IN THE SUPREME COURT OF FLORIDA

NO. SC 01-2182

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PAUL BEASLEY JOHNSON,

Petitioner,

v.

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

Respondent.

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# REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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## INTRODUCTION

**COMES NOW**, the Petitioner, **Paul Beasley Johnson**, by and through undersigned counsel and hereby submits this Reply to Respondent's Response to Mr. Johnson's Petition For Writ of Habeas Corpus. Petitioner does not reply to every issue, however expressly does not abandon the issues and claims not specifically replied to herein.

## PRELIMINARY STATEMENT

At the outset, Petitioner disputes Respondent's claim that "A review of the foregoing claims makes it clear that the instant petition for writ of habeas corpus is, as was the petition filed in Blanco v. Wainwright (citation omitted), 'almost entirely a repetition of the issues raised in the Rule 3.850 proceeding" and Respondent's assertion that "[b]y including these types of claims within his petition for writ of habeas corpus, 'collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.'" (Citations omitted) (State's Response at page 38). As will be demonstrated below, Mr. Johnson's claims are properly before this Court and should be addressed.

## REQUEST FOR ORAL ARGUMENT

Given the matters asserted by the State in its Response, undersigned counsel requests oral argument in this case. Significant issues have been presented and the consequences of

the resolution of these issues are serious as they will determine whether Mr. Johnson will live or die. This Court has not hesitated to grant such a request in similar situations.

## 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.**

Respondent asserts that this claim is procedurally barred because Petitioner alleged in his Rule 3.850 motion that trial counsel was ineffective for failing ensure that the record was complete, that the lower court denied this claim and that this Court affirmed that ruling. Additionally, Respondent asserts that this claim was asserted on direct appeal. (Response at 41).

While it is true that the issue raised in Mr. Johnson's petition for a writ of habeas corpus now pending before this Court does deal with the inadequacy of the record, the claim is distinct from that raised in the Rule 3.850 motion. Moreover, the Rule 3.850 claim and denial thereon, dealt with the allegation of ineffective assistance of **trial counsel**. Accordingly, the 3.850 court addressed trial counsel's performance rather than the adequacy of appellate counsel's representation. Petitions for a Writ of Habeas Corpus filed in this Court are the proper vehicle

to raise issues of ineffective assistance of appellate counsel. See e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Rutherford v. Moore, 744 So. 637, 643(Fla. 2000); Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000).

There is a significant distinction in the claim that trial counsel was ineffective as opposed to appellate counsel's ineffectiveness and the issues require an assessment of different actions. For this Court to rule as the State urges, would be to deny Mr. Johnson an opportunity to have issues regarding appellate counsel's ineffectiveness addressed and make the habeas process meaningless.

In Mr. Johnson's case, the circuit court determined that trial counsel was not ineffective regarding his responsibility to ensure that the record was complete and did not address the completeness of the record itself or the prejudice to Mr. Johnson as a result. [1]

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[1] The circuit court's ruling on the ineffective assistance of trial counsel in its entirety is as follows:

> (2) Claim II alleges that the defendant was denied a proper appeal because portions of the record were missing. The substantive complaint is not properly raised in a motion for postconviction relief. Additionally, the claim was raised on direct appeal and decided adversely to the defendant. *See, State v. Johnson, 608 So.2d 4 (Fla. 1992)*.
>
> The defendant further complains that counsel was ineffective for failing to ensure that a proper record was made. The court allowed collateral counsel the

Respondent has not contended that record is complete. The record clearly is not (See Petition at 8-9). Accordingly, the actions and/or omissions of appellate counsel must be assessed to determine whether deficient performance was rendered on direct appeal regarding the incomplete record and whether Mr. Johnson was prejudiced as a result.

While it is also true that appellate counsel did raise the inadequacy of the record, (See Initial Brief at 83-84), appellate counsel did so in the respect that he was rendered ineffective by this Court's denial of his motion to reconstruct the record.

