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

REPLY BRIEF OF APPELLANT

NEAL A. DUPREE
Capital Collateral Regional Counsel
Florida Bar No. 311545

WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850
LAW OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL-SOUTH
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY TO RESPONSE TO REQUEST FOR ORAL ARGUMENT	1
REPLY TO THE STATE'S STATEMENT OF THE CASE	1
ARGUMENT I	2
ARGUMENT II	16
ARGUMENT III	24
CONCLUSION	25
CERTIFICATE OF SERVICE	26
CERTIFICATE OF COMPLIANCE	26

TABLE OF AUTHORITIES

Page

Apprendi v. New Jersey,
530 U.S. 466 (2000) 16, 19

Bottoson v. Moore,
833 So. 2d 693 (Fla. 2002) 16, 19

Bruno v. Moore,
838 So. 2d 485 (Fla. 2002) 16

Caballero v. State,
851 So. 2d 655 (Fla. 2003) 23

Campus Communs., Inc. v. Earnhardt,
821 So. 2d 388 (5th DCA 2002) 5

Canakaris v. Canakaris,
382 So. 2d 1197 (Fla. 1980) 6

Chavez v. State,
832 So. 2d 730 (Fla. 2002) 16

Doorbal v. State,
837 So. 2d 940 (Fla. 2003) 16

Duest v. State,
855 So. 2d 33 (Fla. 2003) 22, 23

Gaskin v. State,
737 So. 2d 509 (Fla. 1999) 10, 15

Grim v. State,
841 So. 2d 455 (Fla. 2003) 16

Hamblin v. Mitchell,
354 F. 3d 482 (6th Cir. 2003) 6

In re E.B.L.,
544 So. 2d 333 (Fla. 2d DCA 1989) 8

Johnson v. Florida,

593 So. 2d 206 (Fla. 1992) 13

Johnson v. State,
442 So. 2d 193 (Fla. 1983) 24

Johnson v. State,
804 So. 2d 1218 (Fla. 2001) 1

King v. Moore,
831 So. 2d 143 (Fla. 2002) 16

Mills v. Moore,
786 So. 2d 532 (Fla. 2001) 16

Ring v. Arizona,
122 S. Ct. 2428 (2002) . . . 16, 17, 19, 20, 21, 22, 24

Stovall v. Denno,
388 U.S. 293 (1967) 20

Sullivan v. Louisiana,
508 U.S. 275 (1993) 20

Summerlin v. Stewart,
341 F. 3d 1082 (9th Cir. 2003) . . . 17, 18, 19, 20, 21

Turner v. Crosby,
339 F. 3d 1247 (11th Cir. 2003) 16, 17

Wiggins v. Smith,
123 S. Ct. 2527 (2003) 6

Witt v. State,
387 So. 2d 922 (Fla. 1980) 19, 20

Woodson v. North Carolina,
428 U.S. 280 (1976) 20

Other Authorities

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition

February 2003, Guideline 10.15.1C - Duties of Post Conviction Counsel 6

FLORIDA APPELLATE PRACTICE, Chapter 5.5, Philip J. Padovano, West Publishing 1996. 8

Fla. R. Crim. P. 3.851 . . . . . 7, 10

Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63 (2002) 25

REPLY TO RESPONSE TO REQUEST FOR ORAL ARGUMENT

The position taken by the Office of the Attorney General in opposing oral argument in Mr. Johnson's case is unusual to say the least. Even though the Attorney General is statutorily mandated as co-counsel in capital post-conviction proceedings in Florida, in the instant case there has been no appearance in the most recent proceedings below by any representative from the Attorney General. Counsel for Mr. Johnson suggests that the State's alleged rationale for opposing oral argument, preservation of judicial resources, is nothing more than a mask for the lack of familiarity by the Office of the Attorney General with the proceedings below based on a total failure to participate in them. Given the convoluted circumstances involved in the summary denial below, oral argument is vital in this capital case.

REPLY TO THE STATE'S STATEMENT OF THE CASE

The State's Answer Brief accepts Mr. Johnson's Statement of the Case with the proviso that it failed to acknowledge "the extensive review of the exempt documents

that the Circuit Court undertook."[1] The balance of the State's Statement of the Case consists of substantial direct quotes from this Court's opinion in Johnson v. State, 804 So. 2d 1218 (Fla. 2001), from the Orange County Circuit Court's November 4, 2002 order summarily denying Mr. Johnson's Rule 3.851 motion initially filed on February 8, 2002 and amended on August 2, 2002, and from the Circuit Court's March 26, 2003 denial of Mr. Johnson's November 18, 2002 Motion for Rehearing.

