IN THE SUPREME COURT OF FLORIDA

PAUL B. JOHNSON,	:	
Appellant,	:	
vs.	:	Case No. SC14-1175
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

> In 1981 a jury convicted [Appellant Paul B.] 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, among other things, 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). After the signing of a death warrant, Johnson petitioned this Court for writ of habeas corpus, claiming 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. We acknowledged that not keeping a capital-case jury together during deliberations is reversible error and granted Johnson a new trial. 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). Johnson's retrial began in Polk County in October 1987. During the trial, however, the judge granted Johnson's motion for mistrial based on juror misconduct. After that, the judge granted Johnson's motions to disqualify him and to change venue of the case. The case then proceeded to trial in Alachua County in April 1988 with a retired judge assigned to hear it.

Johnson, 608 So.2d at 6.

At the 1988 trial, Johnson sought to suppress the testimony and notes of James Smith, a jailhouse informant, on grounds that Smith was operating as a government agent and had impermissibly obtained incriminating information from Johnson in 1981 in violation of his Sixth Amendment right to counsel. The motion was summarily denied, and Smith testified at trial. The jury rejected Johnson's insanity defense and found him guilty of three counts of first-degree murder, two counts of armed robbery, two counts of attempted first-degree murder, and one count each of kidnapping and arson. The judge followed the jury's recommendation and sentenced Johnson to death on each murder count [footnote deleted] based on several aggravating

circumstances [footnote deleted] and no statutory or nonstatutory mitigating circumstances. Johnson appealed, and the Court affirmed. [Footnote deleted.]

Johnson filed his first rule 3.850 motion in 1994, which the postconviction court dismissed without prejudice. Johnson appealed the dismissal, and while the appeal was pending, he filed an amended motion, which the postconviction court dismissed for lack of jurisdiction. This Court dismissed the pending notice of appeal and directed the postconviction court to reinstate the amended motion and proceed with a hearing. *Johnson v. State,* 661 So.2d 824 (Fla.1995) (table decision). Johnson then filed a further amended rule 3.850 motion, and the court granted an evidentiary hearing. At the hearing, which was held in 1997, the defense presented James Smith as a witness, and he recanted his prior testimony. He testified that he had earlier been operating on instructions from the State and had lied at trial. The postconviction court found that Smith's recantation testimony was unbelievable, and denied the motion. Johnson appealed, and the Court affirmed. *Johnson v. State,* 769 So.2d 990 (Fla.2000). Johnson then filed a habeas corpus petition, raising several claims of ineffective assistance of appellate counsel, which the Court denied. *Johnson v. Moore,* 837 So.2d 343 (Fla.2002). Johnson filed his first successive postconviction motion in 2003, raising a *Ring*[FN5] claim. The postconviction court denied relief, and this Court affirmed. *Johnson v. State,* 933 So.2d 1153 (Fla.2006) (table decision).

[] Johnson filed his second successive postconviction motion in April 2007, raising three claims: (1) a newly discovered evidence, and a *Giglio,*[FN6] and a *Brady*[FN7] claim; (2) a lethal injection claim; and (3) an ABA Report [footnote deleted] claim. The postconviction court granted an evidentiary hearing on the first claim, and the hearing was held on December 4, 2007. The defense asserted that, based on newly discovered notes found in the files of Hardy Pickard, the prosecutor at the first trial, Johnson was entitled to a new trial. The defense claimed that the notes show that Pickard committed *Giglio* and *Brady* violations with respect to State witnesses James Smith and Amy Reid. [Footnote deleted.] Following the hearing, the postconviction court denied the rule 3.851 motion and Johnson filed

> [an] appeal, asserting that the court erred in denying each of the claims.
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> FN5. *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).
> FN6. *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).
> FN7. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Johnson v. State, 44 So. 3d 51, 55-57 (Fla. 2010) (v1/R76-80). On appeal, this Court found prosecutorial misconduct "tainted the State's case at every stage of the proceedings and irremediably compromised the integrity of the entire 1988 penalty phase proceeding", it vacated the death sentences, and it remanded for a new penalty phase proceeding. *Id.*, at 73-74 (v1/R72-120).

On April 8, 2011, a hearing was held before Judge Stargel (v2/R177-195, 196). The defense noted the Florida Supreme Court had ruled that victim impact testimony does not violate ex post facto requirements of the constitutions, but asserted the issue had not been resolved by USSC and it objected to victim impact evidence (v2/R182-183). The trial court ruled victim impact evidence was admissible (v2/R183, 197).

On May 31, 2012, the defense filed a motion to declare section 921.141 Florida Statutes unconstitutional because: (1) factual findings are made solely by the judge; (2) the jury recommendations are non-unanimous and non-specific; (3) the aggravators are elements that must be charged and found

unanimously; (4) constitutional infirmities cannot be cured by revising standard jury instructions; (5) life is the max sentence upon severing unconstitutional portions (v2/R297-317).

On May 31, 2012, the defense filed motions: to exclude victim impact evidence and declare section 921.141(7) Florida Statutes unconstitutional due to creating sympathy for the victim and introducing a nonstatutory aggravating circumstance; to allow victim impact evidence before the judge only; for a list of victim impact witnesses; to limit victim impact evidence; and to preclude victim impact evidence due to ex post facto bar and undue prejudice (v2/R268-285, 326-360).

On July 24, 2012, the defense filed a motion to require the State to allow inspection and copying of Mr. Johnson's clemency file (v3/R366-378).

On July 24, 2012, a motion hearing was held before Judge Jacobsen (v3/R379-457). The defense motions: to find victim impact evidence unconstitutional because it acts as an aggravator and decimates mitigation; to allow victim impact evidence before the judge only; and to preclude victim impact evidence due to ex post facto bar were denied (v3/R426-427, 433-435, 438-439, 459, 485, 487-488). The defense motion to declare section 921.141, Florida Statutes unconstitutional was denied (v3/R447-454, 459, 492).

On January 25, 2013, a hearing was held before Judge Donald Jacobsen (v4/R601-667, 671). The motion to compel discovery of parole board clemency records was denied (v4/R620-624, 673).

On February 4, 2013, the defense filed notice of intention to waive the right to parole and to waive any ex post facto claims (v4-5/R691-766). The appendix includes: (A) articles about Carlos Bello; and (B) Bello transcripts (v4-5/R703-766).

On February 7, 2013, a status hearing was held before Judge Donald Jacobsen (v5/R779-830, 866). The trial court noted it received and reviewed the notice of intention to waive rights to parole and waive ex post facto claims (v5/R781). The defense asserted Mr. Johnson had a right to waive parole and the defense had a right to inform the jury of the waiver (v5/R810-813). The trial court denied the motion (v5/R813-814).

A penalty phase jury trial was held before Judge Jacobsen on February 11-20, 2013 (v5/R867, 874, 884, 885, 897, 901, 909, 910, 917-918; v15-26/T1-2175). Jury selection occurred on February 11-13, 2013 (v5/R867, 874, 884, 909, 910; v15-19/T1-898). The defense sought to revisit the ruling on the waiver of parole and to introduce the waiver and Mr. Johnson's other sentences in evidence, present these matters as mitigation, and have the jury consider them in deciding the case (v15/T5-14, 17-18). The trial court ruled the defense was precluded from

waiving parole because it would result in the imposition of an illegal sentence (v15/T16). The trial court also ruled waiver of parole was not proper mitigation (v16/T309-310).

As to preliminary instructions, the trial court proposed to inform the jury the penalty for each of the murders was death or life in prison and denied the defense request that the jury be instructed the punishment for each offense was death or life without the possibility of parole (v19/T890-891).

The trial was held on February 13-20, 2013 (v5/R884, 885, 897, 901, 909, 910, 917-918; v19-25/T899-1576). At the conclusion of the State's opening statement, it asserted "justice can be delayed, but it cannot be denied." (v19/T929).

During the State's case, the defense twice moved for mistrial due to emotion in the courtroom, but the motions were denied (v5/R884; v20/T957-959; v22/T1338). The defense renewed its objections to victim impact evidence and sought more redaction, prior rulings were renewed, and the objections were denied (v5/R875-878; v21/T1309-1320; v22/1322-1323; 1342).

During cross-examination of a defense expert witness, the State elicited testimony that Mr. Johnson "huffed" paint thinner while incarcerated after the homicide (v22/T1406-1407). The defense objected and moved for a mistrial (v22/T1407-1408, 1414). During a proffer, the expert indicated the use of inhalants

occurred prior to incarceration in this case (v22/T1411-1412, 1415). Motions for mistrial were denied, but the trial court permitted clarification that the use of inhalants occurred in the late 1970s (v5/R891; v22/T1414-1420).

The defense sought to put on evidence of the waiver of parole and waiver of any ex post facto claims and noted it had filed the waivers days earlier[1] (v22/T1481-1482). The trial court renewed its ruling and stated the issue was preserved (v22/T1482).

The defense moved in limine to exclude evidence of prior criminal history (v5/R898-900; v23/T1580). It noted that prior criminal activity was brought up during the testimony of an expert, it had announced it was not relying on the mitigator of no significant criminal history, and it did not want prior criminal history to come up again with the other experts (v23/T1580-1581). The trial court reserved ruling and invited counsel to present proffers during the witness's testimony (v23/T1582-1583).

The defense objected to allowing the State to present former cross-examination testimony of an expert on impairment on other occasions than the night of the incidents which dealt with

[1] The waivers of parole and ex post facto claims, signed and notarized on February 11, 2013, were not filed with the clerk until February 26, 2013 (v5/R869-871), along with other documents from the trial and the trial exhibits (v5/R866-868, 872-908).

indifference rather than the legal standard of capacity, was irrelevant to the mitigating factor, and it was solely to introduce prior bad acts (v23-24/T1700-1705). The trial court found direct examination opened the door, but it instructed the State not to argue it as an aggravator (v24/T1705). The State presented prior testimony of the expert about Mr. Johnson's general indifference to the criminality of his conduct and that there were perhaps seven instances in which he refused to conform his conduct to the requirements of the law (v24/T1738-1739).

The defense objected to questioning another expert beyond the scope of direct examination and misleading the jury to believe the expert had not received information he should have had (v24/T1858-1863). A defense motion for mistrial was denied (v24/T1861-1863).

During closing argument, the State said "[W]e've discussed the fact that the passage of time alone does nothing to excuse what that man did to those three now dead men for all those decades (v25/T2056). It claimed "You are going to have it suggested to you that there is mitigation in the fact that this defendant is possibly going to get a life sentence for all of these murders that would not allow him to have parole for 25 years." (v25/T2077-2078). The State concluded by stating:

> I will close with this comment also Mr. Urra mentioned to you. Justice can be delayed it cannot be denied. The state asks of you a vote for the imposition

> of the death penalty as to each of these three murders as the only just result for those crimes, because of the nature of those crimes, because of the nature of this defendant, and because to not do so ignores the gravity of what this man did.

(v25/T2079). During closing argument, the defense asserted that possible consecutive life sentences with consecutive possibilities of parole was mitigating, especially where Mr. Johnson was already serving 2 consecutive life sentences (T2087, 2131).

The final instructions repeatedly stated the choice was between advisory sentences of death or life in prison without the possibility of parole for 25 years (v1/R919, 922, 924, 925; v26/T2136, 2140, 2144, 2149, 2150, 2152, 2157). The jury, by a vote of 11 to 1, recommended imposition of the death penalty on each count (v5/R910, 918, 927; v26/T2167-2170).

On March 1 and 7, 2013, the defense filed a motion and an amended for a new penalty trial (v6/R1073-1080, 1082-1087). The motions were based on: an improper comment during opening statement and closing argument that "justice can be delayed but cannot be denied"; the improper admission of evidence of Mr. Johnson's prior nonviolent criminal convictions and drug use, compounded by admission of evidence of Mr. Johnson's use of inhalants while in custody; and the verdict was contrary to the weight of the evidence (v6/R1073-1079; 1082-1086) On April 18,

2013, the defense filed a supplement to the motion for a new penalty trial, raising the newly discovered issue that young persons had been systematically excluded from the venire which denied him a fair trial (v7/R1177-1179).

On April 19, 2013, a Spencer hearing hearing was held (v8/R1252-1341, 1342). Ronald McAndrew, a prison and jail consultant testified corrections officers indicated Mr. Johnson was a model inmate who follows order, shows respect, is respected by other death row inmates, and had no serious disciplinary reports (v8/R1273-1282, 1292). Mr. Johnson had fewer disciplinary reports than most inmates, they were minor and not of great concern, and Mr. McAndrew had never seen an inmate without any disciplinary reports in a 30 year period (v8/R1281-1282, 1292, 1295-1296, 1300-1301).

Mr. McAndrew testified he interviewed Mr. Johnson and believed he adjusted to prison life, if given life sentences he would live peacefully in open population in close custody, and he would not be a danger to other inmates or prison staff (v8/R1285-1292, 1298-1299). If he had multiple life sentences, he would have no hope of leaving prison alive and he would never be outside a prison facility (v8/R1288-1291).

Paul Johnson testified he was serving life sentences (v8/R1308). He waived parole in this case and if he would receive

life sentences he would waive his right to parole and to future appeals (v8/R1308). He has corresponded with families of his victims and apologized for the hurt he caused (v8/R1312-1317, 1345, 1346-1347, 1348,-1350, 1351-1352, 1353-1354)

The trial court ruled future evidentiary hearings would be needed for the venire issue (v8/R1258-1260). The defense asserted the State's assertion that "justice can be delayed but cannot be denied" misled the jury to believe the delay in sentencing, caused by prosecutorial misconduct, was due to actions of Mr. Johnson, was an improper emotional appeal to the jury, and this constitutes a nonstatutory aggravating circumstance (v8/R1320-1324).

The defense asserted the admission of cross-examination testimony of experts denied Mr. Johnson a fair trial (v8/R1324-1328, 1332-1333). The defense also asserted the verdict was contrary to the weight of the evidence (v8/R1328). The motion for new penalty phase was taken under advisement (v8/R1333-1334, 1342).

On January 6, 2014, an evidentiary hearing on the venire issue was held before Judge Jacobsen (v10-12/R1721-2094; v13/R2365). The motion was taken under advisement (v12/R2068-2071; v13/R2365). On February 10, 2014, the defense and the State filed arguments and memoranda of law in support on the supplemental motion for new trial (v14/R2384-2416, 2417-2426, 2428-2435, 2437-2439). On

February 28, 2014, the trial court filed an order denying the motion for new trial and the supplemental motion for new trial (v14/R2440-2445). As to the supplemental motion for new trial, the trial court found the defense failed to meet each of the prongs of *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (v14/R2445).

