IN THE SUPREME COURT OF FLORIDA
CASE NOS. SC15-1360, SC16-6

JOHN LEE HAMPTON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

AND

JOHN LEE HAMPTON,
Petitioner,
v.

JULIE L. JONES, etc.,
Respondent.

MOTION FOR REHEARING IN PART

COMES NOW the Appellant, John Lee Hampton, pursuant to Florida Rule of Appellate Procedure 9.330, and hereby files this Motion for Rehearing of this Court's opinion issued on May 4, 2017 to the extent that it affirmed the lower court's postconviction order and states as follows:

THIS COURT'S DECISION

On May 4, 2017, this Court's opinion affirmed "the postconviction court's order to the extent it denies Hampton relief based upon his claim of ineffective assistance of guilt phase counsel. The Court "decline[d] to address the remaining issues because [the Court] grant[ed] the habeas petition and order[ed]

that Hampton receive a new penalty phase proceeding in light of *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *petition for cert.* filed, No. 16-998 (U.S. Feb. 13, 2017).

Nevertheless, the Court went on to address the lower court's denial of Mr. Hampton's intellectual disability claim. (Slip Op. 27-37). The Court went on to rule that "there is competent, substantial evidence to support the postconviction court's conclusion that Hampton failed to establish that he suffers from intellectual disability." *Id*. at 36. The Court then found "there was no basis for trial counsel to file a motion to preclude the State from seeking the death penalty. Trial counsel reasonably relied on their observations of Hampton and the opinions of their mental health experts. Therefore, we agree with the postconviction court's determination that trial counsel were not deficient." Slip Op. 37.

THE COURT MISAPPREHENDED OR OVERLOOKED POINTS OF LAW OR FACT IN THE COURT'S OPINION AND DENIAL OF RELINQUISHMENT OR SUPPLEMENTAL BRIEFING.

This Court's opinion misapprehended or overlooked points of law and fact in order to affirm the lower court's denial of postconviction relief. Additionally, the Court's opinion needs to clarify that Mr. Hampton is not prohibited from raising intellectual disability as mitigation upon penalty phase retrial.

MR. HAMPTON IS INTELLECTUALLY DISABLED AND THUS HIS DEATH SENTENCE VIOLATES THE UNITED STATES CONSTITUTION.

The opinion conflates what may be perceived as malingering during the competency proceedings with malingering during Mr. Hampton's IQ testing. Dr. Cunningham relied on two tests that are valid tests for meeting the first prong of intellectual disability: a Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV) in 2013 in which Hampton received a score of 71, and another WAIS in 1989, in which Hampton received a score of 78. Dr. Sesta administered a valid WAIS-4 in 2013 with valid effort testing. We do not know the version of the test that Mr. Hampton received the score of 78. The other scores, as this Court's opinion correctly found were narrow band IQ tests and not relied upon in this Court's decision. Slip. Op at 28 n.7.

Mr. Hampton's alleged malingering during the competency proceedings has no relation to whether he malingered during the 2013 IQ testing. If Mr. Hampton did indeed malinger during the competency proceedings, that was actually evidence of intellectual disability or at least impaired thinking. At least during some of the time that Mr. Hampton was alleged to have malingered, the State was offering him a life sentence. A finding of incompetency would have delayed the trial but would not have led to Mr. Hampton's release from custody. It would have delayed the imposition of the death sentence but it makes no sense for Mr. Hampton to malinger

to avoid a death sentence when there was a life offer.

To the extent that Mr. Hampton may have malingered, it was part of his overall condition and not some sort of dishonesty. Based on Mr. Hampton's intellectual disability, or at least his impairment, he was not prone to making good decisions. If correct, the very notion that Mr. Hampton would think that he could outsmart a number of individuals with advanced degrees, would be evidence of at least severe impairment. What is more likely is that if there was some sort of exaggeration, Mr. Hampton learned to do so in the Georgia prison system. In a prison system, what little help for mental suffering comes only to those with the starkest and extreme complaints. In the past, Mr. Hampton may have needed help and only have been able to obtain help by exaggerating some symptoms. When Mr. Hampton was being evaluated for competency, he had little internal resources and needed help. Based on counsel's ineffectiveness and counsel's reliance on Dr. Berland, the help that he actually needed never came.

The reliance on supposed evidence of malingering during prior proceedings was prejudicial. Simply because an individual has once allegedly malingered does not preclude mental health evaluations in the future that are necessary for a fair trial. Indeed, in the instant case, the allegations of malingering in the past have served to deny consideration of Mr. Hampton's actual mental condition and intellectual disability.

