IN THE SUPREME COURT OF FLORIDA

NO. SC01-2182

PAUL BEASLEY JOHNSON,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Johnson's first habeas corpus petition from his 1988 convictions and sentences of death. Art. 1, Sec 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating ineffective assistance of appellate counsel, that Mr. Johnson was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal from Mr. Johnson's 1988 trial shall be referred to as "R. ____" followed by the appropriate page number. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred during Mr. Johnson's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, significant errors regarding Mr. Johnson's right to meaningfully exercise peremptory challenges and Eighth Amendment errors are presented.

Mr. Johnson's fundamental rights to a fair trial were violated. Appellate counsel failed to present these and other significant matters to this Court on direct appeal. Had counsel done so, Mr. Johnson would have received a new trial and or sentencing proceeding.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Johnson involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Johnson. "[E]xtant legal principles. . .provided a clear basis for . . .compelling appellate argument[s]." Fitzpatrick, 490 So. 2d at 940. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla.. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were

ruled on in direct appeal but that should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Johnson is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court of the Eighth Judicial Circuit, Alachua County, entered the judgments of conviction and sentences under consideration.

Mr. Johnson was charged by indictment dated March 6, 1981 with three counts of first-degree murder, two counts of robbery, kidnaping, arson and two counts of attempted first-degree murder. He pled not guilty.

Mr. Johnson's original trial was held in September, 1981. A jury returned a verdict of guilty on all counts. The trial court sentenced Mr. Johnson to death. On direct appeal, the Florida Supreme Court affirmed the convictions and sentences. Johnson v. State, 438 So. 2d 774 (Fla. 1984).

Mr. Johnson petitioned the Florida Supreme Court for a writ of habeas corpus after a death warrant was signed. Mr. Johnson was granted a new trial on the grounds that the jury was allowed to separate after it began deliberations. Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986), cert. denied, 481, U.S. 1016 (1987).

The second trial began in October 1987 in Polk County and

ended in mistrial. Subsequently, the trial judge disqualified himself upon a defense motion to disqualify. A change of venue was granted to Alachua County due to excessive pre-trial publicity on the case.

As a result, trial was held in Alachua County in April 1988. Mr. Johnson was tried by a jury which rendered a guilty verdict on all counts (R. 3350-3351).

The jury recommend a death sentence by a vote of eight to four on Count I, nine to three on Count II and nine to three on Count III (R. 3616).

On April 28, 1988, the trial court imposed death sentences on Counts I, II and III. The court further sentenced Mr. Johnson to life for Count IV (Robbery), 15 years for Count V (kidnaping), 15 years for Court IV (arson), life for count VII, 30 years for Count VIII and IX (first degree attempted murder. A sentencing order was entered on the same date (R. 3647). This Court affirmed Mr. Johnson's convictions and sentences on direct appeal. State v. Johnson, 608 So. 2d 4 (Fla. 1992). On August 1, 1994, Mr. Johnson timely filed his initial Rule 3.850 motion. The State filed a motion on August 10,1994, to transfer the case from Alachua County to Polk County. On September 22, 1994, (amended order dated October 25, 1994) that motion was granted.

The trial court ordered the State on November 7, 1994 to show cause why Mr. Johnson should not be afforded an evidentiary

hearing. On November 22, 1994 the State filed its response and on December 12, 1994 the trial court dismissed Mr. Johnson's Rule 3.850 motion as legally insufficient and without prejudice. Mr. Johnson appealed to the Florida Supreme Court.

Mr. Johnson amended his post conviction motion on May 17, 1995. The lower Court dismissed Mr. Johnson's motion which was subsequently reinstated by this Court on August 29, 1995. On January 11, 1996, the Florida Supreme Court ruled that venue was proper in the Tenth Judicial Circuit.

An evidentiary hearing was held in March, 1997 on some of Mr. Johnson's 3.850 claims after which the trial court entered its Order Denying Motion for Postconviction Relief on March 19, 1997. Mr. Johnson timely appealed to this Court which affirmed the lower court. Johnson v. State, 769 So. 2d 990 (2000), rhrg. den. October 11, 2000. Mr. Johnson now files this petition for writ of habeas corpus raising issues of ineffective assistance of appellate counsel and fundamental error.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030 (a) (3) and Article V, sec. 3 (b) (9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr.

Johnson's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Johnson's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla.. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Johnson to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Johnson's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Johnson asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE THAT THE RECORD ON APPEAL WAS COMPLETE. ACCORDINGLY, MR. JOHNSON WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND SENTENCES IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC 3 (b) (1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES ANNOTATED, SEC. 921.141 (4), DUE TO OMISSIONS IN THE RECORD.

In post conviction, the trial court denied the substantive complaint that Mr. Johnson was denied a proper appeal due to omissions in the record on the grounds that it "is not properly raised in a motion for postconviction relief [and that] the claim was raised on direct appeal and decided adversely to the defendant". The post conviction court denied the ineffective assistance of trial counsel component of the claim (Order Denying Postconviction relief at 4).

On direct appeal, this Court ruled "There is no merit in Johnson's argument that we should have granted his motion to

reconstruct the record" Johnson v. State, 608 So. 2d at 13.

Direct appeal counsel stated in his brief:

> Other items which Appellant unsuccessfully requested for inclusion in the record on appeal have hampered his presentation of the issues in this brief. The issues affected and the material denied to Appellant are:
>
> ISSUE II- (a) Written peremptory challenges exercised during the voir dire (to show which party excused which jurors by peremptory strike during voir dire); (b) Newspaper article in the Gainesville Sun which was read by many prospective jurors (to show prejudicial publicity).
>
> ISSUE III- Tape recording made by court reporter during the jury selection proceedings of April 4, 1988 (to show laughter directed at defense counsel by prospective jurors after numerous interruption by the trial judge).
>
> ISSUE IV - Transcript of testimony heard August 28, 1981 which was read and considered by the trial judge in ruling on Johnson's pretrial motion to suppress statements (T. 7440) (large part of the evidence relied upon by the trial judge in denying Appellant's motion is not available for argument on appeal)
>
> The cumulative effect of the denial of a complete record to Appellant is to deny him effective assistance of counsel on this appeal in violation of the Sixth and Fourteenth Amendments, United States Constitution. Certainly, had these materials been in the record on appeal, counsel would have been deficient if he did not raise the jury instruction issue and use the other requested material which belonged in the record in support of his arguments.

(Direct Appeal Brief at 84-85).