ARGUMENT I

The State's Answer attempts to isolate the issue at hand to the matter of whether or not the lower court's handling of the *in camera* inspections of the documents claimed exempt by FDLE comported with the requirements of Fla. R. Crim. P. 3.852. The State claims that Mr. Johnson has "conceded" that the lower court properly followed the public records rules and thus, the inquiry by this Court ends. Although self evident, Mr. Johnson must point out that the contents of the exempt material withheld by the

[1]In footnote 6 of his Corrected Initial Brief, Mr. Johnson noted the *in camera* inspection by the Circuit Court that followed his Motion for Rehearing, quoting some of the same language from the Order entered denying rehearing.

lower court is unknown to counsel. Therefore, a factual challenge to the merits of the lower court's decision about the documents claimed exempt by FDLE following the *in camera* inspections is impossible. How is counsel to demonstrate relevance? What mechanism was available to Mr. Johnson to flesh out the record for purposes of such a challenge? The *in camera* inspection did not take place in open court. FDLE never appeared at any hearing. A public records hearing never took place.

Even given these obvious obstacles, counsel for Mr. Johnson requested that the lower court enter the exempted records into the court file for appellate purposes (R. 43). This Court should compare the sealed exempt documents with all the documents produced for the first time in 2001 by FDLE, documents that included the names of the jurors at Mr. Johnson's trial (S. 198-560) along with the juror questionnaires from the trial (R. 237-250; 261-274). This Court should undertake such a review as a matter of course as part of an overall analysis concerning the validity of the summary denial. The obvious relief sought by Mr. Johnson is the return of the case to Circuit Court for an evidentiary hearing on public records issues.

Mr. Johnson's Motion for Rehearing and Request for a "Huff" Hearing challenged the lower court's action in denying access to the FDLE documents claimed as exempt but found by the lower court to be "irrelevant" (R. 255). After the subsequent Case Management Conference, the lower court denied the Motion for Rehearing except for turning over a single additional document. Counsel for Mr. Johnson argued at the Case Management Conference on March 17, 2003 that counsel had never had the opportunity to participate in the *in camera* process and that the lower court had never specifically made findings as to the legitimacy of the FDLE's claimed exemptions (R. 40). Mr. Johnson's ultimate appeal to this Court of the lower court's final orders incorporated his objection to the lower court's denial of access to the documents that Mr. Johnson had requested to be sealed in the record for appellate purposes. In fact, the State's Answer takes the position the decision by the lower court denying access to the exempt records is the only public records issue that is extant on appeal. As noted **supra**, since the content of the FDLE documents found to be exempt remains unknown to

Mr. Johnson, counsel is unable to provide a factual analysis of why the lower court's decision regarding disclosure should be overturned, beyond the overarching need for a public records evidentiary hearing below.

The State also mistakenly attributes to Mr. Johnson an assertion that "there were other public records requests which remain unidentified" **Answer Brief at 8**. What Mr. Johnson's brief states at the cited page is that "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" **Corrected Initial Brief at 22**. In the context of the argument presented concerning public records in the Corrected Initial Brief there is no mystery or speculation about what the brief is referring to. The outstanding public records issues included: (1) Why did FDLE initiate in 2001 records production of criminal history information concerning persons with the same names as the jurors in Mr. Johnson's case while his summary Rule 3.850 denial was on appeal? (2) Did the FDLE's criminal history search go back to the 1980 date of Mr. Johnson's trial? (3) Did any of the people named in the FDLE criminal records actually

serve as jurors in Mr. Johnson's case? (4) How could the public records claim possibly be deemed untimely and conclusory given the unresolved factual issues apparent in Mr. Johnson's case? (5) Did the lower court ever review and compare the documents produced by FDLE in 2001 and placed in the record by counsel as part of the *in camera* process?[2] Mr. Johnson has not claimed that the lower court's inspection of the withheld documents was an abuse of discretion. His claim is that the lower court's failure to allow him to develop the facts through Rule 3.852 discovery and an evidentiary hearing amounted to an abuse of discretion that resulted in significant prejudice to Mr. Johnson. The lower court's action in summarily denying the public records claim and the other claims in Mr. Johnson's Rule 3.851 motion, based on lack of timeliness, should be reviewed by this Court in the light of both the history of the case after the FDLE's April 2001 production of new records and the State's request during the June 11, 2002 hearing that the lower court

[2]The 362 pages of documents produced as the result of an apparent FDLE criminal records search on the names of jurors in Mr. Johnson's 1980 trial were attached to his May 31, 2002 Reply to the State's Response to the February 2002 Rule 3.851 motion (S. 198-560).

require counsel for Mr. Johnson to file a Consolidated 3.851 motion (R. 30).

Mr. Johnson does not disagree with the State's position concerning this Court's application of an abuse of discretion standard of review concerning the lower court's decision that only one of the FDLE documents claimed as exempt would be turned over to counsel. However, counsel for Mr. Johnson fails to see how the good cause standard for release of autopsy photos cited in the State's Answer applies to his case. See Campus Communs., Inc. v. Earnhardt, 821 So. 2d 388, 402 (5th DCA 2002). Implicit in the decision in Earnhardt was a finding by the appellate court that good cause for non-disclosure of public records (autopsy photos) that had been claimed as exempt pursuant to state law is determined in part by "the availability of similar information in other public records, regardless of form" Id. at 401-402. In the instant case there is no question but that the lower court's decision as to the records was not predicated on this sort of determination because there is no other source of similar information as that contained in the withheld FDLE records.

