IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1042

TERRELL M. JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

CORRECTED INITIAL BRIEF OF APPELLANT

WILLIAM M. HENNIS III
Assistant CCRC
Florida Bar No. 0066850

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL-SOUTH
101 N.E. 3rd Ave., Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This appeal involves the summary denial of Mr. Johnson's successive Rule 3.851 motion without an evidentiary hearing. References in the Brief shall be as follows:

(R. __). -- Record on instant appeal.

(S. __). -- Supplemental Record on instant appeal.

Other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Johnson has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Johnson through counsel accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

Mr. Johnson was indicted for two counts of first degree murder on May 23, 1980, in Orange County, Florida.[1] The jury returned verdicts of guilty and a judgment of conviction was entered on September 26, 1980, for first degree murder as to Count I and the lesser included offense of second degree murder as to Count II. The sentencing jury first voted 6-6 which would have resulted in a life recommendation if no additional vote had been taken. However, the jury continued to deliberate, and after a second vote of 7-5 returned an advisory recommendation of death on September 29, 1980. Mr. Johnson was sentenced to death on October 3, 1980, for Count I of the indictment, and to life imprisonment for Count II of the indictment.

Mr. Johnson appealed from the judgment of conviction and this Court remanded for gross errors and omissions in the trial transcript. The case was resubmitted over lengthy enumerated objections of defense counsel and Mr. Johnson's convictions were affirmed on November 23, 1983. Johnson v. State, 442 So. 2d 193 (Fla. 1983). Mr. Johnson thereafter sought Rule 3.850 relief.

After an evidentiary hearing on December 22, 1986, the trial court issued an order denying relief on June 12, 1989. Subsequently, Mr. Johnson's appeal to this Court was denied. Johnson v. State, 593 So. 2d 206 (Fla. 1992).

On May 5, 1992 Mr. Johnson filed a petition for writ of habeas

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[1]A complete procedural history of the case with citations to the prior records may be found in Mr. Johnson's February 8, 2002 Rule 3.851 motion. (S. 2-7).

corpus in the United States District Court for the Middle District of Florida. On September 8, 1994, the District Court dismissed the petition ordering Mr. Johnson to exhaust claims in state court.

Mr. Johnson filed a Petition for Writ of Habeas Corpus in this Court seeking exhaustion of claims on January 18, 1995. That petition was denied and a motion for rehearing was denied on June 5, 1997. Johnson v. Singletary, 695 So. 2d 263 (Fla. 1996).

On February 13, 1997 Mr. Johnson filed a second Rule 3.850 motion alleging, inter alia, newly discovered evidence and evidence of a previously unknown Brady violation and on January 28, 1999, Mr. Johnson filed a consolidated motion to vacate judgment of conviction and sentence with request for leave to amend and for evidentiary hearing.

On June 15, 1999, the Honorable A. Thomas Mihok entered an order denying Mr. Johnson's motion without an evidentiary hearing. On October 25, 2001 Mr. Johnson's appeal from that summary denial of postconviction relief was denied. A Motion to Relinquish Jurisdiction back to circuit court in Orlando for consideration of public records production issues was also denied by Order of this Court on October 25, 2001, but "without prejudice to file an appropriate motion with the trial court". A motion for re-hearing before this Court was subsequently denied on December 31, 2001. The mandate issued January 30, 2002, included language directing Mr. Johnson to return to Circuit Court to adjudicate public records claims that this Court had refused to remand for during the pendency of the appeal.

Mr. Johnson filed a new Fla. R. Crim. P. 3.851 motion on February 8, 2002 (S. 1-104). The State subsequently filed a response, and on May 31, 2002, Mr. Johnson filed a reply, a motion for continuance of the scheduled Huff[2] hearing and a motion for *in camera* inspection (S. 106-179; 186-560). On August 2, 2002, Mr. Johnson filed a consolidated 3.851 motion with additional claims in light of newly discovered evidence and new federal case law applicable to the Florida death penalty sentencing system (R. 56-124). See Ring v. Arizona, 122 S. Ct. 2428 (2002). On August 6, 2002, Mr. Johnson filed a Motion to Allow Amendment of Prior Motion to Vacate, pursuant to Fla. R. Crim. P. 3.851 (f)(4). (R. 125-27). The lower court ultimately denied the August 2, 2002 motion without an evidentiary hearing in orders dated November 4, 2002 and March 26, 2003. (R. 201-03, 281-84). This appeal follows.

FACTS OF THE CASE[3]

Mr. Johnson is a death-sentenced inmate whose case is before this Court on appeal from the summary denial of postconviction relief on a successive motion filed pursuant to Fla. R. Crim. P. 3.851.

On March 14, 2001 and on April 19, 2001, months after the oral argument in the prior proceedings in this Court, undersigned counsel was informed first by the Office of the Secretary of State (Capital

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[2]Huff v. State, 622 So. 2d 982 (Fla. 1993).

[3]These facts are summarized from Mr. Johnson's Motion To Relinquish Jurisdiction in Case No. 96,333 before this Court (S. 58-105). The Motion was included as Attachment D of Mr. Johnson's February 8, 2002 Rule 3.851 motion. All the documents referred to in the facts may be found in Attachments A-H to the Motion To Relinquish (S. 70-105).

Collateral Post Conviction Records Repository) and then by the Florida Department of Law Enforcement (FDLE) that public records in Mr. Johnson's case had recently been produced to the repository by the State Attorney's Office - Ninth Judicial Circuit and by FDLE. Undersigned counsel responded by letter to the repository on April 25, 2001, attaching the prior correspondence and the FDLE pleading. On May 9, 2001, in response to an April 25, 2001 letter from undersigned counsel, the repository provided a copy of the index specifically detailing the materials that had sent to the repository by Florida Department of Law Enforcement (FDLE) and the State Attorney Office, 9th Judicial Circuit. A CD ROM with the unsealed documents encoded was also provided to counsel by the repository.

The receipt of notice of production of additional public records during an appeal process is an unusual occurrence. Comparison of the new production with the materials previously provided by the State Attorney and FDLE was commenced, with an eye towards supplemental litigation in Mr. Johnson's case.

In the case of FDLE, the two boxes of records provided in April 2001 included one box, #01688, that was labelled as restricted and sealed, pursuant to Fla.R.Crim.P. 3.852 (f).[4]

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[4] **Exempt or Confidential Public Records**

(1) Any public records delivered to the repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07(1), Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public

The only indication anywhere in the record that FDLE ever claimed any exemptions during the postconviction litigation in Mr. Johnson's case can be found in a May 21, 1992 letter from FDLE to CCR in response to a 1992 records request in Mr. Johnson's case (S. 102). The letter stated that FDLE did claim that "[i]nformation exempt from disclosure pursuant to Sections 119.07(3)(b), (k) (x), Florida Statutes, has been excised." However, following a subsequent March 25, 1996 CCR records request to FDLE, during a hearing before Judge A. Thomas Mihok on August 14, 1997 pursuant to a Motion To Compel that had been filed by Mr. Johnson on March 7, 1997, Steve Brady, counsel for the F.D.L.E., represented that "we have conducted a diligent search and we've given them (CCR) everything we have on Mr. Johnson" (S. 62).