Direct appeal counsel was ineffective however, for failing to timely ensure the record was complete by obtaining the missing portions of the record i.e., the court reporter's tapes[1], and the

[1]It should be noted that when trial counsel requested that the tapes be made part of the record, the trial court responded: "I don't make decisions about what goes into the appellate

slips used for peremptory challenges. Due to appellate counsel's failure to do so, those items are not now available to Mr. Johnson's counsel.[2] Mr. Johnson has been prejudiced as a result because he has been precluded from presenting issues to this Court.

Additionally, appellate counsel was ineffective however for failing to raise the issue that other portions of the proceedings were not made part of Mr. Johnson's trial transcript, specifically discussions occurring during several bench conferences were not recorded. (See, e.g., R. 925, 938, 939,954,1020). The items missing from the record are significant and Mr. Johnson has been denied effective assistance of appellate counsel and a reliable direct appeal of his issues. Accordingly, he has been denied due process, equal protection and his rights as guaranteed by the Sixth and Fourteenth amendments to the United States Constitution and corresponding Florida law. To the extent it is at all possible to reconstruct the record at this juncture, undersigned counsel requests an opportunity to do so after which a new direct appeal should be granted.

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record" (R. 308). Trial counsel was threatened with contempt if he pressed the issue further (R. 308).

[2]Undersigned counsel has attempted to locate the tapes and informed by the court reporter that they have been destroyed, and the peremptory slips are not in the record on appeal.

CLAIM II

MR. JOHNSON WAS ABSENT FROM CRITICAL STAGES OF THE TRIAL IN VIOLATION OF HIS RIGHTS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

A criminal defendant's Sixth and Fourteenth Amendments rights to be present at all critical stages of the proceedings against him is a settled question. See e.g., Francis v. State, 413 SO. 2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1984); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F. 2d 1227 (11th Cir. 1982); See also, Fla. R. Crim. P. 3.180. The standard announced in Hall v. Wainwright, 805 F. 2d 945, 947 (11th Cir. 1986), is that "[w]here there is any reasonable possibility of prejudice from the defendant's absence at any stage of the proceedings, a conviction cannot stand. Estes v. United States, 335 F. 2d 609, 618 (5th Cir. (1964), cert. denied, 379 U.S. 964 (1965); Proffitt, 685 F. 2d at 1260."

Mr. Johnson was absent during critical stages of the proceedings wherein critical discussions were had. For example, although Mr. Johnson was present for some challenges during voir dire, he was not included in all of them. Mr. Johnson was not present for challenges which were made at the bench and not announced aloud because of the trial court's employment of a procedure by which the attorney's were required to write their

challenges on slips of paper and hand them to the judge. (See e.g., R. 925, 954, 1055) (wherein challenges held at bench, however Mr. Johnson's presence at bench is not indicated). Mr. Johnson did not waive his right to be included in this critical stage, nor did he ratify the procedure. Mr. Johnson should have been included during those proceedings. Consequently his due process rights were violated. Snyder v. Massachusetts, 291 U.S. 97, 106 S. Ct. 330 (1934), overruled in part on other grounds. This Court has recognized that challenges and strikes to prospective jurors is a critical stage of the proceedings. See Muhammad v. State, 782 So. 2d 343, 351 (Fla. 2001).

The denial of Mr. Johnson's right to be present violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellate counsel was ineffective for failing to raise this issue on direct appeal.

CLAIM III

MR. JOHNSON'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Mr. Johnson's death sentence resulted from multiple errors in the instructions to his jury concerning the proper Eighth Amendment weighing of aggravating and mitigating circumstances. Fundamental constitutional error in the instructions occurred.

A. INVALID AGGRAVATING CIRCUMSTANCES WERE PRESENTED TO MR. JOHNSON'S JURY.

Mr. Johnson's jury was never properly instructed on aggravating factors. The United States Supreme Court set standards regarding the purpose of aggravating circumstances. Zant v. Stephen, 103 S. Ct. 2733, 2743 (1983). The Court also recognized that the aggravating circumstances must "genuinely narrow the class of persons eligible for the death penalty ". Id. at 2742-2743. In Maynard v. Cartwright , 108 S. Ct. 1853 (1988) the Supreme Court held:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).

Cartwright, 108 S. Ct. At 1859. In Mr. Johnson's case, the jury was not instructed as to the limiting constructions placed upon aggravating circumstances.

Furthermore, the Eighth Amendment is violated whenever the sentencer in a "weighing state", such as Florida, considers an invalid aggravating circumstance. Sochor v. Florida ,112 S. Ct. 2114 (1992). An aggravating circumstance may be invalid if it is

so undefined that it fails to offer adequate guidance to the sentencer, thus the error tilts the weighing process in favor of death. Sochor, 119 L. Ed. 2d at 336-37.

1. Cold, Calculated Premeditated. The instruction given to Mr. Johnson's penalty phase jury regarding the cold, calculated and premeditated aggravating factor (CCP) was unconstitutionally vague and over broad.

The post conviction court considering this claim in Mr. Johnson's 3.850 motion stated that "the trial in the instant case concluded prior to the decision in Jackson v. State, 648 So. 2d 85 (Fla. 1994)" and ruled that the "instruction attempted to provide the jury with guidance in analyzing the applicability of the aggravator. The defendant has failed to demonstrate that [trial] counsel's actions were deficient or prejudicial". (Post Conviction Order at p. 5).

On direct appeal the cold, calculated and premeditated statutory aggravating factor was only raised as applied. Appellate counsel was ineffective for failing to raise the issue that the CCP aggravating instruction given in Mr. Johnson's case was unconstitutionally vague and over broad. The instruction given in Mr. Johnson's case was:

> [], the crimes for which the defendant is to be sentenced were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. To establish this aggravating circumstance, there must be more than just

> premeditation shown, there must be proof of a heightened degree of calculated premeditation or methodical intent.

(R. 3609). This instruction failed to adequately guide the jury and narrow the class of defendants eligible for the death penalty. This Court addressed and defined "cold, calculated, and premeditated" one year prior to Mr. Johnson's trial in Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). This Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged design." Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("the cold, calculated and premeditated factor[] require[es] a careful plan or prearranged design."). This Court requires trial courts to apply these limiting constructions and consistently rejects this aggravator when these limitations are not met. See, e.g. Gore v. State, 599 So. 2d 978, 986-987 (Fla. 1992); Jackson v. State, 599 So 2d 103, 109 (Fla. 1992); Green v. State, 583 So. 2d 647, 652-3 (Fla. 1993); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985).