The lower court's decisions in the public records realm should be evaluated according to a "reasonableness test" in the context of the entire case. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). Although the lower court's decisions as to the validity of the claimed exemptions following the final *in camera* inspection may have been reasonable, the lower court's ultimate decision to summarily deny the public records claim and the Rule 3.851 motion was not. This Court should consider that the lower court's orders all failed to specify what the valid exemptions were for the documents that were withheld (R. 133, 202, 282).

The lower court's findings that the public records claim was "untimely" and "conclusory" is factually in error. (R. 201). The decision by the lower court represents a failure to allow development by postconviction counsel of meritorious issues required under relevant rules of professional conduct.[3] The lower

[3]See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition February 2003, Guideline 10.15.1C - Duties of Post Conviction Counsel. ("Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overtly restrictive procedural rules. Counsel should make every professional effort to present issues in a

court also failed to follow the requirements of Fla. R. Crim. P. 3.851 (f)(5)(B).[4] The implication of "new" Fla. R. Crim. P. 3.851 which applies to postconviction motions filed after October 1, 2001 is the Circuit Court should set an evidentiary hearing "on claims listed by the defendant as requiring a factual determination."[5] The lower court's findings are conclusory and not based on the record of the case.

The record will reveal that Mr. Johnson's counsel was not informed of the existence of a new records production until March 13, 2001. At that time his appeal was still pending before this Court. A Motion to Relinquish Jurisdiction back to Circuit Court to litigate public records was denied by this Court on October 1, 2001. Mr. Johnson filed a successor Rule 3.851 motion in Orange County Circuit Court, predicated on the FDLE and State

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manner that will preserve them for subsequent review") See also Wiggins v. Smith, 123 S.Ct. 2527 (2003); Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003).

[4]"At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held and hear argument on any purely legal claims **not based on disputed facts. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief**, the motion may be denied without an evidentiary hearing" (emphasis added).

[5]Fla. R. Crim. P. 3.851(f)(5)(A)(i).

Attorney production of records to the repository in March and April 2001, on February 8, 2002, only nine days after the mandate issued from this Court on January 30, 2002. This motion was filed well within a year of Mr. Johnson's counsel learning of the new production, and as noted above, only days after jurisdiction transferred back to Circuit Court. Yet the lower court, first in a order dated November 4, 2002, and finally in an order dated March 26, 2003, denied Mr. Johnson's public record claim in part based on a finding that the final Consolidated Rule 3.851 pleading Mr. Johnson filed on August 2, 2002 was out of time.[6] The State's Answer simply fails to speak as to the timeliness issue.[7]

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[6]This Court should take note that the lower court entered an order on January 2, 2003 scheduling a Case Management Conference on January 30, 2003 (R. 278-279). This date was one year to the day from issuance of the mandate of this Court following the Rule 3.850 appeal, the first day Mr. Johnson could jurisdictionally file a successor Rule 3.851 motion in Circuit Court based on the new public records produced by FDLE in April 2001. Through no fault attributable to Mr. Johnson, the Case Management Conference was re-scheduled from the January date to March 17, 2003 (R. 35-55).

[7]"When a decision is based on the exercise of discretion, the trial judge should make oral or written findings setting forth the reasons for the decision. If there are no findings to support the exercise of discretion, the appellate court may remand the case back to the trial court for further explanation. In some cases, the appellate courts have held that the absence of findings regarding the exercise of discretion deprives the court of an opportunity to provide effective appellate review under the abuse of discretion standard." FLORIDA APPELLATE PRACTICE, Chapter 5.5 , Philip J. Padovano, West Publishing 1996. See In re E.B.L., 544 So. 2d 333, 336

The State's Answer criticizes Mr. Johnson for failing to file his Motion to Interview Jurors until April 15, 2003, a little less than a month after the lower court refused to accept an **ore tenus** motion for same at the Case Management Conference on March 17, 2003 (R. 43, 53-54).[8] The record reveals that the lower court entered an order dated March 26, 2003 denying Mr. Johnson's Motion for Rehearing. The order was date stamped in at the Circuit Clerk's Criminal Division office in Orlando on Friday, March 28, 2003 at 4:00 P.M. (R. 281). Logic dictates that Mr. Johnson's counsel would, at the earliest, have received the order in Fort Lauderdale on Monday, March 31, 2003. At that point the hearing had been two weeks in the past. After reviewing the order, it was obvious to counsel that it was unlikely that the lower court was going to undertake any further actions. However, two

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(Fla. 2d DCA 1989)("It is our obligation to review the actions of trial courts to assure their compliance with the requirements of the law. Even when the trial judge is an experienced and able jurist, as in this case, we cannot affirm legal decisions which lack factual findings expressly required by the rules of procedure to allow for meaningful review").