FDLE asserted two entirely new exemptions in the April 2001 production of records: 119.07(3)(c) regarding information revealing the identity of a confidential informant and 119.07(3)(f) regarding criminal intelligence information or investigative information...which reveals the identity of a victim of sexual battery (R. 84). In 2002 an *in camera* examination was performed in circuit court on the contents of Box # 01688. Mr. Johnson had plead

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records and the legal basis for the exemption.

(2) Upon entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.

that it would be necessary to obtain testimony from FDLE and other parties to establish the relevance and materiality of the documents produced to the repository in his final consolidated motion:

> 1. Mr. Johnson pleads pursuant to Fla. R. Crim. P. 3.851(e)(2)(C) that potential witnesses at an evidentiary hearing would include, but not be limited to:
>
> Chris Lerner, Esq.
> Office of the State Attorney
> 415 N. Orange Avenue
> Orlando, FL 32801
> (407)836-2406
>
> Custodian of Records
> Office of the State Attorney
> 415 N. Orange Avenue
> Orlando, FL 32801
> (407)836-2406
>
> James D. Martin, Esq.
> Assistant General Counsel
> Florida Department of Law Enforcement
> P.O. Box 1489
> Tallahassee, FL 32302
> (850)410-7676
>
> The Custodian of Records
> Florida Department of Law Enforcement
> P.O. Box 1489
> Tallahassee, FL 32302
> (850)410-7676
>
> Pamela Izakowitz, Esq.
> Martin McClain, Esq.
> Sylvia Smith, Esq.
> c/o: CCRC-South
> 101 N.E. 3rd Ave., Suite 400
> Ft. Lauderdale, FL 33301
> (954)713-1284
>
> 2. If an evidentiary hearing is scheduled in the above captioned case, undersigned counsel is prepared to subpoena the above listed witnesses to testify under oath to the facts alleged in the motion, pursuant to Fla. R. Crim. P. 3.851 (e)(C)(ii). Documentary evidence pursuant to Fla. R. Crim. P.

> 3.851(e)(C)(ii) is contained in the Attachments to this pleading and/or prior pleadings.

(R. 63-64). These same names and addresses of witnesses to be called at an evidentiary hearing were also included in the first Rule 3.851 pleading filed by Mr. Johnson in this cause on February 8, 2002 (S. 8).

Mr. Johnson never got the opportunity to examine the FDLE about the genesis of the documents that were produced. The lower court entered orders denying his Rule 3.851 motion without an evidentiary hearing.

SUMMARY OF THE ARGUMENTS

1. The lower court entered orders denying relief without an evidentiary hearing on Mr. Johnson's public records claim which were an abuse of discretion that denied him an opportunity to develop the reasons why and how in 2001 the FDLE produced for the first time records concerning criminal activity by persons with the same names as the jurors in his 1980 trial.

2. Mr. Johnson is entitled to relief from his death sentence pursuant to Ring v. Arizona, 122 S. Ct. 2428 (2002). The lower court's order failed to find any procedural bar, finding only that "this claim does not merit relief".

3. Action by the lower court entering orders denying relief without an evidentiary hearing on Mr. Johnson's claim that newly discovered evidence required an evidentiary hearing in circuit court to support his position that lethal injection as a method of execution violates the Eighth Amendment of the United States

Constitution was erroneous.

ARGUMENT I

MR. JOHNSON IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS RULE 3.851 CLAIMS

Mr. Johnson's final consolidated Rule 3.851 motion was filed on August 2, 2002.[5] He pleaded detailed issues and demonstrated his entitlement to an evidentiary hearing. However, on November 4, 2002, and on March 26, 2003, the lower court entered orders summarily denying Mr. Johnson' Rule 3.851 motion without granting a hearing on any portion of it. (R. 201-03, 281-84).[6] The lower court erred.

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[5]Mr. Johnson's initial successive Rule 3.851 motion was served on February 8, 2002. The motion was twenty pages long, with additional Attachments A-D. (Note that Attachment D, Mr. Johnson's May 23, 2001 Motion To Relinquish Jurisdiction, itself included Attachments A-H). Mr. Johnson's Rule 3.851 initial motion contained two claims. The first concerned certain documents related to Mr. Johnson's case produced in March and April 2001 to the Capital Collateral Post Conviction Records Repository by the FDLE and the Office of the State Attorney in Orange County, Florida. Attachment B of Mr. Johnson's motion included indices prepared by the documents repository of the 2001 production, including the information that the FDLE's production referenced individuals named Linda Stewart, William Young, Peggy Smith, Gregory Simmons, Fred Cooper, William Young, and Betty Phillips. The second claim was a cumulative error claim predicated on Kyles v. Whitley, 514 U.S. 419 (1995) and State v. Gunsby, 670 So.2d 920 (Fla. 1994). The second claim was ultimately denied as procedurally barred in the lower court's order on November 4, 2002. (R. 202). The public records claim requested leave to amend after an *in camera* inspection by the lower court of all documents claimed as exempt, subsequent review of any documents turned over by the lower court, and comparison of all the new documents discovered since 2001 with all documents previously in the possession of counsel.

[6]The later order, granting in part and denying in part Mr. Johnson's Motion for Rehearing, released to the parties copies of a single FDLE investigative report that had been claimed as exempt, document MI-57-656, described by the lower court in the order as follows: "The report refers to a fugitive with a criminal history

The law strongly favors full evidentiary hearings in capital post conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing...our review is limited to determining whether the motion conclusively shows whether [Mr. Johnson] is entitled to no relief." Gorham v. State, 521 So.2d 1067, 1069 (Fla; 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).

Some fact based claims in post conviction litigation can only be considered after an evidentiary hearing, Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. Where a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-3 (Fla. 1987). "Accepting the allegations . . .at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing", Lightbourne v. Dugger,

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who uses as an alias the name of one of the jurors in Defendant's trial. While the Court notes that any connection between that fugitive and the actual juror is purely speculative, that investigative report is the only exempt document which the Court cannot definitively find to be irrelevant." (R. 282). No opportunity to amend was provided by the lower court after entry of the order. The order noted that "All other claims within the instant motion are DENIED" and further that "Defendant is advised that if he wishes to appeal, he must do so in writing, within thirty (30) days of this Order" (R. 283).

