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SUPREME COURT OF FLORIDA

CASE NO. SCO3-362

LOWER TRIBUNAL F89-12383B

RONNIE JOHNSON,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY BRIEF ON THE MERITS OF APPELLANT RONNIE JOHNSON

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STATEMENT OF THE CASE

JOHNSON realleges and reaffirms the Statement of the Case contained in his Initial Brief.

ARGUMENT

ISSUE I

Citing Chandler v. United States, 218 F.3d 1305, 1317 (11th Cir. 2000), the State mocked JOHNSON's presentation at the evidentiary hearing stating it was conjured up by a dedicated post-conviction litigant "with the luxury of time and the opportunity to focus more resources on specific parts of a made record." JOHNSON rejects that suggestion, but would call the Court's attention to that portion of Chandler that states:

> The proper inquiry is articulated in Rogers v. Zant: 'Once we conclude that declining to investigate further was a reasonable act, we do not look to see what a further investigation would have produced.'

218 F.3d at 1317, quoting Rogers v. Zant, 13 F.3d 384, 388 (11th Cir. 1994).

JOHNSON's presentation showed that not investigating his mental health was an unreasonable act.

The State mischaracterized Dr. Haber's testimony. The thrust of Dr. Haber's testimony was not that JOHNSON possessed antisocial tendencies. Her opinion was that JOHNSON's mental disorders overshadowed whatever antisocial

tendencies may have also appeared in testing. The State was incorrect when it stated that Dr. Haber's diagnosis of Adjustment Disorders were only the manifestations of the normal grieving process. The State was incorrect when it asserted that JOHNSON's revealed homosexuality could be discounted because it was never explored or revealed prior to trial.

According to the State, Dr. Haber's testimony portrayed JOHNSON as a repressed homosexual, who was upset about the deaths of those close to him, and reacted by engaging in antisocial behavior, to-wit: a murder for hire of two people. If that was it, then the State would likely have had a point. However, Dr. Haber did not characterize JOHNSON in this fashion. Understanding her mitigation testimony is a prerequisite for appreciating the prejudice caused by the Penalty Phase jury not having heard it as well as the ineffectiveness shown by Badini's failure to have unearthed it before trial.

In a death-penalty case, defense counsel is constitutionally compelled to investigate all reasonable avenues of mitigation. Rassdale v. State, 798 So.2d 713, 716 (Fla. 2001).

In Wiggins v. Smith, 123 S.Ct. 2527 (2003), the U.S. Supreme Court decided that a strategic decision not to present known mitigating evidence could be unreasonable.

The Court explained how both Wiggins and Strickland v. Washington, 466 U.S. 668 (1984), considered a conscious decision by counsel to limit the scope of his investigation into potential mitigating evidence. Wiggins, 123 S.Ct. at 2535, citing Strickland, 466 U.S. at 673. What was constitutionally compelled under Wiggins and Strickland was the overturning of as many stones as possible to develop available mitigating evidence, and a duty to use it.

In the case at bar, Badini did not conduct the requisite investigation. He never learned the truth about his client. He never unlocked the keys to his personality. Dr. Haber insisted that had the right questions been asked before trial, the full picture of JOHNSON's personality would have emerged. She then described how the different stressors in JOHNSON's recent past contributed to adjustment disorders that affected his judgment, and served not only to support non-statutory mitigating circumstances, but explained to some degree his willingness to take orders to kill from another. This not only brought him within a statutory mitigating circumstance, but offered a defense to the cold, calculated, premeditated, aggravating circumstance specifically advanced by the State in this case.

Badini chose to present a more traditional social history. JOHNSON's mother and other relatives took the stand and talked about his sense of humor, certain acts of

kindness, and devotion to his family. There were some suggestions of a troubled personality left dangling without further explanation. The presentation of testimony was similar to that seen as constitutionally inadequate in Wiggins. What made this Penalty Phase constitutionally defective was not the fact that this testimony was put before the jury, but that Badini's investigation was so deficient that he had no choice but to present testimony later determined by the trial judge to be woefully inadequate. This was all he had. Or perhaps it should be stated that this was all he found. Unfortunately for JOHNSON, what he presented was a very superficial and idealized view of JOHNSON which was not true. If he had endeavored to unlock the enigma he admittedly saw in JOHNSON by having a full psychological workup done prior to trial, then the type of evidence presented by Dr. Haber would likely have been before the jury, and the result different.

