IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1024

DAVID EUGENE JOHNSTON,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This petition is filed to address a substantial claim of Sixth and Eighth Amendment error, which denied Mr. Johnston a constitutional sentencing proceeding.

Citations are as follows: the record on appeal concerning the trial and penalty phase are referred to as "R.". The post-conviction record on appeal are referred to as "PC-R.".

INTRODUCTION

Johnston is under a sentence of death. In this petition, he seeks this Court's re-examination of the record as it existed in 1991 when this Court affirmed the circuit court's denial of post-conviction relief. Johnston seeks re-examination of the record because the circuit court misapplied the law and made conclusions contrary to law. On appeal, this Court did not apply the correct and constitutional standard for reviewing an ineffective assistance of counsel claim. In Stephens v. State, 748 So. 2d 1028 (Fla. 2000), this Court acknowledged that it had, in the past, failed on occasion to provide de novo review to mixed questions of law and fact arising in ineffective assistance of counsel cases. Johnston's case is one such case.

PROCEDURAL HISTORY

Johnston was indicted on December 12, 1983 for first-degree murder (R. 1918). Johnston was convicted (R. 2382) and the jury recommended death by an 8 to 4 vote (R. 2403). The judge imposed a death sentence, finding 3 aggravators: prior violent felony; offense committed in the course of a felony; and especially heinous, atrocious, or cruel (R. 2412-15). Johnston's conviction and sentence were affirmed on appeal. Johnston v. State, 497 So. 2d 863 (Fla. 1986). In 1988, a death warrant issued and Johnston filed a 3.850 motion. The trial court granted a stay and an evidentiary hearing on several claims.

Following the hearing, the circuit court denied relief (PC-R. 1678-88). This Court affirmed and denied Johnston's petition for state habeas corpus. Johnston v. Dugger, 583 So. 2d 657 (Fla. 1991). Johnston filed a federal Petition for a Writ of Habeas Corpus (R1-1), which was conditionally granted. Specifically, the district court granted the Writ on Claim VII (the instruction on the statutory aggravating circumstance "heinous, atrocious or cruel" violated the Eighth Amendment) and Claim XXI (Florida's overbroad death penalty statute was applied to Johnston in violation of the Eighth Amendment). The Writ was conditioned upon appropriate review by a state tribunal. In June, 1994, this Court ruled the Eighth Amendment error harmless and procedurally barred. Johnston v. Singletary, 640 So. 2d 1102 (Fla. 1994).

On February 27, 1995, the Supreme Court denied certiorari, Johnston v. Singletary, 115 S. Ct. 1262 (1995), and Johnston's

death sentence thus became final.

On February 26, 1996, The federal district court entered an order denying Johnston habeas relief. The Eleventh Circuit Court of Appeals affirmed. A suggestion of rehearing en banc was denied. A Petition for United States Supreme Court Writ of Certiorari was denied on October 4, 1999.

STATEMENT OF JURISDICTION

This is an original action brought pursuant to Fla.R.App.P. 9.100(a). See also Article I, §13, Fla. Const. This Court's jurisdiction is invoked under Art. V, §3(b)(9), Fla. Const., and Fla.R.App.P. 9.030(a)(3). This case involves Johnston v. State, 583 So. 2d 657 (Fla. 1991), and the unconstitutional manner in which this Court reviewed Petitioner's ineffective assistance of counsel claim on appeal from the denial of postconviction relief. This Court has habeas corpus jurisdiction.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for writ of habeas corpus, Johnston asserts that his sentence was obtained and affirmed during this Court's appellate review process in violation of his Sixth, Eighth, and Fourteenth Amendment rights to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

JOHNSTON WAS DENIED PENALTY PHASE EFFECTIVE ASSISTANCE OF COUNSEL. THIS CLAIM WAS ERRONEOUSLY DENIED BY THE CIRCUIT COURT DUE TO ITS MISAPPLICATION OF THE LAW. JOHNSTON WAS ALSO DENIED HIS RIGHT TO APPELLATE REVIEW WHEN THIS COURT DID NOT CONDUCT DE NOVO REVIEW OF MIXED QUESTIONS OF LAW AND FACT.

A. INTRODUCTION

Johnston is mentally retarded and mentally ill. Although his trial attorneys knew that Johnston was mentally ill, the jury that sentenced him to death did not. The jury was told, by Johnston's step-mother, that he had been hospitalized but knew nothing of Johnston's history of treatment and repeated hospitalizations for mental illness, his placement in state schools for the mentally retarded, and his diagnosis of schizophrenia and organic brain damage. Johnston's attorneys failed to investigate and to present mitigation evidence that would have resulted in a life recommendation. The only explanation offered for their complete failure to investigate and present the readily available information that would have made the difference between life and death is that Johnston did not want them to litigate mental health issues. The attorneys responsible for saving Johnston's life deferred to his opinion regarding a complex litigation decision despite their acknowledgement that they believed him to be mentally ill.

Johnston was denied the fair, reliable and individualized sentencing to which he is entitled under the Eighth Amendment because his trial counsel failed to present compelling evidence of his mental retardation and his mental illness. Johnston has

been diagnosed as schizophrenic at least twenty times, and, since early childhood, has been committed for psychiatric treatment at least twelve times. He has received medication for his mental illness since he was eight years old; however, both the medication and the psychotherapy that were repeatedly recommended were administered only sporadically. Records from the State of Louisiana show that during his adolescence, when schizophrenia first manifests itself, Johnston was shuttled back and forth between the county jail and psychiatric hospitals as different state agencies avoided responsibility for him. When his aggressive, hostile, and self-destructive behavior at the jail became too much to handle, he would be sent to the hospital where he would improve under medication. However, in a matter of days, or even on the same day, Johnston would be discharged back to the jail without the medication that had enabled him to improve.

This pattern of mistreatment began during his early childhood when David was diagnosed as mentally retarded and brain damaged. At the age of seven, when he started school, his I.Q. was tested at 57 and he was classified as educable retarded. When he was twelve, his I.Q. was tested at 65, still within the educable retarded range. David's childhood behavior was a problem at school and at home, but the response of his family and school officials only exacerbated his problem. Despite being brain damaged and mentally retarded, David was treated as a boy who intentionally misbehaved and deserved to be punished. At seven, school records state that David was "an extremely frightened and

anxiety-ridden youngster" who is "generally frightened for his physical well being." His "fears may be quite realistically based as there appears to be some definite physical neglect and abuse towards this youngster by his parents." A later record states that David was whipped by the principal at a state school until an arrangement was made "with the mother so that whenever he does need discipline they will call her and she will come to the school and whip him."

Johnston's attorneys failed to present any of this information, which is documented in state records, to the jury that sentenced Johnston to death. The jury did not know that Johnston was abused as a child, both at school and at home. They did not know that he was mentally retarded and brain damaged, suffered from schizophrenia and that he had never received competent psychiatric care. These records and the available testimony of Johnston's relatives show that since his childhood he was seriously mentally ill and that his family and state agencies failed to provide appropriate care. Instead, he was physically abused by his family and mistreated by psychiatric hospitals when he was repeatedly diagnosed as schizophrenic and then released, either to the county jail or to the street, without the antipsychotic medication which helped him control his illness. Johnston exhibited signs of untreated schizophrenia: aggression, hostility, self-mutilation, psychosis, and hallucinations. Psychiatrists who could have helped him did not, and others simply misunderstood his behavior.

During post-conviction proceedings, Johnston claimed that he was deprived effective assistance of counsel at penalty phase. The circuit court denied relief, and this Court affirmed. However, as a recent United States Supreme Court decision makes clear, the circuit court applied an erroneous legal standard in denying Johnston's ineffective assistance claim. This error survived appellate review only because this Court improperly deferred to the circuit court's legal findings despite the lower court's misinterpretation of the requirements of Strickland v. Washington. As recognized in Stephens v. State, this Court has applied the wrong legal standard to ineffective assistance of counsel claims, deferring to circuit court findings when this Court should have been conducting de novo review. In Johnston's case, this Court improperly deferred to the circuit court's conclusions. Habeas relief is appropriate at this time.