549 So.2d 1364, 1365 (Fla 1989).

Mr. Johnson has pleaded below detailed allegations concerning the public records mess which he found himself in when public agencies took it upon themselves to produce entirely new records to the records repository while Mr. Johnson was appealing the lower court's prior denial of Rule 3.850 relief to this Court. Once he was able to return to Circuit Court via the means of filing a successive motion pursuant to Rule 3.851(e)(2), which he did only 9 days after the mandate issued from this Court following the prior appeal, he argued that only an evidentiary hearing could help him to establish what the FDLE documents meant in the overall context of the case. On February 21, 2002, the lower court ordered the state to respond within 30 days to Mr. Johnson's motion (S. 105). On March 25, 2002, the State filed a thirteen-page response, with additional Exhibits A-G, to Mr. Johnson's initial Rule 3.851 motion (S. 106-179). On May 31, 2002, Mr. Johnson filed a Reply to the State's Response, further detailing the necessity for an evidentiary hearing on the public records issues:

> 2. The State noted in its Response that this Court entered an order dated August 18, 1997 finding that the Ninth Circuit State Attorney and the FDLE had complied with public records requests. As noted in Mr. Johnson's 3.851 motion, this Court later entered an order on January 5, 1999 stating that "there will be no further public records requests or argument regarding public records requests," and Mr. Johnson subsequently filed his consolidated postconviction motion on January 28, 1999.
>
> 3. As a starting point, Mr. Johnson informs the court that that portion of the production of records by FDLE in April 2001 that was not claimed as exempt and sealed

includes numerous documents that were never produced to Mr. Johnson during the pendency of his case in circuit court. Twenty three (23) folders of documents were indexed and included in the FDLE production. Attachment 2.

4. Even a cursory examination of these records reveals that many of them could not possibly have been provided to Mr. Johnson during the course of his case in circuit court. This is because four folders of the documents had not been created within FDLE until after Mr. Johnson filed his final 3.850 motion on January 28, 1999. Specifically, folders 8, 18, 19 and 23 contain documents dated July 8, 1999, April 7, 1999, November 12, 1999, and June 10, 1999, all created after this Court summarily denied Mr. Johnson's 3.850 motion.

5. In addition to the documents created after the public records process had been ended in Mr. Johnson's case, the other 19 folders produced in 2001 by FDLE appear to have been produced to Mr. Johnson for the first time in 2001 despite the long history of prior public records litigation in circuit court. These documents are dated from February 1988 until September 1998. Certainly this production calls into question the record keeping practices of the FDLE in regards to Mr. Johnson's case. This is not speculation as alleged in the State's response. Mr. Johnson affirmatively states that he was never provided the nineteen folders of records dated from 1988-1998 attached to this Reply and it is self evident that he could not have been supplied with folders 8, 18, 19 and 23, that post-date his January 1999 3.850 pleading.

6. Why the pre-1999 FDLE records were not produced before 2001 is an issue that can only be resolved at an evidentiary hearing. Why the 1999 FDLE material was produced in 2001 along with the other material is another entirely relevant issue. The material produced by FDLE is newly discovered evidence pursuant to the State's citations in its Response. See Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). "The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." Williams v. Taylor, 529 U.S. 420, 435 (2000). "Diligence . . . depends on whether the prisoner made a reasonable attempt, in light of

the information available at the time, to investigate. . . . [I]t does not depend . . . upon whether those efforts could have been successful." Id. Mr. Johnson is being diligently represented through the instant pleadings.

7. However, Mr. Johnson submits that the reliance by the State on Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994) for the proposition that the evidence withheld must establish facts that would probably produce an acquittal on re-trial is not the relevant caselaw for the determination of whether Mr. Johnson is entitled to an evidentiary hearing. This is the kind of issue that the Florida Supreme Court had in mind when it recently advised that "[a]lthough evidentiary hearings on factually based claims contained in successive motions are not automatically required under the new rule, we encourage trial courts to liberally allow them on timely raised newly discovered evidence claims, and Brady or Giglio claims. This will avoid possible delays caused by the need to remand successive motions for factual development of such claims." Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993 and Florida Rule of Judicial Administration 2.050, 797 So. 2d 1213, 1219-20 (Fla. 2001).

8. The State is in no position to explain why the FDLE waited until April 2001 to produce extensive records involving criminal activity by six of the jurors in Mr. Johnson's case: Linda Stewart, William Young, Peggy Smith, Gregory Simmons, Fred Cooper, and Betty Phillips. This material was never produced by FDLE during the pendency of Mr. Johnson's prior postconviction motion. Effective legal representation has been denied Mr. Johnson because the public records from FDLE that were previously produced were incomplete. It is impossible for counsel to properly prepare a complete Rule 3.851 motion for Mr. Johnson without complete discovery.

9. Mr. Johnson's position is that his postconviction claims cannot be fully and properly plead until an *in camera* inspection of the additional documents produced by FDLE to the Secretary of State's repository for the first time in April 2001 is undertaken by this court pursuant to Fla. R. Crim. P. 3.852(f).

As Mr. Johnson argued in his 3.851 motion, only after disclosure of any additional documents by this Court can the comparison of all the new 2001 records production with the materials previously provided by the State Attorney and FDLE be completed. This undertaking is an absolute responsibility of postconviction counsel. See Steinhorst v. State, 695 So. 2d 1245, 1247, 1248 (Fla. 1997).

10. There is no road map for the present proceedings. The State's Response takes the position that Mr. Johnson is free to "petition the court to examine those sealed copies to determine whether they should be released to him." Response at 10. Mr. Johnson does not agree to his Rule 3.851 motion being transmuted into a Fla. R. Crim. P. 3.852(f)(2) motion for examination of exempt or confidential records.

11. However, undersigned counsel has no objection to further discovery before proceeding to a Huff hearing in the instant case. Therefore, simultaneously with this Reply, Mr. Johnson is filing a "Motion for In Camera Inspection" and a "Motion to Reschedule the Huff Hearing". An *in camera* inspection of the FDLE documents in circuit court will provide Mr. Johnson with a forum for obtaining this information, and to avail himself of the postconviction discovery process, which requires a certain showing be made to the trial court. See State v. Lewis, 656 So. 2d 1248 (Fla. 1995).

12. **Testimony at a public records proceeding from the relevant FDLE officials about their records production in 2001 is necessary to establish both why the records were produced in 2001 as well as why they were not produced before. Counsel respectfully suggests that since FDLE will be present at an *in camera* inspection, such testimony could be adduced at the same hearing**.

13. Undersigned counsel has not, as the State's Response charges, engaged in speculation. This matter was brought about solely by the actions of the Ninth Circuit State Attorney and the FDLE in producing public records while Mr. Johnson's case was before the Florida Supreme Court. Counsel for Mr. Johnson is compelled to pursue every possible document connected to his case pursuant to Steinhorst. To proceed to a Huff hearing and a summary

> denial of this claim without an evidentiary hearing as the State suggests, without further discovery, is a recipe for revisiting these issues several years hence.

(S. 192-194)(emphasis added).[7] As noted in the pleading, Attachment 2 to Defendant's Reply included all the FDLE documents included in the April 2002 production.