This Court's opinion relies on Dr. Gamache's testimony when Dr. Gamache never met or tested Mr. Hampton. Both Dr. Sesta and Dr. Cunningham met with and evaluated Mr. Hampton. Having had the opportunity to observe Mr. Hampton and to give and/or review Mr. Hampton's effort testing, neither expert found that Mr. Hampton was malingering.

The use of the Flynn effect in a clinical setting is not so much controversial as it is unnecessary. While the United States Supreme Court has made clear that intellectual disability is to be determined under clinical standards, the courts should still consider the Flynn effect in appropriately determining whether a person is intellectually disabled to the point that the death penalty is prohibited. The same is true with the Standard Error of Measurement.

If an individual is being treated in a clinical setting, whether the person has a 76 IQ or a 70 IQ does not affect the treatment. A few points on the IQ test do not alter the treatment and social support necessary for someone being seen in a clinical setting outside the criminal justice system. An individual with a 76 is not excluded from help and treatment because of one point. No legitimate mental health professional would deny or alter the treatment of John Hampton because he had an improperly administrated IQ test showing his IQ score as 78.

The fact that Mr. Hampton was given the wrong test does not

mean that he would have scored higher on the proper test for his age. The mistake of giving the wrong test for Mr. Hampton's age does cast considerable doubt on whether the test administration was sufficient in the first place. If the 78 WAIS test was the wrong test, it is highly likely that the test givers did not properly and correctly administer and score the improper test itself.

In *Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010), the Court upheld the district court's finding of Intellectual Disability where the district court considered the Flynn effect. The court stated:

> An evaluator may also consider the "Flynn effect," a method that recognizes the fact that IQ test scores have been increasing over time. [] The Flynn effect acknowledges that as an intelligence test ages, or moves farther from the date on which it was standardized, or normed, the mean score of the population as a whole on that assessment instrument increases, thereby artificially inflating the IQ scores of individual test subjects. Therefore, the IQ test scores must be recalibrated to keep all test subjects on a level playing field.[]

Id. at 753. (Internal citations omitted). The court considered whether the district court's application of the Flynn effect was "clearly erroneous" and found:

> At the hearing, all the experts acknowledged that the Flynn effect is a statistically-proven phenomenon, although no medical association recognizes its validity. Numerous courts recognize the Flynn effect. *See e.g., Walker v. True,* 399 F.3d 315, 322-23 (4th Cir.2005) (stating that on remand, the district court should consider the Flynn effect evidence to determine if

> petitioner's IQ score is overstated); *United States v. Davis,* 611 F.Supp.2d 472, 486-88 (D.Md.2009) (district court considered Flynn effect in evaluation of defendant's intellectual functioning); *People v. Superior Court,* 28 Cal.Rptr.3d 529, 558-59 (Cal.Ct.App.2005), *overruled on other grounds by* 40 Cal.4th 999, 56 Cal.Rptr.3d 851, 155 P.3d 259 (2007) (recognizing that Flynn effect must be considered); *State *758 v. Burke,* No. 04AP-1234, 2005 WL 3557641, at *13 (Ohio Ct.App. Dec. 30, 2005) (stating that court must consider evidence on Flynn effect, but it is within court's discretion whether to include it as a factor in the IQ score). There are also courts that do not recognize the Flynn effect. *See In re Mathis,* 483 F.3d 395, 398 n. 1 (5th Cir.2007) (noting that circuit has not recognized Flynn effect as scientifically valid); *Berry v. Epps,* No. 1:04CV328-D-D, 2006 WL 2865064, at *35 (N.D.Miss. Oct. 5, 2006) (refusing to consider Flynn effect); *Bowling v. Commonwealth,* 163 S.W.3d 361, 374-75 (Ky.2005) (noting that because Kentucky statute unambiguously sets IQ score of 70 as cutoff, courts cannot consider Flynn effect or SEM). Because there is no uniform consensus regarding the application of the Flynn effect in determining a capital offender's intellectual functioning, and there is no Alabama precedent specifically discounting a court's application of the Flynn effect, we cannot say that the district court clearly erred in applying it. The district court considered the Flynn effect just as it considered the other evidence in the record presented by the parties regarding Thomas's intellectual functioning. Moreover, even without application of the Flynn effect, Thomas has still shown by a preponderance of the evidence that he has significantly subaverage intellectual functioning. Hence, we are not left with a definite and firm conviction that the district court erred in its finding.