Espinsoa and Sochor make clear that the instruction given to Mr. Johnson's jury was Eighth Amendment error. In Sochor, the Supreme Court held that this Court's striking of the "cold, calculated and premeditated" aggravating factor meant that Eighth

Amendment error had occurred. The aggravating factor was "invalid in the sense that the Supreme Court of Florida had found [it] to be unsupported by the evidence. . . It follows that Eighth Amendment error did occur when the trial judge weighed the coldness factor in the instant case" Sochor, 119 L. Ed 2d at 341. Failure provide a limiting instruction concerning the aggravating circumstance likewise renders it invalid. Espinosa; Hodges v. Florida, 113 S. Ct. 33, 121 L.Ed 2d 6 (1992) (remanding in light of Espinosa a case raising the constitutionality of the "cold, calculated" jury instruction; cf. Hodges v. State, 619 So. 2d 272 (1993) (refusing to address the issue on procedural grounds).

Mr. Johnson's jury was not properly instructed on the limitations and presumably found the aggravator present. Espinosa,112 S. Ct at 2928. As a result the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence with eighth amendment error.

2. Heinous Atrocious or Cruel. In Mr. Johnson's direct appeal, this Court recognized that the HAC instruction given in Mr. Johnson's case was struck down by Espinosa. Johnson v. State,608 So. 2d 4, 13 (1994). This Court held the error to be harmless. However, as the discussion below demonstrates, given the multiple invalid instructions given in Mr. Johnson's case, this Court should revisit that determination.

3. Avoiding Arrest. The sentencing court also relied upon

the aggravating factor of "avoiding arrest." However Mr. Johnson's jury received an over broad and vague instruction on this aggravator. The jury was not told that this aggravator applies only when avoiding arrest is the "dominant or only motive" for the murder. See Clark v. State, 443 So. 2d 973, 977 (Fla. 1983). Thus this aggravator was invalid in Mr. Johnson's case. The trial court did not apply a limiting construction of this aggravating circumstance in finding or instructing the jury upon this fact. As a result, this aggravating factor was too broadly applied, see Godfrey v. Georgia, 446 U.S. 420 (9180); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and failed to genuinely narrow the class of persons eligible for the death sentence. See Zant v. Stephens, 462 U.S. 862, 876 (1983). Mr. Johnson's death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Such an instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988) and the Eighth and Fourteenth Amendments to the United States Constitution.

Undersigned counsel acknowledges this Court's contrary rulings and that the post conviction court stated that this jury instruction was constitutional relying upon Whitton v. State, 649 So. 2d 869 (1994) (Post conviction Order at 15-16). Counsel

raises the issue in order to properly exhaust state claims for federal review.

4. Pecuniary Gain. The trial court found the aggravating factor of "pecuniary gain" However, the jury received a vague and over broad instruction on this aggravator. The jury was not told that this aggravator exists only when pecuniary gain is the "primary motive" for the murder. Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988). This aggravator was invalid in Mr. Johnson's case. Appellate counsel was ineffective for failing to raise this issue on appeal.

B. THE EIGHTH AMENDMENT ERROR THAT INFECTED THE JURY'S WEIGHING PROCESS IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The effect of Mr. Johnson's jury weighing invalid aggravating factors on the resulting death sentence has been discussed by the United States Supreme Court in Espinosa and Stringer v. Black, 112 S. Ct. 1130 (1992). Reliance upon such invalid aggravating factors invalidates the death sentence. Stringer v. Black, 112 S.Ct. 1130 at1139 (1992). Thus, improper weight was given to death's side of the scales and deprived Mr. Johnson the right to an individualized sentence. Id at 1137.

Here, where multiple invalid instructions were given, this Court should analyze the errors cumulatively, with each other, and taking into consideration the failure of the trial court to find any mitigation established at the trial.

CLAIM IV

THIS COURT SHOULD REVISIT THE ISSUE THAT MR. JOHNSON WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED AND FAILED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

This claim was raised in Mr. Johnson's Rule 3.850 post conviction motion. The post conviction court found "[t]his ground should have been raised on direct appeal." The issue was addressed on direct appeal at Johnson, 608 So. 2d 4, 10 -12 (Fla. 1992) ("where there is competent substantial evidence to support a trial court's rejection of mitigators, that rejection will be upheld") (internal citations omitted).

This Court however, should now correct that ruling because the failure in Mr. Johnson's case to find established mitigation results in the arbitrary and capricious imposition of the death sentence. The sentencing judge in Mr. Johnson's case found no mitigating circumstances (R. 831-833). The lower court's conclusion however is belied by the record.

Pursuant to the Eighth and Fourteenth Amendments a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U. S. 242 (1976). The record should be reviewed to determine whether

there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F. 2d 1438, 1449 (11th Cir. 1986). Where that finding is clearly erroneous, the defendant is "entitled to a new re-sentencing." Id. At 1450.

Mr. Johnson established statutory as well as non statutory mitigation. Mr. Johnson presented compelling evidence that he acted under the influence of an amphetamine-induced psychosis and that he was substantially impaired as a result of amphetamine intoxication. Three expert witnesses testified regarding this during the penalty phase. The state's own expert, Dr. Gary Ainsworth, testified the offenses were committed while Mr. Johnson was under extreme emotional or mental disturbance caused by severe intoxication while on amphetamines with elements of delirium. Dr. Ainsworth opined the Mr. Johnson's ability to conform his conduct to the law was substantially impaired. Numerous lay witnesses testified throughout the trial concerning their personal knowledge of Mr. Johnson's history of drug dependency and as to his use of these drugs on the date of the crimes. In addition, mitigating testimony was introduced concerning the poverty and neglect that Mr. Johnson suffered as a child.

The jury and judge were required to weigh these mitigating factors against the aggravating circumstances. According to his

sentencing order the judge did not weigh this substantial mitigation. The judge failed to understand what constitutes mitigation:

> The fact that this defendant had an undesirable or not necessarily happy childhood has absolutely nothing to do with this case. That's all the more reason why, when he reached adulthood or a point when he could think for himself and use reasonable judgment, that he would decide: I won't subject myself to any of that. I'll pull myself up by my own bootstraps and show that I can be somebody. But, no.
>
> That's like the argument that is made that if you are abused as a child, you're therefore going to abuse your children. That never made any sense to me. That's all the reason in the world why one should say: I won't subject my children to those things. I had stripes on me from a peach switch many times, that I had to go cut, but I'll guarantee you one thing: I never struck one of my children with a switch, because I remembered how it felt. I did get their attention, but not that way.
>
> I don't doubt as a matter of fact the evidence shows, that Mr. Johnson was a drug user, of his own volition. I didn't hear any testimony that anyone forced it on him, or that he couldn't quit any time he wanted to, and there are several schools of thought on that, depending on who you're talking to. But that cannot be used when it falls short of what this jury found of McNaugton insanity, as a screen to hide such antisocial, cruel, inhuman behavior.
>
> You might drink or take your drugs to reach some euphoric state, but you know before you start that that's where you're headed, so you know in advance: if I do that, I might then have any inhibitions lowered to the point where I'll do things that I didn't have the nerve to do when sober, or I'll find some way to say I didn't know what I was dong.