Mr. Johnson also filed two motions on May 31, 2002. One was a motion for continuance of the Huff hearing then scheduled for June 11, 2002, and a second motion requested that the lower court enter an order pursuant to Fla. R. Crim. P. 3.852(f) requiring the shipment of the sealed FDLE records from the records repository to the court for an *in camera* inspection (S. 186-190). Two days after the hearing on June 11, 2002 (a hearing which had originally been scheduled as a Huff hearing), the lower court entered an order requiring that the sealed FDLE records be shipped to him for an *in camera* inspection. (R. 5-34). The record is silent as to the reason and timing for FDLE's production of previously undisclosed documents relating to the criminal history of jurors at Mr. Johnson's trial. At the June 13, 2002 hearing there was considerable discussion about just this issue:

> MR. HENNIS: That's one of the reasons I want an evidentiary hearing so I can call in FDLE and ask them exactly why they created the documents, what they're relevant to from their perspective, how far back did their search go because the additional 19 folders have documents going back to 1988, certainly during the pendency of Mr. Johnson's post-conviction

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[7]The Orange County Clerk omitted pages 2-5 of Mr. Johnson's May 31, 2002 Response from the recently filed Supplemental Record. They are included as Attachment A to this Amended Initial Brief.

> case that were never provided. FDLE certainly never on the record said that they have provided these documents to us before, and I don't think the state attorney knows, your honor. So he is not in a position to say so. That's the reason I want to have an evidentiary hearing on this public records claim. But that's sort of getting ahead of myself. You know, the documents, as I pointed out in my last pleadings, have to do with the jurors in the case, the FDLE documents. And in my reply to the State's response, I have attached the 24 folders of documents that FDLE filed so that the Court and the State can look at them if they would like to look at them and so they'll be in the record.
>
> * * *
>
> And there's also additionally the problem of the records that they filed simultaneously that have never -- I am submitting, have never been examined by this court or anybody else, either, that they've taken a claim of exemption on.

(R. 10-11). Further discussion with the lower court during the same hearing further clarified the need for testimony from the FDLE:

> THE COURT: Okay. And these 24 folders that you received from FDLE, your claim is that these folders were not provided to the repository until after this court had its decision?
>
> MR. HENNIS: Well, my claim is, actually -- Thats part of my claim, Your Honor. My claim goes further than that, that they were never provided to prior counsel for Mr. Johnson at any time during the history of his case.
>
> THE COURT: Even in light of the public records requests that were made?
>
> MR. HENNIS: Exactly, Your Honor.
>
> THE COURT: Do you know why that is?
>
> MR. HENNIS: No, Your Honor. That's the reason I want an evidentiary hearing.

(R. 15). Counsel then advised the lower court that after the completion of an *in camera* inspection of the FDLE documents that had

been claimed exempt, if documents were then turned over to Mr. Johnson, counsel would require 60 days to amend. (R. 16). Both the State attorney and the lower court stated on the record that they did not know if the FDLE documents had been previously provided to Mr. Johnson (R. 17-18). The lower court then decided, on the record, to obtain the sealed FDLE documents and to perform an inspection of them:

> THE COURT: Prepare an order. I'll sign an order to have those documents transported here, and I'll do an in camera inspection of the documents. Okay?
>
> MR. HENNIS: That's fine, Your Honor.
>
> THE COURT: After I do, I'm probably going to have you all come back here --
>
> MR. HENNIS: I understand that, Your Honor.
>
> THE COURT: -- To deal with the next step. That's all I want to do at this point.

(R. 19-20). The State Attorney then represented that Mr. Johnson was not claiming that there had been non-production by FDLE of documents in existence prior to the lower court's 1999 summary denial order (R. 22). Counsel for Mr. Johnson objected to that representation and explained the rationale for evidentiary development:

> MR. HENNIS: Let me just say: First of all, Your Honor, In my reply, which was filed last week, I do specifically say that I'm affirmatively stating that we have never been provided the 19 folders of records dated from 1988 through 1998 that are attached to the reply, and I've got all those records attached to the reply that was dated May 31st, 2002. So you can look to the reply to see the variety of intelligence reports and other material that's in there. So the State is simply wrong to say that I haven't affirmatively asserted that we didn't get it

before. I have.

I would also like very briefly to point out, Your Honor, I think the State's entirely wrong about what they brought up about the claim. I think if Your Honor will take a look at Thompson v. State, 759 So. 2d 650, (Fla. 2000), in there the Court is talking about public records and public records issues and whether or not they can be claims in 3.850, motions to which you're entitled a hearing on. And they say very clearly that while an evidentiary hearing isn't required to resolve every post-conviction motion that alleges a public records violation, there's two criteria that they look at.

One criterion is, if the motion itself identified the specific agency that they're claiming somehow violated the public records law, and, number 2, points out the content, the specific content of the records. And what they're pointing out is that it's not enough at a Huff hearing, is the example they're talking about, not enough to say we've got a few skinny little records and we know there has to be a box. In this case we're saying it's FDLE that didn't provide the records until during the pendency of Mr. Johnson's appeal and that the records are fairly extensive records having to do with jurors in the case and criminal activity and other activity that they were involved in. So I think that's very much specific enough under the case law to require an evidentiary hearing to get FDLE to come in and explain why they did what they did.

THE COURT: You mean why they disclosed certain records or why they didn't disclosed or why they generated documents?

MR. HENNIS: Why they sua sponte decided to disclose these documents after Mr. Johnson's oral argument had already taken place in the Florida Supreme Court on the appeal from the summary denial of post conviction relief.Why did they do it then? Why did they choose records from 1988 through 1999? Did they search earlier than that? Those are the kind of questions that I would like to find out from FDLE, and that's the reason in my initial motion I listed two FDLE witnesses as people I would like to call at the evidentiary hearing,

the records custodian and their counsel.

(R. 24-25). The lower court then ruled that there would be "an automatic de facto continuance of the Huff hearing" until he completed the in camera inspection (R. 28-29). Counsel then asked about participation of FDLE:

> MR. HENNIS: Your Honor, whenever we do schedule the in camera inspection, do you want to make arrangements to have counsel for FDLE present? Because I think they probably have that right since it's their box.
>
> THE COURT: If they have that right to be present, then we need to have them present when we go through the documents. Any objection to that , Mr. Lerner?
>
> MR. LERNER: No, Your Honor. But I've never -- I don't believe there is any requirement that it be done in court.
>
> THE COURT: I'm not going to do it in court. I mean, I'm going to do it in my office and go through those things, and like I said, after I go through that, figure out what I'm dealing with, then I'll have to come back here, and we'll have to talk some more about, like I said, where we go next. I have no idea what's in this box.

(R. 29). The State then complained about "unauthorized pleadings" by Mr. Johnson, specifically the reply to the State's response, and requested that the lower court require Mr. Johnson to file a consolidated 3.850 motion.[8] The lower court deferred any decision on the State's request:

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[8]As noted elsewhere, Mr. Johnson did file a Consolidated Rule 3.851 motion on August 2, 2002, and a Motion to Allow Amendment of Prior Motion to Vacate on August 6, 2002. (R. 56-124, 125-128). The Consolidated motion included a claim concerning Ring v. Arizona, which had been decided on June 24, 2002.

