IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,333

TERRELL M. JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Johnson's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

Citations in this brief shall be as follows: The record on appeal from the denial of the instant Rule 3.850 motion shall be referred to as "M. ___" followed by the appropriate page number. The record on appeal concerning the original court proceedings shall be referred to as "R. ___." The record on appeal concerning the 1986 evidentiary hearing and denial of the preceeding Rule 3.850 motion shall be referred to as "P. ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF FONT

Mr. Johnson's Initial Brief is written in Courier font, size 12.

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STATEMENT OF THE CASE

Mr. Johnson was indicted for two counts of first degree murder on May 23, 1980, in Orange County , Florida. (R. 625). The jury returned verdicts of guilty and a judgment of conviction was entered on September 26, 1980, for first degree murder as to Count I and the lesser included offense of second degree murder as to Count II (R. 738-40). The sentencing jury first voted 6-6 which would have resulted in a life recommendation if no additional vote had been taken. However, the jury continued to deliberate, and after a second vote of 7-5 returned an advisory sentence of death on September 29, 1980 (R. 744). Mr. Johnson was sentenced to death on October 3, 1980, for Count I of the indictment, and to life imprisonment for Count II of the indictment (R. 804-08).

Mr. Johnson appealed from the judgment of conviction and this Court remanded for gross errors and omissions in the trial transcript. The case was resubmitted over lengthy enumerated objections of defense counsel and Mr. Johnson's convictions were affirmed on November 23, 1983. Johnson v. State, 442 So. 2d 193 (Fla. 1983). Mr. Johnson thereafter sought Rule 3.850 relief.

The trial court conducted an evidentiary hearing on December 22, 1986, and issued an order denying relief on June 12, 1989 (P. 1761-70). Motion for rehearing was denied June 30, 1989, and notice of appeal was filed August 28, 1989 (P. 1783-84). Subsequently, Mr. Johnson's appeal to this Court was denied. Johnson v. State, 593 So. 2d 206 (Fla. 1992).

On May 5, 1992 Mr. Johnson filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. Subsequently, the District Court dismissed the petition ordering Mr. Johnson to exhaust claims in state court.

Mr. Johnson filed a Petition for Writ of Habeas Corpus in this Court seeking exhaustion of claims. That petition was denied and a motion for rehearing was denied on June 5, 1997. Johnson v. Singletary, 695 So. 2d 263 (Fla. 1996).

On February 13, 1997 Mr. Johnson filed a second Rule 3.850 motion alleging, inter alia, newly discovered evidence and evidence of a previously unknown Brady violation.

The Honorable A. Thomas Mihok entered an order on August 18, 1997, directing Mr. Johnson to take a limited deposition of Pamela Cavender, the Records Custodian for the Orange County Sheriff's Office, by September 17, 1997. It further required that Mr. Johnson file any amended motion by October 17, 1997, in light of the inquiries allowed per the terms of the order.

A Motion to Compel was filed on October 9, 1997 by Mr. Johnson subsequent to the September 16, 1997, deposition of Ms. Cavender and in consideration of the lower court's order of September 9, 1997 "that all public records requests will be deemed satisfied by October 9, 1997."

Mr. Johnson filed a supplemental Motion to Vacate dealing solely with outstanding public records issues on October 15, 1997 in response to the order of the lower court dated August 18, 1997. The State responded on November 10, 1997. This Court issued a series of

orders tolling the time limits contained in Fla.R.Crim.P. 3.851 & 3.852 as to Mr. Johnson. The tolling expired on September 1, 1998.

Mr. Johnson filed a consolidated amended motion incorporating all his claims from his prior pleadings on August 31, 1998, and the State responded on September 22, 1998.

A status hearing was held on December 28, 1998 and the lower court entered an order on January 5, 1999, stating that "there will be no further public records requests or argument regarding public records requests," and further that Mr. Johnson had until January 28, 1999 to file a "`cleaned up' and consolidated motion under Florida Rule of Criminal Procedure 3.850."

On December 29, 1998, Mr. Johnson mailed timely additional records requests for information concerning the jurors in Mr. Johnson's case pursuant to Amendments to Florida Rules of Criminal Procedure-Rule 3.852 Capital Postconviction Public Records Production) and Rule 3.993 (Related Forms), 23 Fla. L. Weekly S478 (Fla. Sept. 18, 1998) in light of the holding in Buenoano v. State, 708 So. 2d 941 (Fla. 1998). These records requests had been prepared several days in advance of the mailing date as part of a mass mailing of public records requests for juror information in all the cases in the Miami office of CCRC that had been covered by the Rule 3.852 stays of proceedings.

On January 28, 1999, Mr. Johnson filed a consolidated motion to vacate judgment of conviction and sentence with request for leave to amend and for evidentiary hearing. The state responded on February 23, 1999, and, subsequently, a Huff hearing was held on May 3, 1999

with Mr. Johnson present for legal argument. (M. 54-98).

On June 15, 1999, the Honorable A. Thomas Mihok entered an order denying Mr. Johnson's motion without an evidentiary hearing. (M. 281-354). Counsel for Mr. Johnson filed a motion for rehearing on June 29, 1999, which was denied by a written order from Judge Mihok on July 20, 1999. Notice of appeal was filed on August 10, 1999, and this brief follows.

SUMMARY OF ARGUMENTS

1. The circuit court erred in summarily denying Mr. Johnson's

3.850 claims for an evidentiary hearing. Mr. Johnson plead substantial factual allegations, including ineffective assistance of counsel, newly discovered evidence, and Brady violations. Further, the circuit court failed to conduct the requisite cumulative analysis including the records and files of the 1980 trial and 1986 evidentiary hearing. An evidentiary hearing should have been ordered.

2. The circuit court erred in denying Mr. Johnson access to files and records in the hands of certain state agencies pertaining to the jurors in Mr. Johnson's case.

3. The ethical rule that prohibits Mr. Johnson's lawyers from interviewing the jurors in Mr. Johnson's case is unconstitutional.

4. The circuit court erred in rejecting Mr. Johnson's claim concerning the cruel and unusual nature of electrocution as a means of execution and Mr. Johnson requests leave to amend regarding the new lethal injection option.

5. Mr. Johnson must raise the "insane to be executed" argument in order to preserve the issue.

ARGUMENT I

MR. JOHNSON IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS RULE 3.850 CLAIMS

A. ERRONEOUS SUMMARY DENIAL WAS IMPROPER

On January 28, 1999 Mr. Johnson filed his consolidated Rule 3.850 motion (M. 220-244). He pleaded detailed issues and demonstrated his entitlement to an evidentiary hearing. At a Huff hearing on May 3, 1999 postconviction counsel Pamela Izakowitz supplemented the pleading with legal argument in support of an evidentiary hearing on the seven (7) claims for relief that were included in the motion. (M. 54-97). On June 15, 1999, the lower court entered an order denying relief without an evidentiary hearing (M. 281-354).

A trial court has only two options when presented with a Rule 3.850 motion: "either grant an evidentiary hearing or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted", Witherspoon v. State 590 So.2d 1138 (4th DCA 1992). A trial court may not summarily deny without "attach[ing] portions of the files and records conclusively showing the appellant is entitled to no relief", Rodriguez v. State, 592 So.2d 1261 (2nd DCA 1992). See also Brown v. State, 596 So.2d 1025, 1028 (Fla.1992).

The law strongly favors full evidentiary hearings in capital post conviction cases, especially where a claim is grounded in factual as opposed to legal matters. The lower court attached a total of fifty-eight (58) pages of material to the summary denial order. (M. 297-354). All but eight pages of this total were excerpts from the September 22, 1980 suppression hearing prior to Mr. Johnson's trial (M.

315-354) and the full transcript of a December 28, 1998 status hearing that encompassed Ms. Izakowitz's first appearance in Mr. Johnson's case. (M. 297-306). The other eight pages were copies of some of the attachments to the State's response to Mr. Johnson's consolidated 1999 3.850 motion, including six pages of Orange County Sheriff's police reports, a copy of two Miranda cards, and a copy of a 3 June 1980 letter from Bruce Hinshelwood, the Assistant State Attorney, to Gerald Jones, Mr. Johnson's trial counsel, concerning discovery in Mr. Johnson's case. The letter includes a reference to "Miranda card". (M. 220-244), (M. 307-314).

Some fact based claims in post conviction litigation can only be considered after an evidentiary hearing, Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. Where a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-3 (Fla. 1987). "Accepting the allegations . . .at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing", Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla 1989).

Mr. Johnson has pleaded substantial factual allegations including ineffective assistance of counsel, newly discovered evidence, and Brady violations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Because we cannot say that the record conclusively shows [Mr. Johnson] is entitled to no

relief, we must remand this issue to the trial court for an evidentiary hearing, Demps v. State, 416 So.2d 808, (Fla. 1982).