On May 7, 2014, a sentencing hearing was held before Judge Jacobsen (v14/R2464-2477, 2478). Concurrent sentences of death were imposed on each count, concurrent with sentences previously imposed on the other counts of the indictment (v14/R2475-2476, 2505).

On May 8 and 23, 2014, the sentencing order was filed (v14/R2479-2490, 2493-2504). The trial court found: the prior conviction of another capital felony or felony involving the use or threat of violence aggravating circumstance applied to each murder and was assigned great weight; the capital felonies were committed while engaged in the commission of, an attempt to commit, or flight after committing or attempting to commit arson or kidnapping applied to the murder of William Evans and arguably to the murder of Daryl Beasley, but due to possible doubling it was assigned no weight; the capital felonies were committed for financial gain aggravating circumstance applied to the murders of William Evans and Daryl Beasley and was assigned great weight; the capital felony was committed for the purpose

of avoiding or preventing a lawful arrest or effecting an escape from custody aggravating circumstance applied to the murder of Deputy Burnham but it was assigned no weight due to doubling; the victim of the capital felony was a law enforcement officer applied to the murder of Deputy Burnham and was assigned great weight; the capital felonies were committed in a cold, calculated, and premeditated manner aggravating circumstance applied to the murders of William Evans and Daryl Beasley and was assigned great weight (v14/R2480-2485, 2494-2499).

The trial court found the following statutory mitigating circumstances: the capital felonies were committed while Mr. Johnson was under the influence of extreme mental or emotional disturbance which was assigned slight weight; his capacity of to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired which was assigned slight weight; and the existence of any other factors in his character, background, or life, or the circumstances of the offense which was assigned moderate weight (v14/R2485-2486, 2488-2489, 2499-2500, 2502-2503).

The trial court found the following nonstatutory mitigating circumstances: Mr. Johnson suffered from brain damage and/or drug usage that may have impaired his ability to reflect and consider his actions which was assigned slight weight; he was the

biological son and grandson of violent alcoholics which was assigned slight weight; his mother was sick throughout her pregnancy and had a traumatic childbirth at home which was assigned slight weight; his mother was physically abused by his father while she was pregnant with him which was assigned slight weight; he was abandoned by his biological parents as a toddler which was assigned slight weight; he was raised by his elderly paternal grandparents which was assigned slight weight; he tried to do better for his own son than his father had done for him which was assigned slight weight; he began abusing alcohol, drugs, and inhalants at a young age which was assigned slight weight; he could be punished by imposition of 3 consecutive life sentences which was assigned very slight weight; 3 consecutive life sentences could be imposed consecutive to the prison sentences already imposed on counts 3-9 (natural life, followed by 15 years, followed by 15 years, followed by natural life, followed by 30 years, followed by 30 years) which was assigned very slight weight (v14/R2486-2488, 2500-2502).

The trial court found the aggravating circumstances outweighed the mitigating circumstances, and concurrent sentences of death were imposed on each count, concurrent with previous sentences imposed on the other counts (v14/R2489-2490, 2503-2504).

Notice of appeal was filed on May 30, 2014 (v14/R2505).

STATEMENT OF THE FACTS
A) PENALTY PHASE

Paul Johnson was born in 1949 (v22/R1370). His mother was abused by his violent alcoholic father while she was pregnant with him, including being beaten unconscious (v22/T1445-1452, 1490-1496; v23/T1548, 1557-1558). His mother was sick throughout her pregnancy, but she had no prenatal care (v22/T1448, 1451-1452, 1456, 1490, 1493). After a traumatic home birth, a breech delivery by a midwife then by a doctor who was summoned due to the danger, he was born blue and with a misshapen head (v22/T1448, 1451-1452, 1497-1500; v24/T1836-1837, 1871). He was sickly, but he received no medical care and inadequate parental care (v22/T1454-1455, 1459-1460, 1500, 1503; v23/T1565-1567).

While Mr. Johnson was a toddler, his mother left his father due to continuing abuse (v22/T1455-1457, 1461, 1501-1503). She left Mr. Johnson to be raised by his elderly paternal grandparents (v22/T1460-1463, 1503; v23/T1548, 1551-1552, 1558-1561, 1566-1568). His grandfather was a bad tempered alcoholic (v22/T1458-1459, 1495; v23/T552-1553). Mr. Johnson did not see his mother or his siblings until he was an adult, and he seldom saw his father and received no attention from him (v22/T1462-1467; v23/T1549, 1559-1562, 1567, 1569-1571, 1595).

Mr. Johnson did very poorly in school, had little emotional control, had to repeat grade levels 4 times, dropped out of the 7th grade at age 16, and never obtained a GED (v6/R1057-1061; v22/T1369-1374, 1424; v24/T1839-1840). At age 6, he hit his head on concrete while playing, he did not lose consciousness, and he was not treated (v22/T1384, 1400-1401). In his early teens, he hit his head, lost consciousness for 5 minutes, and was not treated (v22/R1384, 1401-1402). He began abusing alcohol and marijuana in his teens and began using cocaine, crystal methedrine, and other drugs regularly at about age 24, and used inhalants as well (v22/T1387, 1404-1407, 1421; v24/T1846-1847).

In the late 1970s, Mr. Johnson moved to California with his wife Cheryl and his baby Paul (v22/T1447, 1476, 1506-1507; v23/T1513). Mr. Johnson worked (v22/T1470, 1507-1508; v23/T1590-1591). His wife soon returned to Florida with the baby (v22/T1469-1470, 1507-1508). After 2 years, he returned to Florida to be with his son (v22/T1471, 1477; v23/T1513, 1594).

In March 1980, Mr. Johnson was Baker Acted due to bizarre and hostile behavior (v6/R1005-1029; v23/T1523-1529, 1531-1534). He appeared to be under the influence of something, and was diagnosed with toxic psychosis substance abuse (v6/R1007, 1018; v23/T1540-1541). He calmed after given medication and was released the next day (v6/R1008-1022; v23/T1539).

In 1981, Mr. Johnson lived with his wife and son (v20/T1014, 1017-1018). He did construction work (v20/T1021; v23/T1610, 1613, 1619; v24/T1818). He regularly consumed lots of drugs, he injected more methedrine than his companions, and while under the influence of methedrine he was nervous, paranoid and sweaty, and sometimes went long periods without sleep (v20/T980, 985, 1020, 1024-1030; v23/T1611-1612, 1619-1625; v24/T1793-1794, 1799-1803, 1808-1815, 1819-1821).

At lunchtime on January 8, 1981, Mr. Johnson and his wife Cheryl injected methedrine (v20/T1023-1026). In the evening of January 8, 1981, he and his wife Cheryl visited friends and they injected methedrine for hours (v20/T969-971, 980-981, 996-999, 1015, 1021, 1029-1030). Mr. Johnson injected more methedrine than his wife and despite the cold, he was sweating and removed his sweatshirt (v20/T1030-1031). Mr. Johnson became upset when the drugs were gone and said he was going to get money for more drugs even if he had to shoot someone (v20/T971-972, 981, 1001-1005). He left before midnight (v20/T972, 974, 1031-1032).

A taxi dispatcher testified that on the night of January 8, 1981, she dispatched her father, William Evans, to pick up a fare (v20/T947-948). He had $100 in his wallet (v20/T950). He called while he was en route to the fare and she never heard his voice again (v20/T951, 955). At about 11:45 p.m., a stranger's

voice came over the radio and the dispatcher conversed with him until about 1:45 a.m. (v20/T953-955). He was incoherent and sounded like he was on drugs (v20/T962-963).

Mr. Johnson subsequently went to a restaurant in the early morning (v23/T1603-1608). He appeared to be drunk or high and his language was vulgar (v23/T1603-1604). Mr. Johnson approached Amy Reid and Ray Beasley in the parking lot, claimed his car broke down, and asked for a ride (v20/T1097, 1104). Mr. Beasley agreed (v20/T1104). During the drive, Mr. Johnson said he had to relieve himself and Mr. Beasley stopped the car (v20/T1109). Mr. Beasley went with Mr. Johnson to the rear of the car, then Mr. Johnson pointed a handgun at him (v20/T1110-1114). Ms. Reid moved to the driver's seat, drove away, and phoned the Sheriff's Office from a convenience store (v20/T1116-1117).

Deputies responded to her call and looked for the area where Ms. Reid left Mr. Johnson and Mr. Beasley, but they found no one (v20/T1117-1118, 1149-1150,; v21/1169-1170, 1172-1173, 1194-1195, 1214-1217). Deputy Theron Burnham called on the radio to report stopping a suspect (v20/T1120; v21/T1150, 1174, 1195, 1217). The deputies drove to Deputy Burnham's location and found his patrol car parked with the motor running, the lights on, and a door open, but they did not see Deputy Burnham (v20/T1121; v21/T1151, 1153-1154, 1173-1176, 1196-1198, 1218-1220, 1228).

Mr. Johnson approached the deputies' car and said a deputy needed help (v20/T1122-1123; v21/T1153, 1155, 1177-1179, 1198-1200, 1220, 1228-1232). The deputies exited their car, Mr. Johnson fired a handgun at them, the deputies returned fire, and Mr. Johnson ran away (v20/T1123-1124; v21/T1152-1155, 1180-1183, 1200-1205, 1221-1223, 1231). Deputy Burnham's body was found in a ditch near his car (v21/T1184, 1205-1206, 1224). His firearm was missing (v21/1225, 1248-1249). A .22 handgun was found on the side of the road (v21/T1246-1247).

Later that day, Mr. Beasley's body was found .7 miles from where Deputy Burnham was found (v21/T1240, 1272-1273). He had been shot once in the head (v21/1276). Inserts from his wallet were found (v21/1278).

Cheryl Johnson returned home early in the morning (v20/T1015-1016). Mr. Johnson had been out all night and his gun was not in the home (v20/T1016-1017, 1037). In the afternoon, a friend picked up Mr. Johnson (v20/R975). At the friend's home, Mr. Johnson shaved off his beard and moustache (v20/T975). He told his wife that he killed 2 people and he could not be connected to a third person who was in an orange grove out of town (v20/T978-979). He showed his wife and friends an indentation on his waist from carrying a deputy's gun in his waistband and said when someone had a gun to his head he shot before they did

(v20/T979-980). One of the friends informed the police about his presence and the police arrested him (v20/T1007, 1009).

On January 14, 1981, Mr. Evans' body was found near an orange grove road (v21/T1249-1250, 1254, 1257, 1261-1263, 1265). He had been shot twice in the face (v21/T1249-1252). His taxi, which had been set on fire, was found nearby (v21/T1239, 1249, 1255, 1265).

Deputy Burnham had 3 gunshot wounds: one through the armpit and lungs lodged in the spine and caused death; ones to his legs could have contributed to death; and the order of the wounds and his position during the infliction of the wounds could not be determined (v20/T1061-1084). A superficial abrasion on his chin occurred shortly before death (v20/T1072-1073, 1085-1089). He needed immediate surgery in order to survive and he lost consciousness within minutes of one wound (v20/T1066-1067, 1081-1085).

Darrell Beasley had a fatal gunshot wound with stippling to the left temple exiting the right eye that caused immediate unconsciousness (v21/1286-1289). There were minor scratches on the back of the left hand and wrist (v21/T1289, 1304-1306).

William Evans had 2 gunshot wounds to the face (v21/T1291-1292, 1299-1301). The bullet from a wound in front of the right ear, with no stippling, travelled across his face and lodged in

the skin over the left cheekbone (v21/T1291-1292, 1300-1302). This wound could have inflicted pain and shock and could have caused unconsciousness (v21/T1294-1295). The bullet from a wound with stippling to the right eye lodged in his brain and caused immediate unconsciousness and death (v21/1291-1295, 1302-1303).

Mr. Johnson had neurological impairment when tested in 1995 (v24/T1844-1845, 1849-1850). At age 62, he read at a second grade level, his spelling and math were at a kindergarten level, and his overall IQ was borderline (75) (v22/T1372, 1382, 1392-1393, 1422). He had a severe brain impairment relating to impulse control at age 62, and apparently had brain impairment since his early childhood (v22/T13392-1396). MRI testing on Mr. Johnson's brain in 2011 indicated impairment of the frontal lobe, the parietal lobe, and the occipital lobe (v6/R1069-1071; v25/T1912-1920, 1932-1940, 1962, 1972-1973). The damage preceded 1981 (v25/T1972-1974). The damage could have been congenital and/or caused by toxins, lack of oxygen, head injuries, prenatal nutrition, intrauterine trauma, and/or birth trauma (v25/T1948-1953, 1969-1970, 1974).

Mr. Johnson was psychotic due extreme methamphetamine abuse at the time of the incidents (v23/T1635-1698; v24/T). He suffered from brain damage that reduced his ability to resist the addictive nature of controlled substances, and made him

susceptible to a controlling addiction to drugs (v24/T1753-1766, 1783; v25/T1917-1920, 1939-1946). Brain damage, coupled with the use of drugs, intensified his brain's functional impairment so as to reduce his ability to reflect and consider his actions at the time of the offenses or his ability to control impulsive behavior (v23/T1635-1671; v24/T1753-1766, 1783; v25/T1917-1920, 1942-1943, 1970). He was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (v23/T1635-1698).

B) HEARING ON THE SUPPLEMENTAL MOTION FOR NEW TRIAL

On January 6, 2014, an evidentiary hearing was held before Judge Jacobsen (v10-12/R1721-2094; v13/R2365). The following facts were established:

Judge Bruce Smith was elected chief judge in 2011 (v12/R2053). As chief judge, he had authority over management, operation, and maintenance of the jury system, but he testified his role is passive and by tradition is exclusively in the hands of the Clerk (v12/R2054). Polk County Clerk of Circuit Court Stacy Butterfield was sworn in in January 2013, but she worked at the Clerk's Office since 1986 (v10/R1754). One of her duties

was managing jury pools and generating candidate lists, but prior to becoming Clerk, she was last involved in the selection of venires in the 1990s (v10/R1753-1756, 1759, 1761-1762).

