconviction relief supported by public records recently disclosed to Mr. Johnson by the state of Florida. At the end

of the memorandum, the defendant requests 60 days to review materials and amend his motion for postconviction relief. After a review of the memorandum, the files and records in this case, and the applicable law, the court finds as follows:

On January 9, 1997, this court allowed CCR 20 days to amend Mr. Johnson's motion for postconviction relief because CCR had recently come into possession of previously unknown materials. The court allowed CCR the opportunity to amend its motion, not because the public records statute or case law demanded such a result, but because this is a death case and the court believed that the defendant should not be penalized for the failure of collateral counsel to act in a timely manner regarding the inspection of public records.

On January 28, 1997, the defendant filed an amended motion for postconviction relief. The amended motion contained no new grounds for relief. The defendant claimed, however, that the newly discovered material supported many of the claims raised in the original motion. Also, the defendant requested additional time to review the materials and renewed the claim concerning the disclosure of public records. The court reviewed the amended motion and issued an order on February 3, 1997. *In the order, the court stated that CCR could utilize the new material to support any claims previously raised, but denied the request for additional time for review and investigation.* Furthermore, it appeared that the amended motion did not raise any completely new claims. As a precautionary measure, the court requested that CCR file a memorandum within 5 days "if there are any new claims in the amended motion" that the court may have overlooked.

On February 7, 1997, CCR submitted the instant memorandum. The memorandum indicated that the

> [i]nvestigation of new claims arising from public records recently disclosed on January 3, 1997 to Mr. Johnson by the Office of the State Attorney of the Thirteenth Judicial Circuit and the Office of the Attorney General is ongoing. Because of the ongoing nature of this investigation, counsel for Mr. Johnson is unable to plead new claims until completion of this investigation.

Counsel also renewed a request for 60 days to review the material and amend Mr. Johnson's motion for postconviction relief. These requests and complaints of insufficient time "to conduct a proper review and investigation" (*see,* instant memorandum, p. 2), ignore the fact that this court has previously held that "CCR's delay [in regard to going to the attorney general's office and inspecting the records the attorney general told CCR it could inspect] is inexcusable and the court would be justified in denying all further relief." *See,* Second Order on Motion to Hold Proceedings in Abeyance filed on January 10, 1997, p. 2. Had the court been presented with evidence that a state agency had deliberately hidden public records or that the disclosure of records was not timely due to no fault of CCR, the court would have more than likely given CCR the 60 days it requests. However, under the specific facts and circumstances of this particular case, the 20 day limit was more than sufficient.

The defendant cites *Ventura v. State,* 673 So.2d 479 (Fla.1996) in support of the request for 60 days to file an amended rule 3.850 motion. This court finds that *Ventura* is limited by its facts. In *Ventura*, the Florida Supreme Court stated that the "case has been extensively delayed, primarily due to the **failure of governmental entities** to provide public records." 673 So.2d at 479 (emphasis added). The Court then held that the dismissal of the defendant's motion for

> postconviction relief was premature because he had not yet received public records to which he was entitled. The Court permitted the defendant to amend his motion within 60 days after receipt of the public records.
>
> As noted, the instant case differs from *Ventura*, in that there has been no evidence presented that the governmental entities have failed to provide public records. Conversely, the evidence presented has demonstrated that CCR did not inspect the records until after the filing of the motion for postconviction relief even though there was ample time for inspection prior to the deadline to file the motion. Furthermore, the court finds that *Ventura* does not stand for the proposition that all defendants shall be allowed 60 days after receipt of public records to amend a postconviction motion. This court allowed Mr. Johnson an opportunity to amend his motion and he did so. There will be no further extensions of time and counsel shall be prepared to litigate the motion for postconviction relief that was filed on January 28, 1997, at the evidentiary hearing scheduled for March 3, 1997.

(PC-R6: 898-900)(emphasis added)

The three day evidentiary hearing commenced a month later, on March 3, 1997. (PC-T8-10: 1-382) Although Johnson had now had the additional state attorney files for well over the 60 days he had initially sought, he did not assert any new claims before, during or after the evidentiary hearing. (PC-T10: 360-382)

Now on appeal, Johnson, nevertheless, asserts that late receipt of the files prejudiced him. He also speculates that all of the records have still not been provided. Johnson argues that the files contain no notes of Julia Hyman who assisted in the

prosecution or notes concerning certain interviews. Not only is this claim barred as it was not presented to the lower court, it is without merit. The record in the instant clearly shows that all of the agencies produced all of the records requested that were in their possession. Johnson's speculation that additional records *should* exist is insufficient to support his claim of error.

This Court has recently addressed the trial court's responsibilities with regard to the evidentiary determinations to be made on public records requests in Downs v. State, 24 Fla. Law Weekly S231 (Fla. May 20, 1999). This Court rejected Downs argument that he was entitled to an evidentiary hearing on his public records claims pursuant to the holding in Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993) and his claim of error based on Mendyk v. State, 707 So. 2d 320 (Fla. 1997) and Mills v. State, 684 So. 2d 801 (Fla. 1996). In both Mendyk and Mills, this Court had found no error in the trial court's failure to order production of documents requested where the public agency denied having possession of the requested documents and the defendant had failed to demonstrate their existence. In Downs, both the state and the sheriff's office stated during a hearing on Downs' public records request that all documents had been disclosed and expressly denied the existence of any documents not otherwise included in the disclosed files. This Court noted that:

> [O]ther than a recitation of the names of the investigating officers and the witnesses apparently interviewed during the criminal investigation, Downs did not proffer or assert the existence of any evidence that the alleged notes existed and were improperly being withheld. Rather, Downs' entire basis for concluding that investigative notes existed apparently was the relatively thin size of the sheriff's office file and the fact the record custodian did not know if all documents had been disclosed. While the record custodian admitted he had no knowledge as to whether all documents that had been requested were, in fact, given to him for disclosure, this fact alone does not mean additional materials existed and were withheld by the JSO. When considered in light of the State and JSO's assertion that all documents had been provided to collateral counsel, and in the absence of any colorable claim that handwritten police notes existed and were being withheld, we find the trial court did not abuse its discretion in denying Downs' motion for production or for an evidentiary hearing on this point. See Mendyk, 707 So. 2d at 322; Mills, 684 So. 2d at 805.

Downs v. State, 24 Fla. Law Weekly S231 (Fla. May 20, 1999).

See, also, Robinson v. State, 707 So.2d 688, 700 (Fla. 1998) (denying claim that the trial court erred in denying request to amend his motion after receiving additional public records); Buenoano v. State, 708 So.2d 941 (Fla. 1998)(public records claims can be rejected where requests not timely made); Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997)(rejecting defendant's claim that records remained outstanding.) No error has been shown.

Similarly, Appellant's attempts to excuse his failure to timely review the Attorney Generals' files is without merit. He

erroneously asserts that access to the Attorney Generals' files was prohibited until October, 1995. While it is true that the Attorney General's Office and the Office of the Capital Collateral Representative had agreed to a schedule of files to be examined, at no time was appellant ever denied access to the files. In fact, as previously noted, despite Johnson's failure to assert a denial of access to the Attorney Generals' Office's files at the first hearing on Johnson's public records claims on April 15, 1996, the state noted that these files had not been inspected and that they were available at the Tampa office for inspection at any time. (Supp.PC-R1: 61) As Johnson neither complained about the failure to produce or attempted to inspect the Attorney General's files until well after the court closed the public records issues and after the amended motion had been filed this claim is barred and meritless.