B. WILLIAMS V. TAYLOR DEMONSTRATES THAT THE CIRCUIT COURT APPLIED THE WRONG LEGAL STANDARD TO JOHNSTON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

A recent Supreme Court opinion demonstrates that the circuit court misinterpreted the requirements of Strickland v. Washington and applied the wrong legal standard to Johnston's ineffective assistance of counsel claim. In Williams v. Taylor, the Supreme Court reversed the Fourth Circuit Court of Appeals' denial of an ineffective assistance of counsel claim. In Williams, the trial court granted relief during post-conviction proceedings, but the Virginia Supreme Court reversed. During federal habeas proceedings, the District Court granted relief, finding that the Virginia Supreme Court's analysis "was contrary to, or involved an unreasonable application of, clearly established Federal law." The Fourth Circuit Court of Appeals reversed. The Supreme Court found that the Virginia Supreme Court's opinion was contrary to Strickland v. Washington and constituted an unreasonable application of that case because the court improperly analyzed the prejudice prong of the ineffectiveness test. The Supreme Court's opinion in Williams demonstrates that the circuit court similarly erred in Johnston's case.

The Supreme Court found that Williams' lawyer rendered prejudicially deficient performance by failing to conduct an investigation that would have uncovered extensive records describing Williams' childhood and failing to introduce the mitigation evidence that was available. Trial counsel testified that he made a tactical decision to focus on his client's

cooperation with the police, emphasizing his voluntary confession. The trial court ruled this did not excuse or explain his failure to conduct a thorough investigation into his client's background or to present the mitigation evidence that was available to him even without an investigation. The Supreme Court ruled "the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession." (32).

The Supreme Court found the Virginia Supreme Court's analysis of the ineffectiveness claim contrary to clearly established law and an unreasonable application of law in two respects. First, the court erroneously interpreted Strickland to impose a higher burden on defendants alleging penalty phase ineffectiveness, requiring proof that the sentencing proceeding was fundamentally unfair. Second, the Virginia Supreme Court failed to evaluate the totality of the mitigation evidence -- that presented at the trial and that which was not presented due to counsel's ineffectiveness -- in weighing it against the aggravation evidence presented by the State. As Justice O'Connor explained, "[t]he Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence." (18) (O'Connor, J., concurring).

The Supreme Court makes clear that the defendant's burden is to prove that the mitigation "may alter the jury's selection of penalty," not to completely rebut the State's evidence in

aggravation: "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case. The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel." (34).

In this case, the circuit court concluded that Johnston failed to prove he was prejudiced by his attorney's failure to investigate and to present mitigation evidence regarding his mental illness, mental retardation, and childhood abuse. The court explained that there is "no reasonable possibility" that the jury would have recommended a life sentence based on the mitigation evidence that was not presented because "of the derogatory aspects of those records" (PC-R. 1684). The court's explanation is insufficient and reveals its misinterpretation of Strickland. Johnston was denied relief not because he failed to prove his ineffective assistance of counsel claim, but because the circuit court failed to apply the correct legal standard.

The circuit court's analysis is improper for the following reasons: the court characterized evidence as "derogatory" that has consistently been recognized by this Court as valid mitigation; the court gave weight to evidence that could not have been considered at Johnston's penalty phase because it would constitute nonstatutory aggravation; the court focused exclusively on what it believed to be "the negative aspects" of hospital records without evaluating the evidence that would have

assisted the defense and supported a life sentence; the court ignored other records detailing Johnston's mental retardation and childhood abuse; and the court fabricated explanations for counsel's failures that were not based on counsel's own testimony and accepted their inadequate explanations for their failure to investigate. Like the Virginia Supreme Court in Williams, the court failed to consider the combined effect of the mitigation presented at trial and that which counsel failed to present. The sentencing jury was deprived of evidence necessary to a reliable sentencing decision due to trial counsel's ineffectiveness. The circuit court's evaluation of this claim was erroneous.

The circuit court erred when it justified the failure to present hospitalization records because they contained "derogatory" evidence. The circuit court indicated what it believed to be harmful facts in Johnston's records:

> The records are replete with references to defendant's arrests and convictions; his suicidal, homicidal, and abnormal sexual tendencies; his combative, threatening and antisocial acts; his past drug and alcohol abuse; his dangerousness; and his psychiatric diagnoses ranging from schizophrenia to organic brain damage to antisocial personality.

(PC-R. 1684). The circuit court concluded that this information "would explain why defendant was capable of committing such [a] heinous crime, and would tend to show that he would be incapable of rehabilitation and might kill again" (PC-R. 1684).

The circuit court's decision is contrary to this Court's precedent establishing that the evidence contained in the records

is appropriate mitigation.[1] In addition, as Dr. Merikangas explained, much of the information that the circuit court believed to be damaging to Johnston was caused by and symptomatic of his untreated schizophrenia (T. 386). A mental health expert would have been able to explain Johnston's behavior. Many of the records explain that Johnston's behaviors are symptomatic of his mental illness. A 1980 psychological evaluation from Larned Hospital in Kansas explains what was commonly perceived as Johnston's "misbehavior." That report states that Johnston "attempts to be threatening and intimidating in attitude and is frequently oppositional and uncooperative." (Mtn to Vacate., Exh. 11). However, this report explains Johnston's behavior:

> Because of Johnston's intellectual shortcomings, his hostile, uncooperative, threatening, demanding behavior is likely to be a function of efforts to defend himself from a world that he cannot understand. He is concerned with power and controlling, again as a defense against a world he has trouble comprehending.

(Id.). The circuit court erred when it found that it was reasonable for Johnston's attorneys not to present the hospital records to the jury. Contrary to the court's conclusion, these records do not contain information damaging to Johnston.

This Court has consistently recognized that brain damage and schizophrenia, which were cited by the circuit court as "negative" facts that would harm Johnston if presented, are

[1]Those facts that are not recognized mitigation would constitute nonstatutory aggravation if considered by the jury or sentencing court and are discussed elsewhere in this petition.

nonstatutory mitigation.[2] The court erroneously characterized brain damage, mental illness and schizophrenia as "negative" and concluded that they would support a death recommendation. This conclusion is contrary to this Court's precedent.

The court also erred when it found evidence of Johnston's "suicidal tendencies" a "negative" aspect of the records that his attorneys excluded from jury consideration. This Court has deemed suicide attempts or tendencies valid mitigation.[3]

The circuit court similarly erred regarding evidence of drug and alcohol abuse. It found this evidence "negative" and damaging to Johnston. This Court's precedent establishes that such evidence is valid mitigation.[4]

The circuit court's order is also incorrect because it suggests reliance on non-statutory aggravators being considered at a capital penalty phase. The circuit court's decision is contrary

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[2]See Thompson v. State, 2000 WL 373757 (Fla. 2000)(brain damage is nonstatutory mitigation); Ray v. State, 2000 WL 123997 (Fla. 2000)(same); Wickham v. State, 593 So. 2d 191 (Fla. 1992)(history of hospitalizations for mental disorders including schizophrenia is mitigation). See also Cooper v. State, 739 So. 2d 82 (Fla. 1999)(imposing life sentence based on mitigation including brain damage and schizophrenia).

[3]See Peede v. State, 748 So. 2d 253, 259 (Fla. 1999); Hildwin v. State, 654 So. 2d 107, 109 (Fla. 1995). The circuit court's analysis conflicted with this Court's precedent and should have been reversed.

[4]See Mansfield v. State, 2000 WL 329422 (Fla. 2000) (alcoholism is nonstatutory mitigation); Rodriguez v. State, 2000 WL 124379 (Fla. 2000)(drug abuse is nonstatutory mitigation). The circuit court's finding that drug and alcohol abuse are not mitigating should be reversed.

to the Eighth Amendment, the Florida sentencing scheme, and this Court's precedent establishing that only statutory aggravation may be considered by a sentencing jury and court. The court concluded that failure to present Johnston's hospitalization records was reasonable because "the negative aspects of the hospital records . . . would tend to show that he would be incapable of rehabilitation and **might kill again**" (PC-R. 1684)(emphasis added).[5]

This Court has recognized that under the Eighth Amendment,

> [t]he sole issue in a sentencing hearing . . . is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia.

Cooper v. State, 336 So. 2d 1133, 1139 (Fla. 1976). See also Moore v. State, 701 So. 2d 545, 552 (Fla. 1997)(noting that "the only matters that may be asserted in aggravation are those set out in the death penalty statute.")(Anstead, J., concurring in part and dissenting in part). The circuit court order erroneously relied on a nonstatutory aggravating circumstance, which could not be considered by the jury, to justify the trial

[5]Florida's capital sentencing scheme does not allow consideration of a defendant's future dangerousness in determining penalty. Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997)(reversing death sentence because defendant's statement that he would kill again constituted nonstatutory aggravation); Walker v. State, 707 So. 2d 300, 313-14 (Fla. 1997)(finding that State's question to mental health expert: "do you think [Walker] may kill again?" improperly injected future dangerousness).

attorneys' failure to offer hospital records containing compelling mitigation. Contrary to the requirement that courts presume that juries follow the law, Weeks v. Angelone, 120 S.Ct. 727, 733 (2000), the circuit court presumed that the jury would disregard the law. The court's analysis was contrary to Fla. Stat. §921.141(2), and the Eighth Amendment. The court's denial of relief should have been reversed by this Court on appeal.

