SUPREME COURT OF FLORIDA

CASE NO. SC03-362

LOWER TRIBUNAL F89-12383B

RONNIE JOHNSON,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.
_____/

BRIEF ON THE MERITS OF APPELLANT RONNIE JOHNSON

CHARLES G. WHITE, ESQ.
Counsel for Appellant
1031 Ives Dairy Road
Suite 228
Miami, Florida 33179
Tel: (305) 914-0160
Fax: (305) 914-0166
Florida Bar No. 334170

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

ISSUE I

WHETHER THE CIRCUIT COURT ERRED IN DETERMINING THAT JOHNSON'S TRIAL COUNSEL WAS NOT DEFICIENT, AND JOHNSON WAS NOT PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL DURING PENALTY PHASE AND SENTENCING.

ISSUE II

WHETHER THE CIRCUIT COURT ERRED IN DENYING JOHNSON AN EVIDENTIARY HEARING TO CHALLENGE THE IMPROPER DELEGATION OF REPRESENTATION OF COURT-APPOINTED COUNSEL FOR TRIAL TO AN UNQUALIFIED ATTORNEY.

ISSUE III

WHETHER THE CIRCUIT COURT ERRED IN DENYING AN EVIDENTIARY HEARING TO DETERMINE IF TRIAL COUNSEL HAD EFFECTIVELY WAIVED VOIR DIRE ON DEATH QUALIFICATION.

ISSUE IV

WHETHER JOHNSON WAS PREJUDICED BY COUNSEL'S FAILURE TO HAVE REQUESTED INDIVIDUAL VOIR DIRE ON PRE-TRIAL PUBLICITY AND/OR FAILING TO MOVE TO STRIKE THE PANEL WHEN JURORS MADE PREJUDICIAL REMARKS.

ISSUE V

WHETHER THE CIRCUIT COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING ON THE ISSUE OF TRIAL COUNSEL'S CONSTITUTIONALLY INADEQUATE INVESTIGATION INTO THE FACTS AND CIRCUMSTANCES SURROUNDING HIS DETENTION BY THE POLICE THAT LED TO HIS TAPED CONFESSION.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN APPLYING BRAM V. UNITED STATES, 168 U.S. 532 (1897) TO HIS MOTION TO SUPPRESS.

ISSUE VII

WHETHER THE CIRCUIT COURT ERRED IN DENYING *AN* EVIDENTIARY HEARING ON WHETHER TRIAL COUNSEL WAS INEFFECTIVE WHEN HE MADE NO EFFORT TO IMPEACH THE CREDIBILITY OF TREMAINE TIFT.

ISSUE VIII

WHETHER THE CIRCUIT COURT ERRED IN REFUSING TO GRANT AN EVIDENTIARY HEARING ON TRIAL COUNSEL'S INEFFECTIVENESS FOR FAILING TO OBJECT TO THE AGGRAVATING FACTORS OF COLD, CALCULATED AND PREMEDITATED (CCP) ON THE GROUNDS OF CONSTITUTIONAL VAGUENESS, AND THAT JOHNSON WAS DENIED DUE PROCESS AND EQUAL PROTECTION WHEN THE JURY WAS GIVEN INSUFFICIENT GUIDANCE TO DETERMINE WHETHER TO APPLY THE AGGRAVATOR.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT *AN* EVIDENTIARY HEARING ON WHETHER THE STATE SUPPRESSED THE IDENTITIES OF WITNESSES WHO COULD HAVE TESTIFIED TO THE CIRCUMSTANCES UNDER WHICH JOHNSON WAS TAKEN INTO CUSTODY.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN RULING THAT THE COURT'S INSTRUCTIONS UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH *AND* FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

ISSUE XI

WHETHER THE DEATH SENTENCE IN THIS CASE WAS UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH *AND* FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION **AS** A MATTER OF LAW IN LIGHT OF THE FACT THAT JOHNSON WAS NOT THE TRIGGER MAN, *AND* THE TRIGGER MAN RECEIVED A REDUCED SENTENCE.

ISSUE XII

WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT THERE WAS NO PREJUDICE IN THE COURT'S INSTRUCTIONS CONCERNING NON-STATUTORY MITIGATING CIRCUMSTANCES.

ISSUE XIII

WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT FLORIDA'S PENALTY-PHASE PROCEDURE DID NOT VIOLATE APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000).

INTRODUCTION

This is an appeal from Circuit Court Judge Ronald Dresnick's Order Denying JOHNSON's Motion to Vacate, Set Aside, or Correct Illegal Sentence Pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure challenging the death sentence imposed following his conviction for first-degree murder and armed burglary.

STANDARD OF REVIEW

For ineffective assistance of counsel claims raised in post-conviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact. Stevens v. State, 748 So.2d 1028, 1033-4 (Fla. 2000).

To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. McLin v. State, 827 So.2d 948, 954 (Fla. 2002). Pursuant to Rule **3.851**(f)(5)(A)(i) of the Florida Rules of Criminal Procedure, this Court has provided that evidentiary hearings "shall" be held in capital cases on initial post-conviction motions filed after October 1, 2001, on any claim requiring a factual determination. Although not directly applicable, this Court has noted the problems caused by the failure of

circuit courts to conduct such hearings. Finney v. State, 831 So.2d 651, 656 (Fla. 2002).

PROCEDURAL HISTORY

The Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, Florida, entered the judgments and convictions and sentences under consideration. The Honorable Gerald Hubbart, Circuit Court Judge, presided over JOHNSON's trial and sentenced him to death.

Arthur Huttoe was appointed by the Court as a Special Assistant Public Defender. He inexplicably referred the case to Raymond Badini unlawfully, as will be discussed below. Badini with the assistance of Joy Carr represented JOHNSON throughout the trial.

JOHNSON was indicted for the first-degree murder of Lee Arthur Lawrence, in violation of Florida Statute Section 782(04) (Count I). Charged with him was Bobby Lee Robinson, David Bertram Ingraham, and Rodney O'Neal Newsome. He was also accused with the same defendants with the attempted murder of Bernard Williams (Count II), and Josias Dukes (Count 111), in violation of Florida Statute Sections 782.04 and 777.04.

On May 12, 1992, a jury trial commenced. On May 20, 1992, JOHNSON was found guilty on all counts.

The penalty phase commenced on May 21, 1992. The jury recommended a death sentence by a vote of 7-5.

On July 9, 1992, the Circuit Court entered its Sentencing Order. As to Count I, JOHNSON was sentenced to death. As to Counts II and III, JOHNSON was sentenced to life imprisonment.

On direct appeal, the Florida Supreme Court affirmed JOHNSON's convictions and sentences after consolidating the appeal with the one being prosecuted from JOHNSON's conviction for first-degree murder and death sentence in Case No. F89-14998. Johnson v. State, 696 So.2d 317 (Fla. 1997). John Lipinski, Esq., handled the appeal.

The Motion to Vacate, Set Aside, or Correct Illegal Sentence was timely filed on February 1, 2001. It was later amended twice with the permission of the Court. Following a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), an evidentiary hearing was ordered limited to trial counsel's failure to have conducted a reasonable investigation for mitigating evidence involving JOHNSON's psychological profile. All other issues were summarily denied. The evidentiary hearing was held October 4, 2002. Written memoranda were filed post-hearing by both parties.