Additionally, Johnson asserts that there is no evidence that the State Attorney's files were not transferred to the Attorney General's Office until after Judge Doyel had closed the public records litigation. Thus, he contends that the lower court's assumption that if he had timely inspected the files of the Attorney General's Office the State Attorney's files contained therein would have been discovered is a fiction. This argument was not presented at the hearing before Judge Bentley, who made a specific finding that there was no evidence of misconduct on the

part of the state, and is, therefore, barred. Further, contrary to appellant's assertion, the record shows that before closing the public records litigation, Judge Doyel noted that the Hillsborough County State Attorney's Office had represented that all of their records in reference to Paul Beasley Johnson had been provided to Johnson. If the State Attorney's Office was in possession of former Assistant State Attorney Lee Atkinson's files at that time they would have already been provided to Johnson. That they were not is evidence that the files had already mistakenly been mixed in with the Attorney General's files when they were returned to the Attorney General's Office. Any argument to the contrary is mere unpreserved speculation which is not a basis for any challenge. Downs.

Finally, appellant contends that the trial court's *in camera* inspection of the materials claimed as exempt by the Attorney Generals' Office was improper. He contends that many of the blank pages appear to pertain to James Leon Smith. The state claimed exemptions under two different categories. The first was for documents generated during the preparation of the instant 3.850 protected under §119.011 Fla. Stat. The second was for computer criminal history information protected under §119.072 Fla. Stat. The trial court reviewed the material for which the state claimed exemptions and found that they met the claimed exemptions. (Supp.PC-R3: 339-40) Whether any of this information pertains to

James Leon Smith is not relevant to the validity of the exemption. As both exemptions were properly taken this claim should be denied. Ragsdale v. State, 720 So.2d 203 (Fla. 1998).

Based on the foregoing, the state asserts that this claim should be denied.

ISSUE II

WHETHER 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.

Appellant alleges next that Judge Bentley erred in denying the Motion filed by Johnson to disqualify him based on the allegation that Judge Bentley had taken the plea on state witness James Leon Smith. Judge Bentley correctly denied the motion as legally insufficient to merit relief. (PC-R6: 889)

This Court has repeatedly held that a motion to disqualify a judge "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy." Rivera v. State, 717 So.2d 477, 480-81 (Fla. 1998), quoting, Jackson v. State, 599 So.2d 103, 107 (Fla.1992); Gilliam v. State, 582 So.2d 610, 611 (Fla.1991); Dragovich v. State, 492 So.2d 350, 352 (Fla.1986). The motion will be found legally insufficient "if it fails to establish a well-grounded fear on the part of the movant that he will not receive a fair hearing." Correll v. State, 698 So.2d 522, 524 (Fla.1997). This Court further noted that the "fact that the judge has made adverse rulings in the past against the defendant, or that the judge has previously heard the evidence, or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his

opinion with others,' are generally considered legally insufficient reasons to warrant the judge's disqualification. " Rivera v. State, 717 So.2d at 480-81 (Fla. 1998).

The fact that Judge Bentley had presided over the taking of a plea agreement of state witness in 1981, over fifteen years earlier is not sufficient to support a motion to disqualify. A trial judge does not become a material witness in a cause merely because he has knowledge of what occurred in prior proceedings. Wilisch v. Wilisch, 335 So.2d 861, 866 (Fla. 3DCA, 1976); see, also, Jackson v. State, 599 So.2d 103 (Fla. 1992), cert. denied, 506 U.S. 1004; Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Dragovich, 492 So.2d at 352; Walton v. State, 481 So.2d 1197 (Fla. 1985). In Scott v. State, 717 So.2d 908, 911 (Fla. 1998) this Court rejected Scott's claims that the trial court erred in denying his seven motions to disqualify the judge. Scott, like Johnson, asserted that the trial judge should have been disqualified because he had presided over an unrelated trial of affiant Dexter Coffin years earlier. Scott also alleged that his trial judge had received a correspondence from a jailer and Coffin in that matter and commented on Coffin's sentencing. This Court held that none of the allegations set forth a well grounded fear of prejudice. Scott, citing, Walton v. State, 481 So.2d 1197, 1199 (Fla.1985) ("We reject ... the contention that the trial of a codefendant by the same trial judge requires his disqualification....") In the instant case, where Smith was only

a jailhouse informant and not a codefendant the potential for conflict is further attenuated. Accordingly, the motion was properly denied.

Appellant also makes an unsubstantiated claim that the records which reflected Judge Bentley's part in the sentencing were withheld from him until January 5, 1997. This claim is without merit as noted in Issue I. Any delay in obtaining these documents rests at the feet of collateral counsel. Assuming, *arguendo*, Johnson was not solely responsible for his failure to timely review the Attorney General's files, it is clear that counsel knew that James Leon Smith was an informant in this case and, in fact, was a defense witness at the evidentiary hearing in the instant case. Thus, through due diligence Johnson could have obtained this information by inquiring of Smith or the clerk of the court. Further, any delay in obtaining this information in no way prejudiced appellant because the denial of the motion did not rest on its timeliness, but, rather, on its legal insufficiency. Moreover, the files were obtained contemporaneous with the assignment of Judge Bentley to the case. Thus, even if Johnson had received these documents years earlier, they only became relevant when Judge Bentley was assigned to the case.

Finally, appellant argues, as he did in Issue I, that the judge's *in camera* inspection of documents withheld by the state was improper because it appears that certain documents pertaining to

James Leon Smith were withheld. To support this proposition appellant refers to a portion of the record which contains documents attached to a motion filed by Johnson entitled DEFENDANT'S COMPLIANCE WITH COURT'S ORDER ON MOTION TO HOLD PROCEEDINGS IN ABEYANCE. (PC-R5: 631) Johnson has apparently concluded that whenever a blank piece of paper was discovered in the files and notes of the State Attorney's Office that it represents documents withheld by the state. The only documents withheld from the files of the State Attorney's Office were computerized printouts of criminal arrest records, i.e. NCIC reports. (Supp.PC-R3: 339-40) NCIC reports are confidential and not subject to a public records request. Ragsdale v. State, 720 So.2d 203 (Fla. 1998). Moreover, as the state alleged in Issue I, appellant's failure to assert this specific challenge below bars review. Finally, these records were left with the court below and are available for this Court's review.

Based on the foregoing, the state urges this Court to affirm Judge Bentley's denial of the motion to recuse.

ISSUE III

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

The basis of Johnson's claim that the state withheld material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), concerning jailhouse informant James Leon Smith who testified on behalf of the state at all three of Johnson's trials. It is the state's position that this claim was properly denied as Johnson has failed to establish that any material information was actually withheld.