Dr. Haber described those facts elicited during the Penalty Phase that were clues suggesting further psychological investigation. Badini himself testified that he understood the significance of these clues. He recognized there was more to JOHNSON's personality than what appeared on the surface. Where he failed was by not investigating below the surface when he realized that there was something to find.

The State would have Badini excused from any further need to investigate despite the clues, despite the enigma, and despite a belief that there was something to find, because of Dr. Miller's free exam. In the middle of voir dire, with Badini expressing frustration to the trial judge about his professed inability to obtain any cooperation whatsoever from forensic psychologists to evaluate JOHNSON, he was presented with Dr. Miller, who did a quick evaluation for free. The State suggested that sending Dr. Miller off to "find mitigation" satisfied Badini's duty to investigate. How can that conclusion stand legal scrutiny when nothing is known about the type of mitigation Dr. Miller was seeking? Was he looking for mental illness? Was he looking for personality disorders? Was he looking for insanity? Badini does not remember what he told Dr. Miller about JOHNSON or his case. The State suggested that JOHNSON's failure to answer these questions means he has failed to show prejudice. JOHNSON begs to differ.

The only testimony before the Court concerning Dr. Miller's evaluation was presented by JOHNSON. He testified that Dr. Miller spent a very short time with him on one occasion, and his conversation was limited to concerns about his understanding of the proceedings. This is consistent with a competency evaluation. He did not take a social or personal history. He did not evaluate school

records. He did not interview family members. He did not attempt to gather a portrait of JOHNSON's life. These failings showed that this one last-minute effort to gather mitigating testimony for the Penalty Phase after trial had started was constitutionally inadequate.

The psychological profile of JOHNSON that emerged from the evidence presented by Dr. Haber at the evidentiary hearing was far less the portrait of the cold-blooded killer for hire who had successfully masqueraded as a dutiful and loyal son to his family presented at trial, than a deeply troubled and conflicted young man. JOHNSON's inability to have adjusted to the lethal combination of stressors: (1) the abandonment of those close to him who died and his mother, (2) the shame and humiliation of being a homosexual in a macho ghetto world, (3) his retreat into drugs and promiscuity, and (4) his deep need for acceptance amongst his peers were all factors uncovered by Dr. Haber. This was not about presenting an antisocial personality as a mitigating factor, as the State construed JOHNSON's argument (State Answer Br. at 38-9). The State's argument that Badini had made a reasonable strategic decision not to investigate because he would not have wanted the jury to hear about JOHNSON's antisocial tendencies fails because Badini never knew anything about JOHNSON's psychological profile.

ISSUE II

Contrary to what the State has alleged, JOHNSON never maintained that he had the right to choose his court-appointed counsel. He did state that he had the right to be represented by the lawyer appointed to represent him unless there was some good reason for his removal. JOHNSON contended that Huttoe, his original appointed attorney, could not decide on his own to refer the case to another inferior attorney for a kickback. The case law supports JOHNSON's position that once he had a lawyer appointed, he had the right to have that lawyer represent him unless something else more critical to the orderly administration of justice made necessary a substitution.

All of the cases cited by the State concerned situations where, for one reason or another, the Court ordered an attorney off the case and replaced him with another. That was not the situation present in the case at bar. Huttoe referred the case to an attorney who was far less experienced than he without consulting JOHNSON. The Court condoned this substitution of counsel, and, in effect, relieved Huttoe of his responsibilities to the case. What right did Huttoe have to do this? The State insisted that JOHNSON could only obtain relief if ineffectiveness could be established independent of the illegal referral. While JOHNON does believe that prejudice should be presumed

because of the illegal referral and the conflict of interest, he also points to Badini's absolute neglect of the death-penalty issues present in his case as proof of the prejudice prong. All these issues need to be flushed out in an evidentiary hearing.

For a qualified attorney such as Huttoe to receive court-appointments en mass, and then refer them to other attorneys in a fee-splitting arrangement was rightfully condemned as a form of corruption back in 1991-2 when Operation Courtbroom was revealed. The self-interest generated by the fee-splitting of already paultry S.A.P.D. fees ($50.00 per hour for in-court, and $40.00 per hour for out-of-court), created a conflict of interest that would prejudice a defendant in almost any reasonable scenario.[1] How else can the prejudice be measured in a system where young, new or financially desperate attorneys can be induced

[1] It is interesting to note that as a result of "Operation Courtbroom", and Huttoe's fee-splitting arrangements for court-appointed cases, a new system called the "wheel" was initiated in Miami-Dade County in 1992. Administered by the Public Defender's Office, the "wheel" provides for special qualifications and C.L.E. credits in death-penalty issues as a prerequisite for appointment to capital cases. Substitutions of counsel are only allowed for routine events such as calendar calls or arraignments, and not for trials or significant hearings without the express consent of the defendant. These new regulations were intended to remedy the injustice of the former system where there were financial incentives to be a broker of court-appointed cases to young, inexperienced attorneys willing to do the work for rock-bottom prices, in exchange for a percentage of the fees.

to accept capital cases for $25.00 an hour? For the attorney in Huttoe's position, who was receiving 40% or so for doing nothing but collecting the appointment, he benefits. The client, however, is left with inferior representation.