This Court has the ability to grant relief in a habeas proceeding:

> where the petitioner establishes first, that appellate counsel's performance was deficient because 'the alleged omissions are of such a magnitude as to constitute serious error or substantial deficiencies falling measurably outside the range of professionally acceptable performance' and second, that the petitioner was prejudiced because appellate counsel's deficiency 'compromised the appellate process to such a degree as to undermine confidence in the correctness of the result'.[]

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> opportunity to explore the ineffective assistance of counsel aspect of the claim at the evidentiary hearing. Trial counsel Lawrence Shearer testified that he filed a motion to record all proceedings. He believed the motion was granted and that all proceedings were recorded. However, Mr. Shearer testified that he had not read the entire transcript. In any event, the court finds that the defendant has not shown that any actions of counsel were deficient. (Order Denying Motion for Post conviction Relief at 4).

Rutherford, id. at 643 (emphasis in original)(internal citations omitted).

Had this issue been properly and fully raised and addressed on direct appeal, it would have had merit. See e.g. Delap v. State, 350 So. 2d 462, 463-464 (Fla. 1977)(remand for new trial where record on appeal was missing transcript of the jury charge conferences, guilt and penalty phase charges to the jury, voir dire and closing arguments and could not be reconstructed). In Delap, this Court recognized that where the "omitted portions of the transcript are necessary for a complete review" there is no alternative but to grant relief and that it "has the mandatory constitutional duty to hear appeals from final judgments of trial courts imposing the penalty". Delap, at 463 and 463 FN1.

Petitioner recognizes that not all claims based upon omissions in the record result in a new trial. However, relief is warranted in Mr. Johnson's case because the missing portions of the record are necessary for this Court's complete review of the claims raised by Mr. Johnson.

Mr. Johnson was prejudiced due to the omissions in the record because viable claims have been lost due to this Court's denial of appellate counsel's motion to reconstruct the record and appellate counsel's failure to take action to ensure the record's completeness.

Moreover, Petitioner has also included additional matters that he asserts the appellate counsel should have ensured became part of the record. (See Petition at 9). Whether due to appellate counsel's failures, this Court's denial of appellate counsel's motion to reconstruct the record or a combinattion thereof, Mr. Johnson has been denied full and constitutional review of his issues as a result. This Court has stated "in all capital cases the appellant has an absolute fundamental right to have his entire record reviewed". Songer v. Wainwright, 423 So. 2d 355, 356 (Fla. 1982) citing Delap. Accordingly, contrary to Respondent's assertion, Claim I is properly before this Court and should be addressed.

This Court denied appellate counsel's motion to reconstruct the record. Johnson v. State, 608 So. 2d at 13. Appellate counsel himself stated that he was being rendered ineffective due to the omissions in the record cited in his brief. (Initial Brief at 84-85).

Among the items appellate counsel needed but was refused were the written peremptory challenges, newspaper article, tape recording made by court reporter during jury selection, and a transcript of testimony considered by the trial judge when ruling on a motion to suppress statements. (See Petition at p. 8 and Initial Brief at 84-85). These items were necessary in order for

this Court to perform a complete review, particularly regarding the following direct appeal issues: Issue  II (trial court’s denial of individual voir dire of jurors who admitted to reading pretrial publicity). Mr. Johnson has been prejudiced because written peremptory challenges were needed to show which party excused which jurors by peremptory strike and needed the newspaper article to show prejudicial publicity that prospective jurors were exposed to and to demonstrate that the trial court erred in refusing to grant individual voir dire on the publicity issue; Issue III (trial court’s repeated interjections and rebukes of defense counsel in front of jury).  Mr. Johnson has been prejudiced by the ommission of the clerk’s tape recording to show laughter directed at trial counsel by jurors after the judge’s interruptions in order to demonstrate the trial judge’s actions toward defense counsel and the resulting affect upon jurors; Issue IV (trial court’s denial of motion to suppress statements made by jailhouse informant).  Mr. Johnson has been prejudiced by the ommission of the transcript of testimony.  The transcript was necessary to show what the trial judge considered when ruling on the motion to suppress statements and to demonstrate the merits of the appellate issue.

The portions of the record that are missing are likewise necessary for a complete review of the following issues raised in Mr. Johnson’s present Petition for Habeas Corpus: Claim II (Mr.