As to the sufficiency of the pleadings of Brady violations by the state and/or ineffectiveness of trial counsel, Mr. Johnson has clearly met the burden under Fla. R. Crim. P. 3.850. As noted by this Court, "[w]hile the post conviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief". Gaskin v. State, 737 So. 2d 509 (Fla. 1999). See also Peede v. State, 24 Fla. L. Weekly 5391 (Fla. 1999). The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. Id.

B. CUMULATIVE ANALYSIS IGNORED

In his second Rule 3.850 motion, Mr. Johnson alleged facts which (1) had never been previously disclosed to him despite prior public records requests, and (2) required evidentiary development. The lower court, in summarily denying the issue, also failed to conduct the requisite cumulative analysis in order to access the impact on Mr. Johnson's trial of the undisclosed information. The United States Supreme Court has explained:

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

Strickland v. Washington, 466 U.S. 668, 685 (1984).

As explained in Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995),

a court evaluating a Brady claim must consider the prejudice flowing from the nondisclosures "collectively, not item-by-item." Accord Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Young v. State, 739 So. 2d 553 (Fla. 1999); Swafford v. State, 679 So. 2d 736 (Fla. 1996); Jones v. State, 591 So. 2d 911 (Fla. 1991). Since the materiality standard governing Brady claims was borrowed from Strickland (United States v. Bagley, 105 S. Ct. 3375 (1985)), the same cumulative standard must also apply to ineffective assistance claims. The purpose of the prejudice standard is to determine whether the defendant suffered sufficient prejudice to undermine confidence in the reliability of the outcome; the purpose is not to divide the error into compartments and help the State sweep the misconduct under the proverbial rug. See, Kyles, 115 S. Ct. at 1565-1567.

The materiality of a Brady violation is also enhanced by prosecutorial argument that everything has been disclosed. See Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Arango v. State, 467 So. 2d 692 (Fla. 1985). Where the prosecutor presented a false or misleading argument, relief is required unless the State establishes that the error was harmless beyond a reasonable doubt. See Kyles, 115 S. Ct. at 1565 n.7. Where either the state, the defense, or both fail in their obligations, a new trial or sentencing proceeding is required if the cumulative effect of these errors undermines confidence in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); see Kyles, Jones v. State, 591 So. 2d 911 (Fla. 1991). See also Scott v. State, 657 So. 2d 1129 (Fla. 1995).

In 1997, Orange County law enforcement agencies divulged

previously undisclosed evidence, which demonstrated that Mr. Johnson was denied a full adversarial testing at the guilt and penalty phases of his trial. One example of the evidence is a Miranda card showing that five minutes after midnight on January 6, 1980, Mr. Johnson "refused to sign". (M. 313).

This evidence only became available to Mr. Johnson in September, 1997 after he made public records requests to the Orange County law enforcement agencies. This evidence of Mr. Johnson's "refusal to sign" was never before provided despite a specific public records request on April 8, 1992.

In the spring and summer of 1996, in response to public records requests, Orange County law enforcement agencies released a substantial amount of previously undisclosed handwritten notes, reports, and documents. These items had not been provided to trial counsel and were never before provided to postconviction counsel.

In September 1997, following a deposition of the their records custodian, the Orange County Sheriff's Office for the first time provided **legible** copies of numerous documents that had been previously unreadable in response to an order of the trial court.[1] (Attachment I). Orange County law enforcement agencies also disclosed additional evidence of the illegality of the interrogations of Mr. Johnson.

At trial, counsel filed two motions to suppress, but failed to argue or present evidence to show that Mr. Johnson invoked all his

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[1]The order and deposition of Pamela Cavendar are not contained in the Record on Appeal. For that reason and in an attempt to prevent any delay, undersigned counsel is filing a Motion to Supplement the Record contemporaneously with this Initial Brief.

rights when he refused to sign a Miranda waiver form presented to him by Officer Peterson of the Jefferson County, Oregon Sheriff's Department. (R. 696-99). It was never revealed to trial counsel that the police had made a record **proving** that refusal. That record is a Miranda card regarding Peterson's first attempt to interrogate Terrell Johnson which shows that at 5 minutes after midnight, on January 6, 1980, Mr. Johnson "refused to sign." (M. 313).

The lower court in its order summarily denying an evidentiary hearing held that the State's failure to turn the refusal card over to the defense "made no difference in the outcome of Defendant's trial because his later statements to Prineville Police Chief Montee would have been admissible in any event." (M. 288). The lower court is substituting its strategy for that of trial counsel. Trial counsel did not say that. Trial counsel Gerald W. Jones was called as a witness at the 1986 evidentiary hearing and was examined on issues related to the suppression hearing. A review of the testimony indicates that neither 1986 postconviction counsel nor trial counsel were familiar with the refusal card and its significance:

> Q (Mr. Olive) Were you familiar at the time of the trial in this case with the general proposition of law that once a client -- if I'm incorrect about it, tell me. If a client indicates that he wishes not to speak any longer to investigating officers, that unless he re-initiates contact with them, they can't continue questioning him?
>
> A (Mr. Jones) Yes, sir.
>
> Q You did not request any psychological assistance, any psychologist or psychiatrist to assist you in analyzing any issue with regard to the confessions in the case.

A No, sir.

Q In the appendix, Appendix 9, is a police report and included in that police report is the following information, of which I will ask you if you were familiar with or had in your files. This is a police report from Oregon, as I understand it.

Among other things it goes quote:

"Peterson indicated that Johnson didn't wish to answer any questions, and it was decided to let his girlfriend Patricia Sweeney talk to Johnson in the presence of Peterson and myself. This was done and Sweeney went over the statement she had given to me earlier about crimes in Jefferson County, Oregon and California. Johnson did not respond during this period of time.

"About 2:37 a.m. on January 6th, Johnson asked if he could rest because he didn't feel good. At this point in time the interview ended, and arrangements were made to transport Johnson as there was no room here.

"Following this lodging I returned to Jefferson County and made arrangements to meet with Lt. Peterson at 1:00 a.m., to re-interview Johnson.

"On January 6, 1980, I received a telephone call about 9:30 a.m., advising that a Dr. Hugh Gardiner was to fly into Prineville about 11:00 a.m., and I was asked to join Peterson and come to Prineville to meet the doctor who was to examine Johnson.

Do you remember having access to any of that material?

A It sounds vaguely familiar. I don't --

Q The point is that the Defendant said, "I don't have anything else I want to say to you, " essentially, and they quit interviewing him, fully intending to come back and re-interview him. Did you know that?

A I may have.

> Q You filed no motion regarding that?
>
> A But did they? I would have if they had re-interviewed him.
>
> Q Well, I understand they did. But the next day on January 6, 1980, they also went and got a psychiatrist and took him back over. The psychiatrist interviewed Terry, and then they went back in.
>
> ***
>
> A All I knew during that time period, I knew the only thing they had on Terry was his confession. And I went over the reports and the depositions time and time again and researched throughly the law regarding confessions and voluntariness and Miranda and Escabido and all of these decisions. Perhaps something slipped by me. I'm certainly human.
>
> Q Did you know that before -- do you know whether before he confessed he had been interrogated and refused to give any statements; the girl friend talked with him, urged him to? The police took a psychological profile of him through a psychologist and then went back and interrogated him and got a statement. Do you know whether or not that scenario is accurate, or not?
>
> A No, I don't.

(P. 256-59). Trial counsel was never given the opportunity to address this issue because this information was withheld from both defense counsel and prior post-conviction counsel, in violation of Brady.

What was also overlooked by the lower court is that when Mr. Johnson refused to sign the Miranda card, he invoked his right to silence. Chief Montee testified that his initial contact with Mr. Johnson was at 2:00 a.m. on the morning of January 6th when he was asked to "assist" Lt. Bob Peterson of the Jefferson County Sheriff's Office "in an interview of Mr. Johnson." (M. 319). This was nearly two hours **after** the "refusal to sign" at 12:05 a.m. Montee's description of that

interview was part of his testimony at the 1980 suppression hearing:

> Q And your first contact with Mr. Johnson, I am talking about a face to face contact, was when?
>
> A Approximately [at] 2:36 in the morning on the 6th, and he was in the office of Lt. Bob Peterson in Jefferson County.
>
> Q Now, at that initial meeting, did you yourself advise Mr. Johnson of his Constitutional Rights?
>
> A No, I did not, but as I entered the room, Lieutenant Peterson introduced me to Mr. Johnson and advised me that he had advised Mr. Johnson of the [his] rights.
>
> Q But, so far as you know, [it was] never done in your presence?
>
> A It was not done in my presence.
>
> Q And how long did your contact with Mr. Johnson last on that early morning hour, [on the] 6th of January?
>
> A Just a couple of minutes, because **Mr. Johnson did not answer two or three questions that he was asked by Lieutenant Peterson. And he stated after I had been there two, three minutes, that he was very tired, [and] would like to sleep. And so the interview was ended**.
>
> Q When did you next see Mr. Johnson?
>
> A Well, I was in contact with Mr. Johnson from then until approximately, 3:30, I believe, because I transported him from Jefferson County to my jail in Prineville.
>
> Q [Was there] Any conversation about any offense during that period?
>
> A **There was no conversation about anything during that period**.