(R. 3645-3646). The trial court failed to understand the concept of mitigation in many respects. First, the court's outright refusal to accept an abusive and impoverished childhood is contrary to many cases recognizing childhood circumstances as

mitigating. (See, e.g., Clark v. State, 609 So. 2d 513 (Fla. 19912); Gaskins v. State, 591 So. 2d 917 (Fla. 1991)and numerous others). Second, the trial court's own experiences of having been hit with a switch as a child and the judge's own personal experience with that event was improper in that the trial court relied upon evidence not in the record and his personal reaction to his own treatment as a child to judge Mr. Johnson in rejecting mitigation rather than basing his sentencing determination upon Mr. Johnson's experience and the evidence presented at the penalty phase. This violates Mr. Johnson's right to an independent, individualized and dispassionate sentencing determination to which he was entitled. Third, although the trial court did not "doubt" the fact that Mr. Johnson was a drug user, (see also sentencing order wherein trial court states the defendant "used drugs on a large scale" R. 833) his failure to acknowledge this fact as a mitigating factor is inconsistent with cases where this court and trial courts throughout Florida have recognized such circumstances to be mitigating. See e.g, Hollingsworth v. State, 522 So2d 348 (Fla. 1988); Stevens v. State, 613 So 2d 402 (1992); Wright v. State, 586 So 2d 1024 (Fla. 1991); Freeman v. State, 547 So 2d 125 (Fla. 1989); Pentacost v. State, 5454 So 2d 861 (Fla. 1989); Buford v. State, 570 So 2d 923 (Fla. 1990); Carter v. State, 560 So. 2d 1166 (Fla. 1990); Holton v. State, 573 So 2d 284 (Fla (1990).

The trial court failed to understand the concept of addiction and employed an archaic rationale to dismiss it. (See e.g., "The defendant [used drugs] whether he needed to or not" (R. 833). Further the trial court erred in stating that Mr. Johnson's drug use cannot be used as mitigation when it "falls short" of McNaughton insanity. The lower court clearly did not understand or simply refused to accept the distinction between factors that can constitute legitimate mitigating circumstances although not rising to the level of legal insanity. Finally, the trial court errors are revealed by the fact that the trial court apparently recognized the fact that drug use lowers inhibitions yet refused to acknowledge the mitigating nature of that statement.

The judge erred as a matter of law in not considering and weighing the unrefuted mitigation. See, Hitchcock v. Dugger, 481 U.S. 393 (1987). Mr. Johnson was deprived of the individualized sentencing required by the Eight and Fourteenth Amendments and is entitled to a new sentencing hearing. Zant v. Stephens, 103 So. Ct. 2733 2744 (1983); Eddings v. Oklahoma, 102 S. Ct. 869, 874-875 (1982); Lockett v. Ohio.

In denying Mr. Johnson post conviction relief on his Rule 3.850 Motion, the trial court in post conviction found that trial counsel presented "competent evidence to support the only two applicable statutory mitigating circumstances, extreme mental

disturbance and capacity to conform conduct impaired" and denied Mr. Johnson's claim that trial counsel failed to adequately investigate and prepare additional mitigating evidence and failed to challenge the state's case. However as stated above, this Court, when previously addressing whether the trial court (sentencing court) erred in failing to find mitigation stated : "There was too much purposeful conduct for the court to have given any significant weight to Johnson's alleged drug intoxication, a self-imposed disability that the facts show not to have been a mitigator in this case"and that "when there is competent, substantial evidence to support a trial court's rejection of mitigators, that rejection will be upheld. Johnson at 13. Accordingly, this Court should revisit the issue of the sentencing court's rejection of mitigating factors in light of the post conviction court's determination that competent evidence was presented at trial to establish two statutory mitigators. At the very least, the record reflects substantial non statutory mitigation that the sentencing court should have found and considered. Mr. Johnson is entitled to a new sentencing proceeding.

CLAIM V

MR. JOHNSON'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This issue was raised in Mr. Johnson's Rule 3.850 post conviction motion and the post conviction court ruled "[t]his is an issue that should have been raised on direct appeal." (Post conviction Order at 5). This issue was not raised on direct appeal and appellate counsel was ineffective for failing to raise it.

Mr. Johnson's jury was repeatedly instructed by the court and the prosecutor that it's role was merely "advisory" (R. 3607, 3609,3611,3612,3613,3614,3340,3354, 3356, 3357), in violation of law. Time and again the jury was told that their role in sentencing was just a "recommendation". These instructions and comments infected every aspect of Mr. Johnson's capital proceedings including voir dire, opening statements, closing arguments and the jury instructions.

During voir dire, the court conditioned the perspective jurors by telling them their decision was only an advisory verdict and emphasized the bifurcated nature of the trial (R. 484, 618,622). Here the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of

responsibility violated the Eighth Amendment to the United State Constitution. Caldwell v. Mississippi, 472 U.S. 320 (1985). See Pait v. State, 112 So 2s 380 (Fla. 1959).

CLAIM VI

MR. JOHNSON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS AND COMMENTS BY THE COURT AND STATE SHIFTED THE BURDEN TO MR. JOHNSON TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. JOHNSON TO DEATH.

The post conviction court ruled"[a]ny substantive claims regarding "burden shifting" are procedurally barred because they should have been raised on direct appeal. [Citations omitted] Failure to object does not constitute a serious and substantial deficiency that is measurably below the standard of competent counsel." Mendyk v. State, 592 So.2d 1076 (Fla. 1992), and denied the ineffective assistance of trial counsel portion of the claim (Post conviction Order at 10-11). Appellate counsel was ineffective for failing to raise this issue on direct appeal.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. . .
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla, 1973). This straightforward standard was never applied at the penalty phase of Mr. Johnson's

capital proceedings. To the contrary, the court shifted to Mr. Johnson the burden of proving whether he should live or die. Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989) reflects that these claims should be addressed on a case-by -case basis in capital post conviction actions. Mr. Johnson herein urges that this Court assess this significant issue in his case and, for the reasons set forth, that the Court grant relief.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 3230 (1985); Hitchcock v. Dugger, 107 S.Ct. 1821 (1987); and Maynard v. Cartwright, 108 S.Ct. 1853 (1988).