The circuit court erred because it focused exclusively on purportedly "negative aspects" of the hospital records and failed to evaluate the effect of the evidence that would have supported a life sentence.[6] Williams v. Taylor holds that an attorney's failure to present relevant records will not be excused simply because they may contain some information damaging to the defendant. Mr. Williams' unpresented records contained some negative facts about his past:

> Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system--for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. . . . [T]hose omissions . . . demonstrate that trial counsel did not fulfill their obligations to conduct a thorough investigation of the defendant's background.

[6]As discussed above, the circuit court's characterization of the information as "negative" was also improper because it is contrary to this Court's precedent recognizing such information as appropriate mitigation and because it gives weight to what would be nonstatutory aggravation if considered by either the jury or court in imposing a death sentence.

(32) (citations omitted). In Williams, the Court found trial counsel ineffective for failing to present records despite the fact that they contained some negative information about Mr. Williams' past.

The Eleventh Circuit Court of Appeals reached the same conclusion in Harris v. Dugger, 843 F.2d 756 (11th Cir. 1989), when it rejected the state's argument that counsel made a tactical decision to not present good character evidence because it would have permitted cross-examination regarding the defendant's priors. The court explained: "the introduction of evidence about Harris' character would have opened the door to further explore the appellant's other felony convictions as well as his dishonorable discharge from the Army. Nevertheless, on this record, we cannot conclude that effective counsel would have made a strategic decision to forego testimony about Harris' good character merely because its use would have permitted the state to add some prior unlawful acts to the proof already in the case." Id. at 764. The circuit court order in Johnston's case reaching the opposite conclusion is an incorrect application of the law.

The circuit court completely ignored that the hospital records contained compelling evidence of untreated mental illness that would have resulted in a life sentence. These records outline a childhood spent in an abusive home and at residential schools for the mentally retarded. The records lay out the life of a mentally retarded boy who develops schizophrenia. Schizophrenia

sets in in 1977. During Johnston's childhood, a pattern developed in which he temporarily received psychiatric treatment when his behavior became too much for his parents and the school to handle with their own misguided attempts at discipline. This pattern of seeking treatment for him only when he misbehaved continued throughout his adolescence when he essentially bounced from the county jail to the hospital. The years from 1977 to 1979 were particularly difficult for David as his schizophrenia manifested in bizarre and self-destructive behavior. After arrests on minor criminal charges, David would go from jail to the psychiatric ward where he would be medicated. However, once medicated with anti-psychotic medication, he would be discharged back to jail, usually without the needed medication.

On April 14, 1977, David's father committed him to the Central Louisiana State Hospital because of bizarre behavior. He was diagnosed with schizophrenia. (Mtn to Vacate, Exh. 8). One month later, David was admitted to E.A. Conway Memorial Hospital and again diagnosed as schizophrenic. (Id). Despite the diagnosis of schizophrenia, he was released the next day with no medication. The very next day, David was back at the Central Louisiana State Hospital. He was again diagnosed as schizophrenic.

Schizophrenia can be managed with medication under careful supervision. Left untreated, schizophrenia leads to psychotic episodes, hallucinations, destructive outbursts, and bizarre behaviors. Johnston is schizophrenic. He is not an evil person or one who intentionally misbehaves but one who suffers from a

severe mental illness that left untreated has prevented him from controlling his behavior and living a productive life. David never received any long term, competent and appropriate psychiatric treatment.

On November 30, 1977, David was sentenced to jail for two years. He served about 17 months. While in jail, he was seen by a psychiatrist at least six times for self-injurious behaviors. He was released without medication and would lapse back into psychosis with each episode becoming more destructive and more bizarre. By March 1978, David's disease had worsened and he was seen by a psychiatrist from Conway Hospital:

> Schizophrenia
> This youngster was seen by me in the parish jail on 3-9-78. I was called by jail authorities to see this boy because of his bizarre behavior. He had scratched his arms and was creating resentment between himself and the inmates. The other inmates in turn attack him and he has on one occasion been raped. Officials of the jail state that they do not have a non-cell arrangement for him. past history reveals that he has been antisocial and has had difficulty at home adjusting with his father. Has had fights with his father who in turn called police and had pt arrested.

(Id). The report notes that David was treated with Thorazine, Artane, Stelazine, Dalmane in addition to Benadryl and Triavile, but that he was discharged to the jail without medication. (Id).

Eight days later, David was again admitted to Conway Hospital on March 17, 1978; however, he was discharged on March 29th. The discharge report again diagnoses schizophrenia:

> Paranoid Schizophrenia - This 18 year old white male was brought to the Special Unit again from Pea Farm. He is resentful, hostile and threatening toward Special unit employees. Very adamant and demanding. Treated on Thorzine, Artane, Stelazine and Dallmane. Discharge back to jail. No rx on discharge.

(Id).

A report dated May 5, 1978, reflects that David's distress intensified with the death of his father and that he experienced hallucinations and destructive behavior that necessitated continuing hospitalization:

> This 18 year old Caucasian man was transferred from the Parish Jail because "they gave me a shot that messed up my nerves". This person has a history of psychiatric treatment with a Schizophrenic Diagnosis as I understand it. His father died 4 days ago and he attended the funeral. This has added to his distress characterized by inability to eat, hallucinations, and extreme frustration. He states that several weeks ago he slashed his arms in response to his distress.

(Id). The report concludes that David suffered from "Schizophrenia, Chronic undifferentied Type, by history and now in partial remission." (Id). The psychiatrist recommended hospitalization, concluding that "his destructive behavior to himself is likely to accelerate otherwise. He needs psychiatric follow up on a continuing basis." (Id). Nevertheless, he was discharged back to jail the same day. (Id).

One week later, a report confirms this recommendation but also reveals that it was not followed:

> This 18 year old boy was transferred from the Parrish jail to the Special Unit because he had refused to eat and to cooperate with officials at the jail. Has been on this unit many times, most of which he was sent from the jail with same symptoms. On those occasions as well as this one, he had refused to eat, become hostile and resentful and claimed that he had been abused in the jail. **This is a schizophrenic and should be committed to ELSH**. Letters to this effect have been written to judges. He was seen by Dr. Richie, psychiatrist and Special Unit consultant, who believes as I do that **this boy should be at ELSH under continuous psychiatric therapy**.

(Id.)(emphasis added). The report notes that "another attempt

will be made to have this boy placed at ELSH." (Id). However, David was again discharged to the jail. (Id).

Less than a month later, another Conway Hospital document indicates yet another attempt to admit him for permanent psychiatric treatment was made. A June 2, 1978, report states:

> Pt was again admitted to the Special Unit from the parish jail as has been done intermittently for a period of time because he becomes more or less psychotic, arrogant, resentful and is afraid that he may become dangerous to himself. An attempt is now being made to have him committed to ELSH.

(Id). The report also notes that David was treated with Thorazine, Artane, Stelazine and Dalmane.

One week later, on June 9, 1978, another report recommends that David be hospitalized:

> This 18 year old Caucasian male is known to the writer from previous interviews. He has a history of being beaten and abused by his father which dates back to the age of 8 or 9 years. He is now in jail after conviction on charges of Simple Burglary. He states that he broke into a trailer attempting to escape from his father.
>
> In the interview he is cooperative and very polite. He speaks with out display of emotion and is logical but brief in his responses. He has a child like quality (immature) in his speech. He admits to hallucinations, mostly at night prior to sleep.
>
> This youngster has been to CLSH twice and in E.A. Conway Hospital many times. He is presently on moderate doses of antipsychotic medication. The most nearly appropriate diagnosis is Schizophrenia, Chronic, undifferrentied type, in partial remission.
>
> **Continued hospitalization is indicated for treatment of his psychotic disorder and his depression** (related to his father's death).

(Id.) (emphasis added).

Two months later, David was re-evaluated at Conway Hospital:

> This 18 year old white male has been on the Special Unit on

> numerous occasions with same diagnosis of schizophrenia. He was sent from this Unit some months ago to ELSH where he remained until two weeks ago. It was stated that he got into a fight while at ELSH and was sent back to jail. He has since refused to eat, scratched himself with objects, etc. Had to be restrained while on the Special Unit because of hostility and combativeness. Refuses to eat most of the time.