Id. at 757–58.

In the end, to meet prong one of intellectual disability, Mr. Hampton presented one test that was improperly administered and one test that was properly administered and placed him in the range of IQs necessary for a diagnosis of intellectual disability.

Contrary to this Court’s conclusion, Mr. Hampton never “feigned intellectual impairment” - - through the testimony of Dr. Cunningham he proved intellectual disability conclusively. The interpretation of IQ scores is not a clerical exercise and requires consideration of consideration of the psychometric properties and the age of the testing norms. Dr. Cunningham considered three psychometric properties: The standard error of measurement; the Flynn effect; and the flexibility in IQ score in the diagnosis of intellectual disability.

Mr. Hampton had almost the exact same evidence of prong one as Freddie Lee Hall. Mr. Hall "presented evidence of intellectual disability, including an IQ test score of 71." I*d.* at 1991-92. Mr. Hall's IQ was evaluated 9 times in 40 years. *Id*. at 1992. His scores ranged from 60 to 80, "but the sentencing court excluded the two scores below 70 for evidentiary reasons, leaving only scores between 71 and 80." *Id*. (citations omitted). *Hall v. Florida*, 134 S. Ct. 1986 (2014). Mr. Hampton presented two scores; the first was the same as Mr. Hall, a 71. Mr. Hall had a score of 80. Mr. Hampton had a score of 78 that appeared higher than it actually was because of the Flynn Effect. It was the wrong test for his age group, raising issues of whether it was properly administered.

In *Hall*, the United States Supreme Court held, "This rigid rule, [Florida’s strict 70 cut off], creates an unacceptable risk

that persons with intellectual disability will be executed, and thus is unconstitutional." *Id*. In the instant case Dr. Gamache's speculation of malingering and the lower court's reliance created an unacceptable risk that Mr. Hampton will be executed despite his intellectual disability.

On the second prong, Dr. Cunningham testified that after actually evaluating Mr. Hampton. Based on standardized assessments, records, and anecdotal reports, Dr. Cunningham found that Mr. Hampton exhibited deficits in adaptive function over his lifetime. Some of the limitations were significant enough to qualify independently for a diagnosis of intellectual disability. Others, while perhaps insufficient to meet the criteria were necessary for understanding Mr. Hampton's global or broader-range impairments. (Vol. VI PCR. 1023). Globally, Mr. Hampton's capabilities are limited. (Vol. VI PCR. 1023).

Contrary to the opinion's reliance on trial counsel's interaction with Mr. Hampton to find a lack of ineffectiveness, Dr. Cunningham explained that a detailed analysis of adaptive functioning is necessary because intellectual disability is not something that can be determined by looking or speaking with an individual. (Vol. VI PCR. 1017). (Thus explaining why the State's attempt to portray trial counsels' and his family's interactions with Mr. Hampton as normal was irrelevant and misleading).

The brief and Dr. Cunningham's testimony was replete with

evidence of Mr. Hampton's impaired lack of adaptive functioning. Dr. Cunningham found this prong by conducting the detailed evaluation demanded by the United States Supreme Court and the Eighth Amendment. The opinion incorrectly attributes Mr. Hampton's lack of adaptive functioning to his serving time in prison. This does not take into account that beyond bad behavior, Mr. Hampton's intellectual disability contributed to him being imprisoned. The intellectually disabled are prone to incarceration because of impulsivity, impaired judgment and a lack of ability to avoid detection. This was a case in which the State presented evidence that Mr. Hampton returned to the crime scene with the victim's blood on his clothes. Mr. Hampton's intellectual disability explains his incarceration and problems with the law. His incarceration does not explain his intellectual disability.

If Mr. Hampton only spent three years of his adult life in which he was not incarcerated, that would be the same amount of time from when an individual turns 18 until the same person turns 21. While people mature differently, a non-intellectually disabled person is more than able to function adaptively as an adult at age 21. Mr. Hampton never could because he was intellectually disabled.

Regarding the third prong, this Court's opinion improperly relied on the fact that Mr. Hampton's mother stopped drinking when she became aware that she was pregnant with him. This may or may not be true but it ignores the fact that she *was* drinking while

pregnant. If it were true that she stopped, there still could have been damage done.

There was ample evidence of spinal meningitis and fetal alcohol syndrome. Dr. Cunningham found other etiological factors that were present before age 18: his mother's deficient intelligence and probable MR/ID was "hereditary" which "can be a significant aspect of intellectual functioning"; prenatal alcohol exposure; spinal meningitis at age two; developmental delays in his bladder control as well as in other features; and a history of head injuries predating age 18. (Vol. VI PCR. 1057-58).