STATEMENT OF FACTS

The facts of the case are set forth by this Court in its Opinion on JOHNSON's direct appeal, and are as follows:

> The record reflects the following. Lee Arthur Lawrence was murdered on March 20, 1989. Four suspects were charged in the crime. Ronnie Johnson and Bobby Robinson were convicted, in separate trials, of first-degree murder and sentenced to death. David Ingraham was convicted of first-degree murder and sentenced to life in prison. Rodney Newsome was convicted of second-degree murder and sentenced to 22 years in prison.
>
> The relevant incident occurred in the evening of March 20, 1989, at Lee's Grocery in Dade County. Working in the store at the time of the shooting were Valerie Briggs and Juanita Meyers. Bernard Williams had come to the store with his dog. He was Meyers' boyfriend. Before closing time, Briggs asked Meyers to take the trash outside. At that time, the owner (and victim) Lawrence left his office and went to the parking lot. Williams also exited to check on his dog. Outside, customer Josias Dukes was using a telephone. Due to his vantage point, Dukes was able to identify Ingraham as the perpetrator who carried the Uzi, a semi-automatic firearm. With these persons present, the violence began. Ingraham opened fire on Bernard Williams. Williams was hit in the back and fell to the ground. Ingraham then shot at Lawrence. Lawrence also fell to the ground. At this point, Johnson exited the store (he had been making a purchase inside) and started firing his revolver at Lawrence. Ingraham started firing shots at Dukes. Both Ingraham and Johnson fired stray shots in various directions. Lawrence was killed in this incident. Neither Dukes nor Williams died.
>
> Johnson subsequently confessed to multiple crimes. In his confession, Johnson indicated that 'G' had hired him to murder Lawrence. The victim was targeted because of his anti-drug

efforts in the community.[1] Johnson stated that he had been offered $1,500.00 to commit the murder. Prior to trial, Johnson moved to suppress the confession. A hearing on the motion was held on June 28, 1991. A total of five persons testified at the hearing. The defense called Johnson. The State called Milton Hull, Gregg Smith, Thomas Romagni, and Danny Borrego.

Officer Hull testified that he found Johnson on his grandmother's porch eating a hot sausage on April 1, 1989. Hull called Johnson over to him. It was little after 6:00 p.m. Hull told Johnson that some investigators wanted to talk to him about a murder. If Johnson was willing, Hull would take him to the investigators and bring him back. Actually, however, other detectives transported Johnson after he agreed to go. Hull testified that Johnson was not handcuffed when he was transported. Detective Gregory Smith also testified that Johnson was not handcuffed when he was transported to the Team Police Office. At that point, Johnson signed a Metropolitan Dade County Police Department Miranda Warning Form. Detective Thomas Romagni testified that he witnessed Johnson sign this form. Romagni stated that Johnson was not handcuffed when the Miranda form was read to him. Detective Danny Borrego then testified that prior to the signing of the Miranda form, he ascertained that Johnson understood the English language, could read, and was not under the influence of drugs or narcotics. In sum, all four officers expressly testified that they neither threatened Johnson nor promised him anything. On the other hand, Johnson testified that he was handcuffed while being taken to headquarters. He also said that he was told he could avoid the electric chair by cooperating. Johnson stated that he was punched in the chest and arms by investigators during the questioning.

---

[1] This statement of fact was contained in the Opinion, and represented the prosecution's theory of the case. In his confession, however, JOHNSON claimed that Lawrence was being murdered because he was responsible for the death of one of "G's" relatives. The media coverage of the incident had emphasized the State's theory although there was scant direct evidence that it was valid.

> Johnson testified that he asked to speak with his family. He says that he was told he could do so only after 'what they were doing was over with.' Further, he testified that he was scared for his family when he signed the sworn statement.
>
> The Motion to Suppress was denied. The case proceeded to trial. The jury convicted Johnson of first-degree murder for the death of Lawrence, attempted first-degree murder in the shooting of Williams, and aggravated assault in the shooting towards Dukes. After hearing penalty-phase evidence, the jury recommended that a death sentence be imposed by a margin of seven to five. The trial judge then sentenced Johnson to death on July 16, 1992. In his Sentencing Order, he found the following four statutory aggravating circumstances: (1) prior violent felony convictions; (2) great risk of death to many persons; (3) the murder was committed for pecuniary gain; and (4) the murder was committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. The trial judge then considered the following two statutory mitigating factors: (1) that the defendant was under the influence of extreme mental or emotional disturbance at the time of the crime; and (2) the age of the defendant at the time of the crime. The trial judge rejected both of these factors. As for non-statutory mitigation, the judge found that it was established that Johnson is a good friend and a man who cares for his family. The judge concluded as follows:
>
> > That this mitigating evidence is overwhelmingly outweighed by the aggravating circumstances. After presiding at three trials of this defendant, this court has come to the conclusion that he is a man who murders people for money. This Court has searched the record and its conscience to find a reason for not imposing the death penalty and has found none.
> >
> > A sentence of death was imposed.

Johnson v. State, 696 So.2d 317, 317-18 (Fla. 1997), cert. denied, 522 U.S. 1120 (1998) (footnotes omitted).

SUMMARY OF ARGUMENT

Trial counsel did not conduct a reasonable investigation into mitigating evidence, including obtaining expert psychological testimony. The decision of trial counsel not to pursue investigation was not reasonable. Psychological evidence presented at the evidentiary hearing demonstrated prejudice. The Court below erred in determining that trial counsel's performance was not deficient, and that Appellant was not prejudiced thereby.

Appellant was indigent, and counsel was appointed. His attorney made an improper referral to a less experienced attorney with whom he split fees. This referral was never approved by the Appellant nor the Court. This referral was per se reversible error. To the extent that it was not per se harmful error, an evidentiary hearing is necessary to establish whether (1) a less qualified attorney represented Appellant at trial, or (2) conflicts related to the fee-splitting deprived Appellant of his right to counsel. Prejudice should be presumed, but trial counsel's deficiencies can be demonstrated.

Trial counsel made no effort during voir dire to question jurors to determine if they were biased towards death, and whether they would be able to follow the law concerning the reception of mitigation evidence. Trial counsel thereby functioned as no counsel at all, and

provided deficient representation. An evidentiary hearing is warranted to determine the reason for trial counsel's decision not to participate in a death-qualification process.

The incident had attracted a great deal of media coverage. Trial counsel made no effort to individually question jurors on their exposure to the case. Consequently, juror comments tainted the jury. An evidentiary hearing was necessary to determine the reason for trial counsel's failure to request individual voir dire or make a Motion to Strike the Panel when the prejudice became apparent.

The principal evidence against Appellant was a taped confession. Appellant has located three witnesses who could testify to circumstances surrounding Appellant's arrest that would have helped suppress the confession. Trial counsel was ineffective for failing to have investigated the facts and circumstances surrounding Appellant's detention. Trial counsel was also ineffective for having failed, during the cross-examination of Detective Borrego, to point out that he had been deceived into waiving his Miranda rights. As part of his Motion to Suppress, trial counsel failed to raise that Appellant was placed under oath before being administered Miranda rights. This was a form of compulsion, which rendered his confession involuntary.

Trial counsel neglected to impeach the credibility of Tremain Tift, who was arguably an accessory after-the-fact for the murder, but who testified as a State witness. His potential liability as an accessory after-the-fact suggested that he had received immunity, which was never brought out. Tift's testimony without impeachment was devastating in both the Guilt and Penalty Phase.

Trial counsel failed to object to the jury instruction as to the aggravating factor of Cold Calculated and Premediated (CCP) on the grounds of unconstitutional vagueness when this Court had found it so. The jury was not given sufficient guidance to apply the aggravator.

The State failed to disclose the three eye-witnessees who observed Appellant be detained by Officer Hull. By so doing, the State failed to fulfill its obligation to disclose exculpatory information. An evidentiary hearing is necessary to determine whether this discovery violation occurred and involved a material issue.

The jury was repeatedly and unconstitutionally instructed by the trial court that its role was merely "advisory". These instructions minimized the responsibility and role juries are intended to play in capital cases.

The Appellant was not the triggerman. The death sentence imposed was disproportionate to the life sentence received by the triggerman.

The trial court did not give any instructions on any non-statutory mitigating circumstances. Trial counsel was ineffective for failing to articulate any non-statutory mitigating circumstances for the jury.

Florida's death-penalty process is unconstitutional in that it violates the principle that any factor which increases the maximum possible penalty faced by a criminal defendant is an element of the offense which must be found beyond a reasonable doubt by a jury as an element of the crime.

ARGUMENT

ISSUE I

THAT THE CIRCUIT COURT ERRED IN DETERMINING THAT JOHNSON'S TRIAL COUNSEL WAS NOT DEFICIENT, AND JOHNSON WAS NOT PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL DURING PENALTY PHASE *AND* SENTENCING.