(Id). David was "treated on Thorazine, Artane, Stalzine and Dalmane," but he was discharged to jail with no medications.

In October 1978, David attempted suicide. Several mental health professionals state he should be institutionalized for an indefinite period of time and that return to jail is not warranted. An admission report dated October 14, 1978 states:

> **In my judgment, this man should be returned to East Louisiana State Hospital in Jackson and committed for an indefinite period of time.** This man is dangerous to himself as exemplified by ingestion of poisonous chemicals. He has also exhibited other bizarre reactions characterised by cutting himself, taking overdoses of medication and stating that he was going to destroy himself in various other ways. Dr. William Erwin and John Richie, psychiatric consultants to the Special Unit, as well as myself have recommended that David be institutionalized. He was committed to ELSH on a court order 6-13-78 but remained only a relatively brief period of time. He was returned to jail because he gave the authorities at ELSH problems due to his disturbance at that institution. I do not believe that his return to jail was warranted and this opinion is apparently confirmed by Drs. Erwin and Richie.

(Id.)(emphasis added). The recommendations were ignored, and it is clear that because David was not receiving the appropriate treatment for his mental illness, frustration with him mounted. Two days later, on October 16, 1978, another Conway Hospital report recognized that David suffered from schizophrenia and organic brain syndrome:

> This pt was admitted to ICU on 10-12-78 after ingestion of organic phosphate and was discharged on 10-13-78 back to jail. I saw him in the parish jail on Friday afternoon, 10-13-78 and found him somewhat confused and appeared to be ill. He was

> transferred to the Special Unit for observation, treatment and disposition. This man has been on the Special Unit on many occasions as well as to various other institutions including CLSH, ELSH, Mandeville, etc. he is a schizophrenic and apparently has some organic brain syndrome. He has been in and out of the two jails in Monroe for one offense or another for the past few years.

(Id.). David was discharged the next day; the discharge report states that while at the hospital, he was treated with Vistaril, Probanthin, Thorazine, Artane, Stlazine and Dalmane and that his condition was somewhat improved. (Id). However, he was discharged to jail without the needed medications. David was admitted again to Conway Hospital for the purpose of observation & suicide prevention." (Id).

From 1979 through 1980, David was committed to the Central Louisiana State Hospital for the third and fourth time. During this time he was also admitted to the E.A. Conway Memorial Hospital at least four times. Each time he was diagnosed as suffering from schizophrenia. He became delusional and organic brain syndrome was diagnosed. He was described as "extremely mentally ill" and psychiatrists recommended that he be committed.

A February 7, 1979, Conway Hospital report states:

> Step-mother called the coroner about 12:00 last night and stated that David was once again threatening to kill himself. The coroner request Sheriff's Dept. to pick pt up and bring him to the Special Unit for self-protection. This boy has a long history of mental illness, incarcerations in both city and parish jails . . . commitment to ELSH and CLSH, attempted suicide. He is delusional, has a "no-Fault" syndrome, has Organic Brain Syndrome, is Schizophrenic and Antisocial. **He is extremely mentally ill and should be committed to ELSH's Forensic Unit.** This morning he is very resentful, hostile and threatening. He shows evidence of psychosis.

(Id.)(emphasis added).

David's inability to appreciate the consequences of his actions and his inability to control his impulses were documented in an October 23, 1979, evaluation:

> This patient is known to the writer from several previous admissions to the Special Unit of ELSH. He is in City Jail after involvement in an altercation with an officer after hearing where he had been charged with disturbing the peace... he has a diagnosis of Schizophrenia and previously he has been on antipsychotic medication at the time of my interviews.
>
> . . .
>
> Though he has a diagnosis of Schizophrenia he is not now overtly psychotic. He has the characteristics of an immature anti-social personality . He seeks immediate gratification and does not have the capacity to consider the consequences, weigh options and make appropriate delays. It is my opinion that his behavioral symptoms will continue while in jail including the possibility of injection of poison if he has the chance. **He must be protected from impulsive potentially destructive behavior**.

(Id.)(emphasis added).

David suffered from facial spasms, a common side effect of psychotropic drugs. On 3/7/80, the following report was made:

> Hysteria - This 19 y/o WM was admitted to the Special Unit, after being seen in the Admitting Room with marked spasms of his face, which was felt to be psychological. The patient was an inmate of the Monroe City Jail. This patient had numerous previous admissions to this institution. The patient was treated with Dalmane for sleep, he was also given Dilantin and Vistaril. After the patient was improved, he was transferred back to the Monroe City Jail.

(Id.).

In May 1980, an Assistant District Attorney requested that Davis be admitted for treatment. A Conway Hospital report dated May 31, 1980, states:

> Final diagnosis : Schizophrenia - This 21 y/o WM from Ouachita Parish Jail was admitted to the Special Unit on 5/27/80. He has been in jail most of his life, recently discharged from the [jail]. He has been in various institutions, including Mental Health Clinic, CLSH, East State in Jackson. The patient refused to eat at the jail and was transferred to the Special

> Unit for treatment. The patient was treated on the Special Unit. He was treated on the Special Unit with anti-psychotic medications. He was in improved condition on discharge and was transferred back to the Ouachita Parish Jail on the same medications.

(Id). This report notes that "Mr. John Harrison, Assistant District Attorney, requested that this patient be transferred to Central for treatment, if possible." (Id.).

In September 1980, David was back at Conway Hospital:

> Schizophrenia - This pt was transferred from the parish jail because he was once again becoming antagonistic. He has a long history of mental problems and incarcerations dating from the time he was 17 years of age. He has been on this unit many, many times. Has attempted suicide many times, has been to CLSH many times. He has also been treated at ELSH. Every attempt has been made to rehabilitate this young man to no avail. Within days or weeks after release from jail, he is back for another committed crime.

(Id.). He was treated with Elavil and Dalmane; his condition improved. (Id.). He was discharged back to jail.

The circuit court focused only on the fact that the hospital records refer to minor criminal charges and arrests during Johnston's adolescence. Essentially, the court repeated the same mistake as the state agencies that were responsible for Johnston during this period -- he was treated as an aggressive and hostile person who deserved to be punished rather than a mentally ill person desperately in need of psychiatric care. Johnston's behavior demonstrates the classic symptoms of untreated mental illness. The symptoms of mental illness of course appear in the records. The symptoms are not "negative" aspects of the records, but facts supporting mitigation. The circuit court's analysis is incorrect and should have been reversed on appeal.

In its exclusive focus on what it believed to be "derogatory," the circuit court again erred when it completely ignored other records that contain nothing that could be construed to be detrimental to Johnston. Records offered at the evidentiary hearing from the State of Louisiana contain compelling details of Johnston's nightmarish childhood abuse and mental retardation. David started school when he was seven years old; however, after only three months, he was transferred to the Northeast Special Education Center where he was diagnosed as mentally retarded:

> On the Stanford-Binet Intelligence Scale, and results on the Peabody Picture Vocabulary Test, highly indicate intellectual functioning within the Retarded Educable range. This youngster obtained I.Q.'s of 57 and 58 on the Binet and Peabody Test, respectively. His mental ages respectively to the Binet and Peabody Test, were Mental Ages of 4-8 and 4-0. These scores consistently reflect current intellectual functioning within the Retarded Educable range. . . . David's severist deficiencies on the Binet Test were dealing with concept formation, verbal facility, and those subtests dealing with visual-motor coordination and organization.

(Motion to Vacate, Exh. 3). The examiner concluded that David suffered from "moderate to severe levels of perceptual problems and/or organic brain damage" and that "this youngster is definitely experiencing some level of brain damage." (Id.).

The report also states David came from "a home environment that is extremely unhealthy both physically and emotionally" (Id). He is described as "a very frightened youngster," and the examiner concluded that "the etiology of this youngster's fear appears directly related to the manner in which David's parents have resorted to discipline the youngster" (Id). The report continues:

> David would often on his own initiative relate in detail certain incidents that occurred with his home environment.

> Generally, the content of these verbalizations dealt with how his parents disciplined David. At one point David stated, while in the midst of answering an I.Q. test item. "Daddy like to have killed me the other night." Pertaining to this incident, David stated that his daddy had "beat me hard and put me outside in the dark at night." David made this statement several times during testing and these instances occurred when David was involved in intelligence testing. He appeared to be intent on having the examiner talk with him on his home environment.
>
> . . .
>
> When David was asked to describe his mother and father, in 90% of the verbalizations of this youngster, he related their methods of disciplining him. This was always with the connotation of fear of his parental figures and fear of physical abuse.