Johnson’s absence from a critical stage of the trial, i.e., exercising of peremptory strikes). Mr. Johnson is prejudiced because due to the fact that the written peremptory strikes are missing, Mr. Johnson cannot accurately track the peremptory challenges made and by whom; Claim VIII (abridgment of Mr. Johnson’s ability to exercise peremptory challenges, refusal to grant additional peremptory challenges and error in refusing to grant defense challenges for cause). Mr. Johnson has been prejudiced by the ommission of the newspaper article and cannot show the substance of jurors knowledge of the case from pretrial publicity. This item is necessary due to the trial court’s limiting individual voir dire and thereby forcing defense counsel to use peremptory challenges when cause challenges were denied. Had this information been included in the record, Mr. Johnson would be able to demonstrate that the judge erred in denying the challenges for cause requested by the defense of jurors who were exposed to it and that defense counsel was wrongfully precluded from discovering necessary information through voir dire, and thus, error for the court to deny additional peremptory challenges. Mr. Johnson was also prejudiced by the absence of the written peremptory slips that are necessary to adequately track the strikes exercised.

Contrary to the situation presented in Thompson v. State, 759 So. 2d 650 (Fla. 2000) upon which Respondent relies (Response

at 42), the situation is not that Mr. Johnson has "point[ed] to no specific error which occurred" during the portions of the record that remained untranscribed". Thompson at 660. Here, Mr. Johnson has specifically alleged the errors that occurred and has demonstrated that he has been prejudiced due to the specific portions that were not included in the record that are necessary to more fully plead his claims.

Additionally, appellate counsel was ineffective for failing to timely obtain the missing items, i.e., the court reporter's tapes, and slips used for peremptory challenges and then move to supplement the record with these items. Because of the passage of time, these items are no longer physically available.

Accordingly, this claim is properly before this Court and habeas relief is warranted. To the extent it is possible to reconstruct the record, Petitioner requests this matter be remanded to the lower court for that purpose. To the extent reconstruction of the record is impossible, Mr. Johnson is entitled to a new trial.

## 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.**

The State asserts that this claim is procedurally barred because it was not raised below. (Response at 43).

Petitioner disputes Respondent's interpretation of Muhammad

v. State, 782 So. 2d 343 (Fla. 2001) wherein the Respondent asserts that "claims of absence during bench conference must be preserved for appellate review through a specific objection" (Response at 43). No pin cite for this assertion was provided. Apparently, however, Respondent's reliance is upon the language in Muhammad wherein the Court states "In this case, no objection was raised and therefore the procedural protections ***of Coney*** are waived." Muhammad at 353 (Emphasis added). Accordingly, the State's interpretation and attempted application to Mr. Johnson's case is incorrect. As this Court made clear in Muhammad, Coney[2] was this Court's "interpretation of a procedural rule rather than an absolute constitutional right to be present at the bench conference when peremptory challenges are exercised" Muhammad at 353. Mr. Johnson has raised this as a constitutional right as opposed to a violation of procedure, i.e., Fla. Rule Crim P. 3.180(a)(4), which was at issue in Carmichael v. State, 715 So. 2d 247 (Fla. 1998) and Coney. Thus according to this Court's ruling in Francis v. State, 413 So. 2d 1175[3] (Fla. 1982)(receeded from on other grounds), Mr. Johnson's claim is properly before this Court.

Additionally, the State's reliance upon Rutherford v. Moore,

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[2] Coney v. State, 653 So.2d 1009 (Fla. 1995).

[3] Undersigned counsel apologizes for a typographical error in the citation to this case in the initial petition. The correct cite is 413 So. 2d 1175 (Fla. 1982).

774 So. 2d 637 (Fla. 2000),(Response at 43), is not applicable to the issue raised by Mr. Johnson. In Rutherford, the issue that was procedurally barred was regarding the Petitioner's absence from a penalty phase charge conference which consisted of purely legal issues and the defendant's presence would be of no assistance. See Rutherford at 647. Likewise, Respondent's reliance upon Hardwick v. Dugger, 648 So. 100 (Fla. 1994) (defendant's absence during depositions), is not on point. Mr. Johnson's claim specifically deals with his absence during the exercise of peremptory challenges. This Court has recognized that "the exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant". Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982)(receeded from by Muhammad on other grounds at FN4) citing to Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410 (1894) and Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136 (1892). This Court recognized the same principle in Muhammad:

> In *Francis* [citation omitted], we recognized that the process of exercising challenges to members of the jury constitutes a critical stage of the proceedings where a defendant has a right to be present. We found reversible error in *Francis* because the defendant did not have an opportunity to consult with his counsel while peremptory challenges were being exercised and the defendant did not subsequently waive the right to be present.