The trial of this case occurred six months after the one in Case No. F89-14998. That trial had taken place 31 months after JOHNSON's arrest. During the period of time before the Case No. F89-14998 trial, Raymond Badini, who was handling JOHNSON's case, did not have a single mental health professional evaluate JOHNSON. During the voir dire in that case, Badini brought to Judge Hubbart's attention for the first time the claim that he was having difficulty obtaining forensic psychologists or psychiatrists willing to

help him with JOHNSON's case. He alleged that the ones he had contacted were refusing to work on any criminal cases because Miami-Dade County was refusing to pay them. The Court located Dr. Lloyd Miller, a forensic psychiatrist, who was willing to meet with JOHNSON (F89-14998: Vol.V-R.864-4). At the evidentiary hearing, Badini reiterated his alleged frustration in not being able to recruit any mental health experts, and claimed to have been finally able to enlist Dr. Miller's assistance for free (Tr. of 10/4/02 at 95-6).

Badini's expressed an inability to obtain a forensic psychologist. Badini attempted to blame Miami-Dade County's refusal to pay for these shortcomings (Tr. of 10/4/02 at 94-5). After the trial in this case, he testified that he gave up practicing criminal law because he did not feel that the proper tools were being made available (Tr. of 10/4/02 at 105-6). He summarized his conclusions as follows:

> Q: It is fair to say from your last answer that you wanted to have a full psychological evaluation of Mr. Johnson, but you were prevented to do so because of the financial situation from the County Attorney's Office?
>
> A: Absolutely. Again, this is why I quit doing this because I knew ten years later this thing would happen and then people spend their money and then people look back, but at that time the County Attorney controlled what happened, and it was a bad time in this courthouse. A lot of judges were afraid of their own shadow at this particular time.

(Tr. of 10/4/02 at **106**).

Aside from Badini's self-serving declarations, the frustration he allegedly felt, and the obstacles he claimed had prevented him from fully investigating JOHNSON's mental status, the admitted deficiency in his representation cannot be attributed to anyone but him. The absence of activity on record where Badini had sought the Court's assistance to obtain a "full psychological evaluation" belies his claims.[2] Badini began a capital case with no mitigating evidence aside from family members. Those family members had a whitewashed impression of JOHNSON because they really did not know him. Badini had not sought the evidence he needed in order to know whether presenting a "good guy" defense in mitigation of the death penalty was a wise strategic move. After losing the trial in Case No. F89-14998, Badini made no effort to investigate further any mitigating evidence. He claimed that Miami-Dade County continued to refuse to authorize any funds because of the first conviction and death sentence. (Tr. of 10/4/02 at 93).

Badini admitted that he believed a thorough mental health examination was necessary in JOHNSON's case. He

[2] Badini testified that he did not make formal application for the appointment of experts "because it's work product. It would come to me. I would become a witness that the State could depose." Tr. of 10/4/02 at 195. This statement suggests that Badini was not aware of his ability to seek expert witnesses and still maintain confidentiality. This is evidence of incompetence.

to believe him "always an enigma" (Tr. of 10/4/02 at 105-6). Badini said that it was difficult to equate JOHNSON's nature with a person willing to kill for money. He recognized that there was "something more there". Badini recognized that certain events in JOHNSON's life which he learned before trial, particularly the deaths of certain people who were close to him, could act as a "trigger" into the development of psychological evidence in mitigation of the death penalty (Tr. of 10/4/02 at 104). Since he did not have the benefit of mental health evidence, however, he was reduced to telling the jury at closing argument, "If I'm good, you are going to let him live. If I'm bad, you are going to let him die." (Tr. of 10/4/02 at 105). This testimony constituted a virtual admission that he was deficient in not having fully pursued an investigation into his JOHNSON's mental health

The Circuit Court relied heavily on Dr. Miller's alleged psychiatric examination of JOHNSON in denying his 3.850 motion. As the Circuit Court stated:

> It is clear from the testimony that the Defendant was evaluated by Dr. Miller prior to the penalty phase. While the testimony differs as to the extent of the evaluation, counsel did have an evaluation performed by a competent doctor and cannot be deemed incompetent for failing to have the Defendant evaluated.

The testimonial conflict as to the extent of the evaluation came from comparing JOHNSON's description of the interview as where he was only questioned about his capacity to understand the charges against him, resembling a competency evaluation, and Badini's claim that he had asked Dr. Miller to make a more comprehensive evaluation into "mitigation" (Tr. of 10/4/02 at 81-2, 96).

There was insufficient evidence to conclude that Badini's investigation into JOHNSON's mental health in the search for mitigating evidence was reasonable. If not reasonable, then it was deficient.

After his appointment to represent JOHNSON in these post-conviction proceedings, undersigned counsel retained Dr. Merry Haber to perform the type of psychological evaluation she has undertaken in death-penalty cases since the mid-1980's. Dr. Haber is a forensic psychologist who has impeccable credentials in death-penalty cases. She has been a psychologist since 1966. She began to practice forensic psychology in 1975, and evaluates approximately 300 persons per year, usually ordered by a court. She began doing death-penalty work in the mid-1980's (Tr. of 10/4/02 at 13-14).

At the evidentiary hearing, she expounded on the role of the forensic psychologist in the presentation of mitigating evidence as follows:

> I understood it to be looking for factors that would have affected the defendant at the time of the crimes, the stressors that were acting on them, if there were any, major mental illnesses, if there were any, mitigating circumstances to be able to present a picture of that defendant as an individual with their various diagnoses, if there were any.

(Tr. of 10/4/02 at 14).

She further described her role in the habeas proceedings as follows:

> [M]y purpose today is not to evaluate for the death penalty. It was to say what I would have done then had I been asked to do it and what my opinion would likely have been within as much psychological certainty to right now.

(Tr. of 10/4/02 at 37-8).

Dr. Haber was given all the necessary tools to permit her to conduct her evaluation. She was provided with a memorandum from counsel that described in summary form the facts of each murder case. She received the transcript of the penalty phases for F89-14998, and records from Union Correctional (Tr. of 10/4/02 at 16-18). Dr. Haber was also granted access to JOHNSON's family, and met with him on two occasions for formal psychological testing and clinical interviews. She summarized her role as being "able to explain them [defendant] as a human being to jurors so they can see that there might be an explanation for the behavior that is different from or in addition to what they have heard in phase one, which is cold facts." (Tr. of 10/4/02 at 20). She administered the Minnesota Multiphasic

Personality Inventory-2 (MMPI-2), and the Millon Clinical Multiaxial Inventory (MCMI-3).

In the instant case, the only evidence Badini presented in mitigation was the testimony of JOHNSON himself, his mother (Wilhemina Ferguson), aunt (Rose Cooper), first cousin (Darren Wood), cousin-in-law (Trubia Cooper), ex-girlfriend (Bernadette Hargrett), and brother (Lamont Ferguson). Dr. Haber was asked at the evidentiary hearing whether her review of their testimony offered any clues that would have warranted follow-up. She indicated (1) the discrepancy between Lamont Ferguson's knowledge of JOHNSON's alcohol problem, and the ignorance of the other witnesses to any such problem; (2) JOHNSON's refusal to discuss the death of his closest friend; (3) the step-father's alcoholism; (4) the grandmother's death; and (5) JOHNSON's own expressed confusion with his life at the time (Tr. of 10/4/02 at 22-4). There was testimony from Wilhemina Ferguson over JOHNSON's fears and nightmares involving a statue of a black cat in his bedroom when he was nine years old (Tr. of 10/4/02 at 75). Ms. Ferguson had testified at trial that she was not aware of her son having problems with drugs or alcohol (R. 207). During the evidentiary hearing, she testified that she did have a strong suspicion that JOHNSON was using drugs when he stole a television set, but

she was instructed by Badini not to mention it (Tr. of 10/4/02 at 76-7).

Dr. Haber noted that from reading the testimony of the family members, JOHNSON appeared as a fun-loving, jovial guy who got along with everybody (Tr. of 10/4/02 at 29). In contrast, her evaluations revealed a deeply conflicted person with two diagnosed personality disorders. According to the DSM-III, which was in use at the time of JOHNSON's trials, he had an adjustment disorder with mixed disturbance of emotions and conduct, and a sexual disorder derived from his discomfort with his sexuality. Dr. Haber explained how the stressors of his best friend's death, the absence of a suitable male role model figure, the feeling of abandonment on the part of his grandmother who was dying, and augmented by a homosexuality he maladjusted to in a dramatic way, impacted on his judgment. He self-medicated with alcohol, cocaine, and marijuana. He was prostituting himself for money and drugs. Dr. Haber had this to say in summary.