(M. 346-47)(emphasis added). Mr. Johnson invoked his rights by refusing to respond to police initiated interrogation for the first 39

hours after his arrest. Mr. Johnson provided an indication that he wanted to remain silent. Law enforcement should have stopped all police-initiated interrogation. Mr. Johnson's refusal to waive Miranda was an unambiguous assertion of his right to counsel that was violated by re-initiation of interrogation. Edwards v. Arizona, 451 U.S. 477 (1981). "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Miranda v. Arizona, 384 U.S. at 473-474. This ruling was reaffirmed in Edwards v. Arizona, 451 U.S. at 482 and Michigan v. Mosley, 423 U.S. 96 (1975). See Owen v. Alabama, 849 F.2d 536 (11th Cir. 1988); Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987).

Here, the lower court dismissed Mr. Johnson's Rule 3.850 guilt phase and penalty phase Brady claim and associated claim of ineffective assistance of trial counsel by asserting that in regard to the Miranda card claim:

> ...Defendant's refusal to sign the card does not in itself constitute an affirmative assertion of Defendant's right to remain silent or a request to speak with an attorney. His refusal to sign, given the language employed on the card, can at most be taken as a refusal to affirm that Defendant understood his rights as a refusal to acknowledge his rights. Thus, his refusal to sign this card did not foreclose additional questioning after additional advisement of his Miranda rights.
>
> The record plainly shows that, irrespective of the 12:05 A.M. refusal, Defendant was advised of his Miranda rights and acknowledged them prior to making any inculpatory statements regarding the Orlando crime to Police Chief Montee. Thus, even assuming Defendant's allegations are true,

> failure to turn the refusal card over to the defense made no difference in the outcome of Defendant's trial because his statements to Montee would have been admissible in any event. In sum, no interrogation was made nor were any inculpatory statements obtained regarding the Orlando murder before Defendant received his Miranda warnings, signed a card indicating that he understood his rights, and waived those rights by offering a voluntary statement to Montee.
>
> ***
>
> Finally, Defendant's allegation also rests heavily on his assertion that he was never expressly informed that he could stop questioning at any time. "The right to cut off questioning is implicit in the litany of rights which Miranda requires to be given to a person being questioned. It is not, however, among those that must be specifically communicated to such a person." Brown v. State, 565 So.2d 304, 306 (Fla. 1990). Thus, Defendant's rights were in no way compromised by the failure to give this particular warning.

(M. 288-89). These findings simply fly in the face of the total record history of Mr. Johnson's case. The lower court has overlooked and misapprehended several issues that were raised in Mr. Johnson's Amended Rule 3.850 Motion and Motion for Rehearing. Without an evidentiary hearing, the lower court cannot determine that Mr. Johnson's refusal to sign would not have made a difference. The lower court improperly substituted its own strategy for that of trial counsel's. "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." Harris v. Reed, 874 F.2d 871, 878 (7th Cir. 1990). Without an evidentiary hearing on these disputed facts, it is impossible for this Court to know whether this information would have made a difference.

The lower court's summary denial order also dismisses the "newly discovered" nature of the evidence in the form of the Miranda card because "Defendant was personally aware of his initial refusal and all circumstances attendant to his interrogation." (M. 287). Quite apart from the fact that this interrogation took place over 40 hours and involved, according to law enforcement testimony, "eight or ten" separate advisories (M. 339), Mr. Johnson's condition in the early morning hours of January 6th was described as, "He looked very tired, he was red eyed, extremely nervous, his clothing was wrinkled and unkempt, his hair was messed up" (R. 372). There is significant and relevant evidence in the record of this case to cast into grave doubt Mr. Johnson's "personal awareness." Moreover, the State's Brady obligations are not dependent on the defendant's "personal awareness."

At the 1986 Rule 3.850 hearing, Dr. Glennon described the effects of the forced detoxification following Mr. Johnson's arrest:

> Q We also asked you to provide us with some insight with regard to whether someone who's a chronic alcoholic, who has been drinking and who gets arrested and who the police interrogate, would have any impaired judgment, have any problems, hallucinations; for instance, any physical and mental problems that might make it difficult for them to knowingly and intelligently waive things like the right to have an attorney present, the right to remain silent, the right to give no statement to the police officer. Say six hours after being arrested, 12 hours, 24, 36, 78, two, whatever. Do you have any opinion with regard to that?
>
> A Well, a person who is drinking or someone who is withdrawing from alcohol who has been using it significantly is going to be in a state of impaired judgment. Okay? And, again, it's considering the consequence of their decisions. They're going to be less appreciative

of those consequences.

> Q What if they're withdrawing or not taking any more alcohol? What about during that period of time?
>
> A Well, during that time there were physical changes, a rise in blood pressure, weight, tremora, poor sleep, maybe nightmares. An individual's ability to concentrate and remember is impaired; judgment is impaired. Only occasionally will there be, you know, hallucinations.

(P. 180-81)(emphasis added). Further, Mr. Johnson's condition was exacerbated by his underlying personality disorders and brain damage. The police psychiatrist recognized Mr. Johnson's impaired mental state when he reported to the police that Mr. Johnson was alcoholic, suicidal, got his feelings hurt easily and was not very sophisticated. (P. 1150-52). Mr. Johnson's impaired mental state was carefully and persistently exploited for thirty nine hours of sophisticated psychological interrogation.

The lower court, in its summary denial order, also overlooked the fact that Mr. Johnson refused to waive his Miranda rights for 39 hours before he succumbed to police pressure. To get Mr. Johnson to talk, the police arranged for Mr. Johnson to speak with his girlfriend. To get him to talk, police arranged for a psychiatrist to interview Mr. Johnson and find out what his weaknesses were. To get him to talk, police delayed Mr. Johnson's arraignment. Mr. Johnson finally talked to police on January 7, 1980, 40 hours after his initial arrest.

Mr. Johnson was only advised of his rights two times before his confessions; and, he was never advised that he could halt the questioning at any time. When the questioning ceased from time to

time, the police re-initiated. Clearly he never understood his right to stop the police from continuing this marathon interrogation especially given that they had failed to honor his prior invocation of his rights. Richard Montee, Chief of Police in Prineville, Oregon, testified at the 1980 suppression hearing:

> Q Now, in the interview at 1:30 p.m. on the 7th day of January, you stated earlier that you advised him of his Rights from the Miranda card, is that correct?
>
> A Yes, sir.
>
> Q Where did you get your card from, your Miranda card?
>
> A I have no idea. They are from some police supply house, I don't know which supply house we obtain them from.
>
> Q How long have you used that particular card?
>
> A Well, that card was --
>
> Q Or that type of card?
>
> A That was the card that was being utilized by the Prineville Police Department at the time I took it over, in February of 1979.
>
> Q Make note of number six; you have the right to interrupt the conversation at any time, what does that mean?
>
> A That if he wishes to interrupt the questioning or conversation at any time, he has that right.
>
> Q Anywhere on there does it say, if at any time he wishes the conversation to cease, no more questions will be asked him?
>
> A It states he has the right to remain silent.
>
> Q Right. But, does it state that once he

starts talking he has a right to stop the conversation, and no more questions will be asked of him?

A I don't recall offhand. I don't memorize the card.

Q I show you a copy of the card.

A (Witness examining card.) No, only number six.

Q About the interruption?

A. Yes, sir.

Q Does it say on there, if any time during the conversation he wishes to have an attorney present, all questioning will stop until such attorney can be obtained for him?

A I don't believe it does.

Q Did you advise him of any rights that would not be contained on the card?

A No, sir, I follow the rights.

Q To the letter?

A Yes, sir.

(R. 373-75)(emphasis added). At no time was Mr. Johnson advised that he could stop the questioning at any time if he wanted to have an attorney present.[2]

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[2]The facts here should be compared to those in Duckworth v. Eagan, 109 S. Ct. 2875 (1989). There, adequacy of the Miranda warnings was upheld because:

> We think the initial warnings given to respondent touched all of the bases required by Miranda. The police told respondent that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had "this right to the advice and presence of a

Lieutenant Robert A. Peterson of the Jefferson County Sheriff's Department in Oregon first had contact with Mr. Johnson in the early morning of January 6th, 1980 in the course of a robbery investigation when he invoked his rights and refused to waive them (R. 407). Yet the jury, trial counsel and the court were mislead into believing that Peterson's involvement in obtaining statements from Johnson was limited to the events of February 7, 1980. Peterson testified that on the 7th, Johnson initiated a discussion with Peterson during which Johnson made inculpatory statements.