While there were no records available, Mr. Hampton's mother, Isabella, reported to Dr. Cunningham that he had Spinal Meningitis and was hospitalized at age two and:

> described that John’s [Hampton’s] functioning was markedly impacted by the spinal meningitis. She recalled that prior to this disease, he had appeared to develop at a normal rate and seemed to be “normal.” After suffering this disease, though, he was “slower” than other children, “kept to himself, and couldn’t cope like a normal kid.” She recalled that in school, John [Hampton] “couldn’t catch on to what the teacher told him.” Isabella attributed his deficits to the meningitis. Isabella’s intuition has some support in the scientific literature. Studies have reported that the probability of mental retardation following bacterial meningitis is 4.2%.

(Vol. IV PCR. 574). Isabella herself is impaired. It strains belief that she would make up this scenario for Dr. Cunningham if Mr. Hampton were not in fact ill.

The Court’s opinion overlooks that Dr. Wood reviewed Mr.

Hampton’s postconviction PET Scan and reported:

> --Portions of the general pons-brainstem-cerebellum region are distinctly hypometabolic, implicating a wide range of behavioral dysfunctions. These specifically include impaired sensory-motor processing and impaired regulation of arousal and alertness. Urinary incontinence is also related to lesions in this area, more so than in most other brain regions.
>
> --The anterior left temporal lobe (from the pole to approximately 5 cm back) is abnormally reduced in size and is hypometabolic throughout its lateral, basal, and medial portions. The behavioral implications of damage in this region particularly include impaired naming vocabulary, deficient memory, and poor verbal reasoning regarding social and emotional realities. The latter is an inability to connect thought (verbal) with emotion (feeling-based); hence, an inability to apply rational guidance to one's emotionally stimulated behavior.
>
> --The basal frontal lobes (orbital cortex) are mildly hypometabolic, which implicates impaired decision-making, including impaired attention to multiple stimuli and events happening the same time. Decisions to avoid and refrain from a given behavior are particularly affected.
>
> --The impairments are anatomically diverse, and the history of meningitis is particularly consistent with these findings. Extreme physical and emotional trauma is also known to inflict atrophy, especially in medial temporal regions, and repeated head trauma likewise routinely leaves basal-medial temporal and orbital-frontal residual damage. These may have further exacerbated the initial impairment from meningitis.
>
> --Overall, the behavioral implications are additive and therefore consistent with generalized brain dysfunction. The anatomical abnormalities are highly likely to have originated in early childhood. Taken together, the PET findings strengthen the diagnosis of mental retardation.
>
> --Mental retardation, or neurodevelopmental intellectual disability, describes a syndrome of fairly generalized and unambiguous brain damage, sometimes inherited but often acquired in early infancy or early childhood. Like any cognitive impairment arising in early childhood, it has a distinctive trajectory through to adulthood. In particular, it amplifies the deleterious effects of further emotional and physical

> trauma--because the brain of such a child has far fewer resources for coping with any adverse challenges. Moreover, the emotional and physical traumas are both known to inflict further brain damage; in consequence, John Hampton's brain—already retarded from an early episode of meningitis—continued to deteriorate throughout childhood and young adulthood. All the childhood testing scores, when properly analyzed, describe statistically clear mental retardation. Similarly, and as a consequence of his chronically progressing neurodevelopmental disorder, he was at the time of the crime both: (a) under the influence of severe emotional disturbance—i.e. inability to control his emotion; and (b) significantly impaired in his ability to conform his behavior to the requirements of law.

(Vol. IV PCR 744-45). Dr. Wood confirmed all of these findings at the evidentiary hearing. (Vol. VIII PCR 1353-91). There was more than sufficient evidence of the etiological factors that showed the onset of Mr. Hampton's intellectual disability before age 18.

This Court's opinion also overlooked the testimony of Donna Markson and Dr. Cunningham's reliance on her contemporaneous reports about Mr. Hampton. Mr. Hampton was held back in school and socially promoted. Dr. Cunningham again conducted a detailed evaluation to determine that there was evidence of the onset of Mr. Hampton's intellectual disability before age 18. Indeed, Dr. Cunningham concluded that there was evidence of the onset of intellectual disability prior to the age of 18 based on:

> The assumption of intellectual continuity in the absence of intervening insult, that's one; two, pre-18 etiological factors; three, pre-18 intellectual assessment corrected for norm obsolescence; four, pre-18 standardized assessments of language and academic achievement; and five, pre-18 school based description of deficits in adaptive skills.