> A. I think his judgment was somewhat impaired at the time. He was mentally confused, disturbed at the time, and that he felt guilty at the time and that he was depressed at the time. He had internal turmoil, depression, and a number of psychological factors that affected his judgment and his behavior.
>
> ***Q.*** How would this relate or be a factor in the decision for someone to accept an offer of money to kill someone?

A. Well, I guess that--1 believe that at the time I think that he didn't value life or death. I don't think money was the issue. I think reckless abandon was his issue. I think he didn't care whether he lived or died. I think he needed to present an image to the world of being cool and tough and gaining status in his community that he didn't have, in a very negative manner.

Q. When you say that the money didn't matter, what do you mean by that?

A. Oh, the money did matter. I think clearly he got some pecuniary gain. But I believe for him the status in the community was probably more important to him than the money.

(Tr.of 10/4/02 at 28-9).

It seemed easy to dismiss or diminish, as the State attempted to do in cross-examination, the revelation of JOHNSON's homosexuality. As Dr. Haber noted, not all homosexuals maladjust to their status. JOHNSON did, and that is why she diagnosed him with a sexual disorder. The shame and humiliation he felt as a gay male in a macho, urban, street culture was profound. Deprived of role models, abandoned by divorce or death, carrying a shameful secret, JOHNSON slipped into a dark world. Rather than the cold, calculated decision to murder for hire as portrayed by the State, the real picture of JOHNSON was very different. A deeply wounded psyche, who was desperately seeking status while harboring forbidden urges, engaging in humiliating behavior, living a secret life of shame away from his family, and engaging in daily substance abuse, paints a

picture of a person who a reasonable juror might conclude should not be executed despite having committed horrible crimes. Presenting the true picture of JOHNSON that emerged through Dr. Haber's evaluation was important information for the jury to accept or reject. In a situation where the jurors' recommendation was nine to three for death in F89-14998, and seven to five in F89-12383B, the ability to have influenced only a handful of jurors would have changed the recommendation. This suggests the prejudice which JOHNSON received due to his lawyer's inability to have investigated and presented mental health evidence.

The mental health testimony offered by Dr. Haber suggests the evidentiary basis to assert the statutory mitigating factor that he was under the influence of extreme duress or under the substantial domination of another person at the time of the crime. In addition, the psychological profile offered by Dr. Haber could have made JOHNSON's age more relevant. The trial judge commented in rejecting that statutory mitigating factor that JOHNSON was old enough to know that killing people for money was wrong. Based upon Dr. Haber's conclusions, that does not appear necessarily to have been an accurate conclusion. While it might appear to have been valid from a look at the prosecution's version of the facts, it completely omits the underlying psychological basis for JOHNSON's actions. It appears that it was

JOHNSON's own imperatives: the need for status in a macho world where homosexuals are repressed, with judgment impaired by daily substance abuse taken to mask insecurities and shame, and where JOHNSON has been unable to cope with any of the bad things that have happened in his life, that motivated his behavior rather than the cold, calculated premeditated mind interested only in killing for money.

The primary prejudice to JOHNSON was that at both trials his attorney put on a good-guy defense that failed to address any reasonable juror's concerns about the nature of the person they were judging. A family-oriented, funny, and good-natured individual who had some tragedies in his life, enters into a cold-hearted business deal to kill for money, and not even that much money. The thought of such an enigma must have sent chills up the jury's spine. If they had only known more, would they have reached the same conclusion?

The U.S. Supreme Court has recently spoken clearly on precisely the issue before this Court. In Wiggins v. Smith, ____ U.S. ____, **123** S.Ct. 2527, 156 L.Ed.2d 471 (2003), the Court clarified its definition of ineffective assistance of counsel as it pertained to deficiencies in preparation for and presentation of mitigating evidence in the penalty phase of a death-penalty case. The Court described the legal principles as follows:

> We established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washinston, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: a petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.' Id., at 688, 104 S.Ct. 2052.
>
> * * *
>
> In this case, as in Strickland, petitioner's claim stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence. Id., at 673, 104 S.Ct. 2052. Here, as in Strickland, counsel attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternate strategy instead. In rejecting Strickland's claim, we defined the deference owed such strategic judgments in terms of the adequacy of the investigations supporting those judgments:
>
> > ' [Sltrategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' Id., at 690-691, 104 S.Ct. 2052.

123 S.Ct. at 2535.

In Wiggins, counsel did pursue some investigation into mitigating evidence. Their investigation was so cursory,

however, that it did not uncover evidence of his family and social history that, if uncovered, would reasonably have led to strong mitigation evidence. The Court noted that trial counsel was aware of certain leads or clues that should have been pursued. In referencing comments by the Federal District Court, it found that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses . . . indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedent in which we have found limited investigations into mitigating evidence to be reasonable." Id., at 2537. The Court further stated that "[i]n assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.'' Id., at 2538.

The Supreme Court utilized the ABA Guidelines in existence at the time as a benchmark for determining the reasonableness of trial counsel's investigation. The ABA standards were applied in Wiggins, Williams, and ~~Strickland~~ as "guides to determining what is reasonable." 123 S.Ct. *at*

2537. The ABA Guidelines provide that "investigations into mitigating evidence" should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for Appointment and Performance of Counsel in Death-Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added by Court). Id.

Under the analysis and standards set forth in Wiggins, Badini's representation was clearly deficient. He knew that further investigation into JOHNSON's mental health was necessary in order to unlock the enigma of his personality. A cursory evaluation conducted in the middle of jury selection by Dr. Miller was simply not enough.

The Wiggins Court addressed the importance of certain types of mitigating evidence in a death-penalty case.

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse.

123 S.Ct. at 2542, referencing Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

This Court has long recognized the strict duty of trial counsel to conduct a reasonable investigation into a defendant's background for possible mitigating evidence in death-penalty cases. Ragsdale v. State, 798 So.2d 713, 716

(Fla. 2001), citing State v. Riechmann, 777 So.2d 342, 350 (Fla. 2000), citing Rose v. State, 675 So.2d 567, 571 (Fla. 1996). See also, State v. Lara, 581 So.2d 1288 (Fla. 1991) (holding defendant was entitled to a new penalty phase proceeding where trial counsel did not investigate defendant's background, did not properly utilize expert witnesses, and virtually ignored penalty portion of trial).

In addition, as presented above, the expert testimony of Dr. Haber may have helped JOHNSON to rebut certain statutory aggravators. "Psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors." Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988).

The Circuit Court's reliance on Morton v. State, 789 So.2d 324 (Fla. 2001), is misplaced. Morton was a direct appeal from a death sentence. The death sentence was affirmed as against the argument that the trial court had failed to give sufficient weight of consideration to mitigating circumstances presented by way of expert testimony in the sentencing order. In its Order denying JOHNSON's 3.850 Motion, the Circuit Court suggested that Morton's holding gave it the authority to ignore the expert psychological testimony presented on JOHNSON's behalf at the evidentiary hearing. The Court also expressed its belief that the expert testimony in question in Morton was limited

to the defendant having an antisocial personality disorder. Morton does not stand for the principle that sentencing judges in death-penalty cases should ignore psychological testimony about a defendant's background. Morton does not stand for the proposition that any psychological profile that contains an element of antisocial personality tendencies is irrelevant to the issue of life or death. The Circuit Court did not properly weigh the evidence presented at the evidentiary hearing, and consequently did not make appropriate legal decisions as to whether Badini's representation in this regard was deficient, and whether prejudice was caused.

ISSUE II

THAT THE CIRCUIT COURT ERRED IN DENYING JOHNSON *AN* EVIDENTIARY HEARING TO CHALLENGE THE IMPROPER DELEGATION OF REPRESENTATION OF COURT-APPOINTED COUNSEL FOR TRIAL TO *AN* UNQUALIFIED ATTORNEY.