The State claimed that Courts have been reluctant to apply a presumed prejudice standard such as was enunciated in Cuvler v. Sullivan, 446 U.S. 335 (1980), to factual scenarios other than multiple representation of defendants by the same attorney. Citing Mickens v. Taylor, 535 U.S. 162 (2002), the State claimed that the Cuyler standard should never be applied outside of its specific facts (State'sAnswer Br. at 44-5). Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995), which was cited in support of JOHNSON's argument that financial issues can create a conflict of interest, actually stands for the opposite proposition. The State interpreted Beets as limited to holding that Cuvler does not apply to conflict situations not involving multiple representation. The State reasoned that "applying Cuvler to alleged conflicts of interest that do not involve multiple representation would allow the Cuvler exception to swallow the Strickland rule" (State Answer Br. at 46). What the State characterized as the Cuyler "exception" constitutes a different rule than Strickland. Conflicts of interest that are actual, and not presumed, create a presumption of prejudice because it is nearly impossible to measure the

impact of the conflict shown to exist. If there is no actual conflict of interest, then there was no presumption of prejudice. JOHNSON has adequately alleged an actual conflict of interest, and is entitled to a presumption of prejudice under Cuvler.

The State cited Bryan **v.** State, 748 So.2d 1003 (Fla. 1999), for the proposition that an attorney's admitted alcoholism at the time of the defendant's trial created conflict between the attorney's self-interest and the interest of his client, and there was no presumption of prejudice (State'sAnswer Br. at 46-7). That is not what Bryan decided. The attorney in Bryan had submitted an Affidavit after the defendant's 3.850 motion had been summarily denied. This Court held that since it had already made a decision that his representation was constitutionally effective, the fact that he might have been drunk at the time of trial would not affect its ruling. There was no discussion equating the attorney's alcoholism with a conflict of interest. The attorney's alcoholism did not create a conflict anymore than an attorney's incompetence creates a conflict.

The State failed to address the Circuit Court's actual ruling on this issue. The Circuit Court Order did not analyze JOHNSON's argument presented in *his* Amended Motion. The argument before the Court with different cases which

were not considered by the Circuit Court. The Circuit Court's ruling summarily denying relief on this issue was legally insufficient, and should be reversed. All aspects of this issue should be explored in an evidentiary hearing.

ISSUE III

The State maintained that JOHNSON is entitled to no relief on this issue because the Court and the State did his attorney's job for him during the death qualification portion of the case (State'sAnswer Br. at 50-2). In what was a death-penalty case with a conviction for first-degree murder as an aggravator, Badini declined to address any of the jurors about the death penalty! He mentioned the death penalty in passing for the second panel, and merely requested they follow the law. When the trial judge asked Badini a question about a particular juror's views on the death penalty, Badini admitted he was not even taking notes. So what did the State and the trial judge do to compensate for Badini's lack of participation?

The treial judge asked some basic questions intended to weed-out those who were prejudged against the death penalty. The State followed-up with extensive questioning designed to elicit the identities of those jurors who were opposed to the death penalty. The State did its job well. It identified those jurors for whom opposition to the death penalty subjected them to being stricken for cause or the

thoughtful exercise of peremptory challenges. This is the essence of death qualification from the State's viewpoint.

What is the obligation and duty of a defense lawyer in the death-qualification phase? Is his or her only concern those jurors who are predisposed asainst the death penalty? What about those jurors who are predisposed **for** the death penalty? What about juror prejudgments about mitigation circumstances? Is not the defense lawyer supposed to ask those questions?

JOHNSON maintains that Badini, in essence, waived voir dire on a critical part of the death-qualification process (Initial Br. at 37).[2] The State incorrectly argued that Badini's failure to participate in the death-qualification phase could be excused because his failure to participate had left no record of the answers to questions he never asked. Under the State's reasoning, no defense counsel could ever be found to have been defective in voir dire.