(Id). David missed 102 days of school during the first grade; David later told a social worker at Larned State Hospital in Kansas that his father never let him go to school after a beating (Mtn to Vacate, Exh. 12). He was "an extremely frightened and anxiety-ridden youngster" who was "highly anxious and hyper-verbal about his home environment" (Id). Based on his observations, the examiner believed his description of his home life:

> David appears to be generally frightened for his physical well being. David's fears may be quite realistically based as there appears to be some definite physical neglect and abusement towards this youngster by his parents. It is certainly obvious that this youngster's home environment is quite detrimental to any future improvement in this youngster's emotional growth and development.

(Id).

When he was twelve years old David was again evaluated by the Northeast Special Education Center. He had been abused by his mother and David's father had been awarded custody when his parents divorced. (Mtn to Vacate, Exh. 6). David's step-mother told the interviewer that David had been in therapy for two years but that this period had been characterized by "continuous acts

of aggression." (Id.). She described David as "constantly at war with the world." (Id.). The report documents David "performed within the retarded educable range" with an I.Q. of 65. (Id.). He was performing at the first grade level in math and could not understand simple subtraction and addition problems. (Id.). He was reading at a third grade level. (Id.).

The report also contains details of his behavior and personality that reveal developing mental illness:

> [T]here is much evidence of a very unhappy, frightened, insecure and hostile youngster. There are several indices from David's drawings to indicate a great deal of latent and open hostility and aggression by David. He appears to be unable to establish adequate relationships with adults in his environment as well as with peers. It is noted in the social history obtained that this youngster is continuing to act out in a very vicious manner at times in his home environment. A short chat with the principal indicates that David is almost at times unmanageable in his school environment. Information gained in the earlier social history of December, 1967, indicates that his earlier familial environment was one of extreme detrimental conditions that would certainly affect adequate emotional growth and development. Results from all data tend to indicate that this youngster is indeed experiencing significant emotional problems that warrant immediate attention.

(Id.). The report concludes that "David may be in need of a more controlled environment along with psychotherapy." (Id.). Despite the recommendation of "immediate attention" and "a more controlled environment," David's developing mental illness was untreated. When asked about his mental health therapy, David responded: "I don't go too often only when I do something bad." (Id.). David's noted hostility, aggression, and inability to control his behavior are all signs of his developing mental illness that was diagnosed early in his life but was never properly treated. In 1973, David was admitted to the Leesville State

School where it was noted he "had long been subjected to violent disciplinary measures in the home." (Mtn to Vacate, Exh. 4). The abuse inflicted by David's natural mother was continued by his step-mother:

> During the interview, he did become upset and expressed some anger as he talked about some of the problems that he has been experiencing. He related that he wanted to "blow the brains out" of his step-mother because of "her daughters". He went on to explain that he was often teased, that he would fight his step-sisters, and that the step-mother did show favoritism toward them, as he related that he was always the one who got the whippings whereas they got off without being punished. David did tell an interesting story about the step-mother's mistreatment of him, and did show resentment toward her. He mentioned that he has been whipped on occasion with a belt, hit with a broom, and that she did scratch him recently when grabbing hold of him.

(Id.). The report indicates that the special education school was complicit in the step-mother's abuse of David, relying on her to administer discipline when he misbehaved:

> The parents indicated that he gets mad over anything but does become angered especially when corrected and that he has been mad to the point that he will tear his own clothes off. . . . The school has worked things out with the mother so that whenever he does need discipline they will call her and she will come to the school and whip him.

(Id.). The report notes that he had recently been arrested for stealing and that this episode "occurred on the same day that he was released from being isolated in his room for a three week period." (Id).

David was not receiving the mental health treatment that he required. A 1973 report from the Monroe Regional Mental Health Center confirms the diagnosis that David was mentally retarded. (Mtn to Vacate, Exh. 5). The report states in part that . . . "He was caught hiding and wearing panties, make-up, etc." (Id).

Mellaril and Dexedrine had been prescribed "with little benefit." (Id). The report concludes that "institutional placement is strongly recommended." (Id).

The controlled environment and antipsychotic medication helped David but the report offered no prognosis of his ability to function outside this environment. During a 1974 interview at the state school when David was fourteen, he was described as "alert, cooperative, and friendly. He was verbally expressive and projected an air of self-confidence. He maintained a good attitude and was very cooperative in both testing sessions." (Mtn to Vacate, Exh. 7). On a 1975 intelligence test, David performed in the "dull normal range" and his reading and math scores placed him on the fourth grade level. (Id). The report notes that David's poor and erratic psychomotor ability indicates "organic involvement and/or emotional disturbance." (Id).

David was administered projective tests which indicated "a disturbed personality structure." (Id). He "is easily distracted and used acting out and verbal expression to compensate for inner frustration and hostility." (Id). He exhibited "a negative attitude toward the world and felt especially hostile toward adult authority." (Id). At this time, David "was on thorazine, 25 mgs. four times a day," (Id), which would explain both his somewhat improved behavior and the underlying pathology revealed in the psychological tests. David spent two years at the Leesville State School for the Mentally Retarded. Eventually, the Leesville State School gave up and referred him to the

Leesville City Detention Center.

The circuit court ignored the evidence of Johnston's mental retardation, brain damage, and abusive childhood in analyzing his ineffective assistance claim. This Court has established that this kind of evidence is mitigation that should be presented to a jury. In Williams, the Supreme Court specifically criticized the Virginia court for ignoring records documenting the defendant's "difficult childhood and abuse and mental capacity." (8 n.5). The circuit court's analysis is contrary to law and should have been reversed.

The circuit court also ignored the evidence that Johnston was the victim of horrendous abuse by his mother beginning when he was only one year old. Johnston's aunt, Charlene Benoit, provided the following information which is not even mentioned in the circuit court order:

> When David was young we all lived in New Orleans. I spent a lot of time visiting David's home. I was a witness to the abuse David received. The worst thing I saw was one time when David was about a year and a half old my mother and I were visiting at Albert and Mary's [David's parents]. David was not successful at potty training, and this time David messed himself. Mary took David and submerged him in the sink for a long time. David turned black under the water. Finally, my mother made Mary stop drowning David when Mary finally stopped, David seemed to be gone. Mary shook David very hard and he started breathing and came back to us. My mother and I were very scared, Mary was out of control. I don't know if she did this [to] David [at] other times. Also, when David was less than 2 years old Mary beat his head on the side of the bathtub so hard she knocked all of David's teeth out. He was hurt badly. My brother Harvey tr[i]ed to make Albert and Mary take David to the Hospital to get the injuries to his mouth and head looked at, but they wouldn't take him to the doctor. This beating was so severe it could have killed him. From birth until David left Mary's house he received beatings . . . all the time. Mary had something against David from the start . . . . Mary did not treat any of her children well, but she was

> very mean to David. Mary would allow the other children to beat David. On Holidays the other kids would receive presents and David wouldn't get any. David would be left out when Mary bought ice cream and sweets for the other kids. Sometimes when I would visit Mary would make David sit in front of the blank T.V. screen for hours on end while the other kids played if David cryed [sic] or moved, Mary would beat him. All David's childhood his parents told him he was crazy and retarded. David was in special education classes in school and had to take medicine to control his behavior. I don't believe Albert and Mary did a good job at keeping David on his medicine.

(PC-R. 1284-86). Mrs. Benoit described the difficulties David had in school and how he was eventually sent to a school for the retarded and how as David got older, his bizarre behavior resulted in commitments to the "Special Unit" of Conway Memorial Hospital in Monroe, Louisiana (PC-R. 1286).

Mrs. Benoit provided information about Johnston's siblings who all had problems "of one degree or another" (PC-R. 1286). Two of his brothers are in prison, and another is "very withdrawn and has a hard time talking to people" (PC-R. 1286). His sister, Debra, married her step-brother, David Neilson; while married to Neilson, Debra had three children by different men (PC-R. 1287). Debra was unstable and could not keep a job due to mental impairments (PC-R. 1287). She could not handle being a mother and gave up custody of her children, one of whom is severely retarded (PC-R. 1287). His sister Pamela had two children by her step-brother David Neilson while Neilson was married to Debra (PC-R. 1287). Pamela also suffers from mental impairments (PC-R. 1287).