(Vol. VI PCR. 1077). There was no valid evidence that contradicted this finding.

Conclusion

Mr. Hampton presented an abundance of evidence showing his intellectual disability. The United States Constitution prohibits a death sentence when there is a risk of an intellectually disabled person being executed. The risk is still present in this case. This Court should grant rehearing.

EVEN IF MR.HAMPTON'S DEATH SENTENCE IS NOT PROHIBITED UNDER THE UNITED STATES CONSTITUTION, THIS COURT SHOULD CLARIFY THAT MR. HAMPTON IS NOT PRECLUDED FROM SEEKING TO PROHIBIT THE DEATH SENTENCE UNDER THE RELEVANT PROCEDURE

This Court's opinion initially indicated that after granting habeas relief based on *Hurst*, the Court was declining to address Mr. Hampton's remaining issues beyond Mr. Hampton's claim of ineffective assistance of guilt phase counsel. If this Court is not inclined to find that Mr. Hampton's death sentence is precluded because of his intellectual disability, this Court should withdraw the part of the opinion where the Court affirmed the lower court's finding that he was not intellectually disabled. This Court should allow Mr. Hampton to pursue a bar of his execution based on intellectual disability under the appropriate pretrial standard.

This Court's opinion found that trial counsel was not ineffective for failing to present Mr. Hampton's intellectual disability as a per se bar to his execution and as mitigation. The

Court's opinion stated:

> As a sub-claim of this issue, Hampton also challenges the postconviction court's determination that trial counsel were not ineffective for failing to argue Hampton is intellectually disabled. However, trial counsel cannot be deficient for failing to raise a claim where counsel does not have a good-faith basis to do so. *See Williams v. State*, 987 So. 2d 1, 10 (Fla. 2008) (holding counsel was not ineffective for failing to seek the disqualification of the trial judge where counsel felt that he did not have a good-faith basis for filing a disqualification motion).Because we conclude Hampton has failed to establish that he is intellectually disabled, we also conclude trial counsel were not ineffective for failing to raise this claim. When trial counsel took over Hampton's case from the public defender, Hampton's records showed that his most recent IQ score was 89 on the CFIT. Attorneys Lastinger and Watts testified they each spent over sixty hours with Hampton, and nothing about Hampton's demeanor was inconsistent with this IQ score. They also reviewed Hampton's medical, school, and prison records, interviewed family members, and consulted with mental health experts, and none of these sources revealed any indication Hampton could be intellectually disabled. Moreover, none of the mental health experts who evaluated Hampton raised the possibility of intellectual disability, including Dr. Berland, who found Hampton to be incompetent to stand trial. Accordingly, there was no basis for trial counsel to file a motion to preclude the State from seeking the death penalty. Trial counsel reasonably relied on their observations of Hampton and the opinions of their mental health experts. Therefore, we agree with the postconviction court's determination that trial counsel were not deficient.

Slip Op. 36-37.

This finding overlooks what the Court previously acknowledged in the opinion. First, the Court's opinion justified trial counsel's ineffectiveness based on Mr. Hampton's "most recent IQ score [of] of 89 on the CFIT. This justification was contrary to

the Court's properly stating in a footnote that:

> The other two tests—the Slosson Intelligence Test (SIT) and the Culture Fair Intelligence Test (CFIT)—are narrow-band IQ tests that are not approved to diagnose intellectual disability; rather, they are primarily used to identify individuals in need of more intensive evaluation. The SIT was administered in 1983, and he achieved a score of 115. The CFIT was administered in 1993, and he received a score of 89. These unapproved tests do not bear upon our decision regarding Hampton's intellectual disability.

Slip. Op at 28 n.7. A CFIT is not a full-scale IQ test that is used to rule out intellectual disability. There was no evidence that an 89 on the CFIT corresponds to an 89 on a full-scale IQ test. Certainly counsel is not required to know the difference to be effective - - that is what a properly informed expert such as Dr. Cunningham does. This Court's opinion denied relief on Mr. Hampton's competency claims because trial counsel relied on Dr. Rothschild's competency opinion because trial counsel did not have faith in their own expert Dr. Berland. This Court's opinion stated, "Co-counsel Watts later testified during the postconviction evidentiary hearing that he wanted another expert to evaluate Hampton primarily because trial counsel's own experiences in dealing with Hampton were inconsistent with what Dr. Berland described in his report." Slip Op. 13.