> THE COURT: -- Again, that's down the road. I'm not going to make those decisions yet. Just get me an order, I'll get the box, I'll do what I have to do with regard to the in-camera inspection, and then invite you gentlemen back. And we're going to have further discussions about where we go in the case. I'm going to go back and review, re-review everything you all have submitted, and I'll invite counsel for FDLE to be here, if they want to be here, but I have done in-camera inspection. With or without them, I'll get notice to them.

(R. 31). Counsel for Mr. Johnson prepared a proposed order regarding the shipment of the sealed documents to the lower court, and shipped it out the day following the June 11, 2002 hearing (S. 569-73). There was no further communication received from the lower court until counsel was served with an Order dated August 30, 2002, denying disclosure of the sealed FDLE documents on the grounds that they were "either exempt from disclosure or not relevant" (R. 133). The certificate of service indicated that the order was not served on FDLE. Id. Counsel was never noticed of the time and date of the *in camera* inspection. At this point Mr. Johnson's range of options was drastically reduced. He had been denied access to the sealed documents by order of the lower court without the promised opportunity for involvement by the FDLE in the *in camera* process.

Without being ordered to do so, the State filed a response to Mr. Johnson's August 2, 2002 Consolidated Rule 3.851 motion on October 2, 2002. (R. 134-200). The lower court remained silent as to Mr. Johnson's motion to allow the consolidated motion. In spite of the representations made by the Court at the June 11, 2002 hearing, no Huff hearing was scheduled and no further public records

development was allowed. Without further proceedings of any kind, the lower court entered an order summarily denying relief without evidentiary hearing on all claims on November 4, 2002 (R. 201-203).

In the proceedings below, counsel for Mr. Johnson did not follow the path of post-conviction counsel in Thompson, where the lower court's summary denial of Mr. Thompson's public records claim was upheld by this Court based on a waiver analysis. Thompson at 658. This Court held that "Thompson did not make specific factual allegations concerning what agencies had failed to comply with the records request or the type of records that were withheld" Id. at 659. Mr. Johnson's pleadings beginning in February 2002 always specifically identified the FDLE as the source agency of the disputed production of documents in 2001 and Mr. Johnson's initial Rule 3.851 pleading included as an attachment the detailed index of the newly produced FDLE documents from the records repository. There was no waiver in Mr. Johnson's case. At the June 11, 2002 hearing, one of only two during the pendency of the case below, Mr. Johnson laid out the necessity for access to the FDLE in substantial detail. As noted elsewhere, Mr. Johnson requested evidentiary development and a hearing on the public records issues and asked that the lower court involve FDLE in the in camera process. Mr. Johnson, unlike Thompson, did actively pursue public records and access to officials at the FDLE because Mr. Johnson knew that a substantial body of new material had already been produced. Mr. Johnson is unaware of any other case in which the FDLE, or any other public agency, produced documents to the post-conviction records repository that had never before been

produced, two years after circuit court litigation had been completed and while the appeal from the summary denial below was still pending. The fact that the reasons for FDLE's acts were unknown was noted by the State and the court below at the June 11, 2002 hearing but never resolved. (R. 6-13).

Mr. Johnson is seeking what the defendant was seeking in Downs v. State, 740 So. 2d 506 (Fla. 1998); an evidentiary hearing concerning public records disclosure. Downs notes that Walton v. Dugger[9] stands for the proposition that non-compliance with public records requests may be raised in Rule 3.850 motions. Downs at 510. A three-part procedure is set out in Walton for review of claimed statutory exemptions in camera by the trial court. Id. That procedure has since been incorporated into Fla. R. Crim. P. 3.852(f), concerning exempt or confidential public records. However, the fact that the lower court in the instant case followed this procedure fails to answer the question as to whether there was full compliance by the FDLE. That is because the lower court erred in failing to provide Mr. Johnson with the opportunity to explore the other outstanding public records issues by deposition or evidentiary hearing. See Mendyk v. State, 707 So. 2d 320 (Fla. 1997), cited in Downs at 510.[10]

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[9]Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993).

[10]This Court upheld the lower court's refusal to hold an evidentiary hearing in Downs, citing Mendyk, wherein the trial court erred by failing to allow the defense to explore by deposition or evidentiary hearing the existence of a missing videotape, but that error was found to be harmless because there was no possibility that the tape could provide the basis for a Rule 3.850 claim. In Mendyk

Mr. Johnson filed a Motion for Rehearing and Renewed Motion for A Huff Hearing on November 18, 2002 (R. 227-250). Attached to the motion were copies of the jury questionnaires from the 1980 trial. (R. 236-50). The State Attorney file in Mr. Johnson's case contained fourteen (14) juror questionnaires from more than twenty years ago. The documents include information concerning all twelve jurors and two alternates in Mr. Johnson's 1980 trial. However, none of the forms include date of birth, social security number or race information. The process of matching up the persons named in the 2001 FDLE production and the 1980 jury forms would require substantial evidentiary development. Mr. Johnson was attempting below to discover how and why FDLE researched the juror names and to what extent the files they produced for the first time in 2001 reflected information about the members of Mr. Johnson's jury. Counsel also argued in the motion that Fla. R. Crim. P. 3.851(f)(B) required the lower court to hold a case management conference within 30 days after the State had filed its answer to Mr. Johnson's Consolidated successive motion for postconviction relief. Pursuant to the rule, at the case management conference the court "shall. . .

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the Sheriff also filed an uncontested affidavit denying the existence of a recording or handwritten notes of interviews with the defendant. Mr. Downs had an opportunity to confront the Sheriff's Office, whose production of documents was at issue in his case, at a hearing in circuit court where both the Sheriff and the state attorney specifically testified that all documents had been produced to the defendant. Downs at 511. Mr. Johnson's case can be easily distinguished from Downs. The operative question in the instant case is: Why was there production by the FDLE in 2001? Mr. Johnson has never been afforded the opportunity to explore the nature and the extent of FDLE's apparent records search concerning the jurors in Mr. Johnson's case.

hear argument on any purely legal claims not based on disputed facts." Mr. Johnson was not been permitted to present any argument to the court prior to the entry of the order of November 4, 2002 denying relief.

Mr. Johnson's motion also argued that the State's action in filing a response to the consolidated Rule 3.851 motion on October 2, 2002 without being ordered to do so by the court, amounted to a State waiver of any objection to the filing of the amended motion. Therefore, once the lower court entered an order denying relief based on the allegations in Mr. Johnson's August 2, 2002 Rule 3.851 motion, by inference the court must have accepted Mr. Johnson's motion seeking leave of court to file the August 2002 amendment.[11] Therefore, Mr. Johnson's amended motion was properly filed.