Muhammad at 351 citing Francis. Ultimately, Muhammad was denied

relief because the questioning of jurors took place in open court **and** he ratified the procedure employed and "[m]ost importantly, after the selections were made, Muhammad gave an affirmative answer to the trial court's question whether [he] had 'enough time to discuss these choices with [his] lawyer". Muhammad at 352. Accordingly, there is a significant distinction between the issues raised by Mr. Johnson in his petition and the cases relied upon by Respondent. Indeed, Respondent recognizes that the cases upon which it relies to justify a defendant's absence from certain events during a trial, stand for the proposition that such a procedure was constitutionally acceptable when the event concerned *purely legal matters* (Response at 43). The same cannot be said for the situation presented in Mr. Johnson's case wherein the allegation is that he was not included in the peremptory challenges - a process where a defendant's presence could be of assistance.

Thus, given the recognition of the critical nature of peremptory challenges, a defendant's right to be included therein and the circumstances presented in Mr. Johnson's case, Mr. Johnson is entitled to a new trial.

## 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.**

Respondent asserts that Petitioner has failed to demonstrate ineffective assistance of appellate counsel. (Response at 48). Additionally, Respondent asserts that appellate counsel did assert the finding of pecuniary gain aggravator for Beasley and the cold, calculated, premeditated (CCP) aggravator for all counts (Response at 45-46). However, the pecuniary gain aggravating instruction was raised on appeal *as applied*, Mr. Johnson raises the fact that appellate counsel was ineffective for failing to challenge the aggravating factor for vagueness and that the jury did not receive the proper limiting instructions. (Petition at 17). Mr. Johnson's jury was never instructed that the pecuniary gain aggravator exists when pecuniary gain is the "primary motive" for the murder. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). Scull was decided in 1988, thus the issue could and should have been raised at the time of Mr. Johnson's direct appeal which was filed in 1991 and appellate counsel was deficient for failing to present the issue to this Court. Mr. Johnson was prejudiced because his jury relied upon this invalid aggravator as instructed and has not been afforded a proper

review and relief on this issue due to appellate counsel's deficient performance.

Likewise, appellate counsel failed to raise the issue that the CCP aggravating factor was unconstitutionally vague and that the jury did not receive the proper guidance. It was only raised as applied. This Court had articulated the definition of this aggravating factor prior to Mr. Johnson's trial in Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988). Moreover, the State's assertion that this claim is not meritorious because Jackson v. State, 648 So. 2d 85 (Fla. 1994)wherein the CCP instruction was struck down had not been decided at the time of Mr. Johnson's trial (Response at 47), is inconsistent with this Court's treatment of the CCP instruction in cases similar to Mr. Johnson's, i.e., occurring prior to Jackson, yet the CCP instruction was addressed by this Court. See e.g., Walls v. State, 641 So 2d 381 (Fla. 1994). In these cases, although the penalty phase occurred prior to the decision in Jackson, this Court addressed the issue on the merits when properly before this Court. Likewise, the Court should do so here and consider the error in a cumulative fashion with the other sentencing errors that occurred in Mr. Johnson case.

Contrary to the suggestion in the State's Response, undersigned counsel is not asking this court to rule on the

heinous, atrocious, and cruel aggravating factor for a second time. As undersigned counsel stated in the petition, this Court has already found error regarding that instruction in Mr. Johnson's case but deemed it harmless. See Johnson v. State, 608 So 2d 4, 13 (Fla. 1992). Counsel is requesting this Court however, to review Mr. Johnson's other sentencing claims raised in the Petition together with the error already found, i.e., HAC, by this Court for the cumulative effect upon the proceedings. Such a cumulative analysis is proper. The cumulative effect is that Mr. Johnson's death sentence is not reliable and he is entitled to a new sentencing.

## 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 is not raised merely to express dissatisfaction with the Court's prior ruling. (See Response at 49). Rather it is raised in order to bring to this Court's attention matters that were overlooked, or now, because of further development in the case, require this Court's attention and action to correct an injustice. This Court has exercised its jurisdiction through petitions for habeas relief in order to grant relief in such instances and has the inherent power to do justice.

Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965)(case remanded on petition for habeas corpus where illegal sentence was imposed); Palmes v. Wainwright, 460 So. 2d 362, 364-365 (Fla. 1984) (argument presented for Court to reconsider matter that was raised and resolved on original appeal addressed on merits as "without basis in law or fact").

Mr. Johnson's death sentence is an illegal sentence because the trial court failed to find and weigh the existence of mitigation that was established in the record.

Mitigating factors "include all matters relevant to the defendant's character **or** record **or** to the circumstances of the offense proffered as a basis for a sentence less than death" Spencer v. State, 691 So. 2d 1062, 1064 (Fla. 1997)(emphasis added). Mr. Johnson met this standard. The trial court's refusal to consider these matters violated the Eighth and Fourteenth Amendment requirements as articulated in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978) that trial court's must consider "as a mitigating factor, any aspect of a defendant's character **or** record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". Lockett, 98 S. Ct. at 2965. In so doing, Mr. Johnson was denied the constitutionally required individual sentencing determination to which he is entitled and the resulting sentence is arbitrary. Hitchcock v. Dugger, 481 U.S. 393 (1987); Proffitt

v. Florida, 428 S.S. 242 (1976). As stated in the petition, similar factors have been accepted as mitigating in other cases. For example, the trial court in Mr. Johnson's case addressed the evidence presented regarding Mr. Johnson's abusive childhood in the following fashion: "The fact that this defendant had an undesirable or not necessarily happy child hood **has absolutely nothing to do with this case**." (R. 3645)(emphasis added). Clearly the trial court's treatment of this valid mitigating circumstance is contrary to the United States Supreme Court's holding in Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869 (1982). It is also contrary to Campbell v. State, 571 So. 2d 415 (Fla. 1990) even as modified by Trease v. State, 768 So. 2d 1050 (Fla. 2000). See e.g., Justice Pariente's concurring opinion in Ford v. State, 2001 WL 1044912, *11 (Fla.), 26 Fla. L. Weekly S553 (2001). Mr. Johnson's trial judge failed to follow the applicable law when assessing the valid and established mitigation. This error should be considered cumulatively with the other sentencing error that occurred in Mr. Johnson's case presented in his petition. Confidence in the result is undermined. Mr. Johnson is entitled to a new sentencing.

## 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.**

The import of this Claim is that Mr. Johnson's right to exercise his peremptory challenges in a constitutional manner was abridged. Appellate counsel did not raise the issue that the trial court erred in denying defense challenges for cause as to prospective jurors Suggs, Wolfe and Towns.

Mr. Johnson's trial counsel went to great lengths to ensure that his position regarding these jurors was documented. Appellate counsel's failure to raise this preserved issue on direct appeal is now properly presented in Mr. Johnson's petition for habeas corpus.

Appellate counsel should have raised this issue on direct appeal because the trial court erred in refusing to grant the challenges for cause. The trial court should have granted the cause challenges because of the long standing rule that:

> if there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial[,] he should be excused on motion of a party, or by [the] court on its own motion.

Singer v. State, 109 So. 2d 7 (Fla. 1959).

Juror Suggs stated that he would have a hard time not leaning toward the death penalty when someone used a weapon and who went out with the intent to kill somebody. These comments are similar to those of juror Johnson in Hill that were determined to be indistinguishable from those made by the juror in Singer that resulted in reversible error. Hill at 556.

Juror Wolfe demonstrated a reasonable doubt as to his ability to fairly consider and apply the insanity defense and Juror Towns, demonstrated a reasonable doubt as to his ability to be fair and impartial based upon his position that because of the multiple charges he would lean in the direction of death and that it would take evidence to change his mind and he could think of no evidence that would do so. Mr. Johnson's trial attorney stated on the record that a reasonable doubt existed as to these jurors impartiality.

As recognized by this Court:

> the "statement of a juror that he can readily render a verdict according to the evidence, not withstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence."

Hill v. State, 477 So. 2d 553 at 555-556 citing Singer.

In this case, as in Moore v. State, 525 So. 2d 870, 871 (Fla. 1988), insanity was ***the*** defense and the potential jurors demonstrated an inability to be impartial regarding the legally

recognized defense. This Court should reverse Mr. Johnson’s case as it did in Moore. See also Noe v. State, 586 So. 2d 371 (Fla. App. 1 Dist., Aug. 7, 1991).