None of the competency experts conducted the comprehensive evaluation required by *Atkins* and *Hall*. Dr. Poorman and Dr. Rothschild conducted no full-scale IQ testing or interviews with

anyone who knew John Hampton in the community. The only expert ever to conduct the necessary evaluation to determine whether Mr. Hampton was intellectually disability was Dr. Cunningham whose opinion was buttressed by Dr. Wood. Reliance on these experts goes against the principle that you cannot determine if someone is intellectually disabled simply by speaking with them. Counsel should have known that further and more extensive evaluation was necessary. At the time of Mr. Hampton's trial there was indeed no greater issue in capital cases.

Additionally, retrial counsel is going to have to raise Mr. Hampton's intellectual disability to exhaust and preserve the claim for federal review. Mr. Hampton should not be precluded from seeking review of a death sentence based on his intellectual disability because he is entitled to a retrial based on *Hurst*.

Apart from what trial counsel knew at the time, there is no competent counsel that would not seek to prohibit execution of Mr. Hampton based on intellectual disability after reading Dr. Cunningham's report. Mr. Hampton should be afforded the opportunity to present evidence of his intellectual disability as a bar to execution prior to retrial and under the appropriate Florida procedure.

AT THE VERY LEAST, THIS COURT SHOULD CLARIFY THAT MR. HAMPTON MAY PRESENT THE EVIDENCE HE OFFERED TO PROVE HIS INTELLCTUAL DISABILITY AS MITIGATION.

This Court should clarify that the Court's opinion does not preclude retrial counsel from presenting any mitigation. This Court's opinion did not address Argument II of Mr. Hampton's appeal. Mr. Hampton put forth in Argument I and II that even if he could not meet the standard for intellectual disability as a bar to execution, counsel were ineffective because the very same evidence that Mr. Hampton presented in postconviction concerning his intellectual disability was also highly mitigating. The Court's opinion affirming the lower court's finding that Mr. Hampton did not meet the requirements for intellectual disability should not serve as a bar to retrial counsel from presenting Mr. Hampton's intellectual disability, along with the other statutory and non-statutory mitigation that Dr. Cunningham and Dr. Wood presented at the evidentiary hearing.

Hurst v. Florida and *Hurst v. State* made clear that it is a jury that must decide whether the aggravating factors outweigh the mitigation. To do this fairly, the jury must hear all of Mr. Hampton's mitigation. Even before *Hurst v. Florida* and *Hurst v. State*, the United States Supreme Court has made clear, a sentencer must consider "any relevant mitigating evidence," *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct 1821 (1987). The majority opinion in *Lockett v. Ohio*, 438 U.S. 586, 605; 98 S. Ct. 2954, 2964-65(1978) explained:

[T]hat the Eighth and Fourteenth Amendments require that

> the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 605; 2954 (Emphasis and footnotes omitted). Mr. Hampton's intellectual disability and the evidence that supports it is highly mitigating even if it does not prevent his death sentence. This Court should clarify that he is allowed to present it to a jury for the first time that one has been available.

Incompetency and other guilt phase claims

Regarding the incompetency claim, at page 13 of the opinion, the Court focuses on the speculative opinions of Dr. Rothschild claiming that "Hampton was feigning and/or exaggerating symptoms of psychosis." This Court's opinion ignores the opinions of Dr. Berland. Dr. Berland wrote a letter to Mr. Watts on June 9, 2008 informing that Mr. Hampton was:

> [I]ncapable of consulting with his attorney with a reasonable degree of rational understanding. This incapacity appears to be the result of psychotic symptoms experienced by this defendant. For the same reasons, I think the defendant lacks a rational appreciation of the nature of the proceedings against him. Therefore, I believe this defendant meets the criteria for incompetency to proceed to trial.

(Vol. IV PCR 696). This absolutely proved to be the case. Mr. Hampton failed to rationally appreciate the charges and the evidence that faced him. He irrationally rejected the State's offer of life due to his incompetency and proceeded to trial against the

advice of counsel. While on the stand, he was unable to understand the proceedings, unable to understand the attorneys as they discussed his priors, and he was incapable of answering the first basic question on cross about his priors. When Mr. Hampton answered incorrectly about the number of priors he had on cross examination, he was not feigning an inability to have a rational understanding of the proceedings against him. He was not faking incompetency. He did not understand what was unfolding at trial. Mr. Hampton was truly incompetent to stand trial.