Based on the prior ruling of the court at the June 11, 2002 hearing, continuing the Huff hearing, Mr. Johnson expected the court to set a case management conference pursuant to the rules, not to enter a summary denial order without providing Mr. Johnson a forum in which to make legal argument concerning his claims for postconviction relief. The lower court accepted the consolidated Rule 3.851 pleading, but turned a blind eye to the self-evident fact that the public records claim contained therein necessarily related back to

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[11]"A motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown. The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason the claim was not raised earlier and attaches a copy of the claim sought to be added. . . If amendment is allowed, the state shall file an amended answer within 20 days after the amended motion is filed." Fla. R. Crim. P. 3.851(f)(4).

the prior pleadings that were filed in February 2002. Eventually, the State agreed that an additional hearing in the form of a Huff hearing was required (R. 275-277). The lower court entered a Notice of Case Management Conference (R. 278-279). That proceeding was eventually held on March 17, 2003 (R. 35-55). During that hearing counsel for Mr. Johnson repeated for the final time his argument about why evidentiary development was necessary on the FDLE records:

> MR. HENNIS: . . .The point with the public records claim from the beginning has been that factual development is necessary on this claim. That's the reason we asked for an evidentiary hearing. As we learned more, we took advantage of the request to amend. We've made in this pleading and all along, we've tried to receive more information. But one of the reasons to have an evidentiary hearing was precisely to have FDLE come in and talk about some of these, some of these issues. If in fact they did criminal records checks of the jurors, how far back did they go? There's this evidence in the record they provided they went back to the time of the 1980 trial, which would have been the most material, material to my questions having to do with juror's conduct back at the time of the trial.
>
> So I would ask that the court turn over all the non-exempt documents found to be irrelevant and to send the other documents that were examined, to have those sealed and put into the record for appellate purposes.
>
> As to the more general issue of fact in claim one, our continuing investigation has now revealed five of the six jurors that FDLE got hits on in their criminal record check based on reports still live in the Orlando area. And counsel has now got their vital information. And I'd ask the court [for full] juror interviews of these people to try to get to the bottom of this issue of criminal history.

(R. 42-44). Counsel repeated the oral motion for juror interviews at the conclusion of the hearing and the lower court advised that a

written motion should be filed and the State provided with an opportunity to respond (R. 54-55). On March 26, 2003, the lower court entered an Order providing one additional FDLE document and otherwise denying Mr. Johnson's motion for rehearing. (R. 281-84). On April 15, 2003 Mr. Johnson served his written Motion for Juror Interviews, relying in part on the new document (R. 285-93). The State never responded to the written motion and no order was ever entered concerning the motion. Counsel served Notice of Appeal on April 24, 2003 to preserve Mr. Johnson's rights (R. 305-06).

Mr. Johnson's Rule 3.851 motion was not untimely. Based on the analysis above, the August 2002 consolidated motion was an amendment, allowed by the court, of the 3.851 motion originally filed on February 8, 2002, well within the one year time period since Mr. Johnson was first informed about the existence of the new production of records by the FDLE.[12] The February 3, 2002 motion listed the FDLE custodian of records and FDLE counsel as witnesses to be called at an evidentiary hearing about the production of the documents. The State should have been on notice that Mr. Johnson had been litigating the issue of the "new" State Attorney and FDLE records as early as May 23, 2001, when he filed a Motion to Relinquish Jurisdiction and Hold Appellate Proceedings in Abeyance in the Florida Supreme Court.

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[12]"Mr. Johnson cannot prepare an adequate 3.851 Motion until the court conducts an in camera examination of certain records alleged to be exempt or confidential and determines if the such is the case. Mr. Johnson must be afforded due time to review materials produced in March and April 2001 and any materials provided by the court after an in camera inspection, to conduct follow-up investigation, to obtain the assistance of expert witnesses and to amend." Defendant's Rule 3.851 Motion of February 8, 2002 (S. 9).

Mr. Johnson's May 2002 reply to the State's response was also timely and was never struck by the court.

"Because we cannot say that the record conclusively shows [Mr. Johnson] is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So.2d 808, (Fla. 1982). As to the lower court's finding that Mr. Johnson's public records claim is "conclusory", neither the court nor the State ever explained why the FDLE waited until April 2001 to produce extensive records that appear to show criminal activity by six people that have the same names as jurors in Mr. Johnson's case: Linda Stewart, William Young, Peggy Smith, Gregory Simmons, Fred Cooper, and Betty Phillips. This material was never produced by FDLE during the pendency of Mr. Johnson's prior postconviction motion. Copies of all of this material was attached to Mr. Johnson's May 2002 reply to the State's response to Mr. Johnson's February 2002 3.851 motion. Without the opportunity for evidentiary development at either a public records hearing or an evidentiary hearing where Mr. Johnson could call the FDLE officials as witnesses, Mr. Johnson was forced to plead as best he was able. The court did not enter an order on the *in camera* inspection until three months after Mr. Johnson filed his May 2002 reply. Mr. Johnson consistently asked for access to FDLE and requested leave to amend pending the outcome of the public records process. Mr. Johnson consistently argued below that FDLE witnesses had to testify about the creation and production of the documents so that the dots could be connected. The record below simply is inadequate to answer the questions raised in the

pleadings and the two limited hearings, one of which occurred after relief had been denied.

Under Rule 3.851 and this Court's well settled precedent, a post conviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case "conclusively show that the prisoner is entitled to no relief", Fla R. Crim. P. 3.851(f)(5)(B). See also Lemon v. State, 498 So. 2d 923 (Fla. 1986); Hoffman v. State, 613 So.2d 1250 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984). Mr. Johnson has alleged facts, which, if proven, would entitle him to relief. Mr. Johnson plead with the specificity required by the Rules of Criminal Procedure, and appended the pleading with copies of the FDLE documents that indicated potential criminal activity by jurors as well as the juror questionnaires from the trial, although such attachments have not previously been a requirement under the law. See Valle v. State, 705 So.2d 1331 (Fla. 1997), Contra Fla. R. Crim. P. 3.851 (e)(2)(C)(iii)("if evidentiary support is in the form of documents, copies of all documents shall be attached, including any affidavits obtained"). The files and records in this case do not conclusively show that he is entitled to no relief.

The trial court's summary denial of Mr. Johnson's Rule 3.851 motion without an evidentiary hearing does not meet the clear requirements of the law. The lower court's first order denying relief, entered on November 4, 2002, contains factual errors on its face and distorts the record of the case. (R. 201-203). By relying on an August 5, 2002 filing date, when Mr. Johnson filed his final

Consolidated Rule 3.851 motion, the order makes findings that Mr. Johnson's public records claims are time-barred because he had access to the FDLE records that were not sealed in May 2001, fifteen months before. (R. 201). In the alternative, the order finds that the allegations in the public records claim are facially insufficient. (R. 202). Mr. Johnson's May 2002 reply to the State's response was timely and was not struck by the lower court. Mr. Johnson's public records claim was a good faith effort to set the record straight, exhaust his state remedies and to preserve his rights based on the FDLE production. An evidentiary hearing was required in the circumstances of Mr. Johnson's case below because without one it was impossible to provide "a detailed allegation of the factual basis" for his public records claim pursuant to Fla. R. Crim. P. 3.851(e)(1)(D) beyond what was presented. An explanation of the unknown events and internal FDLE procedures that lead to the production of the documents two years after Mr. Johnson's case left circuit court must be incorporated into the factually based portions of the public records claim. This is the essence of the discovery process. That is, why did FDLE do it? Only the purely legal aspect of the public records claim, concerning whether or not the claims of exemption by FDLE as to certain documents were valid, were handled by the lower court in a manner comporting with the Rules of Criminal Procedure. That is, would the court provide additional FDLE documents to Mr. Johnson despite the FDLE's claims of exemption.[13]

[13]It was improper for the court to deny access to some number of the FDLE documents after *in camera* inspection where the court *sua*

Obtaining support for factual aspects of the public records claim depended on access to information from the FDLE about the genesis and goals of their production, the accuracy and the reliability of their data, how adequate their records search was, all ultimately directed towards the question of whether members of Mr. Johnson's jury had unreported criminal records at the time of his 1980 trial.