[8](THE COURT: I think you, really that you need to do that, and really take and give the State an opportunity to respond when you file the motion. I need to see a reason why you want to interview the jurors, and I need to look at the other issues, as well. I'll be doing my homework.)

weeks later, on April 15, 2003, Mr. Johnson served the Motion to Interview Jurors on the State and the lower court (R. 285-293). At the end, Counsel believed, based on the lower court's remarks at the hearing a month before, that a response from the State would be ordered. Nine days after the Motion to Interview Jurors was served, on the 30th day since rendition of the order denying rehearing, Mr. Johnson filed Notice of Appeal to preserve his rights. (R. 305-306). The State attempts to blame a lack of diligence by counsel for any failure to obtain a State response or hearing on the Motion for Juror Interviews. The lower court never provided any deadline for filing the motion, and in fact rendered an order denying relief only eleven days after the Case Management Conference. The State certainly had about ten days to respond to the Motion based on the lower court's cryptic comments about the **ore tenus** motion during the March 17, 2003 hearing. This the State failed to do. Both the State and the lower court had the motion in their possession before the Notice of Appeal was filed or served on them, probably for as much as ten days. The failure by both to proceed when the issue was squarely before them as

a result of the Case Management Conference on March 17, 2003 was unreasonable. The Motion to Interview Jurors is yet another unresolved aspect of the instant case which requires a return to Circuit Court pursuant to Gaskin v. State, 737 So. 2d 509 (Fla. 1999) and Fla. R. Crim. P. 3.851.

> TERRELL M. JOHNSON, Defendant in the instant action, by and through undersigned counsel, hereby supplements his March 17, 2003 *ore tenus* motion for juror interviews and states the following in support thereof:
>
> 1. Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial **unless** the lawyer has reason to believe that the verdict may be subject to legal challenge.
>
> 2. The rule allows the lawyer or his or her representative to interview jurors upon written order of the Court or after the filing of a notice of intention to interview setting forth the name of the jurors to be interviewed that is properly served on the Court and opposing counsel "a reasonable time before such interview."
>
> 3. The Eighth and Fourteenth Amendments require that Mr. Johnson be given a fair trial. The Sixth and Fourteenth Amendments require an impartial jury in order to receive a fair trial. The failure of jurors to

truthfully answer voir dire questions has been the basis for relief in other jurisdictions. United States v. Scott, 854 F.2d 697 (5th Cir. 1988); United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984); Freeman v. State, 605 So. 2d 1258 (Ala. Cr. App. 1992). Obviously, a dishonest juror prevents a defendant from fully exploring any bias or lack of impartiality on the part of the juror.

4. The FDLE waited until April 2001, long after Mr. Johnson's previous 3.850 motion had been summarily denied by this Court and during the pendency of his appeal, to produce extensive records that show criminal activity by six people that have the same names as some of the jurors in Mr. Johnson's case: Linda D. Stewart, William L. Young, Peggy J. Smith, Gregory L. Simmons, Fred H. Cooper, and Betty Phillips. This material was never produced by FDLE during the pendency of Mr. Johnson's prior postconviction motion despite requests for it. 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 a public records hearing or evidentiary hearing at which to call the FDLE officials and the assistant state attorneys, Mr. Johnson had to plead as best he was able.

5. With this Court's order of March 26, 2003, granting, in part, Mr. Johnson's motion for rehearing and providing one additional document concerning "Peggy Smith", counsel renews the oral request for juror interviews made during the hearing of March 17, 2003. Such interviews will provide a opportunity for determining whether any of these jurors had criminal records

which they were silent about during voir dire in 1980.

6. The Court should be aware that after there were allegations of misconduct in Mr. Johnson's original trial proceeding concerning juror voting, the original postconviction court allowed a deposition of **only one juror**, Fred H. Cooper the foreman, by then postconviction counsel in 1986. Per the terms of the order, the questions at deposition were limited to the following queries:

(a) Was there an initial vote as to the jury's recommendation on the death penalty or life imprisonment?
(b) What was the vote: how many jurors voted for death? life recommendation?
(c) What was the final vote on sentencing?

(M. 242-43). A deposition did take place, on September 25, 1986, with Mr. Cooper providing a brief description of the deliberations:

The votes were taken, probably discussed, deliberated, went through -- they were -- my terminology's going to be off, but there were two things. There were the mitigating circumstances, and I want to say the aggravated, or a synonym for it. And went through that very very carefully, all of these, and kind of totalling it up. **I don't want to make it synonymous to a scoring, but basically it came down to that**. And then it was just something I did, but I had each juror discuss the things individually, their thoughts, their ideas, their views to make sure that,

like with any group of people that are strong in one direction, some strong in another. We really didn't have too much of that. But certainly there were a couple of them that were, you know, they had gone both ways. So each person, we had a general discussion, and a vote was taken. And the vote was six to six.

(P. 1229-30)(emphasis added). Certainly one reasonable interpretation of this statement is that the jurors simply counted up aggravating factors and mitigating factors and voted accordingly. No opportunity has been provided for further juror interviews as to the issue of juror misconduct or any other subject. Mr. Cooper was never asked in 1986 about whether he had an unreported criminal record at the time of Mr. Johnson's trial. None of the other jurors were interviewed about any of these issues.