David's uncle, Harvey Johnston, provided evidence about Johnston's childhood that was not considered by the court:

> David was an abused child. From David's birth both David's parents Mary and Albert resented David. David's father spent alot of time working and Mary was very cruel to David. Even as an infant David was severely beaten by his mother.
>
> One specific incident of abuse happened when David was about 18 months old. David's mother beat David's head against the side of the bathtub so hard that she knocked out all of his teeth. The baby was hurt badly. I told my brother Albert he had to take David to the hospital to get the baby treated for the beating. Albert refused and we got into a fight about it. Albert was afraid that Mary would get in trouble. David never did get treatment for this horrible injury. All through David's childhood he was beaten almost daily.

(PC-R. 1290-91). He remembered other instances of abuse and believed that David received little or no love and was "terrorized" by his mother (PC-R. 1292). He provided evidence regarding Johnston's mental problems that was ignored by the circuit court:

> As David grew up everybody knew something was wrong with him, something was wrong with his mental health. Albert took David to doctors to try to get him help. David spent his childhood in and out of mental hospitals. David had alot of trouble in school. He never did well and caused trouble at school because of his bizarre behavior. Eventually he was sent to special state schools for kids with mental problems. The psychiatrists gave David medicine that helped keep him from being strange. When David was a teenager his dad tried to make David take the medicine that helped his symptoms, but David didn't always take it and would have problems. It was like he had two personalities. When he didn't take his medication he would get in trouble. Sometimes the police would pick him up for being strange and put him in the jail's padded room or take him to the doctors at Conway Memorial Hospital, Special Unit. They would call someone from the family to come carry David home and get him to take his medicine.

(PC-R. 1292). This tragic story of this brutally abused young man and his constant struggle with mental illness was never revealed to the jury because counsel acceded to their mentally ill client's wishes that the issue not be pursued (T. 45-46).

The evidence of abuse and neglect was not considered by the

circuit court in its order denying relief on Johnston's ineffective assistance claim.

The circuit court erred when it fabricated explanations for Johnston's trial attorneys' failures and accepted their legally inadequate reasons for their failure to investigate. As the Supreme Court made clear in Williams v. Taylor, courts cannot accept every reason put forth by trial attorneys to justify the failure to effectively represent their clients. In Williams, the trial attorney defended his failure to investigate his client's background by explaining that he chose to focus on his client's cooperation with the police. The Supreme Court rejected this excuse and found that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." (32). In Johnston's case, the circuit court accepted an unreasonable explanation from trial counsel and then speculated about other possible excuses for their failure to investigate and present mitigation. The circuit court's analysis is contrary to law.

Johnston's trial attorneys claimed they did not investigate his background and did not present the hospital records they had because he did not want them to litigate mental health issues. Clyde Wolf claimed: "His concern was he didn't want to be involved with anybody in the mental health field at all . . . he did not want to have anything done that would place him in any risk of getting back into a state hospital or a mental institution." (T. 38-39).

Christine Warren, co-counsel, was responsible for preparing for the penalty phase (T. 163). She admitted "it wasn't until a couple of weeks before the trial that I really sat down and went through the whole file" (T. 164). Warren agreed that it was Johnston's decision to not present mental health evidence and they deferred to his wishes. Johnston "insisted that he had no mental problems . . . and did not want to discuss it at all" (T. 147-48).[7] Further, "he [Johnston] did not even want me to put on any evidence of mental problems in the penalty phase" (T. 159). She admitted that "it would have been helpful to have had an expert who would support the contention that he had some very severe psychiatric problems" (T. 160). Although responsible for preparing the penalty phase, Warren admitted she did not talk to the psychologist hired by the defense and she did not discuss the possibility of an expert evaluation with Johnston (T. 160). She had "a lot of records" and that the prior hospitalizations and diagnoses "fit in with what we were seeing" (T. 145-46). She did not present this evidence to the jury. She did not retain an

[7]Warren's impression that Johnston attempted to hide his mental disabilities is supported by a 1981 report from Larned Hospital in Kansas which indicates that Johnston told the interviewer that he had never suffered from any mental or emotional problems, "that he had always gotten along satisfactorily with his teachers and usually had no problems with other students" (Mtn to Vacate, Exh. 12). The report also documents that Johnston "claimed to have made excellent to average grades in school and to have finished the twelfth grade at the age of 16" and to have "a good work record." (Id.). Despite these claims, which are refuted by all the records documenting Johnston's childhood and adolescence, the examiner diagnosed Johnston as borderline mentally retarded. (Id.).

expert to explain these records to the jury.

An attorney's reliance on his client will not excuse a failure to investigate and has been repeatedly rejected by courts considering ineffective assistance of counsel claims. As held in Strickland v. Washington, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." 466 U.S. 668, 690-91 (1984). Deference to a mentally ill client does not constitute a reasonable decision to not investigate. The Eleventh Circuit Court of Appeals has explained:

> On one hand, it is clear that a defendant's instructions may limit the scope of counsel's duty to investigate a particular defense or strategy. On the other hand, it is equally clear that lawyers may not follow such commands blindly.
>
> Although the defendant retains the right to control his defense at trial, counsel must first advise his client which strategies offer the best chance of success.
>
> Uncounseled jailhouse bravado should not deprive a defendant of his right to counsel's better-informed advice. **This principle especially holds true where a possible mental impairment prevents the client from exercising proper judgment, or where an attorney forgoes a defendant's only plausible line of defense.**

Foster v. Dugger, 823 F.2d 402, 407 n.16 (11th Cir. 1987) (citations omitted)(emphasis added).

In Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), the Eleventh Circuit recognized that "a defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase." Id. at 1502. See also Lara v. State, 581 So. 2d 1288, 1290 (Fla. 1991)(rejecting State's argument that trial counsel was not ineffective because

failure to present mitigation was explained by defendant and his family's lack of cooperation).

In this case, the attorneys' reliance on Johnston to decide whether to present mental health evidence is particularly unreasonable because they knew he suffered from mental health problems. Warren testified that "from the beginning of the representation, it was clear to me that he had some serious psychiatric problems" (T. 144). Warren explained:

> I could tell him something, and fifteen minutes later, it would become clear that he did not understand what I had said. In fact, really couldn't -- I don't know if remember is the right word, but did not incorporate it into his consciousness. He made bizarre comments and statements. Was very childish; very demanding.
>
> It was -- and then, of course, he had a, as the case developed, you know we learned that he had been committed and had received psychiatric treatment earlier.
>
> I had, at that point, I had been practicing law about four years. One of the first cases that I ever became involved in was a first-degree murder case. . . . the day after I was sworn in, I appeared for initial appearances for that . . . person where we, where the insanity defense was a defense.
>
> I have family members who are schizophrenic and I have had a lot of, had had even then, a fair amount of experience with clients who had psychiatric problems. And he just seemed to me to have severe mental problems.

(T. 144-45). She further described their conversations:

> It is very difficult to listen to someone who has severe mental problems ramble on for forty-five minutes or an hour and a half. I would be trying to pull him back to reality, to make him realize the situation that he was in" (T. 156).

She explained Johnston's schizophrenia interfered with her ability to communicate with him:

> Just say he did not understand. I, you know, what things there were? The rambling, the meandering, the arrogance, the refusal to listen, the ordering us out of the, ordering us out

of the room, hanging up on us, calling back, crying, ranting and raving" (T. 207).

Warren admitted that she and Wolf "both felt that [Johnston] was continually incompetent" (T. 150). She added:

> I don't think he had the capacity to listen rationally to what we said. To consider it logically, and then to, to make a logical, rational decision based on what we said" (T. 152).

Finally, Warren admitted that Johnston was incompetent to make the decisions that his counsel permitted him to make:

> Q. In terms of leading up to trial and Johnston's contributions to assisting in the defense, his decision making, the limits he placed upon you and what you would investigate and what you couldn't investigate, the limits he placed upon you in terms of seeing a psychologist or not seeing a psychologist, was he competent to be making these decisions?
>
> . . .
>
> A. No.

(T. 195-96).

Warren testified that it was not until the night before the trial began that Johnston first realized that the State was seeking the death penalty:

> It wasn't until, I think the day before trial or the very middle of the trial, we went up to talk with David at night, and he said, in a panic, they're trying to kill me. Do you know that they're trying to kill me. Does President Reagan know they're trying to kill me. This is terrible. President Reagan should be told these people are trying to kill me.
>
> And it was like that was the very first time that it had ever actually connected in his mind that he was facing the death penalty and that he was in a very serious situation. We told him over and over and over again, and it just, as I said, you tell him something, and fifteen minutes later, it was as if it just didn't mean anything to him at all.