In its Order denying JOHNSON relief, the Circuit Court based its decision on an evaluation of case law cited by JOHNSON in his initial 3.850 motion. JOHNSON had been given leave of Court to file an Amended Motion, which cited entirely different case law. These other cases were not considered by the Circuit Court, despite being argued at the Huff Hearing. Specifically, the Circuit Court distinguished the instant case from the situation present in Duval v. State, 744 So.2d 523 (Fla. 2d DCA 1999), wherein a defendant

complained that a certified legal intern was not a practicing attorney representing him at critical stages of the trial. That argument was not raised by JOHNSON in his Amended Motion. Based upon the facts alleged, and the law that controlled the issue of substitute representation, which was cited in his Amended Motion, JOHNSON was entitled to an evidentiary hearing.

Arthur Huttoe had been appointed by the Circuit Court to represent JOHNSON in both his murder cases. Presumably, he was appointed to such an important case because of his long years of experience as a criminal defense lawyer. From the commencement of the appointment, however, Huttoe made only a handful of appearances on JOHNSON's behalf, and most of those occurred during the initial stages of the case. Eventually, attorney Ray Badini became the lawyer representing JOHNSON and at trial was assisted by Joy Carr.

During 1991-1992, the system for appointing private attorneys in criminal cases in Miami-Dade County was exposed as a form of patronage, and in some cases infected with corruption. Campaign contributions to judges by attorneys were rewarded with court appointments. Certain politically-connected attorneys received a disproportionately large number of court appointments. Huttoe was one of those politically-connected attorneys who received a large number of court-appointed cases. It was reported in the Miami

Herald that Huttoe had billed Miami-Dade County for in excess of $400,000.00 as a Special Assistant Public Defender during one 15-month period from 1990-1991, which was during the time JOHNSON's case was pending.

Further investigation had revealed that Huttoe had owned an office building and filled it with young attorneys as tenants. He would refer the vast bulk of his court-appointed cases to these attorneys in exchange for a percentage of the fees collected. One of these attorneys was Badini. JOHNSON was never asked for his consent to Badini's representation.

Although an indigent criminal defendant does not have the right to court-appointed counsel of his own choosing, once counsel is appointed, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained by the defendant himself. Holley v. State, 484 So.2d 634 (Fla. 1st DCA 1986); McKinnon v. State, 526 P.2d 18 (Alaska 1974), overruled on other grounds, Kvasnikoff v. State, 535 P.2d 464 (Alaska 1975); Smith v. Superior Court of Los Angeles County, 68 Cal.2d 527, 68 Cal. Rptr. 1, 440 P.2d 65 (1968) (discusses power of court to change counsel appointed for indigent against objections of accused and original counsel). See also, A.L.R.4th 1227 (1981). The Court's power to replace or substitute court-appointed counsel normally arises through

some concern on the part of the Court that counsel was unprepared or acted improperly in his conduct of the defense. The theory forbidding trial courts from forcibly severing the attorney-client relationship is based on the potential problems inherent when new counsel is forced upon a defendant.

It is clear that a defendant cannot choose his court-appointed counsel. Morris v. Slappy, 461 U.S. 1, 10, 103 S.Ct. 1610, 1615-6, 75 L.Ed.2d 610 (1983). The right to retain counsel of choice, much like the right to keep appointed counsel, is not absolute and can be circumscribed in the event that the right to counsel is being manipulated in order to cause delays in the system. Id., at 11, 103 S.Ct. at 1616. In Morris, the Court was concerned whether substituting retained counsel with appointed counsel shortly before the trial date constituted ineffective assistance of counsel. The competence shown by appointed counsel in that case alleviated any concerns the Supreme Court might have harbored that the defendant was not being well-represented. Compare, United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (forcing inexperienced counsel to trial in complicated fraud case within an unreasonably short time constituted per se ineffective assistance of counsel) with Gibson v. State, 721 So.2d 363, 366-7 (Fla. 2d DCA 1998).

The rule of law arising from the above-cited cases is that while the defendant cannot choose his court-appointed attorney, he has the right to be represented by that court-appointed attorney and none other. Likewise, the trial court cannot force a defendant to accept new court-appointed counsel without good reason for getting rid of the old one. This case concerns the power possessed, if any, for a court-appointed lawyer to substitute new counsel at his own discretion and without obtaining the consent of the defendant or anything other than silent acquiescence from the Court. JOHNSON maintains that the court-appointed lawyer, particularly in a death-penalty case, cannot refer another attorney to the case without the explicit consent of the defendant and the approval of the Court.

In Woodberry v. State, 611 So.2d 1291 (Fla. 4th DCA 1992), review denied, 623 So.2d 496 (Fla. 1993), the Court declined to create a per se rule prohibiting the substitution of counsel not appointed to represent the defendant in a critical stage of the proceedings (sentencing) in lieu of appointed counsel who had tried defendant's case at the discretion of the appointed attorney and without the consent of the defendant. The Court held that in order to demonstrate a constitutional violation, the defendant would have to show that the substituted counsel's

performance was deficient. Id. Judge Stein, however, dissented. He stated his position as follows:

> In my judgment, a defendant is effectively denied counsel where a lawyer, possibly unprepared, appears without explanation at a critical stage in a criminal case on behalf of a defendant in custody, solely at the request of another court-appointed counsel. The attorney was neither selected with the defendant's consent nor formally approved to represent the defendant. He was not even a member of defense counsel's law firm. Under such circumstances, and in the absence of a record with respect to how this appearance came about, I would hold that the only effective way to assure sixth amendment protection is to remand for a new sentencing hearing.

611 So.2d at 1292 (J. STEIN, dissenting).

JOHNSON would request this Court impose a per se rule prohibiting court-appointed counsel from unilaterally substituting someone else to provide representation at any critical stage of the proceedings without the defendant's consent and the Court's approval. The referral is a violation of the lawyer's duty of care. Prejudice should be measured by comparing substituted counsel's level of experience and competence with those of appointed counsel if it cannot presumed. The ethical violation would be considered in a similar fashion as the conflict of interest case law. See, Cuyler v. Sullivan, 446 U.S. 335, 341-2, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

The ethical violation is real and can cause a conflict of interest. The level of attention which court-appointed

counsel can devote to a case is frequently related to the amount of compensation made available from public sources. In the instant case, Badini had agreed to accept only a percentage of what he earned at $40.00 or $50.00 per hour. No wonder Badini spent so little time with JOHNSON, refused to familiarize himself adequately with death penalty legal concepts, or conduct nothing more than perfunctory pre-trial investigation before going to Court with JOHNSON'S life in his hands.

Looking at Huttoe's situation reveals self-interest interfering with his duty of loyalty to JOHNSON. To Huttoe, JOHNSON was a referral case where he would earn a percentage of the fee without having to do any work. It was in Huttoe's financial interest to have Badini do all the work to maximize his return. A lawyer's self-interest can conflict with his duty of loyalty to the client. See, e.g., Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995). Beets recognized that conflicts that might arise between the lawyer's self-interest and his duty of loyalty to his client may depend upon how fees are paid. For instance, in discussing other fee induced conflicts, the Court recognized that an attorney who undertakes representation despite an over-abundance of other work could see his effectiveness diminished as his need for money clashes with his commitment to the work. Id., at 1271.

Under the circumstances of this case, can the Court ignore the unethical referral which imposed a lawyer not appointed upon JOHNSON and the possible conflicts which were created thereby? In the context of a death-penalty case, should not the Court be obligated to ensure that the attorney appointed to represent the defendant carry through with that representation or seek permission from the Court to withdraw? An S.A.P.D. should not be empowered to subcontract the appointment to anyone willing to split the fees generated by the case.

To the extent that the Court rejects the idea of a per se rule, or a presumption of prejudice based upon disparity between the experience and demonstrated competence of the substitute attorney compared to the appointed attorney, JOHNSON can establish that Raymond Badini repeatedly violated his Sixth Amendment right to effective assistance of counsel by performing below the standard expected of a death-penalty practitioner. Those complaints will be dealt with elsewhere in this Brief, but this inappropriate referral should, at the least, weigh as a factor in demonstrating JOHNSON's ineffective assistance of counsel deprivation.