Judicial instructions at Mr. Johnson's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Johnson, but also proved by Mr. Johnson that the mitigation he provided outweighed and over came the aggravation. According to this, standard, the jury could not "full[y] consider []" and " give effect to" mitigating evidence. Penry, 109 S. Ct. 2934, 2951 (1989). This burden shifting

standard thus " interfered with the consideration of mitigating evidence." Boyd v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s}tates cannot limit the sentencer's consideration of any relearnt circumstance that could cause it to decline to impose the 'death] penalty," McCleskey v. Kemp, 481 U.S. 279,306 (1987), the argument and instructions provided to Mr. Johnson's sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S.Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987). The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

The judge instructed the jury that it was their job to determine if the mitigating circumstances out weighed the aggravating circumstances:

> [H]owever it is you duty to follow the law that will now be given to you by me, and to render to the Court and advisory sentence, based on your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 3607)(emphasis added). This erroneous standard was then

repeated to the jury by the judge later in his instructions:

> You should find – Should you find sufficient aggravating circumstances to exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 3609-3610) (emphasis added).

There can be no doubt that the jury understood that Mr. Johnson's had the burden of proving whether he should live or die.

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof t Mr. Johnson on the central sentencing issue of life and death. Under Mullaney, this unconstitutional burden-shifting violated Mr. Johnson's Due Process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F. 2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon. In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating

evidence and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered.

Therefore Mr. Johnson is entitled to habeas relief in the form of a new sentencing hearing in form of a new jury due to the fact that his sentencing was tainted by improper instructions.

CLAIM VII

IMPROPER PROSECUTORIAL ARGUMENT AND THE PRESENTATION AND CONSIDERATION OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES RENDERED MR. JOHNSON'S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

During the sentencing phase of Mr. Johnson's trial, the prosecutor introduced by way of leading questions on cross-examination impermissible, non-statutory aggravating factors. These impermissible non-statutory aggravating circumstances included references to antisocial personality disorder, adult antisocial behavior, prior inability to conform conduct to the law, a study conducted in Washington D.C. showing that 80 % of persons arrested for violent felonies were on drugs wen booked, past drug use and reference to seven prior occasions of Mr. Johnson's failure to conform to the law. The trial counsel objected to these questions by the prosecution because they

introduced non-statutory aggravation to the jury. (R. 3462; 3465, 3468, 3471).

The prosecutor demanded during his closing argument at penalty phase that the jurors sentence Mr. Johnson to death on the basis of inflammatory, improper comments and numerous impermissible factors. The prosecutor foreclosed the jury from recommending a life sentence (R. 356).

The prosecutor further improperly created the impression that four aggravating circumstances existed from the first degree murder charges and contemporaneous prior violent felony. He underscored this erroneous information by illustrating on a blackboard the counting process he went through.

The prosecutor's inflammatory argument aggravated the situation when he argued that nothing could ever mitigate these crimes. The jury was left with the impression that death was the only permissible result. They were erroneously demanded that they must impose death.

The cumulative effect of this closing argument was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F. 2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChrisoforo, 416 U.S. 647 (1974); See also United States v.

Eyster, 948 F. F.2d 1196,1296 (11th Cir. 1991). The prosecutor's argument went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989). He intended that Mr. Johnson's jury consider factors outside the scope of the evidence and permissible considerations.

Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones'" Rosso v. State, 505 So 2d at 614. This Court has called such improper prosecutorial commentary "troublesome." Bertolotti v. State, 476 So. 2d 130,132 (Fla. 1985) see also Brooks, Urbin

Arguments such as those made by the State Attorney in Mr. Johnson's penalty phase violate due process and the Eighth Amendment and render a death sentence fundamentally unfair and unreliable. See Drake v. Kemp, 762 F. 2d 1449, 1458-61 (11th Cir. 19850 (en banc); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armountrout, 885 F.2d 1328 , 1338 (8th cir. 1989); Colman v. Brown, 802 F. 2d 1227; 1239 (10th Cir 1986). Here, as in Potts, because of the improprieties evidenced by the prosecutor's argument, the jury "failed to give [its] decision the independent

and unprejudical consideration the law requires. " Potts , 734 F.2d at 536. In the instant case, as in Wilson, the State's closing argument "tend[ed] to mislead th jury about the proper scope of its deliberations." Wilson, 77 F. 2d at 626. Consideration of such errors in capital cases "must be guided by [a] concern for reliability." Id. This Court has held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

The adversarial process in Mr. Johnson's trial broke down when the prosecutor argued to the jurors to sentence Mr. Johnson to death on the basis of numerous impermissible and improper factors. At the sentencing hearing in front of the judge, trial counsel discussed the prosecutor's improper argument regarding counting aggravating and mitigating factors and conduct that is not otherwise obvious from the transcript of his argument (R. 3632):

The prosecutor continued to argue non-statutory aggravation:

> And as the experts have admitted in giving you a – their opinion to you– today, their review of Mr. Johnson's history leads them to understand the fact is his judgment ain't never been any good. The fact is, he's never been able to conform his conduct to the requirements of law. The fact is he's been indifferent to the criminality of his conduct. The fact is he just didn't give a darn.

(R. 3565) and further:

Ladies and gentlemen, the State of Florida suggests to

you that the aggravated circumstance of the killing of Deputy Theron Burnham during the attempt to arrest this man for murder, as to Deputy Burnham's death, outweighs all of the mitigation that could ever be presented, and certainly outweigh this mitigation that was presented in this case.

Why does the State of Florida suggest that to you? Well, why was he in a uniform? And why do we put a badge, a symbol of authority, on his chest? And why do we put him in a marked car? So, that when we see him as he drives down the road, our community can feel more safe and secure. And why do we give him the power and authority to stop the Mr. Johnson's of the world on the side of the road? It was made an aggravating circumstance of the crime of first degree murder to commit a murder like that of killing Deputy Burnham, and that aggravating circumstance, as to tha [sic] murder, outweighs any mitigation that could be suggested.

(R. 3566-3567) and the prosecutor impermissibly argued that death was required(R. 3569).

The prosecutor's closing remarks were equally improper:

Ladies and gentlemen of the jury, there is no sentence adequate for Paul Beasley Johnson and his crimes. The State seeks his death because that is the most we can do. But there is no sentence that's adequate. There is nothing that would right the wrong. There is nothing that will equal the scales.

In the end, in pleading for the life of Paul Beasly Johnson, it will undoubtedly be suggested to you that Mr. Johnson's life is like all other human life: precious and worthy of preservation. So were the lives of Williams [sic] Evans, Darrell Ray Beasley, and Deputy Theron Burnham. Their lives were more precious. Their lives were more worthy of preservation and protection. Assuming for a moment that you find beyond a reasonable doubt that the aggravating circumstances in this case, as with each of these murders, clearly outweighs any mitigation that's been presented, assuming that you believe as jurors, that the proper recommendation in this case should be death, if you fail to make that recommendation, then what value have you placed on human life at all?