(T. 155). That Johnston failed to appreciate the seriousness of his situation and that the outcome of the trial would determine whether he lived or died further supports the argument that his

attorneys were unreasonable in their deference to his decision regarding mental health evidence. Dr. Merikangas confirmed that Johnston did not appreciate his dire situation and had stated to the police that he could not be executed because he had already died (T. 371). Clearly, Johnston's opinion about the presentation of mitigation evidence was irrational and cannot excuse his attorneys' failure to effectively argue in defense of his life.

Wolf was aware of Johnston's mental illness. He testified Johnston was "very suspicious and guarded in his communication" and was "very impulsive in his reactions to what we wanted to discuss with him" and "some days he would not want to talk about anything except tangential issues that were pressing on his mind" (T. 22-24). Wolf knew "that he had some mental problems" and later discovered that he had a history of mental illness (T. 24).

Joseph Durocher, the Public Defender for the Ninth Judicial District testified that after his first meeting with Johnston he "had concerns" about Johnston's mental health because it was obvious that he "was a person who was just not, not rational" (T. 443). Durocher suspected that Johnston was mentally retarded and felt that he "was talking to somebody with a fried brain" (T. 443). Durocher testified that his "concern in the early stages were on his mental health and, and/or mental retardation, and, and the insanity defense or the issue of competence to stand trial" (T. 447). He reported his suspicions and concerns to Johnston's trial attorneys. Durocher explained his office's filing of a motion to withdraw in part was due to Johnston's

irrational behavior (T. 441-42). Durocher's belief that Johnston's actions were "irrational" and that his actions were in conflict with those of the public defender's office supports the argument that Warren and Wolf were unreasonable in their deference to their mentally ill client's decisions about litigation strategy.

When a client suffers from mental impairments, reliance on him to make litigation decisions is even more unreasonable. In Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), defense counsel failed to conduct an investigation into his client's background out of deference to the client's wishes. The court rejected that explanation:

> The reason lawyers may not "blindly follow" such commands [to not investigate the defendant's background] is that although the decision whether to use such evidence in court is for the client, the lawyer must first evaluate potential avenues and advise the client of those offering possible merit. Here, Solomon did not evaluate potential evidence concerning Thompson's background. Thompson had not suggested that investigation would be fruitless or harmful; rather, Solomon's testimony indicates that he decided not to investigate Thompson's background only as a matter of deference to Thompson's wish. Although Thompson's directions may have limited the scope of Solomon's duty to investigate, they cannot excuse Solomon's failure to conduct any investigation of Thompson's background for possible mitigating evidence. Solomon's explanation that he did not investigate potential mitigating evidence because of Thompson's request is especially disturbing in this case where Solomon himself believed that Thompson had mental difficulties. **An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment.**

Thompson v. Wainwright, 787 F.2d 1447, 1451 (emphasis added) (citation omitted). The court referred to the Florida Code of Professional Responsibility which states that "[a]ny mental or physical condition of a client that renders him incapable of

making a considered judgment on his own behalf casts additional responsibilities upon his lawyer" Id. n.3.

And in Blanco v. Singletary, the court reaffirmed that trial counsel's reliance on an obviously mentally ill client's decision to forego presentation of mitigation is unreasonable. In fact counsel has a greater obligation to investigate and analyze mitigation. Id. at 1502.

The circuit court hypothesized reasons for Johnston's attorneys' failure to present mitigation evidence: "the fact that trial counsel were faced with the adverse reports of Drs. Wilder and Pollock, defendant's refusal to cooperate with Dr. Tell and the refusal of other members of defendant's family to assist at the time" (PC-R. 1683). Drs. Wilder and Pollock were appointed to evaluate Johnston for competency. They met with him for less than an hour, did not administer any psychological tests, and did not evaluate him for mitigation purposes. Their testimony is irrelevant to any decision regarding the presentation of mental health mitigation. As recognized in Blanco:

> The district court also rejected the contention that Blanco's mental health mitigation evidence demonstrated ineffectiveness, because Blanco did not show that he was incompetent at the time of trial. But there is a great difference between failing to present evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider.

943 F.2d 1477, 1503 (11th Cir. 1991). See also Perri v. State, 441 So. 2d 606, 609 (Fla. 1983)(recognizing that "a defendant may

be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state."). Dr. Wilder's testimony reveals that he did not preclude a finding of mental health mitigation (T. 526; 528-29). The State's presentation of evidence damaging to the defense does not obviate trial counsel's responsibility to put on evidence on behalf of his client. If anything, it increases an attorney's duty to advocate for and protect his client.

The circuit court's second hypothetical explanation for trial counsel's failures is equally inadequate. The unavailability of other mitigation witnesses, such as Dr. Tell and Johnston's family, does not excuse his attorneys' failure to present the mitigation that was available. Trial counsel did not testify that the reason they did not introduce the records indicating mental retardation, schizophrenia and brain damage or retaining an expert to explain these records was because witnesses were unavailable. This was nonsensical speculation by the court.

Finally, the circuit court erred because it failed to consider the combined effect of the evidence presented during post-conviction and that presented at trial. Contrary to the analysis required by Strickland, rather than evaluate the cumulative effect of all the mitigation evidence, the circuit court believed that the effect of the evidence not presented by trial counsel was actually diminished by the fact that they did present two mitigation witnesses. The circuit court began its analysis of

the Sixth Amendment claim with the caveat that "[i]t should be noted that trial counsel did call two witnesses, Ken Cotter, defendant's former attorney, and Corrine Johns[t]on, his foster mother, to testify as to defendant's mental problems" (PC-R. 1683). The presentation of two mitigation witnesses does not rebut Johnston's claim that he was prejudiced by his counsel's failure to present compelling evidence in the form of state hospital records chronicling his extensive history of mental illness and to investigate and discover additional records detailing his childhood abuse and mental retardation. Counsel knew Johnston was mentally ill.

As the Supreme Court made clear in Williams v. Taylor, the proper analysis of a penalty phase ineffective assistance of counsel claim requires that the court reweigh all the mitigation evidence against the aggravation presented by the State. The Supreme Court expressly criticized this aspect of the Virginia Supreme Court's Strickland analysis:

> Second, the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding--in reweighing it against the evidence in aggravation.
>
> . . .
>
> [T]he state court failed even to mention the sole argument in mitigation that trial counsel did advance--Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness,[8] the graphic

[8]The Virginia capital sentencing statute recognizes future dangerousness as a statutory aggravating circumstance. Contrary to the circuit court's order in Johnston's case, this is not a valid

> description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability. . . . Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case. The Virginia Supreme Court did not entertain that possibility. It thus failed to accord the appropriate weight to the body of mitigation evidence available to trial counsel.

(34) (citations omitted). The circuit court in this case committed the same error that caused the Supreme Court to grant relief in Williams: it failed to consider all of the mitigation evidence and to reweigh its combined effect against the aggravation presented by the State. The circuit court's failure to conduct the correct legal analysis under Strickland resulted in the denial of Johnston's Sixth Amendment claim.

At Johnston's penalty phase, his attorneys presented two witnesses. Ken Cotter, an attorney, testified that he had known Johnston since 1981 and that he seemed to undergo "tremendous mood swings" (R. 1124). The State impeached Mr. Cotter's testimony by emphasizing that he is not a psychiatrist thus discrediting his testimony about Johnston's behavior (R. 1129).

The second witness, Corinne Johnston, Johnston's step-mother, testified that David's intelligence level is "very low" and that as a child he had exhibited "strange behavior" (R. 1138, 1140). She testified that David had been seen at mental hospitals and that a doctor at Conway Hospital had told her that David had "a

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> aggravating factor under the Florida statute and its consideration by the circuit court constitutes nonstatutory aggravation in violation of Johnston's Eighth Amendment rights.

very bad mental disorder" but that the State of Louisiana could not help him (R. 1141). On cross-examination, the State discredited Mrs. Johnston's testimony regarding David because it consisted of second-hand stories she heard from people who did not testify (R. 1150). This presentation of limited mitigation (which was impeached) does not excuse the failure to present mitigation. See Williams v. Taylor, Cunningham v. Zant, 928 F.2d 1006, 1017 (11th Cir. 1991).

In addition to the mitigation already discussed in this petition that was not presented to the jury, two mental health experts testified at the 3.850 hearing that Johnston was schizophrenic, brain damaged and mentally retarded. Both experts testified the statutory mental health mitigators applied to Johnston. This evidence was referred to by the circuit court but its effect on the outcome of his penalty phase was not evaluated.