Collateral counsel only recently discovered the existence of documentary evidence that Mr. Johnson's explicitly refused to waive his Miranda rights and that Peterson acknowledged that refusal by annotating the card. Previously, for example in a Jefferson County Sheriff's report, Peterson had stated "although conversant, Johnson, after being advised of his rights, demonstrated a reluctance to discuss the matter ... **he appeared to be assuming a pose of not remembering**. Throughout the interview ... approximately (1) one hour duration, he repeatedly asked to see `Pat.' (His female companion)." (Jefferson County Sheriff's Office special report dated 9 January '80 (Wed). at 1300 hours, written by Robert H. Peterson)(emphasis added). Failure to mention that Mr. Johnson invoked all his rights and refused to waive them was an unconstitutional omission.

> lawyer even if [he could] not afford to hire one," and that he had the "right to stop answering at any time until [he] talked to a lawyer."
>
> 109 S. Ct. at 2880.

Thereafter it was Peterson, in concert with the District Attorney and Prineville City Police officer Richard Montee, who arranged for Mr. Johnson to speak with his girlfriend, Patricia Sweeney. Yet, Mr. Johnson continued to refuse to respond to questions and was transported to the Prineville Jail. It was Peterson who arrived the next day at the jail to re-interview Mr. Johnson and it was Peterson who arranged for a psychiatrist to interview Mr. Johnson the following day, and act which clearly failed to honor and acknowledge Mr. Johnson's assertion of rights.

The police made arrangements between 1:00 and 2:00 a.m. on January 6th for Patricia Sweeney to see Mr. Johnson. Ms. Sweeney was to advise Mr. Johnson that she had given a statement and that he should also confess:

> I then went to the Grand Jury room where I interviewed Patricia Delores Sweeney, dob 09-01-47, in the presence of Mrs. Tom Wayne. (See attached statement)
>
> Following this interview I met with District Attorney Sullivan and Lt. Bob Peterson to discuss the interview of Terry Johnson, male suspect in this matter. Peterson indicated that Johnson didn't wish to answer any questions and it was decided to let his girlfriend Patricia Sweeney talk to Johnson in the presence of Peterson and myself. This was done and Sweeney went over the statement she had given to me earlier about crimes in Jefferson County, Oregon, and California. Johnson did not respond during this period of time and at about 2:37 a.m. on January 6, 1980, Johnson asked if he could rest because he didn't feel very good. At this point in time the interview ended and arrangements were made to transport Johnson to Prineville to be lodged as there was no room at the Jefferson County Jail to provide any type of isolation lodging. Johnson was then transported to the Prineville/Crook County jail by Deputy Chuck Duff and me where he

> was lodged. Following this lodging I returned to Jefferson County and made arrangements to meet with Lt. Peterson at 1:00 p.m. on January 6, 1980, to reinterview Johnson.

(P. 1218-19)(emphasis added). In spite of this police tactic, Mr. Johnson still refused to give a statement.

As a matter of "standard operating procedure" a police psychiatrist was brought in to "evaluate" Mr. Johnson on the morning of January 6 (R. 407). This interview produced information which was immediately provided to the police.[3] During the "examination," Mr. Johnson told Dr. Gardner that he was suicidal and alcoholic, that he had an active sex life with Pat, and that his feelings were hurt easily. In addition, Dr. Gardner informed the authorities on the day of Mr. Johnson's statement, that "he engages in self-pity. He is not very sophisticated" (P. 1150-52). See Stano v. Dugger, 901 F.2d 898 (11th Cir. 1990)(en banc).

The police decided to try another visit between Mr. Johnson and his girlfriend. They transported Mr. Johnson's girlfriend thirty miles so that she could again encourage him to confess:

> When Mr. Johnson arrived he asked if he could see his girl friend again. He stated if this could be done, he would give me a full statement with everything he had been involved in. I advised him I would make those arrangements if he would give the statement and I contacted D.A. Mike Sullivan and relayed the request.

(P. 1219). Mr. Johnson still maintained his silence.

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[3]To the extent Mr. Johnson provided the psychiatrist any inculpatory information following this physically and mentally exhausting interrogation, this is in violation of Leyra v. Denno, 347 U.S. 556 (1954) and Walls v. State, 580 So. 2d 131 (Fla. 1991).

Armed with information regarding Mr. Johnson's susceptibilities, acquired from the psychiatric police agent and the girlfriend, the police exploited his simplistic personality and religious beliefs. Mr. Johnson asked if Florida was a death penalty state, an obvious request for legal advice. Detective Soules testified that:

> I said to him that I thought he was in real trouble and that I asked him if he believed in God. And he said, he did. And I told him I thought he was in enough trouble he better become honest with himself and with his Creator, because if he had committed these and if they were proven, with the concern he expressed to me, if he was to be put to death, he was in trouble at that point.

(R. 396). See also (R. 404-05).

Mr. Johnson was scheduled for arraignment in court and appointment of counsel on the morning of January 7, 1980. As soon as 25 minutes after Mr. Johnson's arrest, the police in Oregon knew that the gun they recovered from Mr. Johnson's car possibly matched the gun stolen from Florida.[4] The police were not surprised by Mr. Johnson's statements but instead coerced and deliberately elicited the statements. The Oregon police continually interrogated Mr. Johnson including postponing Mr.

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[4] 1/5/80 2250 hours

Witness, Janoe (Jefferson County Sheriff's Department), processed defendant's vehicle in Madras, Oregon. Witness, Janoe's statement indicates that he obtained a .38 caliber revolver, Iver Johnson, serial number J04793, from the front seat of a vehicle driver by defendant, Johnson, and occupied by Patricia Sweeney and Edith Kasper. All three were arrested In Madras, Oregon.

Note: Iver Johnson, .38 caliber revolver, serial number J04793, was entered into N.C.I.C. as possibly stolen from victim, Dodson.

Orange County Police report, supplemental investigation dated 15 May 80, reported by D.A. Nazarchuk.

Johnson's court appearance in order to continue the interrogation of Mr. Johnson without the benefit of counsel. This was an unconstitutional delay in Mr. Johnson's right to an appearance before the court, and in violation of Mr. Johnson's sixth amendment rights in the face of a State apparatus gearing up for prosecution. In addition, this is a violation of Fla. R. Crim. P. 3.130, which entitled Mr. Johnson to a first appearance before a court within 24 hours of his arrest. Mr. Johnson's impaired mental state, the improper interrogation techniques utilized by the police, and incomplete Miranda warnings, required a suppression of Mr. Johnson's statement obtained in violation of his fifth amendment right to remain silent. Mr. Johnson had the right to the appointment of and consultation with counsel.

Mr. Johnson invoked his rights by refusing to respond to police initiated interrogation for the first thirty-nine hours. Mr. Johnson "provided at least an equivocal or ambiguous indication that [he] wished to remain silent." Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992). Law enforcement officers should have ceased all police-initiated interrogation. Jacobs; Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), cert. denied, 110 S.Ct. 2628 (1990); Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987); Moore v. Dugger, 856 F.2d 129 (11th Cir. 1988). Moreover, his refusal to waive Miranda constituted an unambiguous assertion of his right to counsel which was violated by re-initiation of interrogation. Edwards v. Arizona, 451 U.S. 477 (1981).

The record is clear that after Mr. Johnson was arrested and advised of his Miranda warnings that he chose to remain silent and invoke his rights. However, the police ignored his refusal to make a

statement and launched a lengthy, sophisticated and ultimately successful interrogation. In fact, just prior to Mr. Johnson's first full statement, Police Officer Richard Montee had to leave the room to delay Mr. Johnson being taken for arraignment. The Jefferson County Sheriff's Office had arrived at the city jail and Officer Montee sent them away (P. 350). Mr. Johnson's exercise of his constitutional rights was not "scrupulously honored," and use of the statements against him violated the fifth, sixth, and fourteenth amendments. See Michigan v. Moseley, 423 U.S. 96 (1975); Edwards v. Arizona, 451 U.S. 477 (1981); Minnick v. Mississippi, 11 S.Ct. 486 (1990).[5] Even after the police realized Mr. Johnson did not want to speak, they continued to initiate contact with Mr. Johnson while Mr. Johnson was in custody in violation of Edwards. Mr. Johnson's will was overborne, and his statements were not voluntary. Arizona v. Fulminante, 111 S. Ct. 1246 (1991).