By 1992, a combination of media exposure and criminal indictment put an end to the patronage system enjoyed by

many Special Assistant Public Defenders in the court system. Perhaps in recognition of the deficiencies in the system which permitted this type of referral, new regulations forbid court-appointed counsel unilaterally substituting another attorney to handle critical matters without the formal consent of the defendant. JOHNSON was a victim of that system, and his conviction and death penalty in this case were its proximate cause. Huttoe did not supervise Badini in any meaningful way. Carr was also relatively inexperienced in capital cases, but her involvement in the trial was minimal. Badini was a tenant of Huttoe's, and willing to accept cases from Huttoe. That was his only qualification to serve.

In its Order denying JOHNSON's 3.850 Motion, the Circuit Court also claimed that this issue was procedurally barred on the grounds that it should have been raised on direct appeal. It is clear from the facts alleged above, that an evidentiary hearing was necessary in order to expose the Court to facts outside the Record in making a determination whether there was an unethical referral. Were conflicts of interest created? None of these facts are apparent from the Record. An evidentiary hearing into all the factual issues surrounding Badini's handling of the case, including the referral, needs to be held.

ISSUE III

THAT THE CIRCUIT COURT ERRED IN DENYING *AN* EVIDENTIARY HEARING TO DETERMINE IF TRIAL COUNSEL HAD EFFECTIVELY WAIVED VOIR DIRE ON DEATH QUALIFICATION.

The Court started the death qualification process by asking the jurors in general whether anyone of them opposed the death penalty under all circumstances. Jurors who identified themselves as such were questioned in greater depth by the State. Other jurors who during the course of the voir dire expressed reservations about the death penalty were questioned, primarily by the State. In the process of death qualification, the State also educated the jury on its burden of proof as regards the aggravating circumstances.

When it was Badini's turn to question the jury, he chose not to ask them any questions about the death penalty at all. Reviewing the transcript of the voir dire, one is stuck with the feeling that Badini was oblivious to the fact **he** was trying a death-penalty case. In fact, at one point, he admitted that he was not taking notes to keep track of what individual jurors had said about the death penalty (Vol. V-R. **891).** Not one specific question was propounded to any juror or the panel by Badini that could have either led to an excusal for cause or informed him of the need to exercise peremptory challenges intelligently.

The absence of any effective voir dire on death-qualification was below the standard of representation in death-penalty cases. JOHNSON was certainly prejudiced by this shortcoming. JOHNSON received no information that would have enabled him to determine which jurors believed that death was the most appropriate penalty for first-degree murder. The venire was not asked about the affect mitigating circumstances might have on their willingness to apply the death penalty. The venire's receptiveness toward mitigating circumstances was not explored by Badini. Any juror harboring a bias toward death would have gone virtually undetected given the inadequacy of Badini's inquiry. Badini's failure to have conducted any meaningful voir dire on death qualification constituted a waiver of JOHNSON's right to due process and constituted a fundamental miscarriage of justice.

The failure of the defense counsel to participate in the death-qualification portion of voir dire can be ineffective assistance of counsel. Baldwin v. Johnson, 152 F.3d 1304 (11th Cir. 1998). In Baldwin, the Eleventh Circuit recognized the need for defense counsel to have a role in ascertaining the opinions of the venire about capital punishment, but excused the attorney in the case because he personally knew almost all the members of the venire. The attorney was permitted to substitute his

knowledge and experience as a long-time practitioner in a small, rural community as against his refusal or failure to have asked any questions on the point. Badini cannot claim personal knowledge of any of the venire. The only information he received regarding their opinions of the death penalty was derived from those questions propounded by the Court or the State. Consequently, Badini had waived JOHNSON's right to participate in voir dire, functioned at the level of an absent attorney, and violated JOHNSON's right to due process, equal protection and representation by competent counsel.

In approving the death qualification process, the U.S. Supreme Court has acknowledged that social science and statistical studies overwhelmingly support the proposition that death-qualified juries are more apt to convict. Lockhart v. McCree, 476 U.S. 162, 180-2, 106 S.Ct. 1758, 1768-70, 90 L.Ed.2d 137 (1986). JOHNSON was entitled to an evidentiary hearing to present testimony from experienced death-penalty practitioners on the importance of culling from the venire those persons who so support the death penalty that they would be predisposed to recommend the death penalty in the event of a first-degree conviction, and reject any mitigation evidence.

In its ruling, the Circuit Court claimed that JOHNSON failed "to state what questions were not asked that should

have been asked." The Court also claimed that JOHNSON's claim was deficient because he could not allege what answers to the questions asked would have been different if the members of the venire had been asked the same questions again. That is always the problem associated with ineffective assistance of counsel in voir dire claims. See, White v. Luebbers, 307 F.3d 722, 728-9 (8th Cir. 2002), cert. denied, 123 S.Ct. 1785 (2003). In White, the Court avoided the issue of presuming prejudice by noting trial counsel's misguided strategy for not having questioned potential jurors about the death penalty. See also, Fennie v. State, _____ So.2d _____, 2003 WL 21555090 (Fla. 7/11/03), citing United States v. Cronic, supra (despite defendant's claims, trial counsel had extensively questioned venire on interracial nature of crime as against effort to presume prejudice).

In the instant case, JOHNSON did not get an evidentiary hearing on this issue. The absence of any questioning whatsoever on that point was cited in the 3.850 Motion and urged as a subject *of* any evidentiary hearing that might be ordered in the event that this Court was unable to find a virtual absence of counsel. JOHNSON has at least raised a sufficient enough issue to deserve further inquiry at an evidentiary hearing.

ISSUE IV

THAT JOHNSON WAS PREJUDICED BY COUNSEL'S FAILURE TO HAVE REQUESTED INDIVIDUAL VOIR DIRE ON PRE-TRIAL PUBLICITY AND/OR FAILING TO MOVE TO STRIKE THE PANEL WHEN JURORS MADE PREJUDICIAL REMARKS.

There had been extensive publicity surrounding the murder in this case. The victim, Lee Arthur Lawrence, was depicted as an anti-drug crusader in Perrine who was murdered by drug dealers threatened by his anti-drug activity. In contrast, there was evidence in the case which suggested that Lawrence was a rival drug dealer who may have been responsible for a murder, and his killing may have been motivated by revenge. The jury panel was aware of the media story that lionized Lawrence and connected his death to the acts of vengeful drug dealers. Badini was under an obligation to minimize the damage caused by this pre-trial publicity. Statements were made which demonstrated bias and prejudgment based upon media coverage. Badini never asked for individual voir dire on the pre-trial publicity. Under the circumstances of this case, such failure constituted ineffective assistance of counsel.

The Court started the problem by referencing the pre-trial publicity when it introduced the jury to the case (Vol. IV-R.707-708). Badini did not react. Jurors were then invited to describe their prejudgments in front of the entire panel.

Mrs. Herne and Mrs. Harris explained how happy they were that the killers were caught (Vol. IV-R.708, 709). Mrs. Harris expressed doubts about her ability to be fair. Mrs. Heller agreed that she could not be fair.

Mr. Rogers also agreed, "Yes, if he was trying to get rid of drugs." (Vol.IV-R.709). Mr. Rogers later claimed the ability to set aside whatever he had read and be fair-minded (Vol.IV-R.710). The State's efforts at rehabilitation had the effect of further poisoning the panel. Harris, Herne, and Heller were allowed to express their sympathy for the victim and inability to be fair (Vol.IV-R.720, 728, 729).

Aside from informing the panel that CBS had featured a story on the incident, Badini did nothing to minimize the damage pre-trial publicity had had on the venire as expressed by the jurors themselves in open court (Vol.V-R.887). He made reference to an unnamed co-defendant's case. He never requested individual voir dire on publicity. As a result of that omission, the entire panel was informed (1) that there was pre-trial publicity, and (2) that the publicity buttressed the State's theory of the case. In addition, he incompetently verified the fact that another individual has already been convicted for participating in the same murder. JOHNSON was prejudiced because the State possessed no direct evidence that the murder was in retaliation for Lawrence's anti-drug activity.

Although some witnesses testified to Lawrence's involvement in anti-drug activity, there was no direct evidence to corroborate the theory. JOHNSON's statement did not mention it. The State was able to establish as a fact something it was unable to prove with evidence based upon juror comments during voir dire.