The State's case in support of the death penalty consisted of a Kansas police officer who testified that he was the "victim" of Johnston's threats that resulted in a felony conviction. Tony Higgins testified that he had arrested Johnston in 1981 (R. 1100). As he was being booked at the police station, Johnston told Mr. Higgins that when he got out of jail he was going to kill Mr. Higgins or "get some bikers to do the job." (R. 1106). There was no physical violence involved. Johnston was charged and convicted of making terroristic threats against a police officer (R. 1106). This was used to support the prior violent felony aggravating factor.

While awaiting trial on the charge of making terroristic threats against a police officer, Johnston was found to be incompetent to proceed to trial by a Kansas state hospital psychologist (T. 1361-1363). After a stay at the Larned State Hospital, he was rendered competent and a felony conviction ensued. Clearly, the jury would have given little or no weight to this aggravating factor if they had known Johnston was found to be mentally ill, brain damaged and possessed such low intellectual functioning that a stay in the state hospital was necessary before he could even be convicted of threatening to find some "bikers" to kill the police officer.

The records indicating Johnston was suffering from mental illness, brain damage and low intellectual functioning at the time Johnston threatened the Kansas police officer were available to counsel. Counsel should have presented them. Trial court failed to refer to, much less consider the mental health records from Kansas when he issued his order denying postconviction relief.

The State presented Dr. Pollack, a psychiatrist who examined Johnston for sanity and competency before his trial. Dr. Pollack testified that the statutory mental health mitigating factors do not apply to Johnston. (R. 1170). On cross-examination, Warren established that Dr. Pollack only met with Johnston for forty-five minutes and that he did not administer any psychological tests. (R. 1172). It should be noted defense counsel did not acquire any of the records relating to Johnston's commitments to state schools for the mentally retarded or multiple diagnosis of

mental retardation. Dr. Pollack, who conducted no testing, never knew about or considered multiple diagnosis of mental retardation when rendering his opinion.

During its penalty phase closing argument, the State Attorney argued the mental health mitigators did not apply based upon testimony of the State's "expert witness," while the defense had only presented the defendant's step-mother (R. 1198-99). The defense had no material with which to rebut Dr. Pollack's testimony rejecting the mental health mitigators aside from the suggestion that his opinion was "unreasonable." (R. 1213).

Johnston was prejudiced by his attorneys' failure to investigate and to present mitigation evidence. The presentation of two mitigation witnesses, which fact was relied upon by the circuit court in denying relief, is not dispositive. In Cunningham v. Zant, the court found trial counsel ineffective for failing to present the defendant's medical and school records despite the fact that he presented two mitigation witnesses.

In Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), the court found trial counsel ineffective for failing to introduce records detailing the defendant's childhood which bears an incredible similarity to Johnston's. Like Johnston, Middleton had been diagnosed as an adolescent with schizophrenia and the treating hospital had recommended medication and residence in a treatment center for emotionally disturbed children. Id. at 493. Counsel also failed to present records from reform schools, family court, state youth services, and prison health services;

as in Johnston's case, "these records chronicle a childhood of brutal treatment and neglect, physical, sexual and drug abuse, a low I.Q. and mental illness." Id. at 494. The court explained its finding that Middleton had been prejudiced by his counsel's failures:

> This kind of psychiatric evidence, it has been held, has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior. "Thus, psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors."

849 F.2d 491, 495 (11th Cir. 1988)(quoting Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1977); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987)).

The circuit court's analysis of Johnston's ineffective assistance of counsel claim is an improper application of the requirements of Strickland and should have been reversed on appeal. The adversarial process broke down when his attorneys deferred to his opinion regardless of their knowledge that he suffered from mental illness and mental retardation. Thus, Johnston was sentenced to death by a judge and jury that were deprived of compelling evidence necessary to a fair and reliable sentencing decision. As in Harris v. Dugger, the jury "knew much about the crime, having just convicted [him] of a brutal murder, but little about the characteristics of the defendant." 874 F.2d at 763. Johnston did not receive a full and fair hearing. The denial of relief on this claim should have been reversed by this Court on appeal.

C. THE CIRCUIT COURT'S DENIAL OF JOHNSTON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WAS IMPROPERLY UPHELD ON APPEAL AND MUST BE RECONSIDERED.

This Court failed to correct the circuit court's errors by deferring to its conclusion that Johnston's attorneys' performance was professionally reasonable. As this Court has acknowledged, there has been confusion on this Court regarding the standard of review applied to ineffective assistance of counsel claims. Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999). This Court reaffirmed that "[t]he less deferential standard of review inescapably follows from Strickland" and clarified that "under Strickland, both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court's factual findings." Id. at 1033. In Stephens, this Court cited several cases in which this Court did not conduct de novo review of Strickland claims. This Court's decision in Johnston's case falls within that category of cases.

In light of the Supreme Court's recent decision in Williams v. Taylor, it is clear that the circuit court incorrectly analyzed Johnston's ineffective assistance of counsel claim. The circuit court committed many of the same errors as in Williams. Williams sheds new light on Johnston's case because the ineffectiveness argument raised and the errors committed in the court's legal analysis are the same.

In Williams, the Supreme Court criticized the Virginia Supreme Court for failing to consider some of the mitigation evidence

that had been presented during post-conviction: "The Virginia Supreme Court ignored or overlooked the evidence of Williams' difficult childhood and abuse and his limited mental capacity." (8 n.5). The jury that sentenced Johnston was deprived of the same information and the circuit court failed to consider it in its order denying relief. As discussed in this petition, Johnston's attorneys failed to present school records documenting his mental retardation, brain damage, and abusive childhood. These records are distinct from the hospital records that the circuit court did consider and they contain nothing that could have harmed Johnston at the penalty phase. These records are not mentioned in the order denying relief. The circuit court's error in failing to consider this compelling mitigation evidence in its evaluation of Johnston's ineffectiveness claim undermines the finding that he was not prejudiced by his attorneys' failures. Its decision, like that of the Virginia court in Williams, is contrary to the law and should have been reversed.

The Supreme Court in Williams found that the defendant was prejudiced by his attorney's failure to present records documenting his childhood. As in Johnston's case, the records at issue in Williams would have educated the jury to his mental retardation and abusive childhood:

> Among the evidence reviewed that had not been presented at trial were documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was `borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin.

(5). As discussed in this petition, the records that Johnston's attorneys failed to present contain similar mitigation evidence with the additional mitigation that Johnston is mentally ill and suffers from schizophrenia.

An even more important similarity is that the records that were not presented in Williams contain some negative information about the defendant. The Supreme Court recognized that "not all of the additional evidence was favorable to Williams" because the records included evidence of juvenile arrests (32). However, the Court still found that Williams was prejudiced by his attorneys' failure to present the records: "the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified . . . counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." Id. The court in this case found the attorneys' performance to be reasonable precisely because the records they did not present contained "negative aspects" about Johnston's past. The Supreme Court in Williams expressly found that negative information in a defendant's records that contain other, helpful information cannot justify an attorney's failure to present the records at trial. The circuit court's order is contrary to Williams and should have been reversed on appeal.

Perhaps the circuit court's gravest error is that it misapplied the law by considering nonstatutory aggravation. The court found the attorneys' failure to present Johnston's records to be reasonable performance because the "negative aspects" of those

records would have solidified the jury's death recommendation by demonstrating "that he would be incapable of rehabilitation and **might kill again**" (PC-R. 1684)(emphasis added). The jury and sentencing court in Florida are limited to those aggravating factors specifically enumerated in the Florida sentencing statute. Future dangerousness is not an enumerated factor, and this Court has granted sentencing relief in other cases where this factor was considered. Kormondy v. State, 703 So. 2d 454 (Fla. 1997). It is well-established that "[a] jury is presumed to follow its instructions," Weeks v. Angelone, 120 S.Ct. 727, 733 (2000). It cannot be assumed the jury would consider evidence the instructions specifically reject as valid.

These errors by the circuit court were not corrected on appeal. Johnston's case is one in which this Court applied the wrong legal standard. Johnston was denied his right to appellate review of his ineffective assistance of counsel claim because this Court deferred to the circuit court on mixed questions of law and fact. As a result, the circuit court's erroneous legal analysis escaped correction and was adopted by this Court. This Court in Stephens recognized that "the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle." Id. at 1034. Johnston was entitled to independent review by this Court. Habeas relief is proper at this time.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, this Honorable Court should issue the writ of habeas corpus, vacate Johnston's death sentence, and direct that a new sentencing proceeding be conducted. In the alternative, this Court may remand this case to the circuit court to conduct an evidentiary hearing on Johnston's ineffective assistance of counsel claim so that the evidence can be evaluated under the correct legal standard.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, first class postage prepaid, to Kenneth Nunnelley, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, on July _____, 2000.

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