In 1986, trial counsel testified that the Oregon police agreed to facilitate Mr. Johnson's marriage to Pat Sweeney as part of the efforts to get a confession:

> A ...I remember Pat Sweeney had been told by Mr. Johnson of the murders in Orlando. And the Defendant, for whatever reasons, wanted to marry Pat Sweeney, and there was some type of goings on regarding whether they could get married, or not.

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[5]To the extent that the State argues that this issue was not fully litigated, counsel was ineffective due to an inexcusable ignorance of the law or an unreasonable failure to conduct even the most rudimentary research and investigation. Of course, no "tactic" or "strategy" can be ascribed to attorney conduct which is based on ignorance or a failure to investigate and prepare. See Kimmelman v. Morrison, 477 U.S. 365 (1986).

Q Do you have any personal knowledge about whether the police there helped them get married, put the marriage on for them?

A Personal knowledge?

Q Yes.

A Being defined as what?

Q If somebody told you.

A Yes, sir.

Q From there, who would know?

A Yes, sir.

Q Who was that?

A I can't remember his name. I didn't get the depositions with my file. So I don't have very good recollection of what was said on the depositions out in Prineville. The chief of police out there, the former FBI agent, whatever his name was.

Q You talked with that person?

A Yes, sir.

Q And he said, "We helped them get married?"

A He said Terry wanted to get married real badly and they didn't usually do that, but they made an exception in his case, is what I recall.

(P. 259-60)(emphasis added). See (R. 382).

The romance culminated in marriage, celebrated by all, post-confession. The sheriff's wife helped Ms. Sweeney pick out her wedding dress, a deputy performed the ceremony, and the court provided a courtroom for the couple, all of which was preserved in photographs introduced in the post-conviction proceeding. Police interrogators

Peterson and Montee witnessed the marriage license (P. 1212-17). The police who testified at Mr. Johnson's suppression hearing repeatedly swore that they knew nothing about any connection between Mr. Johnson and this case until around 11:00 a.m. on January 7, 1980, when they received an N.C.I.C. report from Florida about a pistol connected to Mr. Johnson. However, according to St. Joseph, Michigan, police records, this was patently untrue. The report reveals:

> REPORT: 7 P.M. Monday, January 6th, 1980 At this time the undersigned detectives, Cooper and Soucek, made telephone contact with Lt. Robert Peterson at the Jefferson County Sheriff's Department in Oregaon [sic]. As indicated above in Officer Kebschull's report, Lt. Peterson advised that the above subjects, Johnson and Sweeney, were being held for the armed robbery of a service station and the attempted murder of police officer. Bond on Johnson set at 750,000 dollars.
>
> Apparently Sweeney broke down and volunteered their implication in at least 14 and as many as 20 robberies between Florida and Oregon, to include California. It further included a robbery near Orlando, Florida, in which Johnson allegedly killed two persons.
>
> Lt. Peterson advised that both Terrell and Sweeney had admitted that Johnson had robbed a beauty shop in St. Joseph, Michigan, and while do so, a shot was fired, further that they were in possession of a master charge card of Valerie KOLBERG, one of the beauty shop victims, and had used that card through Indiana, Illinois, Utah and California. At this point it was verified that no injuries were made at the beauty shop robbery.
>
> WEAPON: Lt. Peterson reports the weapon confiscated from Johnson is a IVER-JOHNSON, 38 special with 2" barrel, black in color. He has made a determination this weapon was previously stolen in Florida.

(P. 1222)(emphasis added). Obviously, the testimony presented at the

suppression hearing was false.

At the suppression hearing the officers testified that they did not know about the connection with the Florida murder until the next day at 11:00 a.m., January 7, 1980. By delaying Mr. Johnson's scheduled arraignment, the police were able to initiate yet another interrogation without the benefit of counsel. Still, Mr. Johnson said he did not want to make a statement because he feared the death penalty in Florida, and that he would be "put to death for these crimes if he admitted to them" (R. 395). It was only after approximately 39 hours of maintaining his right to silence and six different interactions that the police were finally able to break Mr. Johnson's will and obtain a confession.

The inquiry into the validity of a waiver has two distinct dimensions as illustrated in Moran v. Burbine, 475 U.S. 412, 421 (1986). First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Burbine, 475 U.S. at 421. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Burbine, 475 U.S. at 421 (citation omitted); see Edwards, 451 U.S. at 482 (inquiry has two distinct dimensions). In particular, "[t]he determination of whether there has been an intelligent waiver . . . must depend in each

case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); see Miranda v. Arizona, 384 U.S. 436, 475 (1966)(applying Johnson v. Zerbst standard to waiver of Miranda rights). The accused's mental state is the critical factor. When evaluated by Dr. Glennon, the doctor could not conclude, given the facts, that Mr. Johnson had the ability to comprehend or knowingly waive his rights at the time approximate to the offense (P. 180-81).

There is no indication that Mr. Johnson initiated conversation with the police. Thus, even if Mr. Johnson could said to have waived his Fifth Amendment right to silence, it cannot be said that Mr. Johnson initiated conversation. Since the police never waited "a significant period of time" between continuing the interrogation of Mr. Johnson, Mr. Johnson's constitutional rights were violated. Jacobs; Delap.

Moreover, Mr. Johnson in fact indicated a desire to invoke his right to silence and his right to direct that questioning cease. In Miranda, the United States Supreme Court declared "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74 (emphasis added). This ruling was reaffirmed in Edwards v. Arizona, 451 U.S. at 482, and in Michigan v. Mosley, 423 U.S. 96 (1975). See Owen v. Alabama, 849 F.2d 536 (11th Cir. 1988); Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987).

In addition to not understanding or rationally waiving the rights that were read to Mr. Johnson by Sheriff Montee, see Miranda, Mr. Johnson was never properly informed of his rights at all. The State never established that Mr. Johnson had been sufficiently advised of his right to counsel. In fact, Chief Montee never advised Mr. Johnson that he could stop the questioning at any time and an attorney would be appointed (R. 373-75).

A full recitation of an accused's rights must be conveyed by the police. Failure to do so may result in the inadmissibility of any subsequent statements. The Florida Supreme Court has spoken directly to this issue:

> We hold that the failure to advise a person in custody of the right to appointed counsel if indigent renders the custodial statements inadmissible in the prosecution's case-in- chief and Caso's statement in the present case was improperly admitted.

Caso v. State, 524 So. 2d 422, 425 (Fla.), cert. denied, 488 U.S. 870 (1988). Here the constitutional error is even clearer: Mr. Johnson was in custody, but he was not advised that he had a right to stop the interrogation and have appointed counsel if he could not afford one. Moreover, it is the State's burden to establish that adequate Miranda warnings were given. Here, the State's witness admitted that he never advised Mr. Johnson of his right to stop the questioning and request appointed counsel. Caso establishes that improper and inadequate Miranda warnings were given in this case. See Duckworth v. Eagan, 109 S. Ct. 2875 (1989).

The Eleventh Circuit affirmed the importance of the "rigid

prophylactic rule" that upon any request for counsel, whether it is explicit or equivocal, any interrogation should immediately cease. Towne v. Dugger, 899 F.2d 1104, 1106 (11th Cir. 1990). Further, a court must "give a broad, rather than a narrow interpretation to a defendant's request for counsel." Towne, 899 F.2d at 1106 (citation omitted). Mr. Johnson was never properly instructed on his right to counsel and should not be punished due to a defective Miranda warning.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court declared "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74 (emphasis added). This ruling was reaffirmed in Edwards, 451 U.S. at 482.

Certainly refusing to talk for thirty nine hours indicates a desire to remain silent. Moreover, Mr. Johnson had refused to waive any rights. And even though the exact number of minutes necessary to constitute an invocation of the right of silence may be an open question (cf. Smith v. Illinois, 469 U.S. 91 (1984)), certainly it takes considerably less than thirty nine hours of silence to convey the desire not to talk.

Furthermore, in order to be admissible an accused's statements to law enforcement officers must have been voluntarily given. In Spano v. New York, 360 U.S. 315 (1959), the United States Supreme Court held:

> We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts in their post-indictment setting. Here a grand jury had already found sufficient cause

> to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. [citations] They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these.

360 U.S. at 323-24.

The statements that the police were ultimately able to obtain from Mr. Johnson resulted from psychological coercion, the authorities' willingness to arrange his marriage to his girlfriend, and repeated unlawful re-initiations of interrogation after an unambiguous refusal to waive. Mr. Johnson's subsequent statements were not voluntary. Arizona v. Fulminante. Certainly Mr. Johnson's prolonged refusal to waive evidenced his desire to maintain his silence, but his will was overborne.