In denying the incompetency claim, at page 14 the Court states that "Counsel testified they did not have any difficulty communicating with Hampton, and Hampton had no difficulty assisting counsel in preparing for trial." Here again the Court overlooks Mr. Hampton's irrational trial testimony, and ignores the expression of shock and disbelief of the trial attorneys when Mr. Hampton refused the State's life offer and irrationally insisted on going to trial. This Court's opinion ignores the fact that the trial attorneys to heed Dr. Berland's admonitions about Mr. Hampton's incompetency. Dr. Berland opined in Mr. Hampton's competency report, well before Mr. Hampton irrationally rejected the State's life offer, that Mr. Hampton had:

> an inability because of mental illness to consult with his attorney with a reasonable degree of rational understanding. . . .the defendant lacked a rational appreciation of the nature of the proceedings against him. . . .[he] appeared to have very unrealistic

> expectations on what would happen in court during his trial. . . .[he] appeared unable to benefit from the advice of counsel, or take the issues described by counsel into account in making his decisions. . . .[he had] unrealistic expectation[s]. . . .[he] reluctantly admitted having received communications from God [] that led him to believe God would intervene on his behalf to save him. . . .[he had] auditory hallucinations. . . .[and] he was unable to assist his attorney in accounting for the evidence and the statements against him. . . .this defendant meets the criteria for incompetency to proceed to trial.

(Vol. IV PCR. 693-96).

Regarding the failure to adequately sanitize the videotape evidence, this Court was correct to find that Lane Lastinger made a "mistake" in this regard. This Court was absolutely correct to find that "the record does not support the postconviction court's conclusion that trial counsel were not deficient for failure to redact Hampton's reference to the warrant from the videotape." But this Court's opinion should have found that the numerous improper and inflammatory references on the videotape prejudiced Mr. Hampton at trial.

This Court's opinion disregarded the Court's own precedent with a lack of a finding of prejudice in the instant case following the clearly deficient performance. In *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990), this Court's opinion held that "Erroneous admission of collateral crimes evidence is presumptively harmful." To find a lack of prejudice in the instant case after trial counsel failed to ensure that the jury did not hear reference to Mr.

Hampton's outstanding Georgia warrants is to deny that erroneous admission of the collateral Georgia crimes was presumptively harmful. The Court should have followed its own precedent and found prejudice in the instant case.

In denying this claim, this Court's opinion also ignored its own precedent from *Jackson v. State*, 107 So.3d 328 (Fla. 2012). In *Jackson*, this Court vacated a conviction because "the videotaped interrogation allowed the State to elicit sympathy for the victim and repeatedly informed the jury that the police adamantly believed Jackson was guilty." *Id.* at 339. In *Jackson* this Court reasoned that "it is especially troublesome when a jury is repeatedly exposed to an interrogating officer's opinion regarding the guilt or innocence of the accused." *Id.* at 340. With the airing of the videotaped interrogation, Mr. Hampton's jury was exposed to the same improper evidence that was described in *Jackson*.

At page 18 of the opinion the Court reasons that "Even if the jury had not learned of Hampton's warrant from the videotape, they still would have learned about it from Hampton himself when he mentioned it while testifying." If it was inevitable that the jury would hear the evidence of the warrant from Hampton while testifying, Mr. Hampton was either incapable of testifying relevantly or rationally due to mental illness and incompetency, or, he was ill-prepared to testify due to ineffective assistance of counsel; or, it was a combination of all of those factors.

Regarding the break in trial where counsel was instructed not to speak with Mr. Hampton before his cross examination, this Court's opinion states that "The postconviction court rejected this claim, and found trial counsel did not ask to consult with Hampton during the recess because they needed time to meet with the State to ensure it did not reveal that Hampton was a registered sex offender. The postconviction court concluded this was a reasonable strategy. We agree." This was not a reasonable strategy. This was a failure on trial counsel's part to be aware of and cite to *Thompson v. State*, 507 So.2d 1074 (Fla. 1987) and object to the trial court's erroneous instruction. Trial counsel did not employ any reasonable strategy here. Trial counsel just followed the trial court's erroneous order. Trial counsel needed to meet with Mr. Hampton and ensure that he would answer the question about the number of his priors correctly. This Court should not credit trial counsel's unawareness of established case law as strategy.

At page 21 the Court states that "unlike the defendant in *Thompson*, there was no indication that Hampton was nervous or confused." This was a finding made by Judge Luce in his Order denying postconviction relief. This was the judge who presided over the trial and the postconviction evidentiary hearing. This was the judge that violated *Thompson* in the first place. This Court should not adopt the lower court's unreasonable findings. In denying this claim, here the Court overlooks Mr. Hampton's

outlandish testimony, and his inability to answer even the simplest of questions about the number of his priors. This debacle unfolds right after the correct answer is discussed right in front of Mr. Hampton in court.