This claim was the subject of an evidentiary hearing below, where Smith testified on behalf of Johnson. After hearing evidence and argument in support of this claim, the lower court rejected the claim and made the following findings of fact:

> (8) Claim VIII alleges that the state withheld exculpatory evidence and presented misleading evidence at trial. This claim focuses on a jailhouse informant, James Leon Smith, who testified against the defendant at trial.
>
> James Leon Smith's [sic] testified at all three of the defendant's trials. He was deposed in 1981 and 1987 and testified at a motion to suppress in 1981. His testimony, from 1981 through 1988, was substantially the same. There were minor differences in his testimony, which can be expected because Mr. Smith had to try to recall events that

occurred almost seven years ago. Mr. Smith's 1988 trial testimony is summarized below:

> Mr. Smith met the defendant in the Polk County jail in 1981. Between February and March of 1981, Mr. Smith had several conversations with the defendant. The defendant admitted to three murders. He said that he had killed a cabdriver and burned the cab because his fingerprints were in it, that he had shot Mr. Beasley and stole $100.00, and that he had struggled with a deputy and that the deputy was shot twice.
>
> While in jail, Mr. Smith met with law enforcement officers and told them that the defendant had made the statements. No one made any promises to Mr. Smith for providing this information. The only assistance he received from the state came in the form of a letter written by the prosecutor in 1981 to a judge considering a motion to mitigate sentence. The mitigation motion was granted and the defendant's sentence was reduced to one year of probation. Mr. Smith testified because "it's something that had to be done." No one suggested that Mr. Smith do anything but tell the truth.
>
> *See,* trial transcript, p. 2052-60.

On cross-examination, Mr. Smith provided the following additional information:

> There was nothing promised to him for coming forward with information about the defendant. Law enforcement officers did not outright encourage him to go get more information from the defendant. While in the jail, Mr. Smith read the defendant's discovery materials to him because the defendant told Mr. Smith that he could not read. During their conversations, the defendant told him that he was pretty high when the murders occurred and that he could not remember certain details. The defendant also stated that he had done so many drugs that he lost control of himself

> and started flipping out.
> *See,* trial transcript, p. 2060-93.
>
> On re-direct examination, Mr. Smith testified that the defendant said that "he could play like he was crazy and they would send him to the crazyhouse for a few years and that would be it."
> *See,* trial transcript, p. 2097.

The court has reviewed the numerous transcripts that contain Mr. Smith's testimony. In every court proceeding, Mr. Smith's testimony was essentially the same as that presented to the Alachua County jury in 1988.

At the evidentiary hearing on March 4, 1997, James Leon Smith testified that much of his previous testimony was untrue. On direct examination, Mr. Smith testified that Polk County Sheriff's Office Detective Wilkerson specifically told him what to ask the defendant. Mr. Smith also alleged that law enforcement told him to testify in court that law enforcement had not instructed him to speak with the defendant. Law enforcement also allegedly promised Mr. Smith that they would go speak to the judge and seek a reduction of his sentence, but that he should not tell the jury about this promise. According to Mr. Smith, the defendant never stated that he would play crazy. Mr. Smith stated that he received most of the information that he originally testified about from either law enforcement or the defendant's discovery materials.

On cross-examination, Mr. Smith's testimony became very vague. He admitted that the defendant may have actually admitted to several of the crimes and provided some details about the crimes to him. However, in general Mr. Smith's memory was not that accurate as to where he received the information about the crimes. He also stated that he had suffered retribution, both in prison and in his hometown, for his prior

testimony incriminating the defendant. Mr. Smith could not explain why his testimony had been consistent in numerous court proceedings and had suddenly changed. He alluded to the fact that he did not want someone to die because of his untrue testimony. However, Mr. Smith never came forward after the defendant was originally convicted and sentenced to death in 1981.

In *Armstrong v. State,* 642 So.2d 730, (Fla.1994), *cert. denied,* 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995), the Florida Supreme Court reaffirmed the proposition that "[r]ecantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. *Brown v. State,* 381 So.2d 690 (Fla.1980), *cert. denied,* 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981); *Bell v. State,* 90 So.2d 704 (Fla.1956)." This court must make two findings. First, the court must determine whether Mr. Smith's recantation is true. If so, the court then must determine whether Mr. Smith's new testimony would probably result in a different verdict at a new trial. *Glendening v. State,* 604 So.2d 839 (Fla. 2d DCA 1992).

As to the first issue, the court finds that Mr. Smith's testimony is not credible. In general, recanting testimony is "exceedingly unreliable." *Bell v. State,* 90 So.2d 704, 705 (Fla.1956). Numerous factors indicate that James Smith's recantation is likewise unreliable.

Lee Atkinson, the man who prosecuted the defendant in 1988, testified at the evidentiary hearing. After his appointment to the case in 1987, Mr. Atkinson prepared for the re-trial by reviewing the case file and the 1981 trial transcripts, reading the Supreme Court opinion and meeting with law enforcement. He then arranged a meeting with James Smith so that he could determine whether he wanted to use Mr. Smith as a witness. Mr. Atkinson testified that he told Mr. Smith that he wanted him to tell the truth and to tell

the jury about any deals or promises he may have received in exchange for his testimony. The prosecutor specifically told Mr. Smith that he did not need his testimony to convict the defendant. Mr. Atkinson then asked Mr. Smith if his prior testimony was true. Mr. Smith said that it was. When asked about the defendant's allegations that Mr. Smith was a state agent and was promised specific assistance from law enforcement for his testimony, Mr. Smith denied all the allegations and reaffirmed that he was coming forward voluntarily. Mr. Atkinson also told Mr. Smith that he would not prosecute him for perjury if he said that he lied in 1981, but that Mr. Smith had to tell him about it right now. Mr. Smith replied that everything he testified to was the truth. The prosecutor also stated that if it was within his power, he would prosecute Mr. Smith for perjury if he came forward ten years later and said that he had lied. As it turned out, Mr. Smith did not wait the full ten years before coming forward with a new story.

Looking to jury instruction 2.04 on the credibility of witnesses as a framework for analysis:

(a) Did James Smith seem to have an accurate memory? On direct examination, Mr. Smith appeared to be able to answer many of CCR's leading questions. However, on cross-examination by the state attorney, Mr. Smith's memory faltered numerous times and he had difficulties answering questions. Many of his answers became less and less specific and Mr. Smith appeared to have trouble remembering certain details and events.

(b) Was James Smith honest and straightforward in answering the attorneys' questions? *See,* analysis under (a), above.

(c) Did James Smith have some interest in how the case should be decided or had any pressure or threat been used against James Smith that affected the truth of his

testimony? As noted, Mr. Smith testified that he had suffered because of his original testimony. Apparently, it was well known in prison and on the street that he had testified against the defendant. By changing his story now, the state argued that Mr. Smith would no longer be a snitch in the eyes of the defendant's friends and others.

(d) Did James Smith at some other time make a statement that is inconsistent with the testimony he gave in court? As noted, Mr. Smith gave at least six prior (and consistent with each other) sworn statements that are inconsistent with his testimony given at the evidentiary hearing.

(e) Was it proved that James Smith had been convicted of a crime? It was undisputed that Mr. Smith had been convicted at least six times in the past.

Based upon the court's experience, common sense and personal observations of James Smith, the court is satisfied that his new testimony is false. Simply put, after listening to Mr. Smith, watching his demeanor and analyzing his testimony, the court does not believe his present testimony. Mr. Smith's testimony was consistent throughout the defendant's three trials, a period spanning over seven years. Mr. Smith never came forward with any allegations that his testimony was untruthful until 16 years after his first meeting with the defendant.