The summary denial order of the trial court chastised Mr. Johnson for daring to request the opportunity ask the relevant factual question, identifying Mr. Johnson's attempts to answer the fact based issues as "conclusory".

The lower court's use of the record or files in this case do not show conclusively that Mr. Johnson is not entitled to relief. The order thus ignores the express requirements of Rule 3.851 and the substantial and unequivocal body of case law from this Court holding that courts must comply with the Rule. If this Court applies an abuse of discretion standard to review the lower court's actions concerning the FDLE records, it should find that the lower court abused its discretion. Mr. Johnson's request for a hearing on public records matters with FDLE officials available to testify was not "overly broad, of questionable relevance, [or] unlikely to lead to

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sponte made the decision that some of the documents, even if not exempt, were "not relevant". The lower court did ultimately release one document based on this argument, but provided no opportunity to amend. The decision seems particularly ill advised where the summary denial order found that Mr. Johnson's public records claim was conclusory. If a public record is not exempt, the ultimate responsibility for any consideration as to relevance or materiality at the pleading stage is clearly the responsibility of postconviction counsel. Steinhorst v. State, 695 So. 2d 1245, 1247, 1248 (Fla. 1997).

discoverable evidence". See Moore v. State, 820 So. 2d 199, 204 (Fla. 2002). The attempt by Mr. Johnson to get to the bottom of a records production initiated by FDLE years after his case had left circuit court was not "a fishing expedition for records unrelated to a colorable claim for post conviction relief." Id.[14] Mr. Johnson's actions displayed none of the "delays in reviewing available records" cited by this Court in Moore.

This Court has "no choice but to reverse the order under review and remand" Hoffman v. State, 571 So.2d 449, 450 (Fla. 1990), and order an evidentiary hearing on the public records issues in Mr. Johnson's Rule 3.851 motion.

ARGUMENT II

THE CONSTITUTIONALITY OF MR. JOHNSON'S DEATH SENTENCE MUST BE REVISITED IN LIGHT OF RING V. ARIZONA

Mr. Johnson's August 2, 2002 Consolidated motion included a claim predicated on new federal caselaw pursuant to Ring v. Arizona,

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[14]In another recent opinion involving the summary denial of public records claims, this Court noted that "[t]he record in this appeal contains three volumes of supplemental record, encompassing over 600 pages, relating to Griffin's public records requests. These include numerous requests for extensive records by Griffin and numerous responses from the various agencies and offices. These responses indicate that some records have been supplied, other records have been withheld as either exempt or privileged, some requests could not be fulfilled because the documents did not exist, and other requests were so broad and vague that the offices could not comply. It is difficult to determine what records Griffin has actually received and what, if any, requests are still outstanding." Griffin v. State, 2003 Fla. LEXIS 1621 (Sept. 25, 2003). There has never been a showing that Mr. Johnson requested any public records in the instant proceeding from FDLE or anyone else. For that reason, the genesis of the production is a critical issue. Any vagueness in the circumstances surrounding the production cannot be laid at Mr. Johnson's feet.

122 S. Ct. 2428 (2002). (R. 79-99). The lower court's order denying relief on this claim relied on this Court's holding in Bottoson v. State, 2002 WL31386790 (Fla. October 24, 2002). (R. 202). There was no finding of procedural bar and the lower court's finding was that "this claim does not merit relief". (R. 202).

Ring held unconstitutional a capital sentencing scheme that makes imposing a death sentence contingent upon the finding of an aggravating circumstances and assigns responsibility for finding that circumstance to the judge. The United States Supreme Court based its holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), in which it held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring)). Capital sentencing schemes such as Florida and Arizona violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because they do not allow the jury to reach a verdict with respect to an "aggravating fact [that] is an element of the aggravated crime" punishable by death. Ring, 122 S.Ct. at 2241 (quoting Apprendi, 530 U.S. at 501 (Thomas., J., concurring).

Applying the Apprendi test in Ring, the Court said "[t]he dispositive question....'is not one of form but of effect."' Ring, at 2439 (quoting Apprendi, 530 U.S. at 494). The question is not whether death is an authorized punishment in first-degree murder cases, but whether the "facts increasing punishment beyond the

maximum authorized by a guilty verdict standing alone," Ring, at 2441, are found by the judge or jury. "If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact... must be found by a jury beyond a reasonable doubt." Ring, at 2439. "All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Ibid. at 2240.

Florida's capital sentencing statute, like the Arizona statute struck down in Ring, makes imposing the death penalty contingent on the factual findings of a judge, not the jury. Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life in prison "unless the proceedings held to determine sentence according to the procedure set forth in Sec. 921.141 result in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death." For nearly 30 years, this Court has held that sections 775.082 and 921.141 do not allow imposing a death sentence upon a jury's verdict of guilt, but only upon a finding of sufficient aggravating circumstances. Dixon v. State, 283 So. 2d 1, 7 (Fla.1973) ("question of punishment is reserved for a post-conviction hearing").

The "explicitly cross reference[d]...statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty," Ring, at 2440, requires the judge – after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury" to make three factual

determinations. Fla. Stat. sec. 921.141 (3). Section 921.141 (3) provides that "if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts." Ibid. First, the trial judge must find the existence of at least one aggravating circumstance. Ibid. Second, the judge must find that "sufficient aggravating circumstances exist" to justify imposition of the death penalty.[15] Ibid. Third, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Ibid. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with sec. 775.082." Ibid.

Because Florida's death penalty statute makes imposing a death sentence contingent upon findings of "sufficient aggravating circumstances," and "insufficient mitigating circumstances," and gives sole responsibility for those findings to the judge, it violates the Sixth Amendment.

Because in Florida, the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, the Florida Supreme Court has recognized that its review of a death sentence is based and dependent on the judge's written findings. Morton v. State, 789 So. 2d 324, 333 (Fla. 2001)("The sentencing order is the foundation for this Court's proportionality

[15]The jurors need only find sufficient aggravating circumstances to "recommend" an "advisory sentence" of death. Fla. Stat. sec. 921.141 (2).

review, which may ultimately determine if a person lives or dies"); Grossman v. State, 525 So. 2d 833, 839 (Fla. 1988); Dixon, 283 So. 2d at 8.