If the death sentenced is not deserved for these

> murders under these circumstances for this man, then what value is placed on human life at all? No punishment fits the crimes committed here, save one. No punishment is reasonable in light of the aggravating circumstances proven here, save one,. No recommendation of this jury as to sentence as supported by the facts of this case, can be made expect one and one alone: death.

(R. 3570-3571).

These comments went without objection by defense counsel, however, improper argument by a prosecutor reaches the threshold of fundamental unfairness if it is "so egregious as to create a reasonable probability that the outcome was changed. Brooks v. Kemp, 762 F.2d 1383, 1403 (11th Cir. 1985). The prosecutor's argument in this case meets that threshhold. Mr. Johnson is entitled to a new penalty phase.

CLAIM VIII

THE TRIAL COURT UNCONSTITUTIONALLY ABRIDGED MR. JOHNSON'S ABILITY TO EXERCISE HIS RIGHT TO PEREMPTORY CHALLENGES BY ITS RULINGS AND REFUSAL TO GRANT ADDITIONAL PEREMPTORY CHALLENGES. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL AND FOR FAILING TO RAISE THE CLAIM THAT THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENSE CHALLENGES FOR CAUSE AS TO JURORS SUGGS, WOLFE AND TOWNS.

This issue was presented in Mr. Johnson post conviction motion and the post conviction court ruled that it was an issue for direct appeal (Post Conviction Order at 15).

Prior to Mr. Johnson's trial, the trial judge granted five additional peremptory challenges (R. 70). During *voir dire*, several prospective jurors revealed that they had read a recent

newspaper article about Mr. Johnson's case. This article contained information about Mr. Johnson's prior conviction, prior death sentence, and other prejudicial information. Rather than spoil the entire venire, defense counsel requested an *in camera voir dire* of the prospective jurors who had read the article (R. 135, 436,440,667-668,755-756,841, 1000, 1178,1219,1295). The trial court denied these requests. Consequently , defense counsel was forced to blindly exercise peremptory challenges due to the fact that the court failed to allow the defense the *in camera voir dire* of jurors who had knowledge of Mr. Johnson's prior trial, death sentence, and other prejudicial information. As a result, defense counsel exhausted all of his peremptory challenges. The trial court denied the defense motion for additional peremptory challenges (R. 1180-1183, 1295). Near the conclusion of *voir dire*, defense counsel proffered for the record that he would have exercised additional peremptory challenges against jurors had he been allowed to by the court (R. 1222).

Mr. Johnson was wrongly denied these additional peremptory challenges. See Trotter v. State, 576 So. 2d 691 (Fla. 1990).

Mr. Johnson's trial attorney made it clear on the record numerous times that he was forced to use peremptory strikes against jurors because of their exposure to pre trial publicity and that he was precluded from inquiring into the juror's knowledge about the case further due to the fact that the trial

court refused to allow individual voir dire of those jurors. Trial counsel requested the individual voir dire only of those jurors who had answered affirmatively when asked whether they had heard or read about Mr. Johnson's case in order so as not to taint the remainder of the jury pool who had not read about the case. Pre trial publicity and juror knowledge of Mr. Johnson's case was of particular importance because of the high level of publicity the case attracted which ultimately resulted in the change of venue from Polk County to Alachua County. Additionally, Mr. Johnson had previously been tried convicted and sentenced to death and tried again resulting in a mistrial. Mr. Johnson's trial attorneys were particularly concerned about juror knowledge regarding the previous conviction and death sentence that were subsequently overturned by this Court.

Accordingly, the trial court's refusal to allow individual voir dire of these jurors put the trial attorney in the untenable position of either having to risk leaving a juror on the panel with prior knowledge about Mr. Johnson's case, or having to blindly use his peremptory strikes in an attempt to pick an unbiased jury. Because the trial attorney was forced to use these peremptory strikes in this manner, it was error for the lower court to deny trial counsel's request for additional peremptory strikes.

Several prospective jurors had read about Mr. Johnson's

case and upon whom defense counsel used a peremptory strike. Accordingly, he was forced to use his peremptory challenges to keep exposed jurors off of the panel. Regarding jurors Aldridge,Clark, Harber Haenel, Stewart, Bushelli, trial cousel informed the lower court why individual *voir dire* was necessary in order to intelligently exercise peremptory strikes:

> [MR. SHEARER]: Judge, I wish to request in camera voir dire of the jurors who knew about the case and remembered something about it. I don't want to ask them anything--
>
> [THE COURT]: I'm not going to permit any in camera --
>
> MR. SHEARER: Okay. Can I explain –
>
> THE COURT: – examination of these jurors. There's been no responses that would suggest to the Court that an in camera inquiry would be necessary.
>
> MR. SHEARER: Can I explain my reasons?
>
> THE COURT: Yes, Sir.
>
> MR. SHEARER: I have to be quiet about this. Your Honor, there are seven or eight jurors, and I can identify those, who said that they have read about the case in the newspapers, and they remembered things about what they read other than the charges in the indictment.
>
> THE COURT: No, they said they remembered–
>
> MR. SHEARER: Right.
>
> THE COURT: – matters in there other than the headlines that you asked them about.
>
> MR. SHEARER: Right. I need to ask them what they remember, because there were things that were in the newspaper which, if they read those things, such as the previous trial in this case, they would be exempted on peremptory challenge, if not a cause challenge.

I can't ask that in open court, and I need that information.

THE COURT: You don't need that information based on the answer they gave. I'm no going to allow an in camera examination because of the responses previously given by the entire panel on the previous knowledge of having read about the case.

(R. 436-437). Trial counsel detailed the reasons why an in camera voir dire was necessary (R. 440-442). The court however did not allow the requested *in camera voir dire*. And the defense repeatedly made the request (R. 470-471).

This issue repeatedly occurred during voir dire. Regarding Juror Suggs, the court denied a defense challenge for cause (R. 666) (discussed further below). The defense then asked for individual *voir dire* of this juror which was also denied:

MR. SHEARER: Your Honor, given the Court's ruling on Mr. Suggs, we are concerned as we mentioned previously, about as far as – what he did read as far as publicity. We would request that we have an opportunity in camera, to simply ask him an open-ended question that would not suggest any answers.

It would simply ask him what he recalls reading about the case so we can determine whether or not – For example, he read about the previous trial in '81, conviction and subsequent death sentence.

Also, whether or not he read and has knowledge about the trial in Polk County back in 1987. Of late last year, so that we know the content of what he knows and what he remembers about reading about this case.

As I mentioned, we do not intend to ask him any questions or suggest answers. In other words, we're not going to say "Did you read about his conviction and death sentence?" I would just like to ask an open-ended question to see what he does know, and then based upon what he does know, whether or not that would prevent him from being fair and impartial.

So, your motion for in camera is denied.