Even if the court were to accept Mr. Smith's testimony as being true, the court is confident that the verdict would not have been different. Evidence of the defendant's guilt was overwhelming. At trial, the state presented eyewitness testimony, circumstantial evidence and evidence of the defendant's conduct which indicated the defendant committed the crimes and that he was not insane at the time of the offenses. Furthermore, Lee Atkinson testified that the result of the trial would have been the same

> had Mr. Smith never testified. This allegation was not challenged by the defendant during the evidentiary hearing.
>
> In conclusion, ***the court finds that the testimony of James Smith presented at the evidentiary hearing is false. Furthermore, even if the court were to accept the testimony, the court finds that the result of the trial would not have changed. Therefore, there were no violations of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972)***. There has been no competent evidence presented of either prosecutorial misconduct or improper and unconstitutional police practices. Finally, there has been no showing that trial counsel was ineffective in any way related to the testimony of James Smith.
>
> (PC-R6: 924-28)

A. Brady/Giglio

In order to establish a Brady violation, a defendant must prove the following:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Melendez v. State, 718 So.2d 746, 748(Fla. 1998); Hegwood v. State, 575 So.2d 170, 172 (Fla.1991) (quoting United States v. Meros, 866

F.2d 1304, 1308 (11th Cir.1989). Similarly, to establish a Giglio[2] violation, Johnson must show, "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material." Robinson v. State, 707 So.2d 688, 693 (Fla. 1998).

A review of Johnson's allegation that James Leon Smith's testimony was false and that it was induced by promises from law enforcement in the context of these standards and the facts of this case shows that the trial court correctly found that Johnson was not entitled to relief.

1) That the government possessed evidence favorable to the defendant:

In the instant case, the only evidence raised in support of the allegation that the government possessed evidence favorable to Johnson is Smith's uncorroborated claim that his trial testimony was false and that the state was aware of its falsity. As the trial court found this claim was refuted by the testimony of Lee Atkinson. Moreover, the court made a specific factual finding that the testimony of Smith was not credible. The court stated in pertinent part:

> Based upon the court's experience, common sense and personal observations of James Smith, the court is satisfied that his new testimony is false. Simply put, after

[2] Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)

> listening to Mr. Smith, watching his demeanor and analyzing his testimony, the court does not believe his present testimony. Mr. Smith's testimony was consistent throughout the defendant's three trials, a period spanning over seven years. Mr. Smith never came forward with any allegations that his testimony was untruthful until 16 years after his first meeting with the defendant. after listening Smith's claim was not credible.

(PC-R6: 928)

This Court has repeatedly held that "this Court, as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judge's conclusion." State v. Spaziano, 692 So.2d 174, 175, 177 (Fla.1997); see also Blanco v. State, 702 So.2d 1250 (Fla.1997). This is true because the trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony. Whereas, the cold record on appeal does not give appellate judges that type of perspective. Spaziano at 178; Green v. State, 538 So.2d 647 (Fla. 1991). As appellant has failed to establish that the state presented false testimony, he has also failed to establish that the state possessed any favorable evidence that was withheld. Accordingly, appellant has failed to establish the first prong of Brady. Melendez v. State, 718 So.2d 746 (Fla. 1998)(Defendant was not entitled to postconviction relief where trial court found witnesses' testimony either incredible or vague); Robinson v. State, 707 So.2d at 693 (no error in the trial court's

determination that Robinson has not met the test required to establish a Giglio violation.)

(2) That the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence:

There is no Brady violation where alleged exculpatory evidence is available to the defense and the prosecution. Roberts v. State, 568 So.2d 1255 (1990); James v. State, 453 So.2d 786 (Fla. 1984). James Leon Smith testified at trial three times and was deposed by defense counsel at least three times. As Smith's claim that most of his statements to law enforcement were false was equally accessible to the defense at the time of trial, it does not qualify as Brady material.

(3) That the prosecution suppressed the favorable evidence:

As the court below found that Smith's trial testimony was not false, there was no evidence, favorable or otherwise, for the state to suppress.

(4) Had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different:

There is no reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different". See, Duest v. Dugger, 555 So.2d 849 (Fla. 1990); citing Medina v. State, 573 So.2d 293 (Fla. 1990). Smith's statements were thoroughly challenged at trial. As counsel

conceded at the evidentiary hearing they were aware of the rewards given to Smith as a result of his testifying against Johnson. This only left Smith's new allegation that he was told what to ask and deliberately placed next to Johnson. This evidence went to the suppression issue and since the trial court rejected Smith's testimony, it is unquestionable that none of this evidence would have changed the outcome. Further, as the trial court found, even if the court were to accept Smith's testimony as being true, the court was confident that the verdict would not have been different as evidence of the defendant's guilt was overwhelming. "At trial, the state presented eyewitness testimony, circumstantial evidence and evidence of the defendant's conduct which indicated the defendant committed the crimes and that he was not insane at the time of the offenses. Furthermore, Lee Atkinson testified that the result of the trial would have been the same had Mr. Smith never testified. This allegation was not challenged by the defendant during the evidentiary hearing." (PC-R6: 928)

Given the foregoing, it is the state's position that Johnson has not proven a Brady or Giglio violation occurred. The trial court's denial of the motion should therefore be affirmed.

B. Ineffective Assistance of Counsel

Johnson also raises numerous grounds in support of his claim of ineffective assistance of counsel; 1) opening the door to damaging evidence which allowed the introduction of Smith's

testimony that Johnson said he would act crazy, 2) failure to ensure that record on appeal was complete and, 3) failure to use a voluntary intoxication defense. In Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court recognized that the purpose of the constitutional requirement of effective assistance of counsel is "to ensure a fair trial." Applying this purpose "as the guide" in ineffective assistance of counsel cases, the Supreme Court elaborated that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. The Court set forth a two-prong test for evaluating claims of ineffective assistance:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> Id. at 687, 104 S.Ct. 2052 (emphasis supplied).

Reviewed in this context, none of the claims raised by appellant support his argument that counsel rendered ineffective

assistance. The claim of ineffective assistance of counsel was the subject of the evidentiary hearing below. Defense counsels Shearer and Norgard testified as to their representation of Johnson during his last trials. After hearing this evidence and considering the claims now raised, the trial court found that Johnson received constitutionally effective assistance of counsel. 1) Opening the door

This claim was considered and rejected by the court below. The court stated:

> a) The first claim is that counsel was ineffective in cross-examining James Smith because counsel opened the door to the state and allowed the introduction of damaging evidence. The specific complaint is that trial counsel asked Mr. Smith about several details of a February 11, 1981, conversation that Mr. Smith had with the defendant. One portion of the conversation dealt with the fact that the defendant told Mr. Smith that he had taken a large quantity of drugs and that he was out of control during the crimes. On re-direct, the state asked Mr. Smith about the rest of the conversation and if the defendant had made any comment about his intended defense. Mr. Smith then testified that the defendant told him that he could play like he was crazy and they would send him to the crazyhouse for a few years and that would be it.
>
> At the evidentiary hearing, both Mr. Norgard and Mr. Shearer testified that they knew what Mr. Smith's testimony would be. Both attorneys further stated that there was a tactical reason for asking about the February 11 statement. The defense wanted to introduce evidence of the defendant's drug use to the jury. During this particular conversation with Mr. Smith, the defendant admitted to consuming a large quantity of drugs. Counsel believed

> that it was important for the jury to hear this evidence, even if they also heard the defendant admit that he would play crazy. Mr. Norgard stated that the defense knew Mr. Smith's testimony was harmful to their case, and he and Mr. Shearer made the decision to try to bring out whatever helpful portions of Mr. Smith's testimony that they could and then suffer through the harmful portions.
>
> Counsel has wide discretion in matters of trial strategy. Mr. Shearer had been through the defendant's other two trials prior to the 1988 trial. He knew the evidence and made an informed, tactical decision about how to question Mr. Smith. The court is satisfied that the strategy, although ultimately unsuccessful, was reasonable and did not constitute deficient performance of counsel.