Individual voir dire on pre-trial publicity issues is necessary in order to avoid tainting the rest of the panel, but allows the Court and the parties to fully explore the affects of the pre-trial publicity on juror attitudes. Any competent criminal defense lawyer, particularly in a death penalty case, should request individual voir dire to avoid tainting the panel. See, United States v. Davis, 583 F.2d 190 (5th Cir. 1978).

In the instant case, without individual voir dire, the prejudicial remarks cited above were heard by the entire venire. Competent counsel would have moved to strike the panel. Such a motion would likely have been granted by either the Circuit Court or on direct appeal. See, Overton v. State, 757 So.2d 53 (Fla. 3d DCA 2000); Richardson v. State, 666 So.2d 223 (Fla. 2d DCA 1995); Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983); Kelly v. State, 371 So.2d **162** (Fla. 1st DCA 1979). See also, Brower v. State, 727 So.2d 1026, 1028 (Fla. 4th DCA 1999) (J. FARMER, dissenting). Under those circumstances, JOHNSON was again

victimized by ineffective assistance of counsel, and prejudiced thereby.

ISSUE V

THAT THE CIRCUIT COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING ON THE ISSUE OF TRIAL COUNSEL'S CONSTITUTIONALLY INADEQUATE INVESTIGATION INTO THE FACTS *AND* CIRCUMSTANCES SURROUNDING HIS DETENTION BY THE POLICE THAT LED TO HIS TAPED CONFESSION.

JOHNSON's confession was the product of an illegal arrest. This issue was raised by Badini only in the context of whether JOHNSON was handcuffed on his way to the police station. JOHNSON alleged that three persons: Anita Miller, Terrace Isom, and David Faison observed his detention, and could contradict the State's claim that he had voluntarily accompanied Officer Hull to the police station. Badini never adequately investigated JOHNSON's illegal arrest. JOHNSON believes that his illegal detention, deception practiced on him to obtain a Miranda waiver, and the administration of the oath rendered his confession inadmissible. JOHNSON also alleged, in the alternative, that these three witnesses were newly discovered evidence. As such, an evidentiary hearing should have been granted. McLin v. State, 827 So.2d at 953-4.

Failure to have properly investigated a defendant's legal and factual claims is ineffective assistance of counsel. Wright v. State, 646 So.2d 811 (Fla. 1st DCA

1994). If witnesses could have been located, and their testimony would have helped the defendant, he has shown prejudice. Duharte v. State, 778 So.2d 462 (Fla. 3d DCA 2001).

The Circuit Court dispensed with all these arguments by claiming that because JOHNSON had been identified as the killer in the other case, F89-14998, before Officer Hull picked him up at the request of Detective Borrego, there was probable cause to arrest JOHNSON. This made all the evidence concerning voluntary accompaniment irrelevant.

The Circuit Court was incorrect in its factual assertions. There had not been a positive identification of JOHNSON prior to Officer Hull going to talk to him. The witness was 80% sure, but not positive at the time. Detective Borrego admitted that he did not have probable cause *to* arrest JOHNSON at the time he asked Officer Hull to pick him up.

The Circuit Court held that Badini was not ineffective by failing to cross-examine Detective Borrego to show how deception was used to obtain JOHNSON's confession. Although the police are entitled to use deception to some degree to prompt a response from a suspect, utilizing deception in order to obtain a Miranda rights waiver goes to the voluntariness and the reliability of any subsequent statement.

ISSUE VI

THAT THE TRIAL COURT ERRED IN APPLYING BRAM V. UNITED STATES, 168 U.S. 532 (1897) TO HIS MOTION TO SUPPRESS.

JOHNSON was placed under oath. This coerced him into waiving his Miranda rights. Under Bram v. United States, 168 U.S. 532, 544-50, 18 S.Ct. 183, 187-90, 442 L.Ed. 567 (1897), the administration of the oath compels testimony. The subsequent Miranda rights waiver and confession became the product of coercion.

ISSUE VII

THAT THE CIRCUIT COURT ERRED IN DENYING *AN* EVIDENTIARY HEARING ON WHETHER TRIAL COUNSEL WAS INEFFECTIVE WHEN HE MADE NO EFFORT TO IMPEACH THE CREDIBILITY OF TREMAINE TIFT.

Tremaine Tift helped JOHNSON, Ingraham, and Newsome check into a hotel to hide out after the murder. His actions should have incurred liability as an accessory after the fact. Nonetheless, Tift was never charged. Newsome presented Tift as a witness to the police. Tift was a crucial witness for the State who testified to highly incriminating remarks made by JOHNSON implicating himself in both murders. Yet, Tift was never confronted on cross-examination about any motive he might have had to falsely accuse JOHNSON.

Badini's failure to have impeached Tift, a key witness against him, constituted ineffective assistance of counsel.

Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Brown v. State, 596 So.2d 1026, 1029 (Fla. 1992); Tyler v. State, 793 So.2d 137, 144 (Fla. 2d DCA 2001); Lopez v. State, 773 So.2d 1267 (Fla. 5th DCA 2000).

Tremaine Tift was an important witness for the State. He testified in both the Guilt and Penalty Phases of the case. If the jury had had the notion that Tift was covering for this "god-brother" (Newsome), and escaping his own criminal liability, his testimony would undoubtedly been much differently received.

In its Order denying JOHNSON's 3.850 Motion, the Circuit Court claimed that because Tift had testified in another murder case that he was not aware of the murder until two or three weeks after he had rented the hotel room, he was not an accessory after-the-fact and there was no immunity necessary. Based on the Record before the Court, however, Tift did testify in JOHNSON's trial to an awareness that JOHNSON had killed somebody "down south", and he needed a hotel room. Whether or not Tift was able to successfully convince the police that he was not an accessory after-the-fact or not, his relationship with the prosecution and his desire not to be charged was something which needed to be brought to the jury's attention in order to assess his credibility. The facts are in dispute, and the claim he made in another trial is not part of this Record and cannot

serve to justify summary denial of an evidentiary hearing on this issue.

ISSUE VIII

THAT THE CIRCUIT COURT ERRED IN REFUSING TO GRANT AN EVIDENTIARY HEARING ON TRIAL COUNSEL'S INEFFECTIVENESS FOR FAILING TO OBJECT TO THE AGGRAVATING FACTORS OF COLD, CALCULATED AND PREMEDITATED (CCP) ON THE GROUNDS OF CONSTITUTIONAL VAGUENESS, AND THAT JOHNSON WAS DENIED DUE PROCESS AND EQUAL PROTECTION WHEN THE JURY WAS GIVEN INSUFFICIENT GUIDANCE TO DETERMINE WHETHER TO APPLY THE AGGRAVATOR.

The jury was instructed that it should consider as an aggravating circumstance a determination that the murder "was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification." (Vol.I-SR.160). This instruction on CCP was found to be unconstitutionally vague. Brown v. State, 755 So.2d 616 (Fla. 2000); Jackson v. State, 648 So.2d 85 (Fla. 1994).

In Banks v. State, 700 So.2d 363 (Fla. 1997), the Supreme Court found that an instruction similar to the one applied in this case but with an additional definition of premeditation also suffered from constitutional infirmities because the definition used was the standard one given in all first-degree murder cases in the guilt phase. The CCP aggravator requires a heightened degree of premeditation than what is required to establish a premeditation element of first-degree murder. It also pointed out the lack of any

definition of the terms "cold" and "calculated". Id., at 366, citing Jackson, 648 So.2d at 88-9.

Badini failed to object to any of the aggravators proposed by the State. It is submitted that any failure to have objected was based upon ignorance of the law. Any procedural default that may have been found based upon the failure to object should be overcome by ineffective assistance of counsel at the trial level.

ISSUE IX

THAT THE TRIAL COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING ON WHETHER THE STATE SUPPRESSED THE IDENTIFIES OF WITNESSES WHO COULD HAVE TESTIFIED TO THE CIRCUMSTANCES UNDER WHICH JOHNSON WAS TAKEN INTO CUSTODY.