Mr. Johnson's confession occurred immediately after his religious beliefs were probed by Officer Soules (R. 394, 395, 404, 405). He was interrogated on the heels of a lengthy "psychiatric examination" administered at the instruction of the local district attorney handling the case. The police knew all of this when they manipulated Mr. Johnson to talk by appealing to his religious beliefs. Rhode Island v. Innis, 446 U.S. 291 (1980), would consider this factor in determining the constitutionality of Mr. Johnson's statement:

> Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a

> particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect.

Innis, 446 U.S. at 302 n.8. It is well-established that an involuntary confession may result from psychological, as well as physical, coercion. See, e.g., Blackburn v. Alabama, 361 U.S. 199, 206 (1960)("A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion."); Spano v. New York, 360 U.S. 315 (1959); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949). In particular, the use of religious influence to extract a confession is coercive. See Brewer v. Williams, 430 U.S. 387 (1977).

The lower court summarily denied this claim without an evidentiary hearing on two counts. First, the court said that Mr. Johnson was present when he refused to sign the card and therefore, counsel should have known about it at the time of trial. The lower court said this was not newly-discovered evidence because Mr. Johnson was personally aware of his initial refusal and all circumstances attendant to his interrogation.

Mr. Johnson raised this as a Brady violation and argued that the State failed to disclose exculpatory or favorable evidence to which Mr. Johnson was entitled. The State is required to disclose to the defense evidence "that is both favorable to the accused and “material either to guilt or punishment." United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). The

State's obligation under Brady does not end because the client should have notified his counsel of facts of the case, assuming he knew them. A defendant's obligation under Brady has no bearing on what the State's obligation is. The State cannot shirk its responsibility under Brady by suggesting that it was Mr. Johnson's responsibility to remember each and every time the State attempted to question him in violation of his constitutional rights. Nor is Mr. Johnson expected to know the significance of the numerous Miranda waivers he gave. The lower court failed to address this claim by failing to use the proper analysis under Brady. The Brady information here was material and went directly to Mr. Johnson's subsequent waiver of his Miranda rights.

The lower court erroneously found that the information about Mr. Johnson's refusal to sign was supplied to the defense during the normal course of discovery and that if it was not provided, Mr. Johnson could have obtained it through a simple public records request. (M. 287).

The lower court failed to address the fact that Mr. Johnson did precisely that. He made public records requests since 1992, yet was never provided with a legible copy of his "refusal to sign" Miranda card until after the deposition of the Orange COunty Sheriff's Office records custodian in September 1997, more than seventeen (17) years after his trial. The lower court submitted as evidence that the card had been provided to trial counsel a June 3, 1980 letter to Mr. Johnson's attorney from Assistant State Attorney Bruce Hinshelwood that refers to a "Miranda card". (M. 314). The lower court failed to address the fact that there were numerous Miranda cards noted in testimony in 1980 and 1986 and that it is completely unclear which

Miranda card Mr. Hinshelwood was referring to in his letter. There is simply no credible evidence that the card was ever turned over, and a careful review of the transcripts of the 1980 suppression hearing and the 1986 evidentiary hearing bear that out. During the Huff hearing, the State was asked how many Miranda cards existed in this case. (M. 86). The State Attorney was unable to say, and offered to again review the file regarding the number of Miranda cards. (M. 96). It was only after the Huff hearing when the State reviewed its files that it found two **additional** Miranda cards involving Mr. Johnson. This was documented in a letter from Assistant State Attorney Lerner to Judge Mihok on May 8, 1999. (M. 250-260). Mr. Johnson's "refusal to sign" Miranda card was only made available to the defense in 1997. For the lower court to rule that Mr. Johnson had access to the Miranda card, when it was unclear which Miranda card the June 3, 1980 letter was referring to is disingenuous at best.

The Hinshelwood letter and the additional documentation supplied on May 8, 1999 still fail to explain which Miranda card the documents were referring to since there was more than one. The fact that the lower court relied on the Hinshelwood letter that has no bearing on the correct Miranda card shows that Mr. Johnson is entitled to an evidentiary hearing on this claim. These are facts that are in dispute. Mr. Johnson is entitled to an evidentiary if the records and files do not show that Mr. Johnson is entitled to no relief. See, Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). Because the files and records do not show that counsel for Mr. Johnson ever had the "refusal to sign" Miranda card prior to 1997, Mr. Johnson is

entitled to an evidentiary hearing on this claim.

The lower court erroneously held that this case would have been no different had counsel been aware that Mr. Johnson's rights were violated. That is clearly wrong. The lower court cited to the partial excerpts from the transcript of the hearing on the Motion to Suppress that the trial court attached to its order. (M. 315-354). The Motion to Suppress fails to give any indication that Mr. Johnson was interrogated on January 6, 1980 and refused to sign a Miranda card, thereby invoking his right to remain silent and his right to counsel. In the summary denial order, the lower court relied on testimony from Pineville, Oregon Chief of Police Richard Montee who said that Mr. Johnson was advised of his Miranda rights at 3:55 p.m. on January 6, 1980 and signed a Miranda card. However, there is no mention whatsoever during the Motion to Suppress that Mr. Johnson ever refused to sign a Miranda card. As already noted, what also is absent in the Motion to Suppress is any questions from trial counsel to police about the "refused to sign" Miranda card. It is obvious that trial counsel was not made aware of this "refusal to sign" card, a clear violation of Brady.

Other than the Miranda card, several other documents were provided to postconviction counsel for Mr. Johnson in 1997 by the Orange County Sheriff that had never been provided. One was a handwritten note that was previously unreadable that was contained in the document listed by the State as document "H". That document was provided to Mr. Johnson for the first time in readable form in September 1997. It provided an additional example, not previously plead, of exculpatory information

that was not turned over. The note reads "Mrs. Goff - Lola's Bar white pickup truck parked next to property - 2 men in truck woman outside truck all white 886-6732 she said she might be able to ID girl not men."

In the handwritten notes are references to two different witnesses who saw an egg shell colored truck, similar to the one connected to Mr. Johnson at trial, with two white males in it. At no time was the jury aware that law enforcement suspected the involvement of a second individual. This information was either never disclosed to trial counsel or counsel was ineffective for failure to investigate the possible involvement in a second person. One witness reportedly saw the truck with two white males in it, leaving the parking lot of Lola's Tavern. The records fail to reveal the outcome of the Sheriff's investigation into the identity of that second individual. Police reports in fact fail to mention that this witness had stated that she saw two persons leaving the scene. On the contrary, the reports indicate that she saw an off white camper pick-up truck leave the parking lot of the Tavern but could provide no other information. Another witness, Terry Smith, stated that between 4:15 and 4:45 p.m. on December 4, 1979, she saw a white pick-up truck with two males in it, one wearing a ski cap, leaving the area of Ondick road at a rapid rate of speed. This witness corroborated that a second individual was connected to the vehicle reportedly seen leaving the scene at Lola's bar.

The lower court denied relief in its order stating that "it is clear that Defendant has failed to show prejudice or materiality in

regard to this claim. Even assuming counsel was unaware of this information, the mere fact that law enforcement may at one time have investigated a co-suspect falls well short of establishing a reasonable probability that the outcome of Defendant's case would have been different." (M. 286). The lower court failed to consider that the inability of trial counsel to use this potentially exculpatory information at trial before the jury must be factored into the cumulative analysis that is required where all the new evidence must be factored into the consideration of postconviction claims along with the voluminous records and files in Mr. Johnson's past proceedings.

Orange County law enforcement agencies also disclosed evidence that Charles Himes, the patron of the bar, was, in the opinion of his former girlfriend, the type of person who she believed would resist a robbery attempt. This evidence directly corroborates Mr. Johnson's version of events that he never intended to harm Himes **o**r Dodson, but was provoked when one of the men started to get up and grab him and that it was only then that he started shooting. During the Huff hearing, counsel for the state conceded that the "belligerent" behavior by one of the victims was "probably an explanation for why the verdicts came back as they did with the disparity between the death -- the guilty as charged for the one victim and a lesser offense for the other victim is that the jury was impressed by and pretty much accepted what the defendant said happened inside the bar." (M. 83). Yet the victim killed by multiple shots was not the victim for whose murder Mr. Johnson was sentenced to death. The lower court also failed to consider the effect that the girlfriend's potential testimony would

have had on the sentencing court's evaluation of the aggravating and mitigating factors. The court found five (5) aggravating factors, including under a sentence of imprisonment, prior violent felony, engaged in the commission of a robbery (combined with pecuniary gain), avoiding arrest, and cold, cruel and premeditated. (R. 545-47). The girlfriend's potential as a witness concerning the avoiding arrest and ccp aggravators was ignored in the lower court's summary denial order.