7. Counsel for Mr. Johnson has determined that Linda D. Stewart, William L. Young, Gregory L. Simmons, foreman Fred H. Cooper, and Peggy J. Smith, five of the six jurors that the FDLE provided public records about, are still living in the Orlando area as of March 2003. Mr. Johnson requests leave from this Court to undertake interviews of these jurors to determine if they mislead the parties about any history of criminal activity. In addition, Mr. Johnson requests that the Court allow jurors Stewart, Young, Simmons and Smith to answer the same queries that foreman Cooper responded to in 1986, namely:

(a) Was there an initial vote as to the jury's recommendation on the death penalty or life imprisonment?

(b) What was the vote: how many jurors voted for death? life recommendation?
(c) What was the final vote on sentencing?

(M. 242-43).[FN9 The Florida Supreme Court has held that the deposition of the foreman in this case was not admissible because his testimony "essentially inhere[d] in the verdict" and even if it was admissible that it did not "indicate[] a jury deadlock in this case." Johnson v. Florida, 593 So.2d 206, 210 (Fla. 1992).]

8. Mr. Johnson's inability to fully explore possible misconduct and biases of the jury prevents him from fully detailing the unfairness of the trial. Misconduct may have occurred that Mr. Johnson can only discover by juror interviews Cf. Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957).

9. Florida has created a rule that denies due process to defendants such as Mr. Johnson. "A trial by jury is fundamental to the American scheme of justice and is an essential element of due process." Scruggs v. Williams, 903 F.2d 1430, 1434-35 (11th Cir. 1990)(citing Duncan v. Louisiana, 391 U.S. 145 (1968)). Implicit in the right to a jury trial is the right to an impartial and competent jury. Tanner v. United States, 483 U.S. 107, 126 (1987). However, a defendant who tries to prove members of his jury were incompetent to serve has a difficult task. It has been a "near-universal and firmly established common-law rule in the United States" that juror testimony is incompetent to impeach a jury verdict. Tanner, 483

U.S. at 117.

10. An important exception to the general rule of incompetence allows juror testimony in situations in which an "extraneous influence" was alleged to have affected the jury. Tanner, 483 U.S. at 117 (citing Mattox v. United States, 146 U.S. 140, 149 (1892)). The competency of a juror's testimony hinges on whether it may be characterized as extraneous information or evidence of outside influence. Shillcutt v. Gagnon, 827 F.2d 1155, 1157 (7th Cir. 1987).

11. Such extraneous information that may be testified to by jurors includes evidence that jurors heard and read prejudicial information not in evidence, Mattox v. United States, 146 U.S. 140 (1892); that the jury was influenced by a bailiff's comments about the defendant, Parker v. Gladden, 385 U.S. 363, 365 (1966); or that a juror had been offered a bribe, Remmer v. United States, 347 U.S. 227, 228-30 (1954).

12. In order for a defendant to win relief, the extraneous information that infects the jury deliberations must amount to a deprivation of due process. Jeffries v. Blodgett, 5 F.3d 1180, 1190 (9th Cir. 1993); Harley v. Lockhart, 990 F.2d 1070, 1073 (8th Cir. 1993); Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987). Furthermore, prejudice that pervaded the jury room, yet is not attributable to extrinsic influences, may nonetheless be so egregious that "there is a substantial probability that the [juror's comment] made a difference in the outcome of the trial," thus allowing the admission of juror testimony to prove the abuse. Shillcutt, 827 F.2d at 1159.

13. Because error can occur in the jury room that amounts to a denial of due process, defendants must be given the opportunity to discover that error. Florida, however, bars defendants from their best source of information of what took place in the jury room -- the jurors themselves. Patrick Jeffries never would have known of the impermissible extrinsic evidence considered by his jury, and never would have been granted habeas relief, if Washington had a rule similar to Florida's prohibiting contact with jurors. See Jeffries v. Blodgett, 5 F.3d at 1189. Mr. Johnson cannot allege what, if any, impermissible extrinsic factors other than those previously cited, Tanner; Jeffries; or intrinsic prejudices, Shillcutt; may have affected his jury's deliberations because Florida has erected a bar to his discovery of such due process violations.

14. The Florida Supreme Court recently has recognized that overt acts of misconduct by members of the jury violate a defendant's right to a fair and impartial jury and equal protection of the law, as guaranteed by the United States and Florida Constitutions. Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla. 1995). It is imperative that postconviction counsel be permitted to interview jurors to discover if overt acts of misconduct impinging upon the defendant's constitutional rights took place in the jury room.

15. Any legitimate interest the State has in preventing interference with the administration of justice ends when the trial ends, at least with regard to jurors. Wood v. Georgia, 370

> U.S. 375 (1978). There is no "clear and present danger" that talking to Mr. Johnson's jurors years after his trial would interfere with the administration of justice. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).
>
> 16. The record in this case does not allow Mr. Johnson to make a definitive claim as to the presence of jury misconduct or dishonesty during voir dire based on the FDLE records produced by the agency and by the Court. Mr. Johnson's public records claim is a good faith effort to set the record straight and to preserve his rights based on the FDLE production.
>
> WHEREFORE, Mr. Johnson requests that this Court allow Mr. Johnson discretion to interview the jurors in this case. The failure to allow Mr. Johnson the ability to freely interview jurors is a denial of access to the courts of this state under Article I, Section 21 of the Florida Constitution and deprives him of Due Process. Mr. Johnson requests sixty days to interview the jurors and to report back to this Court. Given that the Court provided additional discovery material that was attached to the Order dated March 26, 2003 that was received by counsel for Mr. Johnson on March 31, 2003, Mr. Johnson requests that he be allowed until Monday June 2, 2003 to interview the jurors and to amend, tolling any necessity to file a notice of appeal.