Iva Turner was director of the Clerk's Office information technology (IT) (v10/R1753). Luis Unda, a Clerk's Office IT manager, was responsible for maintaining or updating jury lists and became responsible for developing a new Jury Application System (JAS) in 2010 (v10/R1753; v11/R1869-1871). Tina Hill was manager of support services at the Clerk's Office and oversaw jury department functions (v11/R1888-1889). Edward Wolfe was Polk County Board of County Commissioners (BOCC) IT director and prior to July 2013, his department was responsible for the Juror Management System (JMS) (v11/R1902-1904). Laura Hayes, a BOCC system analyst, prepared and maintained Polk County jury lists until July 2013 (v11/R1841-1843). Susan Best, a staff attorney with the circuit judges from 1989 to 1995, was responsible for yearly updates of the jury list (v12/R2039-2041, 2044).

To be an eligible voter, one must be a Polk County resident, a citizen of the U.S., 18 years old or older, a legal resident of Florida, have a Florida driver's license or Florida ID or file an affidavit, and not be a felon, incompetent or dead (v10/R1759—1761; v11/R1843-1844, 1846-1847, 1853-1854, 1867; v12/R2047-204). The primary source of candidate lists is

provided by the Department of Highway Safety and Motor Vehicles (DHSMV) to the Florida Association of County Clerks (FACC) which sends it to the Clerk's Office (v10/R1762, 1764, 1766, 1779-1780; v11/R1825-1830, 1834-1835, 1843, 1863-1865; v12/R2047). The list is first filtered to remove persons who are not U.S. citizens, and to include only residents of the relevant county and persons who are at least 18 years old (v11/R1835-1838).

DHSMV had a data base of licensed drivers and persons with Florida identification cards containing the names of 22,600,000 persons v10/R1822). It also had a database of the registration of motor vehicles, trailers, motor homes, off-road vehicles, golf carts, and boats (v10-11/R1824-1825). The databases are updated daily and changes of address to one database are automatically applied to the other (v11/R1825-1826, 1830). There were approximately half a million licensed drivers and persons with Florida identification cards in Polk County (v11/R1827). Each licensed driver and person with Florida identification card has a unique number with a code indicating name, date of birth, and sex (v11/R1828-1832). A change of name results in a different number, but it is linked to the prior number (v11/R1829). Each month DHSMV receives a list of deceased persons from the Bureau of Vital Statistics and it marks the persons as deceased on the DHSMV list (v11/R1830-1831, 1839).

Since 2009, the Clerk's Office IT department was involved in direct handling of jury pool information (v10/R1750-1751). Prior to the July 2013, BOCC's IT personnel managed JMS which read the DHSMV file and selected a venire list by use of a random number generator (v10/R1763-1764, 1767; v11/R1844-1845, 1863-1867, 1890-1891; v12/R2039-2044; v13/2210-2213). The Clerk's Office mails summons to those selected (v10/R1764, 1767).

BOCC and the Clerk's Office worked together on figuring out when to update the juror database (v11/R1849). The goal was to update it once each year as statutorily required, this did not always happen, but prior to 2010 the jury pool list was updated relatively regularly (v10/R1780-1781; v11/R1866, 1893, 1904; v13/R2191-2204, 2208). An update was done in early of 2010 using the JMS system and it was not updated again until after February 2013 (v10/R1766, 1775; v11/R1843-1844, 1846-1847, 1853-1854, 1867, 1905-1911; v13/R2196, 2208, 2234, 2257, 2269, 2272).

The BOCC JMS system was to be replaced by the new Clerk's Office JAS system, the switch to the new system took longer than anticipated, many deadlines were missed, and the jury pool list did not get updated (v10/R1805-1806, 1817; v11/R1913; v13/2208, 2269, 2272). The Clerk's Office IT and BOCC IT had been aware the jury list update had not occurred and exchanged e-mail about the issue, but they failed to notify Clerk Butterfield or others

(v10/R1781-1783, 1795-1796, 1817-1819; v11/R1856-1857, 1861-1863). The failure to update the list resulted in excluding from the jury pool in February 2013 persons who were 18 to 21, who moved to Polk County, and who moved within the county unless they had a forwarding address (v11/R1854-1855, 1860).

In March 2010, Ms. Hayes e-mailed Clerk's Office programmer Charles Marsh (cc: Mr. Unda, BOCC Supervisor Blair Dekker), asking for a projected go-live date for the new JAS jury system (v11/R1847; v13/R2196, 2208, 2235). In July 2010, Ms. Hayes e-mailed Mr. Marsh (cc: Ms. Hill, Mr. Dekker) asking for an update on implementing JAS jury system and asking whether "there is further justification for programming time on the JMS application" (v11/R1848-1849; v13/R2196, 2236). In November 2010, Ms. Hayes and Mr. Unda exchanged e-mail (cc: Mr. Dekker) in which she explained that the DHSMV file is imported into the JMS application once a year to update the jury pool (v11/R1850-1851; v13/R2197, 2237-2238).

The annual jury pool list update was not performed in December 2010-January 2011 (v11/R/1852; v13/R2257, 2269). In April 2011, e-mail from Ms. Hayes to Mr. Marsh (cc: Ms. Hill) sought a go-live date for JAS in light of the need to schedule an annual file update, and Mr. Marsh indicated "It won't happen before late July at the earliest" (v13/R2213, 2269, 2272). In

July 26, 2011 and August 1, 2011 emails between Ms. Hayes and Mr. Unda, she was preparing to update JMS, she sought access to the DHSMV file, and he directed her to the file (v13/R2343).

On October 20, 2011, DHSMV notified Clerks of Court that they would no longer provide social security numbers in the files and last provided social security numbers in the files in December 2011 (v11/R1833). On October 27, 2011, e-mail between Ms. Hayes, Mr. Unda, and Ms. Hill (cc: Ms. Hill, Mr. Dekker) indicated Ms. Hill intended to do an annual update of the jury pool in December, asking whether the JAS would be operating in December 2012, and noting the JMS application needed revisions because DHSMV no longer supplied SSN numbers (v11/R1851-1851, 1894, 1896; v13/R2197, 2239-2242, 2341, 2344-2347). November 2011 e-mail from Gary Powell to Ms. Hill, Ms. Turner, and Mr. Unda (cc: Mr. Dekker, Ms. Hayes, Mr. Wolfe) discussed the problem of updating the list with the DHSMV file without a social security number, but noted the 2011 DHSMV file included social security numbers (v13/R2198, 2214, 2269, 2327, 2341-2342, 2348-2352). Edward Wolfe's BOCC IT staff deferred addressing the technological challenges to updating the file and decided to wait until the Clerk took over the jury pool with JAS, purportedly in the 1st or 2nd quarter of 2012 (v11/R1911-1912). Mr. Wolfe did not know whether the courts were formally informed

about the problem (v11/R1910). It was asserted that at one point, the problem with the failure to update files was caused by the previous Clerk allocating resources instead to the new PICS system (v10/R1806).

The annual jury pool list update was not performed in December 2011-January 2012 (v13/R2257-2258). In May 2012, e-mail between Ms. Hayes, Rosie Betancur, and Mr. Unda (cc: Mr. Powell, Ms. Dekker, Ms. Hill), sought an update on the go-live date of JAS (v13/R2199, 2217, 2258, 2269, 2272). In September 2012, Ms. Hayes and Mr. Unda exchanged e-mail (cc: Mr. Dekker, Gary Powell, Ms. Hill, Mr. Wolfe) indicating October 15, 2012 was a new projected go-live date for JAS (v11/R1852-1853, 1897-1898; v13/R2199, 2209, 2243-2244, 2269, 2273). In September 2012, in e-mail between Mr. Wolfe, Mr. Unda, and Ms. Hayes (cc: Mr. Dekker, Mr. Powell, Ms. Hill, Ms. Turner), Ms. Hayes indicated "Polk IT has no work for the current JMS system as long as the new system goes live before the end of the year" (v13/R2200, 2218, 2258).

The annual jury pool list update was not performed in December 2012-January 2013 (v11/R1852). In January, 2013, e-mail between Mr. Unda and Ms. Hill (cc: Mr. Dekker) indicated JAS would go live on February 4 or the following Monday and had been approved by the Chief Judge (v13/R2219-2200, 2270, 2273). In

February 2013, e-mail between Mr. Dekker and Mr. Unda indicated the jury selection process was running slow and JAS was projected to go-live on March 11 (v13/R2201).

On April 6, 2013, during a phone conversation with BOCC IT director Ed Wolfe, Clerk Butterfield learned the juror candidate list had not been updated for several years (v10/R1774-1775, 1795; v11/R1912-1913; v13/R2253, 2270, 2273). The names of jurors sent to courtrooms in February 2013 did not include person who were 18 to 21 years old, persons who moved to Polk County between early 2010 and 2013, or persons who moved within Polk County between early 2010 and 2013 unless the summons was forwarded or the changed their address with the Clerk's Office (v10/R1798, 1800). Before the issue about the jury pool arose in April 2013, Clerk Butterfield admitted she had not been verifying, but after the jury pool issue arose, she may have done some verifications (v10/R1769). She did not know whether anyone performed verifications from 2009 through February 2013, (v10/R1769-1770).

On April 8, 2013, Ms. Hill e-mailed Clerk Butterfield about the status of the new jury application and noted the system had not been updated since March 2010 (v11/R1898-1899). Clerk Butterfield responded "Oh, my. The file we are using is from March 2010? (v11/R1898-1899; v13/R2209, 2250). Judge Smith met

with Clerk Butterfield and employees of her office (v12/R2058). He was shocked about the problem and the Clerk was apparently shocked and embarrassed (v12/R2057, 2064-2066). The Clerk indicated the issue would be corrected by July 2013 (v12/R2059). Clerk Butterfield investigated the failure to update the list wrote summaries of the issue (v10/R1774; v13/R2252-2567, R2268-2270, 2271-2273).

Judge Smith drafted a memo to each judge in the circuit noting Clerk Butterfield informed him that jury candidate list was last updated in January 2010 (v12/R2056-2057; v13/R2221). On April 19, 2013, Judge Smith e-mailed the Clerk asking that 18 to 21-year-olds be added to the venire for a trial beginning on April 29 (v10/R1811-1813; v12/R2060-2063; v13/R2251).

A patch was placed on the system with updates in April and May 2013, but they were not formally accepted by the judiciary (v11/R1855-1856, 1859-1860; v12/R2059; v13:R2188-2190, 2202-2205, 2206, 2337-2340). The Clerk testified that in April 2013, the Clerk's office added 29,000 18 to 21-year old Polk County residents with driver's licenses or identification cards to the list file (v10/R1788, 1802-1803; v13/R2189-2190). This interim solution did not include persons who moved into Polk County from 2010 to April 2013 and they were not added to the list until June or July 2013 (v10/R1793). This interim solution did not

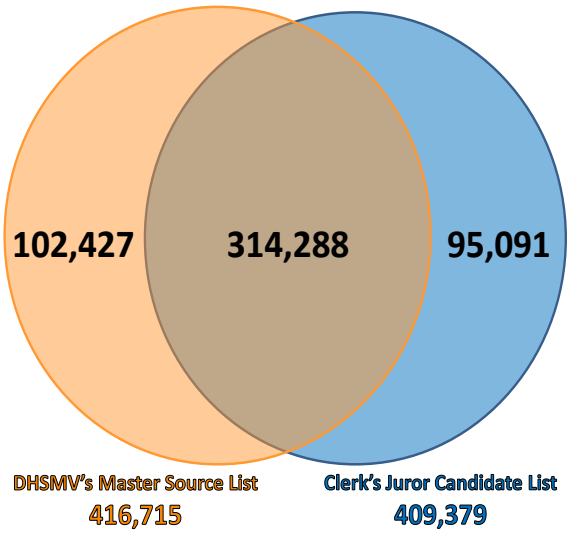
include persons who moved within Polk County from 2010 to April 2013 (v10/R1794-1795). The interim solution was first applied to persons summoned for April 29, 2013 (v10/R1802, 1812-1815). In an update in April 2013, 108,423 names were added to the juror list (v11/R1900-1901).

The JAS system was approved by Judge Smith and Justice Polston and was online in July 2013 (v10/R1766, 1768, 1784-1785; v11/R1872-1874, 1877, 1898; v12/R2054-2055, 2059). With the new system, the candidate list is updated regularly and the list is verified by Clerk Butterfield (v10/R1768-1769, 1783-1784, v10/R1815-1816).

Clerk Butterfield asserted the failure to update the list was not the result of a deliberate decision to excluded people or a deliberate decision to fail to do an update (v10/R1817-1819). Judge Smith did not believe the Clerk's Office deliberately sought to disenfranchise anyone (v12/R2066).

Professor Stephen Drier, a professor of statistics and mathematics at Polk State College, testified he accessed the December 2012 DHSMV list and compared it, name-by-name, to the 3-year-old juror candidate list in use by the Clerk and the trial court (v11/R1949-1950). The December 2012 DHSMV list includes the names of 416,715 persons who should have qualified as jurors (v11/R1950-1951). The Polk County juror candidate list

contains the names of 409,379 persons, none of whom were 18, 19, or 20 years old (v11/R1952-1954). The Polk County juror candidate list contains 314,288 names in common with the list names of 416,715 persons qualified as jurors from DHSMV, and all persons summoned had to in the 314,288 names in common (v11/R1952, 1955). The Polk County juror candidate list did not contain the names of 102,427 persons qualified as jurors (v11/R1953). There were names of 95,091 persons in the Polk County juror candidate list who were not included in the December 2012 DHSMV list, persons who presumably moved or died (v11/R1954, 1971). These findings were summarized in a Venn diagram admitted in evidence and reproduced below:



(v11/R1950-1951; v13/R2361).

Professor Drier testified 1,252 persons were summoned for jury duty for the week of February 11, 2013 (v11/R1956, 1969). 76.28% of those persons were white, 14.02% were black, 6.73% were Hispanic, and 2.96% were other (v11/R1969-1970). Of those 1,252 persons, 429 were on the venire for Mr. Johnson's trial (v11/R1957). The percentage of returned/undelivered summonses was significantly higher from Hispanic or Black households than from white households (v11/R1960-1963, 1966-1967). Summonses may have been returned due to incorrect addresses or due to other reasons (v11/R1967-1969, 1971). Some returned summonses may have been from persons who were not included in the December 2012 DHSMV list, persons who presumably moved or died (v11/R1971-1972).