In the order denying postconviction relief the trial court found that:

> While this evidence may have supported Defendant's theory of defense, it does not constitute "newly discovered evidence" under rule 3.850. The type of newly discovered evidence contemplated by rule 3.850 is that which would probably resuly in acquital upon retrial. See Melendez v. State, 718 So.2d 746 (Fla. 1988). The victim's girlfriends's lay opinion, even assuming it would have been admissible, can hardly be deemed exculpatory to the extent that it produce acquital on retrial.

(M. 286). Certainly in this case where this Court has held that the jury recommendation was for death by the narrowest of margins, seven (7) to five (5), any additional evidence that would have weakened or removed aggravating factors must be considered in the sentencing calculus.

Evidence which supported the theory of defense at trial, such as the evidence of victim Himes' reputation for aggressive behavior, was exculpatory evidence which the State was obligated to disclose. Arango v. State, 467 So. 2d 692 (Fla. 1985); United States v. Spagnoulo, 960 F.2d 995 (11th Cir. 1992); cf. Mills v. Singletary, 63 F.3d 999, 1019

(11th Cir. 1993). To the extent that trial counsel should have discovered the exculpatory evidence, counsel's performance was deficient. See Provenzano v. State, 616 So. 2d 428 (Fla. 1993). The burden of disclosing exculpatory evidence rests with both the prosecution as well as law enforcement. Kyles, 115 S. Ct. at 1565. The state bears the "affirmative duty to disclose evidence favorable to a defendant." Id. The burden of investigating and presenting exculpatory evidence rests with defense counsel. Strickland v. Washington. Mr. Johnson is prepared to establish that either the State withheld material exculpatory evidence which supported his theory of defense information that was significant in both the guilt and penalty phases of his capital trial, or that trial counsel failed to investigate, discover, and present this evidence. Either way, Mr. Johnson was deprived of a constitutionally adequate adversarial testing at the guilt phase and/or the penalty phase of his trial.

In addition to the facts pled above, the lower court should not have adopted the State's position that Mr. Johnson's good conduct as a death row inmate has "no bearing on...any...issue cognizable on postconviction relief." (M. 290). The trial court should have taken into account that Mr. Johnson has now been incarcerated under a sentence of death in the Florida Department of Corrections for nineteen (19) years and seven months and has, as of the last date for which counsel has been provided DOC records, only four inmate disciplinary actions. See Skipper v. South Carolina, 476 U.S. 1 (1986)(The exclusion of testimony from a capital sentencing hearing that a prisoner has adjusted well to confinement during incarceration violates

that prisoner's right to present all relevant evidence in mitigation). Counsel respectfully submits that the now sober and deeply religious Mr. Johnson, a well behaved death row inmate, is not the same man who was sentenced to death in 1980. Skipper evidence would be heard at an evidentiary hearing or resentencing proceeding. The court who sentenced Mr. Johnson to death offered a personal opinion about his case shortly before sentencing him to death:

> Mr. Johnson, the Court's only going to make one personal remark this morning. And that is, from what I know of you and your conduct in the past; and perhaps maybe not all of it is your fault, but it certainly exemplifies to me everything or the major things that's wrong with our society today. And the reason for the high crime rate and the viciousness of the crimes that are being committed in this country. And I'm talking about the breakdown of your family unit. The alcoholism and drug abuse which was present in your life, the inability of our mental health systems and our alcohol rehabilitation programs to deliver successfully the assistance in rehabilitation of the persons that have this need. And it's this Court's opinion that your life certainly exemplifies that.

(R. 544). This from the same court which found **no** statutory mitigation in Mr. Johnson's case. Surely the fact that in the intervening twenty (20) years of incarceration Mr. Johnson has been a good death row prisoner is deserving of consideration as one of a cumulative set of factors requiring an evidentiary hearing and relief from his death sentence.

To comprehend the effect on Mr. Johnson's trial that the previously unknown evidence pled in his 3.850 motion here would have had, this Court must examine the State's case at trial in 1980, the evidence proffered by Mr. Johnson in his prior 1986 Rule 3.850

proceedings, and the previously unknown evidence pled here. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996). Failure to do so would be to deny Mr. Johnson the appellate review due him at this late date:

> We do find some merit in the State's argument that much of this evidence does not meet the test for newly discovered evidence. Newly discovered evidence is evidence that must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant of his counsel could not have known of the evidence by the use of diligence. Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). For a defendant to obtain relief based on newly discovered evidence, the evidence must be of such a nature that it would probably produce an acquittal on retrial. Id. at 915. In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(to establish ineffective assistance of counsel, a defendant must show that (1) counsel performed outside the broad range of competent performance and (2) the deficient performance was so serious that the defendant was deprived of a fair trial). The second prong of Strickland poses the more difficult question of whether counsel's deficient performance, standing alone, deprived Gunsby of a fair trial. Nevertheless, when we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome. Cf. Cherry v. State, 659 So. 2d 1069 (Fla. 1995)(cumulative effect of numerous errors in counsel's performance may constitute prejudice); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(same). Consequently, we find that we

> must reverse the trial judge's order denying Gunsby's motion to vacate his conviction.

State v. Gunsby, 670 So. 2d 920, 923-924 (Fla. 1996). By examining all the evidence Mr. Johnson has presented through direct evidence, cross-examination and proffer throughout his capital proceedings, this Court will find that the previously unknown evidence, in conjunction with the evidence introduced in Mr. Johnson's first Rule 3.850 motion and the evidence introduced at trial, would probably have produced an acquittal, or at the very least, a sentence of less than death. See Swafford.

ARGUMENT II

ACCESS TO THE FILES AND RECORDS PERTAINING TO THE JURORS IN MR. JOHNSON'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES AND JUDICIAL ENTITIES WAS WITHHELD IN VIOLATION OF CHAPTER 119, FLORIDA STATUTES, FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.051, FLORIDA RULE OF CRIMINAL PROCEDURE 3.852, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Johnson sought public records from three government entities as a prisoner whose conviction and sentence of death has become final on direct review is generally entitled to criminal investigative public records as provided in Chapter 119. See Anderson v. State, 627 So. 2d 1170 (Fla. 1993); Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993); Walton v. Dugger, 621 So. 2d 1357 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). See also Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). When agencies fail to comply with public records requests, an evidentiary hearing is

required. Ventura v. State, 673 So. 2d 479 (Fla. 1996).

In the order denying a hearing on this claim, the lower court made much of the fact that the requests for public records related to the jurors were filed on December 31, 1998, "Three days after a status hearing was held at which defense counsel expressly represented to the Court that there would be no more public records requests..." (M. 283-84). A review of the record reveals that Ms. Izakowitz, whose law office is and was located in Tampa, appeared for Mr. Johnson on December 28, 1998 at the hearing in Orlando. The transcript reveals that Ms. Izakowitz's representation to the trial court was "I believe we're done with the public records, my understanding from talking to the prior attorney on this case." (M. 46). This was her first appearance after taking over the case from prior counsel Martin McClain.

On the date of the hearing, December 28, three formal requests for public records, one each directed at FDLE, the State Attorney and the Orange County Clerk and all regarding the jurors in Mr. Johnson's case, had already been prepared and signed by the second chair attorney on Mr. Johnson's case who was based in Miami. These requests were pre-dated for mailing on December 29, 1999, the day after the hearing, and were mailed as part of a massive mailing operation that included identical requests for most of the clients in the CCRC-South Miami office. All the requests had been prepared well in advance of the batch mailing dates of December 28-30, 1998, so as to comply with the 90 day time period from October 1, 1998 available for supplemental public records requests under Rule 3.852(h)(2). This time period came

into being following the lifting of tolling of the public records process in Mr. Johnson's case and other cases, which had been in effect per the prior order of this Court but that tolling was lifted per the terms of emergency Fla. R. Crim. P. 3.852. See Amendments to Florida Rules of Criminal Procedure-Rule 3.852 Capital Postconviction Public Records Production) and Rule 3.993 (Related Forms), 23 Fla. L. Weekly S478 (Fla. Sept. 18, 1998).

For that reason, all the requests had to go out within 90 days of October 1, or before the end of the year. Without the requested records regarding the jurors in Mr. Johnson's case from the Florida Department of Law Enforcement; the Clerk of the Circuit Court Ninth Judicial Circuit; and the Office of the State Attorney, Ninth Judicial, it was impossible for counsel to properly prepare a complete Rule 3.850 motion for Mr. Johnson regarding jury misconduct.