(R. 285-293). Under the totality of the circumstances, the failure by the lower court to timely enter an order requiring a response from the State was unreasonable.

As noted by this Court, "[w]hile the post conviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief". Gaskin v. State, 737 So. 2d 509 (Fla. 1999). Given the unreasonable failure by the lower court to follow the guidance of Rule 3.851 and to allow a hearing in an area where the disputed facts were self-evident, this Court should remand Mr. Johnson's case back to the Circuit Court for a determination as to the Motion to Interview Jurors and for a full and fair public records evidentiary hearing.

ARGUMENT II

The State argues that Mr. Johnson's reliance on Ring v. Arizona, 122 S. Ct. 2428 (2002) is misplaced, because Ring has no application to Mr. Johnson's case. The State's argument overlooks the fact that this Court has repeatedly addressed the merits of claims under Ring or Apprendi v. New Jersey, 530 U.S. 466 (2000), without mentioning whether or not the claim was raised at trial or on direct appeal. This is true even when the claim is

presented in post-conviction,[9] or in a motion for rehearing.[10] Mr. Johnson's claim is before this Court on the merits.

The State, citing to Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003), argues that Ring is not subject to retroactive application on collateral review.

The Ninth Circuit Court of Appeals recently issued an opinion which specifically disagreed with the analysis of the Eleventh Circuit in Turner.[11] In Summerlin, the Ninth

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[9]See Bruno v. Moore, 838 So. 2d 485, 492 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Mills v. Moore, 786 So. 2d 532 (Fla. 2001).

[10]See Grim v. State, 841 So. 2d 455, 465 (Fla. 2003); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003); Chavez v. State, 832 So. 2d 730, 767 (Fla. 2002).

[11]The Ninth Circuit, in Summerlin v. Stewart, 341 F.3d 1082, n.8 (9th Cir. 2003), stated.:

> The Eleventh Circuit did not address the question of whether *Ring* had substantive impact on Florida law in its consideration of whether *Teague* barred the retroactive application of *Ring*. *See Turner, 2003 U.S. App. LEXIS 15043, 2003 WL 2173934, *33-*37*. Thus, our consideration in this respect is different from the issue addressed by the Eleventh Circuit. To the extent that the Eleventh Circuit relied on a pure analogy to *Apprendi* in its *Ring* analysis, we respectfully disagree with

Circuit held, "both on substantive and procedural grounds, that the Supreme Court's decision in Ring has retroactive application to cases on federal habeas review." Id. at 1121.

With regard to the substantive grounds, the Court stated that Ring:

> "decided the meaning of a criminal statute," *see Bousley, 523 U.S. at 620*, and it did so in a manner that both redefined the separate substantive offense of "capital murder" in Arizona and reinserted the distinction between murder and capital murder into Arizona's substantive criminal law structure. **Under the Supreme Court's articulation of "substantive" decisions in *Bousley*, then, *Ring* announced a "substantive" rule**, *Bousley, 523 U.S. at 620*, for it "altered the meaning of [Arizona's] substantive criminal law." *Santana-Madera, 260 F.3d at 139*; *cf. Cannon, 297 F.3d at 994* (holding *Ring's* rule to be procedural in a different capital murder context). When a decision affects the substantive elements of an offense, or how an offense is defined, it is necessarily a decision of substantive law. *Dashney, 52 F.3d at 299.* **And because *Ring* is a "substantive" decision with regard to the meaning, structure, and ambit of the relevant provisions of Arizona's criminal law, *Teague* does not bar retroactive application of *Ring* to cases decided under those Arizona**
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> ---
>
> its conclusions.

> **provisions, regardless of whether those cases are considered on direct or collateral review.**

Id. at 1106 (emphasis added).

* * * *

> Analyzed under *Teague*, the rule announced by the Supreme Court in *Ring*, with its restructuring of Arizona murder law and its redefinition of the separate crime of capital murder, is necessarily a "substantive" rule. *See Bousley, 523 U.S. at 620*. Thus, *Teague* does not bar its application in this case.

Id. at 1108.

As for the procedural grounds, the Court stated:

> In addition to *Ring*'s substantive effect on Arizona law, a full *Teague* analysis of the unique procedural aspects of *Ring* provides an independent basis upon which to apply *Ring* retroactively to cases on collateral review.

Id. at 1108.