A transcript naturally would not reflect someone's nerves while they are testifying. But a defendant at trial facing a first degree murder charge, and the death penalty, would presumably be nervous when he takes the stand and the state begins its cross examination. It would be an extremely rare case where a testifying defendant would not be nervous at such a moment at trial. As *Thompson* explains, this is a stressful time of trial. As far as confusion, the transcript reflects a textbook example of confusion. Mr. Hampton could not even answer the first question correctly about his priors on cross examination. This was an absolute indication of confusion. Mr. Hampton was nervous, confused, and likely intellectually disabled at the time he testified. In denying this claim, the Court ignores *Thompson*:

> Thompson was denied the guidance and support of his attorney when he needed it most (i.e. when the state was preparing for a major attack on his credibility). This denial left Thompson nervous, confused, and may have contributed to his performance on cross-examination....Had the attorney-client consultation been allowed, defense counsel could have advised, calmed, and reassured Thompson without violating the ethical rule against coaching witnesses....we cannot say there is no reasonable possibility that the error did not affect the jury verdict.

Id. at 1075. This Court should follow *Thompson* and grant relief.

At page 21 the Court reasons that "co-counsel Lastinger testified during the evidentiary hearing, the primary concern was reaching an agreement with the State that would avoid the discussion of Hampton's sex offender status." If not primary, it should of at least been secondary that trial counsel ensure that Mr. Hampton answer the questions correctly about his priors on cross. Mr. Hampton had two attorneys at trial. One attorney should have counseled Mr. Hampton before cross examination while the other attorney reached an agreement with the State. The Court concludes "it was reasonable for trial counsel to use the recess to prevent potentially damaging cross-examination." Trial counsel obviously failed. Had the trial judge not erroneously instructed the trial attorneys to refrain from speaking to Mr. Hampton during the recess, perhaps the attorneys could have spoken with Mr. Hampton and calmed his nerves and avoided the confusion. The videotaped interrogation played at trial earlier made one thing clear: Mr. Hampton needed help.

At page 26, regarding the numerous inflammatory and prejudicial statements made by law enforcement during the videotaped interrogation (i.e. Hampton leaving the victim lying there like a stuffed pig, suggesting that Mr. Hampton was laughing about the crime because he thought it was funny, etc.), the Court classified the statements as "troubling." This is an

understatement. Some of the statements are so “troubling” that Lane Lastinger actually admitted he made a mistake in not sanitizing the videotape for at least one of these inflammatory and prejudicial statements. Regarding the “stuffed pig” comment where Mr. Lastinger conceded: “I believe if it was on the tape, I should have moved to redact it if that was on the tape. At trial, you know, it may have come on, you know, I didn’t react to it quick enough. I don’t know. But yeah, I would think I would want to try to redact that if it’s on the tape.” Vol. VIII PCR 1295. He conceded further: “But I think the ‘stuck pig’ comment, you know, that’s probably a little over the line, and I would probably have done—I should have tried to keep that out if it’s on the tape.” Vol. VIII PCR 1295.

On law enforcement's suggesting that Mr. Hampton thought the murder was funny (law enforcement stated: “don’t laugh because this isn’t a laughing matter, this is serious shit”), Mr. Lastinger conceded “that’s one I may have missed . . . there was no reason they should be commenting on him laughing. So I would agree with you there.” (Vol. VIII PCR 1299). Though at times equivocal, trial counsel eventually admitted that there was “no” strategic reason for failing to limine out the suggestion that Mr. Hampton intended to set the victim on fire. (Vol. VIII PCR 1314). The Court overlooks the concessions. This Court’s opinion erred in finding a lack of deficient performance in this regard where trial counsel

even conceded deficient performance. There was deficient performance and this Court's confidence in the outcome should be undermined.

Nowhere in the opinion did the Court mention the PET scan performed in postconviction, nor the testimony of Dr. Frank Wood. This Court should find that trial counsel was prejudicially deficient for failing to obtain a PET scan and present the results of a PET scan to a jury.

CONCLUSION

This Court should rehear this case and clarify the opinion as necessary.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on May 19, 2017, a true copy of the foregoing Motion for Rehearing has been furnished through the portal, which will serve a copy on Christina Z. Pachecho, Assistant Attorney General.

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