Professor Drier testified the February 11, 2013 venire list was not a representative random sample the December 2012 DHSMV list, and the percentage of Hispanic and Black persons in the Polk County juror candidate list was significantly different from the December 2012 DHSMV file of eligible jurors (v11/R1958, 1964). Mr. Johnson' jury was not a representative sample of the December 2012 DHSMV file of eligible jurors and there was a .00012 probability that the ethnic makeup of Mr. Johnson' jury could be obtained from the December 2012 DHSMV list (v11/R1958, 1964-1966). The chances of randomly obtaining from the correct

list, a jury panel that mirrored age and ethnic characteristics of the 1,252 summoned jurors for Mr. Johnson's trial was less than winning the PowerBall lottery three times in a row (v11/R1959-1960).

In his report (v11/R1947-1950), Professor Drier calculated the odds as "virtually zero" of randomly selecting a venire like Mr. Johnson's from the appropriate data base (v13/R2246).

Dr. Julia Graber, a professor of psychology at the University of Florida, testified 18 to 22-year-olds are a distinctive group (v11/R1978-2005, 2011-2014). The majority of 18 to 22-year-olds do not consider themselves to be fully adults, in part because they need extensive education before they achieve stable employment, and they depend on their parents for financial and emotional support, and this is likely to be a permanent change in the perception of this age group (v11/R1981-1985, 1998-2004, 2012-2013). Their brains are still developing (v11/R1987-1990, 1997). They are still exploring the possibilities of their adult lives (v11/R1999-2002). They are less likely to be married or to never have been married than other age groups (v11/R1991-1992). They are more adept and engaged with online activities and online activism than other age groups (v11/R1993-1995, 2014). They are more tolerant about some issues than other age groups (v11/R1995-1997).

State's witness Dr. Stanley Smith, a professor at the University of Florida, testified he was the director of the population program (v12/R2018-2019). At the State's request, he conducted an inquiry into the population demographics for Polk County between 2010-2013 (v12/R2020). He used data from the 2010 Census, National Center for Health Statistics, homestead exemption data, residential electric customer data from 2013, and building permit data from 2010-2013 to make projections for April 1, 2013 (v12/R2021-2024). He also used birth, death, and school enrollment data to make estimates by age, sex, race, and ethnicity (v12/R2022). He made projections for Polk County for 2012 and 2013 by age, sex, race, and ethnicity (v12/R2023-2029; v13/R2381-2382). The largest change was in the increase of the Hispanic population which due to migration to Florida (v12/R2027, 2030). There was a .9% decline in the white population from 2010 to 2013 and the percentage of the 18 to 22 year olds in the black and Hispanic population was higher than the 18 to 21 year olds in the white population (v12/R2033-2035). Younger people change their addresses more frequently than older people (v12/R2035).

Deputy Supervisor of Elections Christine Goding testified that in 2010, 1,579 persons became eligible to vote by turning 18 (v12/R2051). In 2011, 1,624 persons became eligible to vote

by turning 18 (v12/R2051). In 2012, 2,874 persons became eligible to vote by turning 18 (v12/R2051). In 2010, 4,225 persons moved into the county (v12/R2051). In 2011, 4,477 persons moved into the county (v12/R2051). In 2012, 8,930 persons moved into the county (v12/R2051).

SUMMARY OF THE ARGUMENT

The trial court erred by preventing Appellant from waiving his right to parole and his right to ex post facto claims, and by excluding the waiver of parole as mitigation. The cause must be reversed for a new penalty phase proceeding.

The trial court erred by denying the supplemental motion for new penalty phase proceeding. Appellant was denied a fair trial before a jury drawn from a representative cross-section of the community. The cause must be reversed for a new penalty phase proceeding.

The trial court erred by denying the defense motion for inspection of Parole board clemency files. The cause must be reversed for a new penalty phase proceeding.

Admission of victim impact evidence denied Appellant a fair trial. The victim impact evidence statute is unconstitutional, and the admission of victim impact evidence in this case violates ex post facto protections. The cause must be reversed for a new penalty phase proceeding.

Cumulative error denied Appellant a fair trial. The cause must be reversed for a new penalty phase proceeding.

Florida's method of determining who is sentenced to death is unconstitutional. Appellant's death sentences should be reduced to life sentences.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY PREVENTING APPELLANT FROM WAIVING HIS RIGHT TO PAROLE AND EX POST FACTO CLAIMS AND BY EXCLUDING THE WAIVER OF PAROLE AS MITIGATION.

It is well established that a competent defendant may waive a constitutional right, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and the protection against ex post facto laws is no exception. *State v. Fortin*, 843 A.2d 974, 1013-15 (N.J. 2004); *State v. McDonnell*, 987 P.2d 486, 493-94 (Or. 2004); see also *United States v. Harrison*, 393 F.3d 805 (8th Cir. 2005); *United States v. Silva*, 554 F.3d 13, 22 (1st Cir. 2009). Rights intended primarily for the benefit of a defendant are waivable. *Peri v. State*, 426 So.2d 1021, 1026 (Fla. 3d DCA 1983). See Op. Att'y Gen. Fla. 78-29, at 3 (1978) ("Said right [to periodic consideration for parole] being personal to the inmate eligible to be interviewed, it is a right which may be waived by him.").

On February 4, 2013, the defense filed notice of intent to waive the right to parole and to waive any ex post facto claims (v4-5/R691-766). On February 7, 2013, at a status hearing, Judge Jacobsen denied "the motion or the seeking to advise of the waiver of parole" based on *Bates v. State*, 750 So. 2d at 6 (Fla. 1999) and *Orme v. State*, 25 So. 3d 536 (Fla. 2009) (v5/R781, 813-814). On February 8, 2013, the defense filed supplemental

authority relating to the use of redacted judgments and sentences and the waiver of parole as mitigation (v5/R844).

A jury trial was held before Judge Jacobsen on February 11-20, 2013 (v5/R867, 874, 884, 885, 897, 901, 909, 910, 917-918; v15-26/T1-2175). The defense sought to revisit the ruling on waiver of parole and to present the waiver of parole and Mr. Johnson's other sentences in evidence as mitigation (v15/T5-14, 17-18). The trial court ruled that under *Orme* and *Bates*, the defense was precluded from waiving parole because it would result in the imposition of an illegal sentence (v15/T16). The trial court later ruled that waiver of parole was not proper mitigation, but it ruled other prison sentences were proper mitigation (v16/T309-312). As to preliminary instructions, the trial court denied a defense request that the jury be instructed that the punishment for each offense was death or life without the possibility of parole (v19/T890-891).

During the trial, on February 15, 2013, the defense sought to put on evidence of Mr. Johnson's waiver of parole and his waiver of any ex post facto claims regarding that waiver and noted it had filed the waivers days earlier (T1482-1483). The trial court renewed its ruling and stated the issue was preserved (T1483).

During closing argument, the State asserted "You are going to

have it suggested to you that there is mitigation in the fact that this defendant is possibly going to get a life sentence for all of these murders that would not allow him to have parole for 25 years." (v25/T2077-2078), thereby emphasizing the possibility of parole in 25 years in a case which was well over 25 years old. Additionally, the final jury instructions repeatedly stated the choice was between advisory sentence of death or life in prison without the possibility of parole for 25 years (v1/R919, 922, 924, 925; v26/T2136, 2140, 2144, 2149, 2150, 2152, 2157). The jury, by a vote of 11 to 1, recommended imposition of the death penalty on each count (v5/R910, 918, 927; v26/T2167-2170).

At the Spencer hearing, Mr. Johnson testified he was willing to waive his right to parole and waive future appeals In exchange for life sentences (R56-57). Concurrent sentences of death were imposed on each count (v14/R2490, 2504).

Preventing Mr. Johnson from waiving his right to parole rendered such a right illusory, misled the jurors in this cause, and encouraged the jurors to recommend death based on unwarranted fear that he might someday be released, perhaps in the near future. The Eighth Amendment requires "heightened reliability" in capital sentencing. See, e.g., *Sumner v. Shuman*, 483 U.S. 66, 72 (1987). As the New Jersey Supreme Court explained in *Fortin, a* juror's knowledge of whether a life

sentence does or does not include the possibility of parole can be crucial to the decision to vote for life or death:

> Defendant undoubtedly believed that if the jury were instructed on the life-without-parole option, it might be less inclined to return a death verdict. Such reasoning not only has roots in our common intuition, but empirical support from statistical surveys. The United States Supreme Court, in *Simmons v. South Carolina*, noted a survey conducted by the University of South Carolina's Institute for Public Affairs in which more than seventy-five percent of the those questioned "indicated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murder actually would have to spend in prison would be an 'extremely important' or a 'very important' factor in choosing between life and death." 512 U.S. 154, 159, 114 S.Ct. 2187, 2191, 129 L.Ed 2d 133, 140 (1994); see also *Taylor v. State*, 672 So.2d 1246, 1273 (Miss.) (reversing death sentence because jury might have opted for life sentence had it been told that defendant faced life without parole), *cert. denied*, 519 U.S. 994, 117 S.Ct, 486, 136 L.Ed.2d 379 (1996); William J. Bowers & Benjamin D. Steiner, *Death by Default; An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 650, 671 (1999) (finding most jurors "are more likely to vote for death" because of belief that convicted killers will serve prison terms below mandatory minimum for parole and will get out of prison "far too soon").

843 A.2d at 1011.

The Florida Supreme Court in *Bates v. State*, 750 So.2d 6 (Fla. 1999), a 4-3 split opinion, concluded that a capital defendant whose crime was committed before the May 25, 1994 effective date of the amendment making life imprisonment without possibility of parole the alternative punishment to a death sentence for the crime of first-degree murder cannot waive his

right to parole eligibility. The majority found; "no unequivocal language that the Legislature intended the amendment to apply retroactively"; the attempted "waiver of an ex post facto claim in respect to the 1994 amendment ... is of no consequence"; and that a defendant "cannot by agreement confer on the court the authority to impose an illegal sentence." 750 So.2d at 10-11.

Bates was followed in *Orme v. State*, 25 So.3d 536, 546-47 (Fla. 2009), a unanimous decision. The *Orme* decision was based on statutory construction, and the court conducted no analysis of the constitutional issues and implications. Two other jurisdictions have also concluded a right to parole may not be waived, treating the issue solely as an evidentiary or statutory matter under state law. *State v. Dann*, 207 P.3d 604, 625-626 (Ariz. 2009) ("The trial court did not abuse its discretion by refusing Dann's request to inform the jury he would waive parole if spared the death penalty."); *State v. Benson*, 307 P.3d 19, 33 (Ariz. 2013) ("We have previously rejected this argument [about waiver of the right to parole] [citation deleted] and do so again here."); *White v. State*, 589 A2d 969, 974 (Md. 1991) (trial judge rejected waivers of parole and ex post facto argument: "Imposing the requested sentence in this case would be illegal, and the defendant cannot validate an illegal sentence

or insulate it from appeal or collateral attack by consent or waiver.).

The dissenters in *Bates*, Justices Anstead, Pariente, and Kogan, believed a capital defendant should be allowed to waive his right to parole eligibility:

> Since the only person adversely affected by the waiver of the right to be sentenced under the old sentencing scheme is the defendant, it would seem appropriate to ask why the defendant should not be allowed to waive this right. There simply is no plausible answer to that question set out in the majority opinion. Instead, the majority offers a non sequitur: the 1994 law cannot be applied to an earlier crime because it would violate the defendant's ex post facto rights. But it is those rights that the defendant is not only willing, but anxious to waive [footnotes omitted].
>
> In waiving his right to be sentenced under the older, less restrictive scheme, the defendant will be acting in accordance with the express public policy of the State of Florida as explicitly announced by the Legislature. Since 1994, the public policy of the State of Florida has been that persons convicted of first-degree murder are to be punished by either death or life imprisonment without the possibility of parole. Prior to that time, the sentencing options were similar, but the life imprisonment alternative was without the possibility of parole for twenty-five years rather than without the possibility of parole at all. Hence, the State of Florida and its prevailing public policy will be enforced and benefitted by the defendant's waiver.
>
> In addition to the fact that a waiver would be consistent with prevailing legislative policy, this Court has consistently recognized that a defendant can waive constitutional protections. See *Bowles v. Singletary*, 698 So.2d 1201 (Fla. 1997); *Melvin v. State*, 645 So.2d 448 (Fla. 1994); *Cochran v. State*, 476 So.2d 207 (Fla. 1985). In fact, Florida's extensive sentencing guidelines scheme has always permitted a defendant convicted of a noncapital offense the option of being sentenced under the prevailing sentencing law or sentenced under the law

> prevailing at the time the crime was committed. See §921.001(4)(b); *Cochran*, 476 So.2d at 208. By voluntarily opting to be sentenced under the current scheme a defendant is deemed to have waived his ex post facto rights. Cf. *Bowles*, 698 So.2d at 1204. That is all the defendant is asking to do here, to be permitted to waive his ex post facto rights and give up any parole considerations. Capital murder cases have been excepted from the sentencing guidelines only because the sentencing options in such cases are fixed, i.e. death or life imprisonment. Florida's sentencing law has hardly been harmed or disrupted by allowing defendants to waive their ex post facto rights in all noncapital cases, and no harm has been advanced to prevent the same waiver here. Under the majority's holding we now have the anomalous situation that the only defendants in Florida who cannot waive their ex post facto rights and elect to be sentenced under the prevailing sentencing law are those charged with first-degree murder.

750 So.2d at 21. The *Bates* dissenters recognized that the likely motivation for denying a capital defendant the right to waive his "speculative entitlement to parole under the old law" was to deprive him of the benefit of assuring the jurors that if he were to be sentenced to life in prison, he would indeed spend the rest of his life in prison.