(PC-R6: 932)

This Court has consistently held that strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected, Rutherford v. State, 24 Fla. L. Weekly S3, 7 (Fla. 1998); Melendez v. State, 612 So.2d 1366, 1368 (Fla. 1992); State v. Bolender, 503 So.2d 1247, 1250 (Fla.1987); Bryan v. Dugger, 641 So.2d 61, 64 (Fla.1994) and that tactical decisions are not subject to collateral attack. Buford v. State, 492 So.2d 355, 359 (Fla. 1986); Wilson v. Wainwright, 474 So.2d 1162 (Fla.1985). As the trial court found, Johnson's trial lawyers acknowledged that they wanted to introduce evidence of the defendant's drug use to the jury even if it meant allowing Smith to testify concerning Johnson's statements about playing crazy. This is a reasonable tactical decision. Thus, this Court "must indulge

a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 104 S.Ct. 2065.

2) Record on Appeal

With regard to appellant's claim that trial counsel was responsible for ensuring that the record on appeal was complete, it is the state's position that this claim does not satisfy either prong of Strickland. Moreover, as the trial court noted, this claim was raised on direct appeal and rejected. Johnson, 608 So.2d 4 (Fla. 1992). Upon rejecting this claim the lower court stated:

> (2) Claim II alleges that the defendant was denied a proper appeal because portions of the record were missing. 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. *See, State v. Johnson,* 608 So.2d 4 (Fla.1992).
>
> The defendant further complains that counsel was ineffective for failing to ensure that a proper record was made. The court allowed collateral counsel the opportunity to explore the ineffective assistance of counsel aspect of the claim at the evidentiary hearing. Trial counsel Lawrence Shearer testified that he filed a motion to record all proceedings. He believed the motion was granted and that all proceedings were recorded. However, Mr. Shearer testified that he had not read the entire transcript. In any event, the court finds that the defendant has not shown that any actions of counsel were deficient.

PC-R6: 922)

Counsel did everything a reasonable counsel would have done to

ensure that a complete and accurate record was produced. Moreover, appellant has failed to establish how he was prejudiced by this alleged failure. Beyond Johnson's speculation that something may have happened during any non-transcribed bench conference, there was no showing that any relevant and material information was not included in the record. As this claim does not satisfy either prong of Strickland, the trial court correctly denied it.

3. Voluntary Intoxication

Johnson next argues that his counsel was ineffective for failing to present a voluntary intoxication defense. At the conclusion of the evidentiary hearing, the trial judge found:

> (c) The last claim is that counsel was ineffective for failing to investigate a voluntary intoxication defense. Mr. Norgard testified at the evidentiary hearing that the defense presented was insanity due to substantial drug use. Part of the insanity defense would necessarily focus upon the defendant's drug intoxication. Thus, counsel decided that they did not need to present a separate voluntary intoxication defense. Mr. Norgard further testified that, in his experience, juries do not like the intoxication defense and that it was harder to sell to a jury than insanity, which is also unpopular with juries. Mr. Shearer testified that he believed they could not effectively present both the insanity and intoxication defense, as one defense may dilute the strength of the other. Further, he believed that the defense could present the insanity defense without the defendant's testimony, while the defendant might have to testify if they presented the intoxication defense.
>
> The court is satisfied that the tactical decision not to present a defense of voluntary

> intoxication did not constitute ineffective assistance of counsel. Simply because the insanity defense did not work, it does not mean that the theory of the defense was flawed. Furthermore, the court is convinced that a presentation of an intoxication defense would not have changed the ultimate outcome of the proceedings.
>
> PC-R6: 933)

In Remeta v. Dugger, 622 So.2d 452, 455 (Fla. 1993), this Court rejected a similar claim, holding that where the decision not to present a voluntary intoxication defense was a tactical one based on what Remeta's counsel felt the facts of the case supported, Remeta's counsel was not ineffective in failing to raise this claim at trial. See, also, Ferguson v. State, 593 So.2d 508 (Fla.1992); Engle v. Dugger, 576 So.2d 696 (Fla.1991); Henderson v. Dugger, 522 So.2d 835 (Fla.1988). See, also, Buford v. State, 492 So.2d 355, 359 (Fla. 1986)(no prejudice where state proceeded under both a premeditation and felony-murder theory and intoxication not a defense to felony murder since the underlying felony--sexual battery--is not a specific intent crime.) Accordingly, the lower court's finding that the decision to not dilute Johnson's insanity defense with an intoxication argument was a reasonable tactical decision should be affirmed as it is supported by substantial competent evidence.

Based on the foregoing, this Court should affirm the denial of Johnson's claims that Brady/Giglio error occurred and that trial counsel was ineffective during the guilt phase of his trial.

ISSUE IV

WHETHER THE LOWER COURT ABUSED HIS DISCRETION IN DENYING JOHNSON'S CLAIMS THAT TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE OF JOHNSON'S CAPITAL TRIAL.

This Court set out the standard for reviewing such claims following an evidentiary hearing in Blanco v. State, 702 So.2d 1250 (Fla.1997):

> In reviewing a trial court's application of the [relevant] law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, "this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' " Id. at 1252 (quoting Demps v. State, 462 So.2d 1074, 1075 (Fla.1984)).

Grossman v. Dugger, 708 So.2d 249, 250-51 (Fla. 1997)

In the instant case Johnson alleges that counsel should have presented more family members to establish: 1) Johnson's father's history of mental problems and alcohol abuse, 2) abuse suffered by Johnson's mother, 3) Johnson's history of being a "loving, dependable, compassionate person". He also alleges that although counsel presented two psychiatrists and a toxicologist in support of his insanity defense, counsel was ineffective for not presenting a psychologist or psychopharmacologist.