Florida law only requires the judge to consider "the recommendation of a majority of the jury." Fla. Stat. sect. 921.141 (3). In contrast, "[n]o verdict may be rendered unless all of the trial jurors concur in it." Fla. R. Crim. P. 3.440. Neither the sentencing statute, the Florida Supreme Court cases, nor the jury instructions in Mr. Johnson's case required that all jurors concur in finding any particular aggravating circumstances, or "[w]hether sufficient aggravating circumstances exist," or "[w]hether sufficient aggravating circumstances exist which outweigh the aggravating circumstances." Fla. Stat. sec. 921.141(2). In Mr. Johnson's case, at least five jurors recommended against a death sentence. The only inference that one can draw from these facts is that not all jurors agreed that sufficient aggravating circumstances existed to warrant death.

Because Florida law does not require any five, much less twelve jurors agree that the State has proved an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in Combs, Florida law leaves theses matters to speculation. Combs v.

State, 525 So. 2d 853, 859 (Fla. 1988)(Shaw, J., concurring).

The State was not required to convince the jury that death was a proper sentence beyond a reasonable doubt. The jury in Mr. Johnson's case was not required to make findings beyond a reasonable doubt as required by the Sixth Amendment. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact, no matter how the State labels it, must be found by a jury beyond a reasonable doubt." Ring, at 2439. Florida law makes a death sentence contingent not upon the existence of any individual aggravating circumstance, but on a (judicial) finding "[t]hat sufficient aggravating circumstances exist." Fla. Stat. Sec. 921.141(3).

In light of the plain language of Florida's death penalty statute, the rules of criminal procedure and 30 years of the Florida Supreme Court's death penalty jurisprudence, it is clear that the limited role of the jury in Florida's capital sentencing scheme fails to satisfy the requirements of the Sixth Amendment. Even if the Florida Supreme Court were to redefine the jury's role under Florida law, it would not make Mr. Johnson's death sentence valid. Mr. Johnson's Rule 3.851 pleading cited to the original record on appeal where his jury was repeatedly told that its decision was merely "advisory" (R. 92) and that "the final decision as to what punishment shall be imposed was the responsibility of the Judge" (R. 92). The jury was told that its job was to "render to the Court an advisory sentence" (R. 92).

As the Supreme Court held in Caldwell v. Mississippi, 472 U.S.

320 (1985)

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. Caldwell, 472 U.S. at 328-329.

Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposing the death penalty. Fla. Stat. sect. 921.141(3). Because imposing a death sentence is contingent on this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life in prison, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. Ring., at 2432. ("Capital defendants ...are entitled to a jury determination of any fact on the legislature conditions an increase in their maximum punishment.") Nevertheless, Florida juries, like that of Mr. Johnson's jury, are routinely instructed, "Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which out weigh any aggravating circumstances found to exist" (R. 97).

The Due Process clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every fact necessary to constitute a crime. In re Winship, 397 U.S. 358 (1970). The existence of "sufficient aggravating circumstances" that outweigh the mitigating circumstances is an essential element of death-eligible first-degree murder because it is the sole element that distinguishes

it from the crime of first-degree murder, for which life is the only possible punishment. Fla. Stat. sections, 775.082; 921.141. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt. The instruction given Mr. Johnson's jury violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Sixth Amendment's right to trial by jury because it relieves the State of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances" exist that outweigh mitigating circumstances by shifting the burden of proof to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

To comply with the Eighth Amendment's requirement that the death penalty be applied only to the worse offenders, Florida adopted Fla. Stat. 921.141 as a means of distinguishing between death - penalty eligible and non-death penalty eligible murder. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Florida chose to distinguish those for whom "sufficient aggravating circumstances" outweigh mitigating circumstance from those for whom "sufficient aggravating circumstances" do not outweigh the mitigating circumstances. Id., 283 So. 2d at 8. Because the former are more culpable, they are subjected to the most severe punishment: death. "By drawing the distinctions, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, [Florida] denigrates the interests found critical in Winship." Mullaney, 421

U.S. at 698.

Because Mr. Johnson's jury was never required to find the element of sufficient aggravating circumstances beyond a reasonable doubt, the error here cannot be subjected to a harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-280 (1993). Mr. Johnson is entitled to relief.

ARGUMENT III - LETHAL INJECTION

The lower court summarily denied Mr. Johnson's claim concerning the unconstitutionality of lethal injection, finding that the claim was procedurally barred. (R. 202). Mr. Johnson submits that the lower court's order failed to take into account Mr. Johnson's claim of newly discovered evidence in support of this claim, as cited in his motion:

> 14. There now exists substantial new evidence that the use of lethal injection as a method of execution does not meet the minimum standards required under federal law. A report published in the past month by the National Coalition to Abolish the Death Penalty (NCADP), *Drug Companies and Their Role in Aiding Executions*, notes that lethal injection is subject to high rates of error with many "botched" executions resulting. The report alleges that lethal injection fails to guarantee painless or instant death. See In re Kemmler, 136 U.S. 436, 443 (1890)(holding that judicial electrocution must result in instantaneous death to satisfy constitutional standards); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 474 (1947)(same).
>
> 15. The report from NCADP also provides an overview of a number of other issues that also potentially impact on the lawfulness of lethal injection, including: difficulties with the drugs used in lethal injections in the United States; the human rights implications for the use of lethal injection in the face of the April 2002 United Nations Commission on

> Human Rights calling for a moratorium on executions; opposition by the American Medical Association to any sort of physician participation in any aspect of the lethal injection procedure; and corporate responsibility issues and legal concerns about drug companies that supply the drugs used in lethal injection. A copy of the report is including with this pleading as *Attachment A*.
>
> 16. Mr. Johnson's claim is that the use of lethal injection as a method of execution constitutes cruel and/or unusual punishment under the United States and Florida Constitutions. Mr. Johnson requests an evidentiary hearing on this claim, which has never before been heard in circuit court. At such a hearing he would present witnesses, such as those noted in the appended report, in support of this claim.

(R. 100-102). The attachment noted in the motion can be found at R. 104-124. Counsel for Mr. Johnson further informed the lower court at the March 17, 2003 hearing of his intention to call three experts at an evidentiary hearing in support of this claim: Dr. Sidney Wolfe and Dr. Lawrence Egbert from Johns Hopkins and Deborah W. Denno, a law professor who had published a survey of botched lethal injection executions. (R. 48-49).

Mr. Johnson's position is that he met the pleading requirements under Fla. R. Crim. P. 3.851(e)(2)(C) for successive motion based on newly discovered evidence and should have been granted an evidentiary hearing to present his case.

CONCLUSION

Mr. Johnson submits that the lower court erred in failing to grant an evidentiary hearing below, therefore relief is warranted in

the form of a remand to Circuit Court for an evidentiary hearing on the issues presented in the Arguments outlined **Supra.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Corrected Initial Brief has been furnished by United States Mail, first class postage prepaid, to Kenneth S. Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, on November 25, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

WILLIAM M. HENNIS III
Florida Bar No. 0066850
Assistant CCRC
101 N.E. 3rd Ave.
Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Appellant