Other jurisdictions have concluded, consistent with the dissenting opinion in *Bates*, that a capital defendant may waive his right to parole eligibility and/or his protection against *ex post facto* laws so that the jury may be informed that life means life. See *State v. Fortin*, 843 A.2d 974, 1010-15 (N.J. 2004) ("On remand, in any new penalty-phase trial, the court must give defendant the option of a life-without-parole jury instruction

consistent with N.J.S.A. 2C:11-3b(4), provided defendant is willing to give a knowing, intelligent, and voluntary waiver of the application of the *Ex Post Facto* Clause."); *State v. McDonnell*, 987 P.2d 486 (Or. 1999) ("[The U.S. Supreme] Court's jurisprudence indicates that defendant's rights under the federal *ex post facto* clause are subject to waiver. We conclude that defendant waived his federal *ex post facto* protection by choosing not to object to the application of ORS 163.150(5)(a) (1993) in the remand proceeding."); *State v. Rogers*, 4 P.3d 1261, 1267 (Or. 2000) ("[D]efendant intentionally decided not to invoke the protection of the *ex post facto* clauses. That decision constituted a waiver of the protection afforded by those clauses. That the state objected to defendant's waiver in this case, whereas, in *McDonnell*, it did not, makes no difference to the result."); *State v. Guzek*, 86 P.3d 1106, 1109-10 (Or. 2004) ("[D]efendant moved to have the trial court instruct the jury on the true-life sentencing option. To that end, he expressly waived all *ex post facto* guarantees that otherwise would have protected him from retroactive application of the true-life option. ... [T]he trial court's decision not to instruct the jury regarding the true-life sentencing option was reversible error."), rev'd on other grounds by *Oregon v. Guzek*, 546 U.S. 517 (2006); *Furnish v. Commonwealth*, 95 S.W. 3d 34,

50-51 (Ky. 2002) (defense motion for instruction on life without the possibility of parole stating he "chooses to waive his right to be free from ex post facto application" was adequate consent); *Wade v. State*, 825 P.2d 1357, 1363 (Okla. Cr. App. 1992) ("Appellant contends that the trial court erred in refusing to grant his requested jury instruction on the possibility of sentencing him to life without the possibility of parole. We agree. ... [T]his result is more compelling due to the fact that appellant specifically waived his constitutional right against the application of any *ex post facto* law."); *Twillie v. State*, 892 So.2d 187 (Miss. 2004) ("If a defendant in a criminal case can waive the constitutional right to remain silent and give an incriminating confession which eventually places the defendant on death row, it logically follows that a defendant such as Twillie can waive his ex post facto rights and knowingly enter into an agreement to be sentenced to life without parole in order to avoid the death penalty."); see also *Rose v. Palmateer*, 395 F.3d 1108, 1113-14 (9th Cir. 2005) ("The district court ... properly concluded that Rose validly waived his Ex Post Facto objection to his ["true life"] sentence.").

The State recently negotiated for a waiver of the right to parole in exchange for a life without parole sentence. Carlos Bello was sentenced to death for a first-degree murder committed

in 1981, but on appeal the sentence was reversed for a new penalty phase. *Bello v. State*, 547 So.2d 914 (Fla. 1989). Resentencing was repeatedly attempted but Mr. Bello would stop taking his medication and be found incompetent to proceed (v4/R703, 705). In early 2012 he was found competent to proceed (v4/R703, 705). At a hearing held on May 2, 2012, the State withdrew its request for the death penalty upon Mr. Bello waiving his right to parole or to appeal the sentence, and Mr. Bello was sentenced to life imprisonment without the possibility of parole for the 1981 first-degree murder (v4/R708; v5/R740-750, 763-764).

The State bargained for such a sentence when it suited its purposes (i.e., to achieve finality and avoid the necessity of a penalty retrial in a problematic case like Mr. Bello's), but asserts it is illegal when the State wants the retrial and wants the jury to be aware of the defendant's possible release date. This stands the principle of "death is different" on its head, and allows the State to arbitrarily control whether or not a capital defendant can waive a "right" which is intended for his benefit but which in the capital sentencing context is detrimental to his chances of receiving a life sentence, and detrimental to the reliability of the jury's life-or-death decision.

Bates and *Orme* are wrongly decided as a matter of federal constitutional law. *Bates* and *Orme* are also distinguishable, based on the unique factual circumstances of Mr. Johnson's case. Mr. Johnson has already served more than 25 years in prison. This Court used this same circumstance to distinguish *Gore v. State*, 706 So.2d 1328, 1333 (Fla. 1997) and *Armstrong v. State*, 73 So.3d 155, 174 (Fla. 2011) from *Hitchcock v. State*, 673 So.2d 859, 863 (Fla. 1996). In *Gore*, the Court said:

> In *Hitchcock*, the State argued in a resentencing proceeding that the defendant would be eligible for parole after twenty-five years if given a life sentence. We held this argument to be improper and unfairly prejudicial because the resentencing occurred so close in time to the expiration of the twenty-five year period.

Gore, however, was not close to meeting the expiration of the 25 years. 706 So.2d, at 1333. The same distinction was made in *Armstrong*, 73 So.2d at 174 (Armstrong's case does not contain the "peculiar facts" that were present in *Hitchcock;* i.e., the close proximity of the resentencing proceeding to the expiration of the 25 year period before parole eligibility).

Since the offenses occurred in January 1981, the factual circumstances are even more "peculiar" than those in *Hitchcock*. In *Bates* the crime occurred in 1982 and the resentencing took place in 1995, so 12 years remained before the expiration of the minimum mandatory. In *Orme* the crime occurred in 1992 and the

resentencing in 2007, so 10 years remained. This factual difference is profoundly significant, making *Bates* and *Orme* more like *Gore* and *Armstrong*; while Mr. Johnson's unique situation is much closer to that of *Hitchcock*, and much more clearly requires the jury to be properly and constitutionally advised.

Clearly, where Mr. Johnson has already served more than the 25 years required before parole eligibility under the pre-1994 law, jurors may have feared that a life sentence could result in his immediate release. See *Perry v. State*, 801 So.2d 78, 83 (Fla. 2001) ("[A] juror's understanding of a life without parole sentencing option can make a crucial difference in whether the juror votes for life or death."). A death recommendation based even in part on this fear, rather than a dispassionate weighing of the aggravating and mitigating factors, is unwarranted and unreliable. Since the Eighth Amendment trumps state law, applying *Bates* and *Orme* to Defendant's unique factual circumstances fatally injected constitutional error into the penalty retrial.

Since Mr. Johnson (in contrast to Bates, Orme, Gore, and Armstrong) has already served more than the 25 years necessary for becoming parole-eligible under the old law, it was constitutionally imperative that he be allowed to waive the illusory "benefit" of a parole eligibility, in order to lessen

the risk of his receiving a death recommendation from a confused and fearful jury.

Additionally, the trial court erred by denying the request to introduce Mr. Johnson's waiver of parole as mitigation. "A mitigating circumstance can be defined broadly as "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death." *Campbell v. State,* 571 So.2d 415 (Fla. 1990) (quoting *Lockett v. Ohio*, 438 U.S 586, 604 (1978)). "[W]hether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review." *Douglas v. State*, 878 So.2d 1246, 1258-1259 (Fla. 2004). That Mr. Johnson wanted a life sentence without the possibility of parole is truly mitigating.

The trial court erred by preventing Mr. Johnson from waiving his right to parole and his right to ex post facto claims, and by excluding the waiver of parole as mitigation. The cause should be reversed for a new sentencing proceeding.

ISSUE II

THE TRIAL COURT ERRED BY DENYING THE SUPPLEMENTAL MOTION FOR NEW PENALTY PHASE PROCEEDING.

"[J]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor v. Louisiana,* 419 U.S. 522, 538 (1975). The right to a trial by jury presupposes that prospective jurors will be drawn from a pool that is "broadly representative" of the community, and the purpose of affording the right to a jury trial would not be served if "distinctive groups" of people were excluded from the jury pool. *Id.* at 531.

> The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century Blackstone could write:
>
> > "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control,

> * * * But the founders of the English law have, with excellent forecast, contrived that ... the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion."
>
> . . .
>
> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Duncan v. Louisiana, 391 U.S. 145, 151-152, 155 (1968) (footnotes omitted) (incorporating the 6th Amendment into the 14th, thereby making it binding upon the states).

The Florida Constitution mandates that the right to trial by an "impartial" jury is "inviolate." Art. I, §§ 16 and 22. Pursuant to case law, both Article I, section 9 (due process) and Article I, section 2 (equal protection) proscribe discrimination in jury selection. See *Tillman v. State,* 522 So.2d 14 (Fla. 1988) ("The procedure that was followed failed to insure that Tillman's rights to a jury composed of a fair cross section of the community were protected. Instead, Tillman was subjected to a proceeding that was open to racial discrimination

by the state, thus violating article I, section 2 of the Florida Constitution, as well as the Equal Protection Clause of fourteenth amendment to the United States Constitution.").

Section 40.01, Florida Statutes (2012) provides:

> Jurors shall be taken from the male and female persons at least 18 years of age who are citizens of the United States and legal residents of this state and their respective counties and who possess a driver's license or identification card issued by the Department of Highway Safety and Motor Vehicles pursuant to chapter 322 or who have executed the affidavit prescribed in s. 40.011.

A penalty phase jury trial was held before Judge Jacobsen on February 11-20, 2013 (v5/R867, 874, 884, 885, 897, 901, 909, 910, 917-918; v15-26/T1-2175). The jury, by a vote of 11 to 1, recommended imposition of the death penalty on each of three counts (v5/R910, 918, 927; v26/T2167-2170).

On March 1 and 7, 2013, the defense filed a motion and an amended for a new penalty trial (v6/R1073-1080, 1082-1087). On April 18, 2013, the defense filed a supplement to the motion for a new penalty trial, raising the newly discovered issue that young persons had been systematically excluded from the venire which denied him a fair trial before a jury drawn from a representative cross-section of the community (v7/R1177-1179). A hearing on the motion was held on January 6, 2014, (v10-12/R1721-2094; v13/R2365).

Section 40.021, Florida Statutes provides:

The chief judge of each judicial circuit is vested with overall authority and responsibility for the management, operation, and oversight of the jury system within his or her circuit. However, in accordance with this chapter and chapter 905, the clerk of the circuit court has specific responsibilities regarding the processing of jurors, including, but not limited to, qualifications, summons, selection lists, reporting, and compensation of jurors. The clerk of the circuit court may contract with the chief judge for the court's assistance in the provision of services to process jurors. The chief judge may also designate to the clerk of the circuit court additional duties consistent with established uniform standards of jury management practices that the Supreme Court may adopt by rule or issue through administrative order.

Section 40.022(1)(a-c), Florida Statutes provides:

(1) The chief judge or the chief judge's designee shall direct the clerk of the court to select, by lot and at random, a sufficient number of names, with their addresses, from the initial juror candidate list of persons who are qualified to serve as jurors under s. 40.01 and to generate a final juror candidate list of not fewer than 250 persons to serve as jurors as provided for in s. 40.221. The final juror candidate list must be signed and verified by the clerk of the court as having been selected as aforesaid. The final juror candidate list may be created, updated, or supplemented as often as necessary to prevent the selection list from becoming exhausted, but in no case less than annually during the first week of January of each year, or as soon thereafter as practicable. A circuit judge in a county to which he or she has been assigned may also request that the final juror candidate list be updated or supplemented, or that a new list be created as necessary.

(2) When the final juror candidate list is prepared pursuant to the request of a chief judge or the chief judge's designee, the previously prepared final juror candidate lists shall be withdrawn from further use. If, notwithstanding this provision, some names are not withdrawn, such error or irregularity does not invalidate any subsequent proceeding or jury. The fact

that any person so selected had been on a former jury list or had served as a juror in any court at any time shall not be grounds for challenge of such person as a juror. If any person so selected shall be ascertained to be disqualified or incompetent to serve as a juror, such disqualification shall not affect the legality of such list or be cause of challenge to the array of any jury chosen from such list, but any person ascertained to be disqualified to serve as a juror shall be subject to challenge for cause, as defined by law. The set of juror candidate lists, although they may be defective or irregular in form or other formal requirement, or in the number or qualification of the persons so named, shall be the lists from which the names of persons for jury service are to be drawn as prescribed by law.

(3) The clerk of the court shall be responsible for preserving the security of the source and juror candidate lists.

(4) The clerk of the court shall perform the duties set forth in this section and in ss. 40.221, 40.23, and 40.231 in counties having an approved, computerized jury selection system, the provisions of any special law or general law of local application to the contrary notwithstanding. However, the chief judge may designate the court administrator to perform these duties if the county provides funding to the court administrator to provide the personnel and other costs associated with jury services.

Section 40.022(1)(a-c), Florida Statutes provides:

(1) To ensure that the juror candidates summoned satisfy the requirements of ss. 40.01 and 40.013, each clerk of the circuit court shall, upon receipt of the list of persons in the department database from the Department of Highway Safety and Motor Vehicles and at least once each month thereafter, purge the final juror candidate lists of, at a minimum, the names of those persons:

(a) Adjudicated mentally incompetent;

(b) Convicted of a felony; or

(c) Deceased

Section 40.02(3), Florida Statutes provides "The clerk of the court shall be responsible for preserving the security of the source and juror candidate lists."

The Tenth Circuit adopted Amended Local Rule No. 2 (March 15, 2001) and Administrative Order 7-2.2, both of which augment the statutes. The Rule provides for selecting venire from a database updated yearly, "by the first week of January or as soon thereafter is practicable," from a list provided from the Department of Highway Safety and Motor Vehicles (DHSMV) (v13/R2210-2212, 2222-2223). Any local rule adopted pursuant to Fla. R. Admin. P. 2.215 requires both a vote of the conference of judges and Supreme Court approval.

The evidence established that for over 3 years these duties were not performed by the constitutional officers charged with performing them. From early 2010 to April 2013, there was no updating of the Polk County venire file which resulted in excluding from Mr. Johnson's jury pool all persons who were 18 to 21, persons who moved to Polk County, and persons who moved within the county unless they had a forwarding address (v10/R1766, 1774-1775, 1781-1783, 1795-1796, 1817-1819; v11/R1843-1844, 1846-1847, 1853-1855, 1860, 1867, 1898-1899, 1905-1913; v12/R2056-2057; v13/R2196, 2208, 2221, 2234, 2257-2258, 2269, 2272). The Polk County Clerk's Office and BOCC

failure to update the juror candidate list for over 3 years, as well as the Chief Judge's failure to exercise his authority to oversee the jury system, is contrary to and violates all of the clear requirements of the law.

"[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor v. Lousiana*, 419 U.S 522, 528 (1975). Pools "from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. *Id* at 538. "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff,* 407 U.S. 493, 503 (1972) (systematic exclusion of black persons from jury duty violated the 14th Amendment).

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165 85 L.Ed. 84; Glasser v. United States, 315 U.S. 60, 85, 62 S.Ct. 457, 471, 86 L.Ed. 680. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective

> jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

The systematic exclusion of young people and people who recently moved to Polk County from jury service is unconstitutional. See *Duren v. Missouri*, 439 U.S. 357 (1979) (systematic disproportionate exclusion of women from jury service is unconstitutional); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (statute barring black persons from jury duty violated the 14th Amendment).