Mr. Johnson required the records requested to preserve Mr. Johnson's rights to research and discover any irregularities in the backgrounds of the jurors in his case. See Buenoano v. State, 708 So. 2d 941 (Fla. 1998). See Also Argument III. Collateral counsel believed that the final opportunity to obtain any information regarding jurors in the hands of the agencies that were sent records demands was at hand at the end of December 1998. The responsibility for setting a hearing on any objections to the requests filed by the FDLE, the State Attorney and the Clerk rested squarely on the lower court per the terms of Rule 3.852(h)(2) as it then existed: "a person or agency may object to any request under this subdivision, and the trial court **shall** hold a hearing and rule on the objection within 30 days after filing of the

objection." Mr. Johnson never received any response or objection to the records requests, and a timely motion to compel was impossible, where, as here, the filing date for the final 3.850 was less than thirty days away upon receipt. The lower court in its order however overlooked the language of Rule 3.852.

ARGUMENT III

MR. JOHNSON IS DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING MR. JOHNSON'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

The ethical rule that prevents Mr. Johnson from investigating any claims of jury misconduct or racial bias that may be inherent in the jury's verdict is unconstitutional.

Under the Fifth, Sixth, Eighth and Fourteenth Amendments Mr. Johnson is entitled to a fair trial and sentencing. His inability to fully explore possible misconduct and biases of the jury prevent him from fully showing the unfairness of his trial. Misconduct may have occurred that Mr. Johnson can only discover through juror interviews Cf. Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957). After allegations of misconduct in Mr. Johnson's original trial proceeding concerning juror voting, the trial court allowed a deposition of **only one juror**, Fred H. Cooper the foreman, by then postconviction counsel in 1986. Per the terms of the order, the questions at deposition were limited to the following queries:

(a) Was there an initial vote as to the jury's recommendation on the death penalty or life imprisonment?
(b) What was the vote: how many jurors voted for death? life recommendation?
(c) What was the final vote on sentencing?

(M. 242-43). The deposition did take place, on September 25, 1986, with Mr. Cooper providing a brief description of the deliberations:

> The votes were taken, probably discussed, deliberated, went through -- they were -- my terminology's going to be off, but there were two things. There were the mitigating circumstances, and I want to say the aggravated, or a synonym for it. And went through that very very carefully, all of these, and kind of totalling it up. **I don't want to make it synonymous to a scoring, but basically it came down to that**. And then it was just something I did, but I had each juror discuss the things individually, their thoughts, their ideas, their views to make sure that, like with any group of people that are strong in one direction, some strong in another. We really didn't have too much of that. But certainly there were a couple of them that were, you know, they had gone both ways. So each person, we had a general discussion, and a vote was taken. And the vote was six to six.

(P. 1229-30)(emphasis added). Certainly one reasonable interpretation of this statement is that the jurors simply counted up aggravating factors and mitigating fators and voted accordingly. No opportunity was ever provided for further juror interviews as to the issue of juror misconduct.

Counsel is aware that this Court has held that the deposition of the foreman in this case was not admissible because his testimony "essentially inhere[d] in the verdict" and even if it was admissible that it did not "indicate[] a jury deadlock in this case." Johnson v. Florida, 593 So.2d 206, 210 (Fla. 1992).

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is invalid because it is in conflict with the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights. Mr. Johnson should have the ability to interview the jurors in

this case. Yet, the attorneys statutorily mandated to represent him are prohibited from contacting them. The failure to allow Mr. Johnson the ability to interview jurors is a denial of access to the courts of this state under article I, section 21 of the Florida Constitution. Rule Regulating the Florida Bar 4-3.5(d)(4) is unconstitutional on both state and federal grounds.

In the alternative, should this Court uphold Rule 4-3.5(d)(4), an individual who is not restricted by the rule from contacting jurors should be appointed to assist Mr. Johnson. There are social scientists conducting this research who could assist Mr. Johnson.

Mr. Johnson must be permitted to interview the jurors who acted as co-sentencers in his case. Mr. Johnson may have constitutional claims for relief that can only be discovered through juror interviews. However, Mr. Johnson is incarcerated on death row and is unable to conduct such interviews. He has been provided counsel who are members of the Florida Bar. Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, precludes counsel from contacting jurors and conducting an investigation into constitutional claims that would be discovered through interviews.

Mr. Johnson asks that this Court declare rule 4-3.5(d)(4), Rules Regulating the Florida Bar, unconstitutional and allow his legal representatives to conduct discrete, anonymous interviews with the jurors who sentenced him to death. In the alternative, Mr. Johnson asks that the Court appoint researchers not restricted by Rule 4-3.5(d)(4) to conduct juror interviews for the purpose of determining whether overt acts or external influences contributed to his conviction

and verdict of death. Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial. This stricture impinges upon Mr. Johnson's right to free association and free speech. This rule is a prior restraint.

ARGUMENT IV.

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES MR. JOHNSON'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER OF THE FLORIDA CONSTITUTION AND THAT THE SUBSTITUTION OF ELECTROCUTION WITH LETHAL INJECTION AS AN ALTERNATIVE IS A HOBSON'S CHOICE

The evidence from the judicial electrocutions conducted in Florida in the 1990s demonstrates that the execution of Mr. Johnson by electrocution would constitute cruel and unusual punishment. (M. 200-12). Mr. Johnson was sentenced to "be put to death by electrocution." (R. 549).

In July, 1999, the State of Florida executed Allen Davis in the electric chair. When problems arose during Mr. Davis' electrocution, subsequent challenges were made which this Court decided on the merits. See, e.g. Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999); Bryan v. Moore, 744 So. 2d 456 (Fla. 1999). Moreover, in January 2000, Florida changed its statute to offer lethal injection as an option to the electric chair. The one-year period for Mr. Johnson to challenge the new lethal injection statute has not yet passed. Mr. Johnson requests an opportunity to amend his Rule 3.850 motion with those issues which have arisen since his case has been on appeal to this Court.

Mr. Johnson also submits that to the extent that international treaties and covenants that have been signed by the President or ratified by the Senate are applicable to American citizens such as Mr. Johnson, Mr. Johnson seeks to have his rights under said international human rights instruments protected by the courts of Florida, including, but not limited to Articles 6 and 7 of the **International Covenant on Civil and Political Rights** (ICCPR) and Articles XXV and XXVI of the **American Declaration of the Rights and Duties of Man**.[6]

International human rights standards prohibit the use of the injection of lethal drugs and chemicals into the human bloodstream as a means of state execution and these same international human rights standards are applicable to citizens of Florida. Although thr United States has made reservations to the ICCPR, such reservations are not compatible with the objects and purposes of the ICCPR. Mr. Johnson seeks in good faith to preserve his rights under international law.

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[6]Article 6 of the I.C.C.P.R. reads, "Every human being has the inherent right to life. This right shall be protected by law. No one shall arbitrarily deprived on his life." Article 7 of the I.C.C.P.R. reads, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article XXV of the A.D.R.D.M. concerns the denial of the right to humane treatment while Article XXVI concerns the imposition of cruel, infamous and unusual punishment. Mr. Johnson's position is that these well founded international human rights principles apply to him as a citizen of Florida, a state of the United States of America, and that the use of either electrocution or lethal injection as a method of execution, the associated prolonged and extreme mental torture associated with living on death row in Florida facing such a fate, and the length of confinement on death row in Florida awaiting execution by either electrocution or lethal injection, all are prohibited by human rights instruments that are binding on all the United States of America. Further, that the "choice" of electrocution as an alternative to lethal injection provided by new Florida law in Year 2000 is a Hobson's choice.

See Domingues v. Nevada, 120 SCt. 396, 68 USLW 3289 (U.S. Nev. Nov. 1, 1999)(NO. 98-8327).

The lower court's order noted that there was no authority for the proposition that defendant's lengthy incarceration while awaiting execution violated the prohibition against cruel and/or unusual punishment (M. 294). The European Court has ruled that the "death row phenomenon" in the United States would violate the rights of an accused facing extradition to the U.S. for capital trial to be free from violations of the ICCPR. See Soering v. United Kingdom, 161 Eur.Ct. H.R.(ser.A)(1989).

To the extent that this issue was inadequately preserved by trial counsel, direct appeal counsel and prior postconviction counsel, Mr. Johnson was denied effective assistance of counsel and/or access to counsel. Mr. Johnson's sentence of death is the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

ARGUMENT V

MR. JOHNSON IS INSANE TO BE EXECUTED IN VIOLATION OF THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION

Mr. Johnson is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane.

Mr. Johnson acknowledges that this claim is not ripe for consideration. However, it must be raised to preserve the claim for review in future proceedings and in federal court should that be necessary. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998).

Accordingly Mr. Johnson must raise and preserve this issue.

CONCLUSION

On the basis of the argument presented to this Court, as well as on the basis of his Rule 3.850 motion, Mr. Johnson respectfully submits that he is entitled to 3.850 relief, and respectfully urges that this Honorable Court set aside his unconstitutional convictions and sentences of death.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 17, 2000.

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