Trial counsel informed the court that the in camera voir dire was necessary for purposes of determining peremptory strikes:

> MR. SHEARER: Yes, sir. Just so it's clear, I realize that a lot of these issues were directed towards comments on cause challenges. This is also for the purpose of peremptory challenges if I didn't make that clear.
> I understand the court's ruling. Thank you.

(R. 667-669). The defense then used a peremptory strike against juror Suggs (R. 669).

As to Juror Johnson the defense again explained why they needed an *in camera voir dire* of her (R. 755) which the court denied (R 757):

> MR. SHEARER: Your Honor, with regard to Ms. Darlene Johnson I would ask for an in camera hearing. We are concerned about her. She is the one that gave the one response saying "I can't answer ," when asked a question about why the case had taken so long.
> Apparently she said she had read about the case in the newspapers recently. But also she had heard about it before that. Apparently she has some knowledge of the case other than the recent articles in the local papers. And our concern of course is that she knows about the previous conviction – the previous sentence in the case, and it being set for retrial.
> Her response to Mr. Norgard's question, if she was on the jury would she be speculating as to why the case was so old, she answered, "I can't answer that," reflecting – it appeared to me that she couldn't answer in open court because that type of information – she'd already had been told that she shouldn't talk about, that is, what she knew about the case.
> And I anticipate that there may be cause for a cause challenge there . But there's more in – and additionally though, we simply need to know if she does know about the previous conviction. So if it's not a cause challenge we know whether to intelligently exercise a peremptory challenge.
> So, I'd ask for the Court's permission to allow an in camera voir dire of here just concerning – with your

> permission – she knows from outside of the courtroom , about this case.

(R. 754-756). The court denied the request for *in camera voir dire* (R. 757). Regarding challenges for cause the defense stated "I cannot cite the Court any reason for challenge for cause with the information that we have and the voir dire we've had (R. 759) and then exercised peremptory strikes against Ms. Johnson and Judith Clark (R. 759). The voir dire afforded trial counsel was inadequate.

The same situation arose with prospective juror Harper (who stated she had read about the case (R. 800); defense requested *in camera voir dire* of Harper which was denied (R. 841). A peremptory challenge to Harper was then made (R. 842).[3] Likewise, Juror Frierson had read an article about the case (R. 938) and a peremptory challenge was exercised against her (R. 954).

Similarly, prospective juror Fort read about the case (R. 955) and defense requested individual *voir dire* (R. 1000) which was denied (R. 1002). A peremptory challenge was exercised against Fort (R. 1056). Prospective juror Good read about Mr.

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[3]Due to the courts procedure of requiring the parties to write their peremptory challenges on a piece of paper and due to omissions in the record, and appellate counsel's ineffectiveness for failing to ensure that the record was complete, i.e., the slips were never made part of the record, Mr. Johnson cannot with certainty track the peremptory challenges where this procedure was employed.

Johnson's case (R. 1139), defense counsel requested individual *voir dire* (R. 1178) and the lower court denied this request (R. 1180). The defense moved for additional peremptory challenges (R. 1180), which was also denied (R.1183). Prospective juror McLeod also read about the case (R. 1185), the defense requested an individual *voir dire* of this juror which was denied (R. 1219) and the defense used their last peremptory challenge on McLeod. The Defense stated clearly on the record that had they been granted more peremptory challenges that there were challenges that they would have made (R. 1222).

Prospective juror Allen read about the case as well and the defense asked for *in camera voir dire* of her which was denied (R. 1295). The defense again requested additional peremptory challenges for alternate jurors which was denied (R. 1295). The defense then made cause challenge as to juror Allen because they had exhausted all of their peremptory challenges and Allen possessed knowledge about the case. This request was also denied (R. 1296).

Trial counsel used approximately eleven of their peremptory challenges on jurors who had read about Mr. Johnson's case and for whom they were denied further individual inquiry.

Defense counsel made it clear on the record that he was not waiving asking questions that would have educated him about the jurors and thus enable him to exercise his peremptory challenges

in a meaningful way, but that his questions comported with the trial court's rulings (R. 672-673).

The lower court's refusal to grant additional peremptory challenges to Mr. Johnson was error and thus Mr. Johnson's conviction and sentence of death should be reversed.

This court, in addressing whether harmless error occurred in the context of a lower court failing to excuse a juror for cause, stated : " We find that such error cannot be harmless because it abridged appellants's right to peremptory challenges by reducing the number of those challenges available [to] him. Hill v. State, 477 So 2d 533 at 556 (Fla. 1985). The Court went on to state: "Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or here peremptory challenges and an additional challenge is sought and denied. ID at 556. (Internal citations omitted).

While Mr. Johnson asserts that this proposition applies regarding the trial court's failure to grant the causes for challenge against jurors Suggs, Wolfe and Towns (discussed below) he also asserts that by analogy, the same principle was violated and reversible error occurred when the trial court refused to allow trial counsel a fair and meaningful opportunity to *voir*

dire the potential jurors who had outside knowledge of Mr. Johnson's case and thereby abridged Mr. Johnson's right to peremptory challenges by reducing the number of those challenges available to him because the trial attorney was forced to use the peremptories on jurors who had read about the case but of whom he was precluded from inquiring further. Although this Court addressed the issue of the trial court's refusal to allow individual *in camera voir dire* of jurors on direct appeal (Johnson at 9), it did not do so in the context of the effect of the trial court's actions upon Mr. Johnson's right to exercise his peremptory challenges. Although generally trial courts have discretion in whether to grant individual *voir dire*, in this case where Mr. Johnson's right to exercise his peremptory challenges was severely abridged and where as a result he was denied the opportunity to make informed and intelligent challenges, that discretion resulted in denying Mr. Johnson the full effect of his peremptory challenges and thus they were illusory. Appellate counsel was ineffective for failing to articulate the issue the abridgment of peremptory challenges and the resulting denial of Mr. Johnson's Sixth, Eighth and Fourteenth Amendment rights as guaranteed by the United States Constitution and corresponding Florida law as well as due process and equal protection.

Additionally, appellate counsel was ineffective for failing to raise the issue that the trial court erred in refusing to

grant the defense cause challenges as to jurors Suggs, Wolfe and Towns. "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." Kearse v. State, 770 So. 2d 1119, 1127 (Fla. 2000),citing Lusk v. State, 446 So. 2d 1038, 1041 (Fla. 1984).

The defense requested a challenge for cause as to juror Suggs based upon the juror's knowledge of the case from publicity, and views on the death penalty and insanity (R. 664). The trial court denied this request (R. 667) The defense stated that juror Suggs' statement that he would have a hard time not leaning towards the death penalty when someone used a weapon and who went out with the intent to kill somebody supported a strong predilection toward death (R. 665). A reasonable doubt regarding this juror's ability to be impartial regarding the death sentence and in considering the insanity defense was established. The trial court erred in refusing to grant the defense challenge for cause as to this juror.