ISSUE IV

In its Answer Brief, the State characterized the potential jurors' comments on the case as mere opinion, and the trial court's comments as merely introducing the panel

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[2] This issue was not raised for the first time on appeal. JOHNSON has consistently argued that Badini's non-participation acted as a waiver and that prejudice should be presumed. In light of Fennie v. State, 855 So.2d 597 (Fla. 2003), the issue of presumed prejudice is one which is ripe for consideration by the Court.

to the case (State Answer Br. at 58-60). The State missed the point of JOHNSON's complaint.

Badini knew before trial that there was a great deal of publicity surrounding this case. Not only had there been extensive media coverage at the time of the incident, but a trial of a co-defendant had recently taken place, and that had been reported in the press.

The nature of the media coverage must be considered. The media angle was to portray Lee Lawrence as an anti-drug crusader assassinated by drug dealers who felt threatened by his community activity. Preventing his client from being identified as one of those assassins before trial would clearly have been the goal of any competent defense attorney. The only way to further this goal of isolating those who had prejudiced the case and prevent their information from tainting those members of the venire who did not know about the case was to request individual voir dire. Even if the Court's introductory remarks can be excused as necessary to identify those jurors who had been exposed to media coverage about the case, all follow-up inquiries should have been made individually. See, United States v. Davis, 583 F.2d 190 (5th Cir. 1978).

The prejudicial remarks which were heard by the entire panel were the predictable consequence of not having individual voir dire. But having heard the comments, Badini

failed to object and move to strike the panel. He seemed not to care whether the jury had prejudged JOHNSON's case or not. In both these inactions: not moving for individual voir dire, and not moving to strike the panel when the prejudicial comments were made; Badini was ineffective.

The State cited Teffeteller v. Dugger, 734 So.2d 1009, 1028-29 (Fla. 1999), for the proposition that the failure to conduct individual voir dire was not error unless it rendered the trial fundamentally unfair (State Answer Br. at 58-9). The portion of Teffeteller cited, however, concerned itself with ineffectiveness of appellate counsel for not raising the individual voir dire issue on direct appeal. The Court noted no prejudicial remarks by the defense would have added merit to that issue. On the other hand, the remarks which JOHNSON has complained about were highly prejudicial, and Badini was ineffective for failing to take necessary action.

The State debunked the notion that the remarks made about the case were sufficiently prejudicial to prompt a Motion for Mistrial by competent counsel. The jurors' publicly expressed views were characterized as mere opinions (State Answer Br. at 59). Reviewing the comments themselves shows little support for the State's position.

The "opinions" expressed by jurors Herne, Harris, and Rogers were satisfaction that the "killers" responsible for

the death of the anti-drug crusader (Lee Lawrence) had been caught. There had been a recent trial of a co-defendant who had been convicted. This fact was known to some jurors before voir dire, but eventually became knowledge shared by the panel. Although these jurors were properly excused for cause, their comments were precisely the type of prejudgment which can and did taint the entire panel.

In his Initial Brief, JOHNSON cited cases that dealt with the effect a juror having knowledge of other criminal activity can have on his or her ability to serve (Initial Br. at 40). These cases were not inapposite because they all did not address specifically motions to strike the panel (State Answer Br. at 62-3). JOHNSON's point was that the panel was exposed to just that type of prejudicial information which would have compelled an excusal for cause.

The State maintained that none of the remarks complained about, whether by the trial judge or the jurors, contained evidence outside the Record (State Answer Br. at 60-1). To the extent that JOHNSON might have made some reference in his post-arrest statement to a motivation for killing Lawrence that gave credence to the media accounts did not diminish the prejudicial impact the jurors' comments had on those who had been ignorant of the case heretofore. Not only was this a case of much publicity, but the guilty

party had been caught, and here was one of them. Since all of this was allowed to play out before the entire panel, JOHNSON's case was prejudiced, and Badini was ineffective for not having moved to strike the entire panel. Jackson v. State, 729 So.2d 947, 950-1 (Fla. 1st DCA 1998); Richardson v. State, 666 So.2d 223 (Fla. 2d DCA 1995).

ISSUE V

In its Answer Brief, the State maintained that there was no need for further investigation into the circumstances where JOHNSON was taken into custody because probable cause already existed to arrest him for first-degree murder, and evidence that he was detained as opposed to voluntarily agreeing to accompany police to the station-house, was irrelevant. The first time the State has raised this argument has been in this habeas litigation. When responding to JOHNSON's original Motion to Suppress, both at the trial and appellate court levels, the State's position was that JOHNSON voluntarily agreed to accompany the police to the station-house. There was an excellent reason for the State to have taken this position. The lead investigator of this case, Detective Borrego, admitted during the suppression hearing that he did not have probable cause to arrest JOHNSON at the time he dispatched Officer Hull to pick JOHNSON up!