This claim was the subject of the evidentiary hearing below. The lower court heard the testimony of both defense lawyers, as

well as numerous witnesses presented by Johnson as potentially mitigating witnesses. Based on this evidence, Judge Bentley denied the claim based on the following findings:

> (11) Claim XI alleges that counsel failed to adequately investigate and prepare additional mitigating evidence and failed to challenge the state's case. As noted in the analysis of Claim X, trial counsel presented mental health mitigation evidence. Trial counsel presented competent evidence to support the only two applicable statutory mitigating circumstances, extreme mental disturbance and capacity to conform conduct impaired. Trial counsel also presented three family members to testify about the defendant's difficult childhood, his abandonment by his parents and his father's alcoholism.
>
> The defendant called several potential mitigation witnesses at the evidentiary hearing. The defendant also made the argument that trial counsel should have called these same people during the 1988 proceeding. The witnesses were Joan Soileau, the defendant's ex-girlfriend; Jane Cormier, the defendant's mother; Joyce Kihs, the defendant's aunt and sister of Jane Cormier; and Steve Johnson, the defendant's brother. The substance of the evidence presented was that the defendant was a great person while he lived in California from 1976 to 1978. He never did drugs or engaged in any violent behavior. Apparently he liked to cook and he helped his girlfriend and mother clean their respective houses.
>
> Trial counsel testified that he attempted to contact the defendant's mother. The defendant provided an address and phone number, but neither were helpful in locating her. Jane Cormier testified that she had moved several times between 1978 and 1988, but that she was available to testify. There has been no evidence presented that suggests that

> counsel's failure to locate Ms. Cormier constituted ineffective assistance. If one's own client cannot provide information on how to locate his own mother, counsel cannot be faulted. The other proposed witnesses also had similar tales of relocating and losing touch with the defendant once he returned to Florida in 1978.
>
> As to the proffered evidence of Ms. Cormier and the other potential mitigation witnesses, the court finds that "there is no reasonable probability that the sentence would have been different even if what was presented to this court had been presented during the penalty phase of the defendant's trial." *Stewart v. State,* 481 So.2d 1210, 1212 (Fla.1985). Most of the witnesses' knowledge of the defendant came from seeing him for a period of two years while he was in California. What the effectiveness of such a narrow look into the defendant's character and personality would have been is questionable at best. In addition, evidence that the defendant could conform his conduct and refrain from drug use during the California years could have been harmful to some aspects of the case. Having decided that the proposed mitigation evidence would not have made any difference on the outcome of the trial and sentence, counsel cannot be ineffective for failing to present such evidence.

PC-R6: 931)

The trial court applied the right rule of law governing ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), and competent substantial evidence supports its finding. Johnson has failed to make the required showing of either deficient performance or sufficient prejudice to support his ineffectiveness claim. See, Grossman v. Dugger, 708 So.2d 249, 250-51 (Fla. 1997).

This Court's decision in Ferguson v. State, 593 So.2d 508, 510-12 (Fla. 1992), is informative. Ferguson, like Johnson presented an insanity defense at trial. Subsequently, he asserted that his lawyers were ineffective in the penalty phase in both of his trials. After rejecting his ineffective assistance of penalty phase counsel claim with regard to his first trial, this Court stated with regard to the second trial:

> Ferguson's claim that his Hialeah trial counsel was ineffective is similar, in that it is also based on counsel's alleged lack of investigation and presentation of mitigating evidence of Ferguson's mental illness and poor childhood. Ferguson also argues that his counsel was ineffective for failing to object during the prosecutor's closing argument and for making an inadequate closing argument himself.
>
> In the penalty phase of the Hialeah trial, no mitigating evidence was presented by the defense. Ferguson asserts that counsel should have put on mental mitigating evidence. Unlike the Carol City case, Ferguson does not claim here that counsel failed to investigate the extent of his mental illness. At the guilt phase of the trial, the defense claimed that Ferguson was insane, and numerous experts testified extensively as to Ferguson's mental problems. Counsel was fully aware that the standard for finding the statutory mitigating circumstances to be applicable is lower than the M'Naghten insanity standard. Obviously if defense experts thought Ferguson met the higher standard for insanity they also believed he met the lower standard for statutory mitigation. In his penalty phase closing, counsel argued that the statutory mental mitigating factors applied to Ferguson, noting that even the State's experts agreed that Ferguson had a serious mental illness. Counsel testified at the hearing below that he

and cocounsel considered putting the doctors on again and concluded that it would be cumulative. Counsel cannot be faulted for not recalling his experts at the penalty phase or parading still more experts in front of the jury.

We also find no deficiency in counsel's failure to present evidence of Ferguson's family background. Counsel was in touch with members of Ferguson's family. Ferguson's mother was called to the witness stand in the penalty phase. She was unable to testify when she became hysterical and nearly fainted, and counsel chose to remove her from the stand. Although counsel could have asked for a continuance to allow Ferguson's mother to compose herself, the decision to withdraw this witness was certainly reasonable in light of her emotional state. There was no connotation that she was removed because she could have nothing good to say about her son.

Ferguson's assertion that counsel's closing argument was deficient is also without merit. Although in hindsight one can speculate that a different argument may have been more effective, counsel's argument does not fall to the level of deficient performance simply because it ultimately failed to persuade the jury. The circuit judge described the argument as "emotional and comprehensive, with the strategy to relay to the jury that the Defendant was mentally ill, and it was not the policy of the State or humanity to be executing people who are mentally ill ... a credible argument asking for mercy." This argument clearly falls within the "wide range of professionally competent assistance." See Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

* * *

While we have concluded that counsel did not render ineffective assistance in either case, we also hold that Ferguson did not meet his burden under the second prong of the Strickland test. In other words, even if it could be said that counsel was ineffective,

> there is no reasonable probability that the result would have been different, in the absence of any deficient performance.

Ferguson v. State, 593 So.2d at 510-12

Similarly, in Provenzano v. Dugger, 561 So.2d 541, 545-46 (Fla. 1990), Provenzano, who also relied upon an insanity defense at trial, argued that his trial counsel should have called additional witnesses to demonstrate mitigation on his behalf. Upon rejecting his claim that counsel was ineffective for not presenting expert testimony during the penalty phase concerning his mental condition, this Court held that where the defense presented extensive medical testimony during the guilt phase that Provenzano was paranoid, such testimony as might have been presented during the penalty phase would have been largely repetitive. Provenzano also argued that counsel was derelict in not calling additional family witnesses to tell of his difficult background. This Court found that the additional testimony which Provenzano claimed should have been given would have been largely cumulative. Moreover, this Court noted that Provenzano clearly failed to meet the second prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because even without reaching the question of whether counsel would have been well advised to present more witnesses with respect to Provenzano's background, had the witnesses whose testimony was proffered been presented, the result would have been the same. Provenzano v. Dugger, 561 So.2d 541,

545-46 (Fla. 1990).

As Johnson has failed to make the required showing of either deficient performance or sufficient prejudice to support his ineffectiveness claim, the trial court's order should be affirmed.

ISSUE V

WHETHER LOWER COURT ERRED IN DENYING JOHNSON'S CLAIM UNDER AKE V. OKLAHOMA.

As his next claim, Johnson raises a now-familiar mental health issue which is pled in nearly every capital collateral pleading. Johnson, like all other capital collateral defendants, misinterprets the requirements of Ake v. Oklahoma, 470 U.S. 68 (1985), and contends that he is entitled to a "competent" psychiatric evaluation where "competent" is equatable with the same standards used in determining if a defendant was accorded his Sixth Amendment right to effective assistance of counsel. Ake v. Oklahoma merely requires the state to provide psychiatric (or psychological) assistance where there is a demonstrated need therefore and the defendant cannot afford to hire his own experts. See Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987). Thus, as in the instant case, where Johnson was evaluated by a number of mental health experts and presented an insanity defense at trial, there simply is no violation of Ake.