Respondent relies upon this Court’s opinion in Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998) to assert that none of the jurors at issue actually sat on the jury and that he points to no objectionable juror who did sit. (Response at 57). Thus, Mr. Johnson’s trial attorney would have been required to identify a particular juror who he would have used a peremptory challenge against but could not due to the court’s refusal to permit additional peremptory challenges. Trial counsel did inform the lower that he would have used the additional peremptory challenges had they been granted. At the time of Mr. Johnson’s trial, 1988, the case law did not discuss the necessity to specifically identify a juror who was objectionable and remained on the panel in order to preserve the issue. Trotter v. State, 576 So. 2d 691, 693 (Fla. 1991)(FN6).

“Jurors should if possible be not only impartial, but beyond even the suspicion of partiality” O’Connor v. State, 9 Fla. 215, 222 (1860) Here, there was a “doubt as to the juror’s sense of fairness or his mental integrity” and they should have been excused. Johnson v. Reynold, 97 Fla. 591, 598, 121 793, 796 (1929).

As in Hill:

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause. See *Thomas v. State*, 403 So.2d 371 (Fla. 1981). This record clearly reflects that juror Johnson did not possess the requisite impartial state of mind. We find the trial judge in this case failed to apply the rules of law set forth in *Singer*. Consequently, his discretionary authority is not in issue in this proceeding.

Hill v. State, 477 So. 2d 553, 556 (Fla. 1985).

The trial judge in Mr. Johnson's case did not apply the rules of law set forth in Singer, thus "his discretionary authority is not in issue in this proceeding".

Additionally, the error is not harmless because as in Hill, it abridged Mr. Johnson's right to peremptory challenges by reducing the number of those challenges available to him. See Hill at 556. Here the court forced Mr. Johnson to use peremptory challenges on persons who should have been excused for cause and Mr. Johnson subsequently exhausted all of his peremptory challenges and additional challenges were sought and denied.

> "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 case, provided the party subsequently exhausts all of his or her**

**peremptory challenges and an additional challenges is sought and denied.**

<u>Hill v. State</u> at 556,(citations omitted)(emphasis added).

Appellate counsel's failure to present this issue on appeal was deficient performance which prejudiced Mr. Johnson. This preserved issue was not raised on direct appeal, appellate counsel's omission was deficient performance because the facts from which to raise it were in the record, the case law supporting this issue was in existence at the time of Mr. Johnson's direct appeal and applicable at the time of Mr. Johnson's trial and establish the fact that the trial court committed reversible error. The failure of appellate counsel to bring this issue establishing reversible error to this Court's attention on direct appeal prejudiced Mr. Johnson because it is a claim for which relief in the form of a new trial and/or penalty phase was warranted. Accordingly, habeas relief is now proper as ineffective assistance of appellate counsel has been demonstrated and Mr. Johnson should be granted a new trial and/or penalty phase.

The procedure employed by the trial court rendered the exercise of peremptory challenges illusory. Contrary to the State's assertion that Mr. Johnson seeks "another" review of this issue that was raised on direct appeal (Response at 55), this issue was not raised on direct appeal. While it is true that this Court ruled on direct appeal "We also find no merit to

Johnson's other arguments regarding voir dire" Johnson v. State, 608 So. 2d 4, 9 (Fla. 1992), it did so in response to direct appeal Issue II ( See Initial Brief at 29-34). The direct appeal issue focused on the trial judge's refusal to grant individual voir dire. The present claim is a distinct issue regarding the right to peremptory challenges and the denial of cause challenges to jurors Suggs, Wolfe and Towns . Appellate counsel mentioned peremptory challenges in Issue II in one sentence: "Failure to permit individual voir dire also caused defense counsel to exercised peremptory strikes without being able to make an intelligent determination as to whether the prospective juror was biased against Johnson." (Initial Brief at 33). Appellate counsel did not raise the separate and distinct issue presented in this petition that the actions of the trial court abridged Mr. Johnson's right to meaningfully exercise peremptory challenges. Relief is proper.

## CONCLUSION

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 December 17, 2001.

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**CERTIFICATE OF TYPE SIZE AND STYLE**

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

____________________________
HEIDI E. BREWER