As to juror Wolfe, the defense moved for a cause challenge stating:

> . . .Our basis for that is the answers that he gave on the insanity defense. I believe applying these standards we've applied consistently throughout these proceedings, that his answers certainly do cause a person to have a reasonable doubt as to his ability to be fair on the insanity defense.

> The answers that I was writing down as Mr. Shearer was questioning him is that his very first response is that the insanity defense is greatly abused. And we've had other people who have expressed their opinion as to abuse, but the gentleman used the adjective greatly abused.
>
> He then went on to say that he wasn't sure what insanity means. But despite that lack of knowledge, he still feels it's greatly abused. He did say that he could apply the law to the facts, but, frankly I have question as to whether he could apply the law to the facts fairly and reach a just result.
>
> He did say he was not sure of his attitudes. I – would it impair his ability to consider. He went on to say he didn't think so, but that he had doubts about that. And, even in response to the Court's question, his answer was equivocal and he did not say that he could, he said that he thinks he can.
>
> And I feel that because of that there is a reasonable doubt as to his ability to be fair and impartial on that issue, Your Honor.

(R. 797-799). The court denied the challenge for cause (R. 799) and the defense then exercised a peremptory challenge against Juror Wolfe (R. 800).

The trial court should have granted the challenge cause because there was a reasonable doubt as to juror Wolfe's ability to fairly and impartially consider Mr. Johnson's insanity defense. Where there is a reasonable doubt as to a juror's impartiality, the court should grant a challenge for cause. See Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995) and should err on the side of caution and grant the challenge Foster v. State, 778 So. 2d 906, 914 (Fla. 2001). The trial court failed to do this despite juror Wolfe's unclear answers as to whether he could consider the defense. Specifically Juror Wolfe stated he knew

very little about the insanity defense and that " I think it's greatly abused" (R. 790), although he stated he had no problem accepting that the Court might say that he must apply the standard to the case (R. 791), when asked immediately thereafter whether he had any attitudes that would impair him from listening to insanity evidence he stated "I'm not sure" and when asked if he thought he would have negative attitudes because of his personal viewpoint he could only state "I don't think so" and when asked regarding that response whether he had doubts in that regard he stated "Yes" (R. 792). In response to the court's direct question whether he could set his opinions aside, juror Wolfe could only answer "I think I can." (R. 795). The trial court erred in failing to grant the challenge for cause.

As to Juror Towns, the defense made a cause challenge:

> . . . as to his position on the death penalty in that my notes indicate that he said that hearing the number of charges, or as he called it the multiple charges, that he would lean in the direction of the death penalty.
>
> And when asked if it would take evidence to change his mind he indicated that it would. When asked if he had any ideas as far as what type of things could possibly change his mind away form his inclination to the death penalty he said that he didn't know of anything.
>
> These being his responses, I would submit to the Court that his inclinations and strong feelings about the death penalty and his personal attitudes and viewpoints are such that he has an inclination toward the death penalty and that being the case, we would say that he is of a mind, though he does not recognize it as being a prejudice, that he is of a mind that prejudice can be presumed in this regard.

(R. 1002-1004). The trial court denied the cause challenge and the defense then exercised a peremptory strike against Juror Towns (R. 1004). Although juror Towns initially stated he could keep an open mind (R. 959) he stated that he had been on a previous case in which death was a consideration (R. 963) yet still stated regarding his opinion that: " . . . the multiplicity would definitely lean him quite a bit" (R. 985) and that the multiple charges of murder " would definitely tend to unbalance a more neutral standing (R. 986) yet he stated that he did not have a fixed opinion. The trial court erred in denying the challenge for cause as to this juror as well because a reasonable doubt was established regarding this juror's ability to be impartial when considering whether to recommend death or life; Bryant v. State, Id.; and should have approached this issue of a biased juror conservatively. Foster v. State, Id. He admitted that he leaned in the direction of death solely because of multiple charges and that it was an unbalanced standing (This was true even though he had previously sat on a death case and presumably received instructions regarding the death penalty). Thus, he was predisposed toward recommending death in this case before hearing any additional evidence and the denial of the challenge for cause was error.

Accordingly, the trial court's refusal to grant the cause challenges as to Jurors Suggs, Wolfe and Towns abridged Mr.

Johnson's ability to meaningfully exercise his peremptory challenges in addition to the trial court's actions detailed above which also abridged those rights. Trotter v. State, 576 So. 2d 691 (Fla. 1990); Pentacost v. State, 545 So 2d 861 (Fla. 1989). Reversible error occurred. Mr. Johnson is entitled to a new trial.

CLAIM IX

MR. JOHNSON'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Trial counsel presented this issue to the trial court (R 22). Appellate counsel failed to raise this issue on direct appeal and was ineffective for failing to do so.

The consideration and finding of this aggravating factor was tainted by an unconstitutionally vague instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). In Mr. Johnson's case, the judge considered and found an automatic statutory aggravating circumstance; therefor Mr. Johnson entered the penalty phase already eligible for the death penalty (R. 3309, 3608). Such an automatic aggravating factor violates the principle that aggravating circumstances must

channel and narrow the class of person's eligible for the death penalty. Zant v. Stephens, 462 U.S. 862, 876 (1983). Consequently, Mr. Johnson was denied the individualized sentencing determination to which he is entitled. Hitchcock v. Dugger. Accordingly Mr. Johnson's sentencing process was rendered unconstitutionally unreliable. Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

CLAIM X

THE TRIAL COURT ERRED IN DENYING MR. JOHNSON'S MOTION TO DECLARE FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND VIOLATES THE CONSTITUTIONAL PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

This issue was presented to the trial court. Appellate counsel's failure to raise it on direct appeal was ineffective. Florida's capital sentencing scheme denies Mr. Johnson his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents the arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). In this regard Florida's statute fails. The capital sentencing statute fails to provide any standard of proof for determining that aggravating

circumstances "outweigh" the mitigating factors. Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating" factors. These deficiences lead to the arbitrary and capricious imposition of the death penaalty and violate the Eighth Amendment to the United States Constitution. Undersigned counsel is mindful of this Court's holdings to the contrary and raises this issue here for federal exhaustion purposes.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Johnson respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished by United States Mail, first-class postage prepaid, to Candance Sabella, Assistant Attorney General, Westwood Building, 7th Floor, 2002 N. Lois Avenue, Tampa, FL 33607-2391, on October 10, 2001.

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CERTIFICATE OF TYPE SIZE AND STYLE

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

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HEIDI E. BREWER