The Impartial Jury Clause of the Sixth Amendment requires that the venire from which the state and the defendant draw a jury be a fair cross-section of the community. The Supreme Court announced a three-prong test to help courts determine whether there has been a Sixth Amendment violation:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to

> systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979).

The trial court denied the supplemental motion for a new penalty phase trial (v14/R2440-2445). The trial court erroneously found the defense failed to meet each of the prongs of *Duren:* young people and people who recently moved to Polk County are not distinctive groups; there is insufficient evidence that the venire from which Mr. Johnson's jury was selected was not reasonably fair and reasonable in relation to Polk County's population; and the failure to update the jury pool for three years was not willful or intentional and there was no systematic exclusion of any group (v14/R2445).

The first prong of *Duren* "that the group alleged to be excluded is a distinctive group in the community was met. Young people, people who recently moved to Polk County, and people who moved within Polk County are distinctive groups.

"Communities differ at different times and places. What is a fair cross section at one time and or place is not necessarily a fair cross section at another time or a different place." *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) ("If at one time it could be held that Sixth Amendment juries must be drawn from a fair cross section of the community but that this

requirement permitted the almost total exclusion of women, this is not the case today.").

Judicial recognition of distinctive groups has evolved and is evolving. See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 224-225 (1946) (daily wage earners are a distinctive group); *Simmons v. State*, 182 So. 2d 442, 444 (Fla. 1st DCA 1966) ("It is crystal clear that in making up the jury list there was an intentional and systematic exclusion of common laborers as a class."); *State v. Plenty Horse*, 184 N.W.2d 654 (S.D. 1971) (Native Americans are a distinctive group); *Peters v. Kiff*, 407 U.S. 493, 498-499 (1972) (blacks are a per se distinctive group under the first prong of Duren); *State v. Villafane*, 325 A.2d 251, 256 (Conn. 1973) ("Persons of Puerto Rican heritage share a similarity of attitudes, ideas and experience which cannot be adequately represented if they are excluded from grand jury selection."); *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) ("it is no longer open to dispute that Mexican-Americans are a clearly identifiable class."); *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (recognizing women as a distinctive group); *U.S. v. Gelb*, 881 F.2d 1155 (2d Cir 1989) (Jews are a distinctive group); *State v. Fulton*, 566 N.E.2d 1195 1201 (Ohio 1991) ("In construing the standard set forth in *Duren* we find that members of the Old Order Amish religious faith do comprise a

'distinctive' group."); *U.S. v. Jackman*, 46 F.3d 1240, 1246 (2d Cir. 1995) ("There is little question that both Blacks and Hispanics are "distinctive" groups in the community for purposes of this test.") *People v. Garcia*, 92 Cal.Rptr.2d 339, 344 (4th Dist. 2000) ("Lesbians and gay men qualify under this standard. It cannot seriously be argued in this era of "don't ask; don't tell" that homosexuals do not have a common perspective — "a common social or psychological outlook on human events" — based upon their membership in that community. They share a history of persecution comparable to that of blacks and women.");

The young people excluded from Mr. Johnson's jury were distinctive. As Professor Graber testified, in earlier times young folks thought of themselves, and were considered by others, to be fully-functioning adults because they were able to be self-supporting, marry and raise a family using the tools that a high school education provided, but majority of today's 18 to 22-year-olds do not consider themselves to be fully adults, in part, because they are still dependent on their parents for financial and emotional support, and this is likely to be a permanent change in the perception of this age group (v11/R1981-1984, 1999). Their brains are still developing (v11/R1987-1990, 1997). They are still exploring the possibilities of their adult lives (v11/R1999-2002). They are

less likely to be married or to never have been married than other age groups (v11/R1991-1992). They are more adept and engaged with online activities and online activism than other age groups (v11/R1993-1995, 2014). They are more tolerant about some issues than other age groups (v11/R1995-1997).

Not only do young people think of themselves as distinctive, as do their elders, but Florida laws single them out as different or distinctive in various ways. Young people are old enough to own and drive cars, motor cycles and even aircraft; marry, fight, and die for their country; vote; hold public office; own and sell firearms; and serve as personal representatives and guardians. However they cannot: ride a motorcycle without a helmet, or own a motorcycle without a tag that emblazoned with the words, "UNDER 21"; (§ 316.211(3)(b) and 316.211(6), Fla. Stat.); or possess, consume, sell, or serve alcoholic beverages (§ 562.11 and 562.11, Fla. Stat.)]. Florida's juvenile courts have jurisdiction over "children" until their 21st birthday (§ 39.013, Fla. Stat.). They are defined as a minor children until their 25th birthday under Florida's Wrongful Death statute (§ 768.18, Fla. Stat.). They are not adults under the Transfer to Minors Act until their 21st birthday (§ 710.102, Fla. Stat.). These laws express public policy of the State of Florida, and presumably the will of the

people, that young people are distinctive.

The trial court found:

> Young people between the ages of 18 and 21 have never been recognized as an identifiable or distinctive group. See *Bryant v. State*, 386 So.2d 237 (Fla. 1980); *U.S. v. Kuhn*, 441 F.2d 179 (5th Cir. 1971), *Teague v. State*, 529 S.W.2d 734 (Tenn. Ct. App. 1975), *State v. McKinney*, 302 So.2d 917 (La. 1974), *Mooney v. State*, 254 S.E.2d 337 (Ga. 1979).

(v14/R2444).

In *Bryant v. State*, 386 So. 2d 237 (Fla. 1980), the defense moved to dismiss the indictment because women and black people were never selected as grand jury foremen and black people and people aged 18 to 29 were historically and systematically underrepresented on Palm Beach county grand juries. One year after *Duren v. Missouri,* 439 U.S. 357 (1979) authoritatively decided otherwise, the *Bryant* court ruled "The person challenging the selection procedure must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group **to which he belongs**." *Id.* p. 240. (Emphasis added).

It is unclear just what Bryant claimed caused the statistical under-representation, and her statistics for the 18-29 age range were only for one year *Id.* at 240. The *Bryant* court found insufficient proof of underrepresentation of young adults, and followed the 3 out of 4 federal courts that found young

adults do not comprise a cognizable class. Id. at 240. There is no mention of any evidence introduced in support of the class's distinctiveness. At the time of the Bryant trial, young adults did not think of themselves as distinctive, and neither did their elders. In this case there was evidence of young people constituting a distinctive group. Times change, and so should this Court's ruling on the distinctiveness of young people.

In other cases cited by the trial court, the defense also offered no evidence that young people were a distinctive group: *U.S. v. Kuhn*, 441 F.2d 179 (5th Cir. 1971) ("There is nothing in the record to show that registered voters who had attained voting age between the time the 'Plan' became effective and the time of the proceedings below were recognizable as a class."); *Teague v. State*, 529 S.W.2d 734, 738 (Tenn. Ct. App. 1975) (relying on a similar case in which the defense also offered no evidence that young people were a cognizable class. In another case relied on by the trial court, it was erroneously required that underrepresentation be of an identifiable group to which the defendant belongs. See *State v. McKinney*, 302 So.2d 917 (La. 1974) ("The trial judge ruled that there was no evidence in this case that citizens, between the ages of eighteen and twenty, qualified to serve as jurors were systematically, consciously and deliberately excluded from the grand or petit jury venire.

... This determination coupled with the fact that defendant, who was forty-five years of age, was not a member of the group excluded persuades us that defendant's objection is without merit.").

The 1 out of 4 Federal courts in the 1970s that considered whether young adults comprised a cognizable class and found that they did was *U.S. v. Butera*, 420 F. 2d 564, 570 (1st Cir. 1970):

> Finally, we are satisfied that young adults constitute a cognizable — though admittedly ill-defined — group for purposes of defendant's prima facie case. We cannot allow the requirement of a 'distinct' group to be applied so stringently with regard to age grouping that possible discrimination against a large class of persons— in our case, those between 21 and 34— will be insulated from attack. Nor can we close our eyes to the contemporary national preoccupation with a 'generation gap,' which creates the impression that the attitudes of young adults are in some sense distinct from those of older adults. That apparent distinctness is sufficient for us to say that neither class could be excluded from jury pools without some justification. Accordingly, we find the 'significant disparity' with regard to age which raises the inference of discrimination and shifts the burden of explanation to the government.

The holding was receded from by a fractured *en banc* opinion in *Barber v. Ponte,* 772 F. 2d 982 (1st Cir. 1985). The panel opinion in *Barber* contains numerous references to sociological and scientific evidence supporting distinctiveness: "Although conclusive evidence is difficult to obtain... many sociologists contend that young people do comprise a class with distinctive values, outlooks, manners, roles, and behavior patterns." *Id.*

988 (citations and footnote omitted). The panel opinion looked to scholarly articles as well as common experience, p. 988, n. 10:

> Today the differences associated with age are ubiquitous. Age groups differ in "labor force participation, consumer behavior, leisure-time activities, marital status, religious behavior, education, nativity, fertility, child-rearing practices, political attitudes-to name only a few." Moreover, "[o]lder people differ sharply from younger people in many of their opinions, feelings, and dispositions toward such central aspects of life as health, personal problems, or death." The old also tend to be more politically conservative, more resistant to change, and less tolerant of political and social nonconformists than the young. "It comes as no surprise, then, that each age strata has its own *distinctive subculture.*"
>
> Ziegler, *Young Adults as a Cognizable Group in Jury Selection,* 76 Mich.L.Rev. 1045, 1075 (1978) (citations omitted).

On rehearing *en banc*, the court decided to join the other circuits in not finding young adults were a distinctive group, but did so strongly distinguishing that under the facts of *Barber*, the young adults were not intentionally or "specifically and systematically excluded." *Id,* p. 999-1000.

Other courts have held that young people constitute a cohesive unit or distinctive group for Sixth Amendment jury challenges. *State v. Holmstrom,* 168 N.W. 2d 574, 578 (1969) ("[W]e think systematic discrimination in regard to age would render the jury array just as defective as any other type of

systematic discrimination."); *State v. Pruit*, 289 N.W. 2d 343, 346 (1980) ("We are convinced that young adults do constitute a distinctive group whose systematic exclusion from jury service violates the sixth amendment fair-cross-section requirement. ... The young adults of our society are a 'cohesive unit' or 'distinctive group' for purposes of a sixth amendment challenge to a jury array."); *People v. Marr*, 324 N.Y.S.2d 608 (1971) ("The court is aware of the alienation of many of our youth from the institutions of government and feels strongly that participation in government, whether by jury duty or voting or other means, will tend to decrease this sense of alienation. Jury service is an important educational experience for the citizen. It encourages the development of civic responsibility as well as an interest in, and respect for, the law and its enforcement. For these reasons, as well as the primary one of providing a fair trial, the officials who administer the jury system should take whatever positive steps are necessary to insure that young adults are fairly represented on jury lists.").

Mr. Johnson's jury venire not only excluded all young adults, it underrepresented blacks and Hispanic people. The State's expert demographer, Dr. Smith testified the percentage of black and Hispanic people in Polk County has increased since

2010, while the percentage of white people has decreased, and the percentage of the 18 to 22 year olds in the black and Hispanic population was higher than the 18 to 21 year olds in the white population (v12/R2032-2033, 2035).

The second prong of *Duren* "that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community" was met. There is sufficient evidence that the venire from which Mr. Johnson's jury was selected was not reasonably fair and reasonable in relation to Polk County's population. The evidence established there was total exclusion of persons who were 18 to 21, persons who moved to Polk County, and persons who moved within the county unless they had a forwarding address.

The third prong of *Duren* "that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." was met. The evidence clearly establishes the exclusion of young people and people who recently moved to Polk County was systematic or inherent to the procedures for forming the venire. In *Duren at 366*, the Court stated that satisfying the third prong of the test requires only that the exclusion is systematic or "inherent in the particular jury-selection process utilized." Thus, these procedures that regularly lead

to nonrepresentative venires violate the fair cross section guarantee regardless of whether or not there was intent to exclude distinctive groups. See 5 Wayne R. LaFave et al., Criminal Procedure § 22.2(d), at 277 (2d ed. 1999) ("[A] defendant raising a cross section objection can prevail without showing purposeful discrimination."); *U.S. v. Jackman*, 46 F.3d 1240, 1246 (2d Cir. 1995) ("The defendant need not prove discriminatory intent on the part of those constructing or administering the jury selection process.").

However, Mr. Johnson presented evidence that can be viewed only as intentional exclusion. The law requires the master jury lists to be updated at least annually and purged at least monthly. Neither was done for more than 3 years and it was obvious that this would result in exclusion of every person born 18, 19 or 20 years earlier, everyone who moved into Polk County during that time, everyone who moved within the county without they had a forwarding address, and everyone who was naturalized as a citizen during that period. Not only was this failure deliberate, but it was also secret. Section 40.02, Florida Statutes clearly requires that all juror candidate lists "must be signed and verified by the clerk of the court as having been selected as aforesaid." None were signed, none were verified and none were submitted to the Chief Judge as required, even though

the jury venires were routinely provided to the parties as if they had been drawn according to law from a "verified" list. Any claim that there was no knowledge that failure to update the list would exclude young people and people moving to Polk County must fail. "A party is deemed to have deliberate ignorance where his suspicion is aroused, but he then deliberately decides not to inquire further because he wishes to remain ignorant." *U.S. v. Gannaway*, 477 Fed.Appx. 618, 625 (11th Cir. 2012).

> [I]t was a permissible inference that he did know, or at the least that he was playing ostrich—that is, that he suspected that he was violating the law but avoided confirming his suspicion in order to preserve a patina of innocence. That is what is sometimes called—besides "playing ostrich"—"conscious disregard" of risk, "willful blindness," or "gross recklessness," *Bullock v. BankChampaign, N.A., supra,* 133 S.Ct. at 1759, but is more perspicuously understood as knowing that there is a risk of serious harm and that it can be averted at reasonable cost, yet failing to act on that knowledge."

Stoughton Lumber Co., Inc. v. Sveum, 787 F.3d 1174, 1177 (7th Cir. 2015).