Nevertheless, the lower court allowed Johnson to present evidence in support of this claim at the evidentiary hearing. After considering this evidence, the court set forth his extensive findings as follows:

> (10) Claim X alleges that counsel failed to obtain an adequate mental health evaluation and failed to provide the necessary background information to the mental health consultants. The primary allegation is that counsel failed

to present evidence of organic brain damage to the jury. A review of the record indicates that the defendant was evaluated by three mental health experts, Doctors McClane, Afield and Ainesworth. All three men are psychiatrists. The doctors indicated that they had reviewed the case file, taken a medical and life history from the defendant, and had reviewed some materials furnished by defense counsel. While the doctors disagreed as to whether the defendant met the legal test for insanity, all three agreed that the defendant suffered from a severe mental or emotional disturbance due to amphetamine intoxication and that his ability to conform his conduct to the requirements of law was impaired.

At the evidentiary hearing, Dr. Brad Fisher, a clinical forsenic [sic] psychologist, testified for the defendant. Dr. Fisher evaluated the defendant almost 15 years after the crimes occurred. He met with the defendant two times, reviewed the case file, school, prison and police records of the defendant and met with the defendant's mother and brother. Dr. Fisher testified that he did not disagree with the mental health experts who testified at the 1988 trial. He believes that the defendant suffers from toxic psychosis and did so during the crimes. His opinion is that the defendant suffered from an extreme mental disturbance and his ability to conform his conduct to the requirements of law was substantially impaired. The only difference in Dr. Fisher's diagnosis of the defendant is that he believes the defendant suffers from organic brain damage due to extensive drug use. None of the prior mental health experts testified to any organic brain damage.

The defendant argues that had trial counsel provided the mental health experts with the same materials that CCR provided Dr. Fisher, they would have either diagnosed organic brain damage or would have recommended additional testing by a psychologist. The court finds, however, that even if the

> defendant did suffer from organic brain damage and this evidence was presented to the judge and jury, the result would not have changed. The ultimate opinions of the doctors on the defendant's ability to conform his conduct are consistent and were presented to the jury. The defense presented three competent mental health experts. Based upon a review of the trial transcripts and the evidence presented at the evidentiary hearing, the court is confident that Dr. Fisher's finding of organic brain damage is not of such import that it would have changed the jury's verdict or recommendation.[2] There has been no showing that the attorneys' conduct was ineffective in hiring the experts or in the material furnished. There also has been no showing that the mental health experts were ineffective. The defendant seems to argue that because his expert reached a different result that "res ipsa," someone was ineffective.
>
> ---
>
> [2] Although not raised by either side at the evidentiary hearing, the court wonders how almost 15 years of "life" on death row has affected the defendant's mental abilities. Common sense would seem to indicate that the defendant's extended incarceration may have contributed to some portions of Dr. Fisher's findings.

(PC-R6: 929-30)

In disposing of this issue, the trial court undertook a Strickland v. Washington analysis and determined the prejudice prong of that test. With respect to both the right to an adequate mental health examination and the right to effective assistance of counsel, the trial court determined that there is no reasonable probability that the results of the penalty phase would have been different even if the CCR proposed mitigation would have been propounded before a new jury.

Johnson has cited to no case law which demonstrates that the trial court applied an improper standard in the instant case. In any event, it is clear from the facts developed at the evidentiary hearing that Johnson could in no way prove his claim that he received inadequate mental health assistance in this case. Accordingly, Johnson's claim predicated upon Ake v. Oklahoma and State v. Sireci must fail.

Johnson's reliance upon Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), is totally misplaced. In Blake, defense counsel did no preparation or investigation for penalty phase and therefore, the Eleventh Circuit found counsel ineffective. However, in the instant case, the evidence at the state court evidentiary hearing conclusively showed that defense counsel adequately investigated and presented a wealth of mitigation to the jury and sentencing judge. Merely because collateral counsel would now, on hindsight, try the case differently does not mean that defense counsel acted in an unconstitutional manner. Ferguson v. State, 593 So.2d 508, 510-12 (Fla. 1992); Provenzano v. Dugger, 561 So.2d 541, 545-46 (Fla. 1990). With respect to all issues raised by Johnson, the evidence developed at the state court evidentiary hearing conclusively refutes the allegations. Johnson's claim has no merit and should be rejected by this Honorable Court.

ISSUE VI

WHETHER THE LOWER COURT ERRED IN SUMMARILY DENYING CLAIMS WHICH THE COURT FOUND TO BE EITHER PROCEDURALLY BARRED, LEGALLY INSUFFICIENT OR CONCLUSIVELY REFUTED BY THE FILES AND RECORDS IN THE INSTANT CASE.

Johnson also asserts error based on the trial court's summary denial of claims 1 (public records), 2 (appellate record), 3 and 4 (jury instructions), 6 (misleading jury), 7 (improper doubling of aggravators), 9 (jury instructions improperly shifted the burden), 12 (newly discovered evidence), 14 (trial court comments to counsel), 16 (denial of additional peremptory challenges), 17 (death penalty procedure unconstitutional), 18 (unconstitutional automatic aggravator), 19 (improper comments), 21 (jailhouse informants), 23 (flight instruction), 24 (juror interviews), 25 (jury misconduct) and 26 (voluntary drug intoxication).

Many of these claims raised the issue as both a substantive claim and, also, an ineffective assistance of counsel claim. Accordingly, the summary denial of these claims went only to the underlying substantive claim. The court allowed Johnson to present evidence in support of the ineffective assistance of counsel prongs of these claims. Thus, the lower court found that the substantive portions of claims 2, 3, 4, 9, 14, 16, 17, 18, 19, 21, and 23 were issues that could have been, should have been and/or were raised on direct appeal or were conclusively refuted by the files and records in the instant case. This finding by the lower court was

consistent with the law in this state concerning the summary denial of issues presented in a Rule 3.850 Motion to Vacate.

It has long been the law in this state that claims which could have or should have been raised on direct appeal are not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323 (Fla. 1994); Johnson v. State, 593 So.2d 206 (Fla.), cert. denied, ___ U.S. ___, 113 S. Ct. 119 (1992); Raulerson v. State, 420 So.2d 517 (Fla. 1982); Christopher v. State, 416 So. 2d 450 (Fla. 1982); Alvord v. State, 396 So.2d 194 (Fla. 1981); Meeks v. State, 382 So.2d 673 (Fla. 1980). It is also not appropriate to use a different argument to relitigate the same issue. Torres-Arboleda, 636 So. 2d at 1323; Medina v. State, 573 So.2d 293, 295 (Fla. 1990). The purpose of 3.850 motions is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on direct appeal. McCrae v. State, 437 So.2d 1388 (Fla. 1983). Many of the issues typically raised in collateral review are procedurally barred because they were or should have been presented on direct appeal. See, Jennings v. State, 583 So. 2d 316 (Fla. 1991); Swafford v. Dugger, 569 So.2d 1264 (Fla. 1990); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Blanco v. State, 507 So.2d 1377 (Fla. 1987).