* * * *

> The second requirement of the *Teague* exception provides that the newly announced rule must be a "watershed rule" that alters our understanding of bedrock procedural elements essential to the fairness of the proceeding. *Sawyer, 497 U.S. at 242*. Although *Eighth Amendment* concerns are implicated in Ring, the bedrock procedural element at issue is the provision of the *Sixth Amendment* right to a jury trial.
>
> *Ring* not only changed the substantive

> criminal law of Arizona, but it fundamentally altered the procedural structure of capital sentencing applicable to all states. ***Ring*** established the bedrock principle that, under the ***Sixth Amendment***, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty. ***536 U.S. at 609***. ***Ring*** **requires the vacation of a capital judgment based on judge-made findings.**

Id. at 1116 (emphasis added).

The State's Answer also takes the position that the Ring decision is not retroactively applicable under Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). However, in Witt, this Court explained that the doctrine of finality must give way when fairness requires retroactive application:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual applications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt, 387 So. 2d at 925 (footnote omitted).

The rule of Ring is the kind of "sweeping change of law" described in Witt. In Apprendi, Justice O'Conner's dissenting opinion described the rule of that case as "a watershed change in constitutional law." Apprendi, 120 S. Ct. at 2380 (O'Conner, J., dissenting). Extending Apprendi's rule to capital cases, as the Supreme Court did in Ring, is no less of a "watershed change."

In this Court, Chief Justice Anstead has said that Ring "is clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in Furman v. Georgia," Bottoson v. Moore, 833 So. 2d 693, 703 (Fla. 2002) (Anstead, C.J., concurring in result only), and Justice Pariente has described Ring as a "landmark case." Bottoson v. Moore, 824 So. 2d 115, 116 (Fla. 2002) (Pariente, J., concurring). Justice Shaw concluded that Ring applies retroactively under Witt and meets the test of Stovall v. Denno, 388 U.S. 293 (1967), for retroactive application. Bottoson, 833 So. 2d at 717 & n.49 (Shaw, J., concurring in result only).

The purpose of the rule in Ring is to change the very *identity* of the decision maker with respect to critical issues of fact that are decisive of life or

death. This change remedies a "'structural defect [] in the constitution of the trial mechanism,'" by vindicating "the jury guarantee . . . [as] a 'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." Sullivan v. Louisiana, 508 U.S. 275, 281 (1993). Florida has provided for a jury's participation at capital sentencing and gives significance to the jury's decision, but has not applied Sixth Amendment requirements to the jury's participation. Ring's retroactivity is clear. The rule of Ring applies to capital cases and therefore its retroactivity must take into account that "the penalty of death is qualitatively different from a sentence of imprisonment." Woodson v. N.C., 428 U.S. 280, 305 (1976).

Finally, The State argues that Ring has no application to the facts of Mr. Johnson's case. In addition to relying on the arguments previously made in his Corrected Initial Brief, Mr. Johnson notes that in Summerlin, the Ninth Circuit concluded that Ring error was structural error not subject to harmless error analysis:

> ***Ring*** not only changed the substantive criminal law of Arizona, but it fundamentally altered the procedural

> structure of capital sentencing applicable to all states. ***Ring*** established the bedrock principle that, under the Sixth Amendment, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty. 536 U.S. at 609. ***Ring*** requires the vacation of a capital judgment based on judge-made findings.
>
> A structural error is a "defect affecting the frame work within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante, 499 U.S. 279, 310, 113 L.ed 302, 111 S.Ct. 1246 (1991)*. If structural error is present, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark, 478 U.S. 570, 577-78, 92 L.Ed 2d 460, 106 S.Ct. 3101 (1986)(citation omitted)*.
>
> Depriving a capital defendant of his constitutional right to have a jury decide whether he is eligible for the death penalty is an error that necessarily affects the framework within which the trial proceeds. Indeed, the trial has proceeded under a completely incorrect, and constitutionally deficient, frame-work. In short, allowing a constitutionally-disqualified fact-finder to decide the case is a structural error, and ***Ring*** **error is not susceptible to harmless-error analysis.**

Summerlin, at 1116 (emphasis added).

The present state of the law in Florida may well bode

ill for the success of Mr. Johnson's Ring claim in state court:

> Unfortunately, while we do not yet know the answer to whether Florida's sentencing scheme will ultimately survive a Sixth Amendment ***Ring*** challenge before the U.S. Supreme Court, with the majority's opinion today we know that for a defendant in Florida "the factfinding necessary to out him to death" may still be done by a judge alone despite ***Ring's*** holding to the contrary.

Duest v. State, 855 So. 2d 33, 57 (Fla. 2003)(Anstead, C.J., concurring in part and dissenting in part). Nothwithstanding the trial court's finding of statutory aggravators in Mr. Johnson's case that included: 5(a) under sentence of imprisonment, 5(b) prior violent felony, 5(d) felony murder, 5(e) avoiding arrest, and 5(i) CCP, Ring stands for the proposition that the Sixth Amendment required that the jury in his case, not the judge, find the existence of facts utilized in sentencing Mr. Johnson to death:

> In sum, the view that the presence of a single "exempt" aggravating circumstance gives a trial judge free hand to find multiple "non-exempt" aggravating circumstances constitutes not only the most narrow reading of Ring possible, it is a reading that conflicts with Ring's

> central principle as well. Ring is, at its heart, based on the guarantee of the right to trial by jury provided in the Sixth Amendment of the United States Constitution.