When government officials fail to follow the law and deliberately exclude any group – blue eyes, chess players, Masons, or any group – then the Sixth Amendment is *ipso facto* violated (and also the Fourteenth, if the excluded group was a cognizable class). "Where there is direct evidence of intentional discrimination, the proper starting point is *Thiel*, not *Duren*." In *Thiel*, 328 U. S. at 221, the Court held: "The

undisputed evidence in this case demonstrates a failure to abide by the proper rules and principles of jury selection. Both the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage." Thus, Thiel's conviction was reversed and it was "unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class." *Thiel,* 328 U. S. at 225.

In *State v. Silva,* 259 So. 2d 153, 160 (Fla. 1972) the Florida Supreme Court invalidated the Dade County racial quota system in jury selection saying:

> The tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, however, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community, for such complete representation would frequently be impossible. **But it does mean that prospective jurors must be selected at random by the proof selecting officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society.**

(Emphasis added). See *Simmons v. State,* 182 So. 2d 442, 444 (1st DCA 1966) ("It is crystal clear that in making up the jury list there was an **intentional and systematic exclusion** of common laborers as a class.").

Mr. Johnson was denied his constitutional rights to due process and a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 22 of the Florida Constitution. "[E]xcluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor v. Louisiana,* 419 U.S. at 531. "In light of the great potential for harm latent in an unconstitutional jury-selection system [footnote deleted], and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few." *Peters v. Kiff,* 407 U.S. 493, 504 (1972). The cause must be reversed for a new trial.

ISSUE III

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION FOR DISCLOSURE OF PAROLE BOARD CLEMENCY FILES.

Section 922.052(2)(b) and (c) Florida Statues provides the governor shall issue a death warrant only "if the executive clemency process has been initiated and concluded." Governors of Florida signed death warrants for Mr. Johnson in January 1986 and October 2009. *Johnson v. State*, 769 So.2d 990, 992 (Fla. 2000) ("After a death warrant was signed in January 1986, Johnson petitioned this Court for a writ of habeas corpus, claiming ineffective assistance of appellate counsel for failure to challenge the trial court's allowing the jury to separate after it began deliberating Johnson's guilt or innocence. This Court found reversible error ..."); *Johnson v. State*, 44 So.3d 51, 55-56 (Fla. 2010) ("While the present appeal was pending in this Court, the Governor on October 7, 2009, signed a second death warrant for Johnson, with the execution set for November 4, 2009.[2]"). Mr. Johnson asked the Governor to exercise his discretion to allow his representatives to view the clemency

[2] Polk County Sheriff Grady Judd, a personal friend of deceased Deputy Burnham, initiated a petition requesting the governor to sign a death warrant for the execution of Mr. Johnson and the petition obtained over 2,200 signatures (v4/R575, 670, 683). Sheriff Judd reportedly also personally lobbied the governor during the funeral of another law enforcement officer, and as a result Governor Crist signed the death warrant (v4/R575, 670, 683).

file, but the Governor refused (v3/R367).

On July 24, 2012, the defense filed a motion to require the State to allow inspection and copying of Mr. Johnson's clemency file (v3/R366-378). At a hearing held on January 25, 2013, the motion to was denied based on *Parole Commission v. Lockett,* 620 So.2d 153, 158 (Fla. 1993) (v4/R620-624, 673). "A trial court's determination with regard to a discovery request is reviewed under an abuse of discretion standard." *Overton v. State,* 976 So.2d 536, 548 Fla. 2007).

A prosecutor's obligation to provide favorable information upon request is required by the due process provisions of the 14th Amendment to the U. S. Constitution and Article 1, Section 9 of the Florida Constitution, by Florida Rule of Criminal Procedure 3.220(b), and Florida Rule of Professional Conduct 4-3.8(c) (a prosecutor must "make timely disclosure to the defense of all evidence or information known that tends to negate the guilt of, or mitigates the offense or sentence of the accused.").

"[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case and to disclose that evidence if it is material." *Archer v. State*, 934 So.2d 1187, 1203 (Fla. 2006). "[T]he state attorney is charged with constructive knowledge and

possession of evidence withheld by other state agents" *Gorham v. State,* 597 So.2d 782, 784 (Fla. 1992).

> It does not comport either with logic or reason to hold that a defendant is not entitled to the discovery of relevant and material information which may be admissible and useful to his defense and is otherwise unavailable to him merely because such information is not at the time the motion is heard reposing in the files and actual possession of the state attorney. ... Such a possibility does not square with any responsible concept of fairness in the trial of a criminal case. So long as the pertinent and relevant information requested by a defendant is readily available to the state attorney from other state governmental agencies for his use in the prosecution of the case even though not reduced to his actual possession, then it should likewise be made available to the defendant upon his timely demand ... .

State v. Coney, 272 So.2d 550, 554-55 (Fla. 1st DCA 1973).

In *Parole Commission v. Lockett,* 620 So.2d 153, 158 (Fla. 1993), this Court granted a writ of prohibition to prohibit a circuit court judge from requiring the Parole Commission to produce investigative files pursuant to section 119.01(1), Florida Statutes ("It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person."). This Court held that separation of powers controlled the issue and "the clemency investigative files and reports produced by the Parole Commission on behalf of the Governor and Cabinet relating to the granting of clemency are subject solely to the Rules of

Executive Clemency." *Id.* at 158. This Court noted "We note that the public records amendment to article I of the Florida Constitution, approved by the electorate on November 3, 1992, does not become effective until July 1, 1993, and is not an issue in this cause." Id. at 154 fn2.

Article I, section 24(a) of the Florida Constitution provides:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

Section 14.28, Florida Statutes (1993) provides: "All records developed or received by any state entity pursuant to a Board of Executive Clemency investigation shall be confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. However, such records may be released upon the approval of the Governor." The Rules of Executive Clemency also make the Clemency Board's records and documents secret:

> Rule 16 of the Florida Rules of Executive Clemency provides:

> Due to the nature of the information presented to the Clemency Board, *all records and documents generated and gathered in the clemency process as set forth in the* Rules of Executive Clemency *are confidential* and shall not be made available for inspection to any person except members of the Clemency Board and their staff. Only the Governor, and no other member of the Clemency Board, nor any other state entity that may be in the possession of Clemency Board materials, has the discretion to allow such records and documents to be inspected or copied. Access to such materials, as approved by the Governor, does not constitute a waiver of confidentiality.
>
> (Emphasis supplied.)

Chavez v. State, 132 So.3d 826, 830 (Fla. 2014). There is no constitutional exemption of Board of Executive Clemency investigation records from Article I, section 24(a)e, therefore the statutory exemption of the exception of Rule 16 of the Florida Rules of Executive Clemency and section 14.28 would be unconstitutional but for their purposeful adoption in time to be grandfathered in by Article I, section 24(d). See Patricia A. Gleason and Joslyn Wilson, The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(e), 18 Nova Law Review 973, 988-990 (Winter, 1994)

In *Lockett* and cases following *Lockett* on the issue of exemption of clemency investigation records (*Jennings v. State*, 626 So.2d 1324 (Fla. 1993); *Asay v. Florida Parole Commission*, 649 So.2d 859 (Fla. 1994); *Roberts v. Butterworth*, 668 So.2d 580

(Fla. 1996); *King v. State,* 840 So.2d 1047 (Fla. 2003); *Chavez v. State,* 132 So.3d 826 (Fla. 2014)), the request to examine clemency records was raised in postconviction proceedings. Mr. Johnson's request for access to clemency files was made to prepare for a **pending** penalty phase trial. See Justice Kogan's concurring opinion in *Asay v. Florida Parole Commission*, 649 So.2d 859 (Fla. 1994) ("There is some merit with the argument that this case should not be subject to the full strictures of *Brady,* if only for reasons of policy and common sense. As the majority notes, *Brady* generally is conceived as applying only to state-sponsored investigations during roughly the period of the investigations and later trial. Moreover, any possible incentive to withhold exculpatory evidence is diminished in the present context when compared with a 'classic' pretrial *Brady* violation.").

The 14th Amendment to the U.S. Constitution and Article I, Section 9 of the Florida Constitution provide that no person shall be deprived "of life, liberty or property without due process of law." Due process requires disclosure of clemency files in preparation of the penalty phase of a capital case. See *Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the

evidence used to prove the Government's case must be disclosed to the individual . . .”). *Morrissey v. Brewer*, 408 U.S. 471, 488-489 (1972) (“[T]he minimum requirements of due process” include “disclosure to the parolee of evidence against him”). “It is, of course, irrelevant that States need not establish clemency proceedings; having established these proceedings, they must comport with due process.” *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 293 n. 4 (Justice Stevens, concurring in part and dissenting in part).

Lockett was wrongly decided. As Judge Kogan noted in dissent:

> The majority today elevates the Rules of Executive Clemency to constitutional stature, effectively incorporating them by reference into article IV, section 8 of the Florida Constitution. To my mind the sole issue is the text of the Constitution itself, not whatever gloss might have been added by the Executive. Nowhere does article IV, section 8 require or even suggest that clemency records must have the status of a high state secret.
>
> Moreover, no sensible policy considerations require secrecy. There could be no more “encroachment” upon the executive prerogative by releasing clemency documents than there is when the public inspects the files of the Cabinet, this Court, the Legislature, or any state agency. All that will happen is that documents produced pursuant to executive powers will be more available for inspection. I find it difficult to believe that a mere release of documents alone somehow will subvert the executive clemency power. For that reason, I would deny the writ.

Lockett, at 159. Mr. Johnson or his representatives should have been permitted to review his clemency file to prepare for his

penalty phase trial. The cause should be reversed for a new sentencing proceeding.

ISSUE IV

ADMISSION OF VICTIM IMPACT EVIDENCE DENIED APPELLANT A FAIR TRIAL.

Section 921.141 (7), Florida Statutes provides:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

"[J]udicial interpretation of statutes and determinations concerning the constitutionality of statutes are pure questions of law subject to the de novo standard of review." *State v. Sigler,* 967 So.2d 835 (Fla. 2007).

The defense motions to exclude victim impact evidence on grounds including: it violated ex post facto requirements of the Florida and United States Constitutions; it is unconstitutionally designed to create sympathy for the deceased; it unconstitutionally acts as an aggravator and decimates mitigation, and it is unduly prejudicial to the defense; to limit victim impact evidence, and to have victim impact evidence presented solely to the trial court were denied (v2/RR182-183, 197, 268-285, 326-360; v3/R426, 433-436, 438-439, 487-488; v5/R875-878; v21/T1309-1320; v22/T1321-1322).

During victim impact testimony, the defense expressed concern about Deputy Burnham's wife's ability to testify without breaking down (v22/T1333-1335). The trial court asserted it would stop her testimony if she showed outward emotion (v22/T1334-1335). Cindy Burnham Lee could not testify due to being emotional—she choked up at the onset, the court excused the jury so she could compose herself, then the court excused her (v22/T1336-1338). The defense noted some spectators were audibly weeping, the trial court asserted they had a right to be present and show emotion, but it would deal with this if it drew attention of the jurors (v22/T1337). The defense moved for mistrial based on cumulative emotional displays, the trial court found no significant emotional displays and the motion was denied (v6/R1072; v22/T1337-1338).

Mr. Johnson's offenses were committed in 1981. Section 921.141(7), Florida Statutes did not go into effect until July 1, 1992. This Court has rejected similar attacks on victim impact evidence. see *Burns v. State*, 699 So.2d 646, 653 (Fla. 1997) (rejecting challenges to the victim impact statute based upon claims that it violates the prohibition against ex post facto laws, improperly regulates practice and procedure, allows admission of irrelevant evidence which does not pertain to any aggravator or mitigator, and violates equal protection because

it may encourage the jury to give different weight to the value of different victims' lives); *Windom v. State*, 656 So.2d 432, 439 (Fla. 1995) ("[A]pplication of section 921.141(7) in the present case does not violate the prohibition against ex post facto laws."). Although this Court has found no violation of ex post facto protections, this Court should reconsider its ruling. Also, as trial counsel noted, the ex post facto issue had not been resolved by U.S. Supreme Court (v2/R182-183).

Mr. Johnson acknowledges that this court has found section 921.141 (7), Florida Statutes constitutional. However, this Court should reconsider the issue. Victim impact evidence constitutes a nonstatutory aggravating circumstance prohibited by statute:

> Florida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. § 921.141 (5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. *Blair v. State*, 406 So.2d 1103 (Fla. 1981); *Miller v. State*, 373 So.2d 882 (Fla. 1979); *Riley v. State*, 366 So.2d 19 (Fla. 1978). Florida law provides, however, that prior to sentencing any defendant convicted of a homicide, the next-of-kin of the homicide victim will be permitted to either appear before the court or to submit a written statement under oath for the consideration of the sentencing court. These statements shall be limited solely "to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced." § 921.143 (2) (1985).

> Thus, it is clear that the Florida Legislature, like Congress and the legislature of at least thirty-five other states, has made the judgment "that the effect of the crime on the victims should have a place in the criminal justice system." Booth [*v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529], 2356 n. 12 [(1987)]. It is also clear, however, from the *Booth* decision, that the legislature may not make this judgment in capital punishment cases. Accordingly, we hold that the provisions of section 921.143 are invalid insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing. [Footnote deleted.]

Grossman v. State, 525 So.2d 833, 842 (Fla. 1988).

In Florida, aggravating circumstances must be carefully defined and consideration of matters unrelated to aggravating factors renders a death sentence violative of the Eighth Amendment and Article I, Section 17 of the Florida Constitution.

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. See *Clemons v. Mississippi*, 494 U.S. 738, 752, 110, S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," *Stringer v. Black*, 503 U.S. 222, 236, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a "thumb [on] death's side of the scale," *id.*, at 232, 112 S.Ct., at 1137, thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," *id.*, at 235, 112 S.Ct., at 1139. Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons, supra*, 494 U.S. at 752, 110, S.Ct. at 1450

> (citing *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); see *Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731, 739, 112 L.Ed.2d 812 (1991). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. *Id.*, at 320, 111 S. Ct., at 739.

Sochor v. Florida, 504 U.S. 527, 532(1992).

Appellant believes this Court should reconsider its rulings on the constitutionality and admissibility of victim impact evidence. The cause should be reversed for a new sentencing proceeding.

ISSUE V

CUMMULATIVE ERROR DENIED APPELLANT A FAIR TRIAL.