The trial court correctly denied these claims as procedurally barred. The state urges this Court to enforce the procedural

default policy, or appeal will follow appeal and there will be no finality in capital litigation. See, Johnson v. State, 536 So.2d 1009 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality). The expressed finding by this Court of a procedural bar is also important so that any federal courts asked to consider Johnson's claims in the future will be able to discern the parameters of their federal habeas review. See, Harris v. Reed, 489 U.S. 255, 109 S. Ct. 1083, 103 L. Ed. 2d 308 (1989); Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

The remainder of the claims were denied on the merits or because the allegations were legally insufficient or conclusively refuted by the files or records in the instant case. Specifically, the court found:

Claim 1: Public Records: Contrary to appellant’s assertions, there are NO public records requests outstanding. This claim was thoroughly litigated and properly denied. (See, Issue I, supra.)

Claim 2: Missing Appellate Records: The court below found, “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. *See, State v. Johnson,* 608 So.2d 4 (Fla.1992).” Moreover, as appellant concedes, the court did address the ineffective aspect of this claim after the evidentiary hearing. The Court found:

> The defendant further complains that counsel was ineffective for failing to ensure that a proper record was made. The court allowed collateral counsel the opportunity to explore the ineffective assistance of counsel aspect of the claim at the evidentiary hearing. Trial counsel Lawrence Shearer testified that he filed a motion to record all proceedings. He believed the motion was granted and that all proceedings were recorded. However, Mr. Shearer testified that he had not read the entire transcript. In any event, the court finds that the defendant has not shown that any actions of counsel were deficient.
>
> (PC-R6: 922)

Accordingly, this claim was also properly denied.

Claim 12: Newly Discovered Evidence: The court denied this claim finding that it was a repeat of Claim VIII and alleged no new grounds. (PC-R6: 931)

Claim 19: Improper Comments by the Prosecutor: Although evidence was permitted on this claim, the court found that the substantive issue as to whether the state's comments unfairly prejudiced the defendant should have been addressed on direct appeal. (PC-R6: 933; PC-T8: 8) As to the ineffective assistance of counsel claim, the court noted that relief on this issue was denied under Claim XIII. Further, the court found that the comments of the state, taken in their entirety, did not unfairly prejudice the defendant or inflame the jury. (PC-R6: 933)

Claim 24: Juror Interviews: Claim XXIV alleged that Florida Rule of Professional Responsibility 4-3.5(d)(4) violates equal

protection principles. The court rejected Johnson's claim that the Rule of Professional Responsibility was unconstitutional. The court further noted Johnson had not shown any reason why he should be able to interview the jurors. Furthermore, the court found this issue does not appear appropriately raised in a rule 3.850 motion. (PC-R6: 934) This claim was properly denied. Ragsdale v. State, 720 So.2d 203, 205 (Fla. 1998)(Ragsdale not denied due process due to his inability to interview jurors.)

Claim 25: Juror Misconduct: The court summarily denied this claim because it did not contain any facts to support the allegation. Therefore, the claim was denied as facially insufficient to merit relief. Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998); Steinhorst v. State, 498 So.2d 414 (Fla.1986)(where motion lacks sufficient factual allegations the motion may be summarily denied).

Claim 26: Counsel Failed to Investigate, Develop and Present Ample Available Evidence in Support of a Voluntary Drug Intoxication Defense: The court denied relief on issues related to the intoxication defense in the discussion of Claim XV(c). The court found that the previous analysis is applicable to the instant claim for relief as well. (PC-R6: 934)

Johnson asserts that the foregoing was error. Although appellant concedes the lower court attached portions of the files and records, he contends that they fail to conclusively demonstrate that he is not entitled to relief. This position is without merit.

In Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), this Court denied Diaz's challenges to the sufficiency of the trial court's order denying 3.850 relief, where he claimed that the court summarily denied a number of claims without attaching relevant portions of the record as required by case law. This Court held where the trial court stated its rationale for denying each claim, the law does not require the court to also attach portions of the record. Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), citing, Anderson v. State, 627 So.2d 1170, 1171 (Fla.1993) ("To support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion.") Not only did Judge Bentley attach the relevant files and records, he also wrote an extensive and comprehensive order delineating each issue and explaining his rationale for denying each claim. Accordingly, the state urges this Court to deny the instant claim for relief.

ISSUE VII

WHETHER THE LOWER COURT ERRED IN RULING THAT VENUE WAS APPROPRIATE IN POLK COUNTY FOR HEARING JOHNSON'S POST-CONVICTION MOTION.

Johnson's claim that venue was not proper in Polk County is procedurally barred as it was not argued to the court below. See, generally, San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Accordingly, Johnson is not entitled to relief on this claim.

The murders for which Johnson was convicted occurred in Polk County on January 8, 1981. During Johnson's retrial in Polk County in October 1987, the judge granted Johnson's motion for mistrial based on juror misconduct. Johnson's motions to disqualify the trial judge and for a change of venue was granted and the case then proceeded to trial in Alachua County in April 1988 with a retired judge assigned to hear it. After Johnson's convictions were affirmed by this Court in Johnson v. State, 608 So.2d 4, 6 (Fla. 1992), Johnson filed a motion to vacate on August 1, 1994 in Alachua County. The motion was summarily denied. After this court dismissed the appeal, the case was transferred to Polk County.

With the single exception of a letter to former Justice Grimes, Johnson does not indicate any place in this record where he objected to venue being in Polk County or where the issue was presented to the court below. If Johnson was concerned about venue resting in Polk County, he should have filed a motion to change

venue or at least voice an objection to the court below. As “venue is merely a privilege which may be waived or changed under certain circumstances,” Johnson’s failure to properly raise the claim waives any challenge to venue. Lane v. State, 388 So.2d 1022, 1026 (Fla. 1980); Tucker v. State, 417 So.2d 1006, 1009 (Fla.App. 3 Dist. 1982). Cf. Rolling v. State, 695 So.2d 278, 297 (Fla. 1997).

Moreover, Johnson cannot establish any prejudice from the case being heard in Polk County. The original concern was due to the pretrial publicity and the possibility of the not obtaining a fair and impartial jury. This concern is not applicable in the resolution of the motion to vacate. As previously noted, “allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that he judge discussed his opinion with others, are generally considered legally insufficient reasons to warrant the judge's disqualification.” Rivera v. State, 717 So.2d at 480-81 (Fla. 1998). Thus, where the only concern is pretrial publicity, no possible prejudice exists herein. Accordingly, this claim should denied.

ISSUE VIII

WHETHER THE LOWER COURT ERRED IN REFUSING TO CONSIDER JOHNSON'S CLAIM OF CUMULATIVE ERROR.

Johnson's next claim asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. This cumulative error claim is contingent upon Johnson's demonstrating error in at least two of the other claims presented in his motion. For the reasons previously discussed, he has not done so. Thus, the claim must be rejected because none of the allegations demonstrate any error, individually or collectively. Although this may be a legitimate claim on the facts of a particular case, such facts are not present herein. No relief is warranted. Melendez v. State, 718 So.2d 746, 749 (Fla. 1998)(where claims were either meritless or procedurally barred, there was no cumulative effect to consider) and Johnson v. Singletary, 695 So.2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless.)

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the trial court's order denying the appellant's motion to vacate.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
Florida Bar ID#: 0445071
2002 N. Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Heidi E. Brewer, Assistant CCC - Northern Region, Office of the Capital Collateral Regional Counsel - Northern Region, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this _____ day of August 1999.

COUNSEL FOR APPELLEE