In its Order denying JOHNSON's 3.850 Motion, the Circuit Court reiterates its findings as to Issue V that because there was probable cause to arrest JOHNSON, any error relating to the witnesses who could have refuted the contention that he voluntarily accompanied Officer Hull to the police station was harmless. As stated previously, Detective Borrego did not believe that he had probable cause to arrest JOHNSON when he dispatched Officer Hull to bring him in.

The Circuit Court also found that this violation was procedurally barred because it should have been raised on direct appeal. In fact, the State's suppression of

exculpatory evidence can always be raised by way of a motion for post-conviction relief. How was JOHNSON to know on direct appeal that these witnesses' identity was suppressed based upon the record before the Court?

ISSUE X

THAT THE TRIAL COURT ERRED IN RULING THAT THE COURT'S INSTRUCTIONS UNCONSTITUTIONALLY *AND* INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH *AND* FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

JOHNSON's jury was repeatedly and unconstitutionally instructed by the Court that its role was merely "advisory". Because great weight is given to the jury's recommendation, the jury is a sentence in Florida. These comments and instructions violated Caldwell v. Mississippi, 472 U.S. 3209 (1985). The State cannot show that the comments had "no effect". Caldwell, 472 U.S. at 340-41

Although the Florida Supreme Court had refused to apply Caldwell to the Florida advisory jury procedure in Combs v. State, 525 So.2d 853 (Fla. 1988), two separate cases decided by of the U.S. Court of Appeals for the Eleventh Circuit held otherwise as a matter of Federal constitutional law. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc); Adams v. Wainwright, 84 F.2d 1526 (11th Cir. 1986), vacated on other grounds sub nom., Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989)

Since Badini failed to object or argue this issue effectively, his performance was deficient and JOHNSON was prejudiced. Starr v. Lockhart, 23 F.3d 1280 (8th Cir.), cert. denied sub. nom., Norris v. State, 115 S.Ct. 499 (1994). An evidentiary hearing and relief are appropriate.

ISSUE XI

THAT THE DEATH SENTENCE IN THIS CASE WAS UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH *AND* FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS A MATTER OF LAW IN LIGHT OF THE FACT THAT JOHNSON WAS NOT THE TRIGGER MAN, *AND* THE TRIGGER MAN RECEIVED A REDUCED SENTENCE.

The death penalty in this case is disparate and disproportionate given the circumstances and the resolution of the case of David Ingraham, a more culpable co-defendant. In Edmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the U.S. Supreme Court declared that the death penalty would not be appropriate to a non-trigger man in a felony-murder context. The defendant was a participant in the underlying felony presented to the jury under a felony-murder theory, but his co-defendant had killed the individual. In Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Supreme Court modified somewhat its holding in Edmund and declared that a defendant who had substantial participation in the underlying felony could be sentenced to death even if he was not the trigger man. See also, Hazen v. State, 700 So.2d

1207 (Fla. 1997); Slater v. State, 316 So.2d 539 (Fla. 1975).

When deciding this issue on direct appeal, the Court indicated that JOHNSON was a triggerman. Johnson, 696 So.2d at 325-26. Ingraham was the first person who shot and hit Lawrence. The fact that JOHNSON was using a gun during the incident does not make inapplicable the U.S. Supreme Court cases cited above. JOHNSON's death sentence was disproportionate.

ISSUE XII

THAT THE TRIAL COURT ERRED IN DETERMINING THAT THERE WAS NO PREJUDICE IN THE COURT'S INSTRUCTIONS CONCERNING NON-STATUTORY MITIGATING CIRCUMSTANCES.

As to non-statutory aggravating circumstances, the jury was instructed that it had the right to consider "any other aspect of the defendant's character or records, and any other circumstance of the offense." (Vol.II-R.249). This instruction was the equivalent of giving no statutory mitigating factors. The Court's failure to articulate non-statutory mitigating factors violated Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); White v. State, 729 So.2d 909 (Fla. 1999)

To the extent that Badini failed to articulate non-statutory mitigating circumstances at the trial-court level he provided ineffective assistance of counsel. This misconception was below the standards of representation in a death-penalty case, and prejudiced JOHNSON.

ISSUE XIII

THAT THE TRIAL COURT ERRED IN DETERMINING THAT FLORIDA'S PENALTY-PHASE PROCEDURE DID NOT VIOLATE APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000).

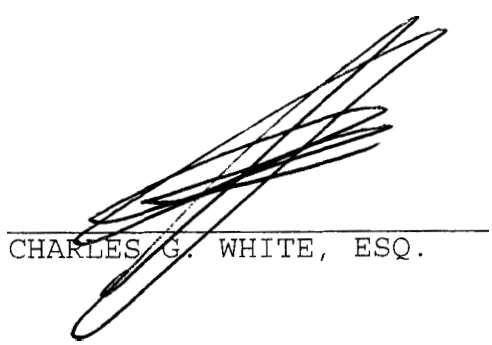
In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d 435 (2000), the U.S. Supreme Court determined that any factor which increased the maximum possible penalty for a criminal defendant was an element, and had to be determined by a jury beyond a reasonable doubt. In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 553 (2002), Apprendi was made applicable to capital cases. JOHNSON recognizes that this Court had decided Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002), which refused to apply Ring to invalidate Florida's penalty phase scheme. JOHNSON believes that Bottoson was wrongly decided, and objects to the notion that the trial court in a death-penalty case can find aggravators to outweigh mitigators beyond a reasonable doubt and impose the death penalty, and not the jury.

CONCLUSION

Upon the arguments and authorities aforementioned, the Appellant requests this court grant him a new penalty phase if he should prevail on Issues I, VI, VII, X, XII, and XIII, vacation of the death penalty, and the imposition of a life sentence as to Count I if he should prevail on Issues XII and XIII, and an evidentiary hearing of he should prevail on Issues II, III, IV, V, VI, VII, VIII, IX, X, and XII, with the final result a remand for a new trial on either the Guilt or Penalty Phases or both.

Respectfully submitted,

CHARLES G. WHITE, P.A.
Counsel for Appellant
1031 Ives Dairy Road
Suite 228
Miami, Florida 33179
Tel: (305) 914-0160
Fax: (305) 914-0166
Florida Bar No. 334170



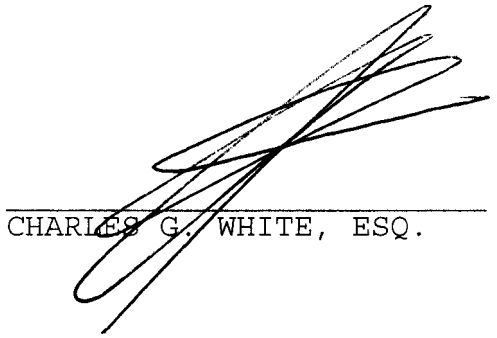
CHARLES G. WHITE, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of October, 2003, to: SANDRDA S. JAGGARD, ASST. ATTORNEY GENERRAL, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131; and GAIL LEVINE, ASST. STATE ATTORNEY, State Attorney's Office, 1350 N.W. 12th Avenue, Miami, FL33125.

Respectfully submitted,

CHARLES G. WHITE, P.A.
Counsel for Appellant
1031 Ives Dairy Road
Suite 228
Miami, Florida 33179
Tel: (305) 914-0160
Fax: (305) 914-0166
Florida Bar No. 334170



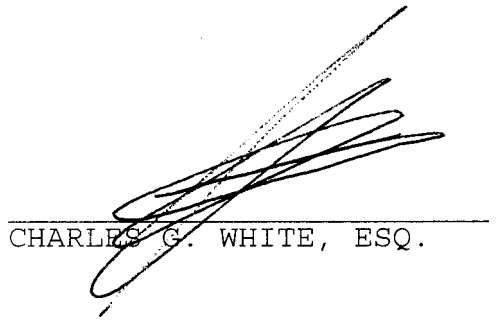
CHARLES G. WHITE, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Brief of Appellant, RONNIE JOHNSON, was typed in 12-point courier.

Respectfully submitted,

CHARLES G. WHITE, P.A.
Counsel for Appellant
1031 Ives Dairy Road
Suite 228
Miami, Florida 33179
Tel: (305) 914-0160
Fax: (305) 914-0166
Florida Bar No. 334170



CHARLES G. WHITE, ESQ.