During the testimony of State's witness Linda Evans Collins, daughter of victim Williams Evans, the trial court offered her a break (v20/T955). She said she wanted to go home (v20/T955). The trial court indicated she could leave soon (v20/T955). The defense noted she cried and was emotional throughout her testimony and it moved for mistrial (v20/T957-958). The trial court noted she was emotional, crying, and using a Kleenex, but the motion for mistrial was denied (v20/T957-958). As noted in the previous issue, there was an emotional display during victim impact testimony, the defense moved for mistrial based on cumulative emotional displays, court found no significant emotional displays and the motion was denied (v6/R1072; v22/T1336-1338).`

> In reviewing motions for mistrial dealing with emotional outbursts from witnesses, appellate courts should defer to trial judges' judgments and rulings when they cannot glean from the record how intense a witness's outburst was. *See Arbelaez v. State*, 626 So.2d 169, 176 (Fla.1993); *Torres-Arboledo v. State*, 524 So.2d 403, 409 (Fla.1988); *Justus v. State*, 438 So.2d 358, 366 (Fla.1983).

Thomas v. State, 748 So.2d 970 (Fla. 1999). However, this Court need not defer to the trial judge as to the outburst during

victim impact testimony because a dvd of this is in the appellate record (v6/R1972).

> "[T]his Court reviews a trial court's ruling on a motion for mistrial under an abuse of discretion standard." *Salazar v. State*, 991 So.2d 364, 371 (Fla. 2008), *cert. denied*, ___ U.S. ____, 129 S.Ct. 1347, 173 L.Ed.2d 614 (2009); *see also Perez v. State*, 919 So.2d 347, 363 (Fla. 2005); *Floyd v. State*, 913 So.2d 564, 576 (Fla. 2005). The motion should be granted "only when it is necessary to ensure that the defendant receives a fair trial." *Salazar*, 991 So.2d at 372 (quoting *Cole v. State*, 701 So.2d 845, 853 (Fla. 1997)).

Tumblin v. State, 29 So.3d 1093 (Fla. 2010). The displays of emotion served solely to garner sympathy for the victims, thereby tainting the subsequent jury verdict due to the consideration of sympathy.

During direct examination of Dr. Henley, he testified Mr. Johnson's long term substance abuse prior to the incidents of this case contributed to his brain impairment (v22/T1387-1396, 1406-1407). During cross-examination of Dr. Henley, the State asked if Mr. Johnson reported using inhalants while in custody (v22/T1407). Dr. Henley agreed (v22/T1407). The State then asked if the use of inhalants in jail occurred after the homicide (v22/T1407). Dr. Henley agreed (v22/T1407).

The defense objected, noted the State had agreed to not go into prior incarceration, and moved for a mistrial (v22/T1407-1408, 1414). During a proffer, Dr. Henley indicated the use of

inhalants occurred during incarceration prior to incarceration in this case (V22/T1410-1411, 1415). The trial court was concerned about that the inhalant use occurred prior to 1981, but felt this was legitimate cross-examination and clarifying the timing would expose the jury to his prior incarceration (v22/T1413). The motion for mistrial was denied (v5/R891; v22/T1413-1414).

The defense request that the jury be informed that the use of inhalants occurred before 1981 was denied, and it was instructed to not pursue the matter further because it would only be digging a deeper hole (v22/T1414-1418). The defense renewed the motion for mistrial, asserting the purported use of inhalants since 1981 would act as a nonstatutory aggravator (v22/T1418-1419). The renewed motion for mistrial was denied, but the trial court permitted clarification that the use of inhalants occurred in the late 1970s (v5/R891; v22/T1419). Dr. Henley then testified the use of inhalants occurred in the late 1970s (v22/T1421).

> Any implication of collateral crimes, not relevant to any material issue, should not be admitted. *Czubak v. State*, 570 So.2d 925 (Fla. 1990), (reference by witness to defendant as "escaped convict" held to be inadmissible collateral crime evidence). When a defendant moves for a mistrial based on the improper admission of collateral crime evidence, the motion is addressed to the sound discretion of the trial court. *Salvatore v. State*, 366 So.2d 745 (Fla. 1978), *cert. denied,* 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). When this kind of irrelevant evidence is admitted, however, there is a presumption that the error was harmful, because of

> "the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged."
>
> *Straight v. State*, 397 So.2d 903 (Fla. 1981), *cert. denied,* 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). A reviewing court may affirm the conviction only if the state proves beyond a reasonable doubt that the verdict could not have been affected, and a showing that the evidence against a defendant was "overwhelming" is insufficient. *Castro v. State*, 547 So.2d 111 (Fla. 1989).

Williams v. State, 692 So.2d 1014 (Fla. 4th DCA 1997). Also, as the defense asserted at a hearing on the motion for new trial, testimony that Mr. Johnson used inhalants while in custody inaccurately implied he did so while on death row and undermines Mr. Johnson's ability to receive a life sentence (v8/R1326-1328).

The defense subsequently moved in limine to exclude evidence of prior criminal history (v5/R898-900; v23/T1580). It noted that prior criminal activity was brought up during the testimony of Dr. Henley, it had announced it was not relying on the mitigator of no significant criminal history, and it did not want prior criminal history to come up again with the other doctors (v23/T1580-1581). The trial court reserved ruling and invited counsel to present proffers during the witness's testimony (v23/T1582-1583).

On direct examination, former testimony of Dr. McClane established Mr. Johnson's capacity to conform his conduct to the requirements of law was impaired due amphetamine intoxication and delirium (v23/T1695-1698). The defense objected to allowing the

State to present former cross-examination testimony on impairment on other occasions than the night of the incidents which dealt with indifference rather than the legal standard of capacity, was irrelevant to the mitigating factor and beyond the scope of direct examination, and was solely to introduce prior bad acts (v23-24/T1700-1705). The trial court found direct examination opened the door, but it instructed the State not to argue it as an aggravator (v24/T1705).

On cross examination of Dr. McClane, the following was presented:

> Q. Well, then when you say the capacity to appreciate the criminality of one's conduct, you mean something other than simply being indifferent to it, correct?
> A. Yes.
> Q. All right. And isn't it a fact, sir, that in your history of Mr. Johnson, you became aware of the fact that he had generally, since the age of 16, shown an indifference to the criminality of his conduct?
> A. Certainly at times he had, yes.
> Q. And isn't it a fact, sir, that in the history of Mr. Johnson, other than the night of January 8, 1981, you were aware of at least seven instances in which he refused to conform his conduct to the requirements of the law?
> A. I don't know the number, but several instances in that range, yes.

(v24/T1738-1739). "On cross-examination the state must, as a general rule, limit itself to questions no broader in scope than those propounded by the defense." *McCrae v. State*, 395 So.2d 1145, 1151 (Fla. 1980). The State was again erroneously permitted to use the defense experts to present irrelevant

collateral crimes evidence. Additionally, this testimony turns the evidence of a mitigating factor into evidence of an aggravating circumstance.

Dr. Fisher testified he interviewed Mr. Johnson, reviewed records, and performed neurological testing in 1995 which established he had neurological deficits (v24/T1832-1850). During cross-examination of Dr. Fisher, the State asked "Did you know that there was a statement after the fact of the murders, but within short order, to the effect of, Don't worry about that third body; they'll never connect it to me?" (v24/T1858-1859). The defense objected to questioning beyond the scope of direct examination where the defense only presented the expert's testimony about neurological testing in 1995 (v24/T1858-1861).

Cross-examination of a witness is limited to the subject matter on direct examination and matters affecting the credibility of the witness. § 90.612, Fla. Stat. The defense asserted Dr. Fisher had been provided with all of the records of the offense in 1995, he testified as to his opinion in 1997, and the State was improperly misleading the jury about Dr. Fisher not getting everything he should have had (v24/T1862-1863). A defense motion for mistrial was denied (v24/T1861-1863).

At the conclusion of the State's opening statement, it asserted "justice can be delayed, but it cannot be denied."

(v19/T929). During closing argument, the State said "[W]e've discussed the fact that the passage of time alone does nothing to excuse what that man did to those three now dead men for all those decades (v25/T2056). The State concluded by stating:

> I will close with this comment also Mr. Urra mentioned to you. **Justice can be delayed it cannot be denied.** The state asks of you a vote for the imposition of the death penalty as to each of these three murders as the only just result for those crimes, because of the nature of those crimes, because of the nature of this defendant, and because to not do so ignores the gravity of what this man did.

(v25/T2079) (emphasis added).

The defense failed to object to these statements, but raised their impropriety as grounds for relief in the motions for new trial (v6/R1073-1080, 1082-1087). At a hearing, the defense asserted the State's assertion that "justice can be delayed but cannot be denied" misled the jury to believe the delay in sentencing, caused by prosecutorial misconduct, was due to actions of Mr. Johnson, was an improper emotional appeal to the jury, and this constitutes a nonstatutory aggravating circumstance (v8/R1320-1324). The trial court denied the motion for new trial (v14/R2440-2445).

The extreme delay in sentencing Mr. Johnson for offenses committed in 1981 is not attributable to delaying tactics of Mr. Johnson, it is "directly attributable to the misconduct of the

original prosecutor." *Johnson v. State*, 44 So. 3d 51, 54 (Fla. 2010) ("This is not a case of overzealous advocacy, but rather a case of deliberately misleading the court.").

At the 1981 suppression hearing, a jailhouse informant testified Mr. Johnson made inculpatory statements and the informant took notes. *Id.*, at 57-58. Informant Smith asserted he had contact with a State investigator, but the investigator did not direct him or instruct him to make notes. *Id.*, at 57. The investigator testified he did not direct the informant, and on cross-examination by the Assistant State Attorney (ASA) retracted his testimony that he instructed the informant to take notes. *Id.*, at 58. In closing argument at the suppression hearing the ASA asserted: "*The issue is whether the police had anything to do with what Smith was doing. And they did not according to all the testimony from all the police officers and Mr. Smith, Smith did it on his own.*" *Id.*, at 59. The trial court denied the motion to suppress and this Court affirmed, but both courts found there was a close question of whether Smith acted as a government agent. *Id.*, at 59

Mr. Johnson later obtained a new trial based on appellate counsel's failure to challenge the trial court's failure to sequester the jury during deliberation on guilt. *Id.*, at 57 n. 10. A 1987 trial ended in mistrial due to jury misconduct. *Id.*,

at 55. At his 1988 trial, Mr. Johnson again sought to suppress the testimony and notes of informant Smith. *Id.*, at 55. The motion was denied based on the ruling at the 1981 trial. *Id.*, at 57 n. 10. At a 1997 postconviction hearing, the informant recanted his former testimony and testified he acted on instructions from the State, but the trial court did not find him credible and the motion was denied. *Id.*, at 55.

At a 2007 hearing on a post-conviction motion, when the original ASA was confronted with newly discovered notes of the ASA, he indicated the informant "*told* to go back and gather information (he was told 'to keep his ears open') and record it in notes (he was told '[t]o take notes') and then presumably disclose it to the State (he 'may have been even told to turn over the notes')." *Id.*, at 60-61. This Court found prosecutorial misconduct "tainted the State's case at every stage of the proceedings and irremediably compromised the integrity of the entire 1988 penalty phase proceeding", it vacated the death sentences, and it remanded for a new penalty phase proceeding. *Id., at* 73-74.

The State implying Mr. Johnson delayed justice when it knew that the State that delayed justice is clearly improper. "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn

from the evidence." *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). The State improperly injected emotion and fear into the jury's deliberations.

> When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument. These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct. In his determination to assure that appellant was sentenced to death, this prosecutor acted in such a way as to render the whole proceeding meaningless.

Garron v. State, 528 So.2d 353, 359 (Fla. 1988) ("Such violations of the prosecutor's duty to seek justice and not merely 'win' a death recommendation cannot be condoned by this Court"). The prosecutors' comments also constitute arguing a nonstatutory aggravating circumstance, that Mr. Johnson merited the ultimate penalty because he manipulated the system to delay justice. The only matters that may be considered in aggravation are those set out in the death penalty statute. *Zack v. State*, 911 So.2d 1190, 1208 (Fla. 2005). See *Robinson v. State*, 520 So.2d 1, 5 (Fla. 1988) ("We vacate Robinson's death sentence because we agree with appellant that the state impermissibly argued a nonstatutory aggravating factor and injected evidence calculated to arouse racial bias during the penalty phase of his trial").

The cumulative effect of these errors and the errors addressed in the previous issues denied Mr. Johnson a fair trial. "While isolated incidents of [error] may or may not warrant a [reversal], in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive" the defendant a fair trial. *Nowitzke v. State*, 572 So.2d 1346, 1350 (Fla. 1990); *Pollard v. State*, 444 So.2d 561 (Fla. 2d DCA 1984) (error lacking objection has a cumulative effect and the combined weight of these errors should be considered with others to determine whether substantial rights of the appellant have been affected. The cause should be reversed for a new sentencing proceeding.

ISSUE VI

FLORIDA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONALLY INVALID.

Because the death penalty can only be imposed in Florida if the judge alone finds additional circumstances that were not unanimously found by the jury when a defendant is convicted of first-degree murder, section 921.141, Florida Statutes violates the 5th, 6th, 8th and 14th Amendments to the U.S. Constitution and article I, §§ 2, 9, 15(a), 16, 17, and 22 of the Florida Constitution. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. at 482).

In Florida a jury's advisory verdict recommending a sentence based on its assessment of aggravating factors, mitigating factors, and the balance between them includes no express findings, its recommendation of death is neither necessary nor sufficient to authorize a death sentence, and it does not bring Florida's scheme into line with the 6th Amendment. See *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (consistent "with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt.").

That Florida's capital sentencing scheme allows a jury death verdict to be reached without unanimity compromises the deliberative process, impairs the reliability of the life-or-death decision, and therefore violates the Sixth, Eighth, and Fourteenth Amendments.

That Mr. Johnson was convicted of a contemporaneous or prior violent felony should not exclude *Ring* protection. "[T]he Sixth Amendment requirements announced in Ring and Apprendi (do not) allow a trial judge alone to find additional aggravating circumstances to be utilized in imposing a death penalty just because a prior violent felony aggravating circumstance need not be found by the jury. These additional circumstances would have to be made by the jury." *Duest v. State*, 855 So.2d 33, 54 (Fla. 2003) (J. Anstead dissenting).

Florida uses a constitutionally impermissible method of determining eligibility for the death penalty and for imposition of the death penalty. This Court should declare section 921.141 unconstitutional. Paul Johnson's death sentences imposed pursuant to these procedures are invalid. The death sentences should be reduced to life sentences.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court to reverse the death sentences imposed by the lower court.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 18th day of August, 2015.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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