Id. at fn 24. Judge fact finding in Florida capital sentencing presents real problems:

> Even if a judge, rather than a jury, may find the facts necessary to establish the prior violent felony aggravating circumstance, there will rarely, if ever, be a case in Florida where the death penalty will be imposed solely on the existence of this aggravating circumstance. And of course, this case is clearly not one of those rare cases. The death sentence here is predicated upon substantial findings of aggravation made solely by the trial court and not by the jury. Ring, of course, essentially stands for the proposition that any fact utilized by the trial court to impose the death penalty must be found by a jury and not the judge, much in the way an element of the crime must be found by a jury. The logic implicit in the majority's position is that once the prior violent felony aggravating circumstance is present, a trial judge, rather than a jury, can then find additional aggravating circumstances that under Ring would ordinarily need to be found beyond a reasonable doubt by the jury,, and the same trial judge may then utilize those additional circumstances to justify a death sentence. Clearly, as held by the Arizona Supreme Court, this "end run" around Ring would be improper and make a mockery of the principle Ring stands

> for.
>
> In other words, the majority's position is that the mere existence of the prior violent felony aggravating circumstance allows the Court to ignore any error in the jury's failure to find the two aggravating circumstances that are not exempt from a Ring analysis and that were expressly found and actually relied upon by the trial court in imposing a sentence of death. However, to reach this conclusion, the Court must be prepared to say that this Sixth Amendment error was harmless beyond a reasonable doubt.
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> * * *
>
> In good conscience, I cannot declare this error harmless beyond a reasonable doubt. The finding of these additional aggravating circumstances was obviously integral to the trial judge's imposition of the death penalty, and violative of Ring's essential holding that the ultimate penalty, death, cannot be predicated upon findings of fact made by a judge rather than the jury.

Id. at 55-56. C. J. Anstead has also identified this same problem in relation to the "exempt" circumstance of felony murder:

> Even if we were to rewrite Florida's capital sentencing scheme to equate a guilt phase conviction with an automatic finding of the aggravating circumstance that the murder was committed during the commission of an enumerated felony, the fact remains that the trial judge alone found three other serious aggravating circumstances and utilized them in imposing the death sentence. Thus, in

> direct violation of the tenets of Ring, the death sentence in this case is explicitly premised on factfinding done by a judge alone.

Caballero v. State, 851 So. 2d 655, 664 (Fla. 2003)(Anstead, C.J., concurring in part and dissenting in part).

This Court should review the facts of Mr. Johnson's case in light of Ring:

> Johnson was tried in Orange County on an indictment charging two counts of first degree murder. He admitted the killings but claimed they were provoked by the customer's attack and denied all premeditation. He was convicted of second degree murder for the death of the customer and of first degree murder in Dodson's death. On the first-degree conviction the jury recommended and the trial court imposed the death penalty.
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> * * *
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> We have reviewed the other aggravating factors relied upon by the trial court and find they were proper. By appellant's own admission, the homicide was committed during a robbery and for pecuniary gain. These two factors were properly merged into one by the trial court. The defendant was under sentence for another crime at the time the murder was committed; Johnson was on parole at the time. The defendant had previously been convicted of felonies involving the use or threat of violence. Appellant argues that the trial court erred in instructing the jury that the felonies of which Johnson had been convicted,

> attempted robbery and attempted murder, were as a matter of law felonies involving the use or threat of violence. Appellant further contends that the trial court's reliance on this factor was erroneous in the absence of evidence of actual violence used or threatened by appellant. Both robbery and murder involve violence *per se*; any attempt to commit these crimes must inherently involve the threat of violence. We find no merit here.

Johnson v. State, 442 So.2d 193, 195, 197 (Fla. 1983).

ARGUMENT III

Mr. Johnson disagrees with the State's characterization of the document concerning problems with lethal injection that was attached to his Consolidated Rule 3.851 motion (R. 105-124). In addition, the State's Answer completely ignores the argument presented at the Case Management Conference and Mr. Johnson's reliance at that hearing upon a law review article, written by then prospective evidentiary hearing witness Deborah W. Denno, published in 2002. The article cited comprehensively evaluated lethal injection from an Eighth Amendment perspective, including a comprehensive review of execution protocols and botched executions.[12] (S. 47-

[12]Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal*

49).

CONCLUSION

Mr. Johnson again 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 in his Corrected Initial Brief and this Reply Brief.

Injection and What It Says About Us, 63 OHIO ST. L.J. 63 (2002). Undersigned counsel served a copy of this article on the lower court and the State on April 14, 2003 (R. 294-295)(S. 578-579). Although this Court ordered the Orange County Clerk to Supplement the record on appeal with this item on October 24, 2003, the supplemental record includes only the Notice of Filing. Attachment A to this Reply Brief is a copy of the article omitted from the record by the Clerk.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply 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 February 26, 2004.

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
Litigation Director
101 N.E. 3rd Ave.
Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Mr. Johnson