The State claimed that probable cause was created by an eye-witness who had identified JOHNSON as the shooter of Tequilla Larkins (State Answer Br. at 64).[3] The State did acknowledge that it was not a positive identification, but cited the witnesses' positive identification at trial as curative. Subsequent testimony did not change the fact that Detective Borrego did not have a positive identification of JOHNSON as the shooter. Any arrest of JOHNSON would have lacked probable cause.

In its Answer Brief, the State did not deny that he was placed under arrest by Officer Hull. This Court can consider its silence on this point to be an admission sub silentio. The State has limited its argument to the claim that this evidence of detention is irrelevant because of the presence of probable cause. If the State was wrong about probable cause, then the proffered witnesses are relevant, and needed to be heard.

The only question remaining is whether Badini had a duty to investigate, and, if not, then these witnesses are newly discovered. Either way, JOHNSON is entitled to an evidentiary hearing where he can present the witnesses so their credibility can be assessed. Once factual findings can be made, the Circuit Court will have the power to make

[3] Tequilla Larkins was the victim in F89-14998, which is before the Court in SCO3-382.

whatever findings it feels appropriate based upon the new Record before it.

As for the failure to have cross-examined Detective Borrego regarding the deception of JOHNSON, the State asserted that (1) deception does not go towards admissibility; and (2) there was no deception (State Answer Br. at 66-8). The State is incorrect on both counts.

JOHNSON maintained that the deception was relevant to the waiver of his constitutional rights. Even after his "waiver", the utilization of deception would have impeached the reliability of the statement.

Even if the State can establish that the deception was used after he had waived his constitutional rights, it is relevant to the reliability and voluntariness of the statement to the jury. Just because a statement has been admitted does not mean that a jury must accept it was being voluntarily entered. Under Jackson v. Denno, 378 U.S. 368 (1964), the jury also makes a finding of voluntariness, and it should ignore a confession it determines to be involuntary. Deception on the part of the police can have a significance impact upon a jury's assessment of the voluntariness of a confession.

Secondly, there was deception utilized in JOHNSON's interrogation. The Record does not refute this. The

evidence is subject to interpretation and argument. An evidentiary hearing is necessary to sort out the truth.

Was Badini aware of the deception? If so, did he make a conscious strategic decision not to reveal it to the jury (or the Circuit Court during the Motion to Suppress)? If so, what was the basis for that decision? JOHNSON maintains that if Badini "missed" this highly significant fact, then he was constitutionally ineffective. If he realized that JOHNSON had been deceived, and made a strategic decision not to bring it out, then his explanation needs to be heard. Absent the deception, there was no other evidence in the Record that could have been used to impeach the reliability or voluntariness of the confession. JOHNSON is entitled to an evidentiary hearing on that point.

ISSUE VI

In its Answer Brief, the State maintained as a threshold issue that JOHNSON is procedurally barred from making this argument. The State's assertion is incorrect.

The evidence in the Record was that JOHNSON was placed under oath prior to the interrogation which led to his confession. The Record is equally clear that the impact on that oath was never considered in any way in determining the voluntariness of the statement. The U.S. Supreme Court decision in Bram v. United States, 168 U.S. 532, 544-50 (1897), held that the administration of the oath compels

testimony. Since the oath was administered prior to the waiver of constitutional rights and resulting confession, it was a product of this compulsion.

Bram was a U.S. Supreme Court case interpreting Federal law. Up to this point, the Florida Courts have not had an opportunity to weigh the impact of this portion of Bram's holding on JOHNSON's case.

The concept of procedural bar is a function of judicial comity. It is based upon a consideration of one court, usually the Federal Court, towards another court, usually a State Court. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Murray v. Carrier, 477 U.S. 478, 490-2 (1986). If this case was in Federal Court in habeas proceedings, the State would be erecting the barrier of procedural bar to prevent this issue from being considered because it was never reviewed by the Florida Courts. This is a Florida Court, however, and JOHNSON should have this argument determined on its merits.

To the extent that this argument should have been made pre-trial, Badini's failure to have done so constituted ineffective assistance of counsel. This justifies consideration of this issue on the merits as JOHNSON has shown cause and prejudice why it was not raised earlier. Bruno v. State, 807 So.2d 55, 63 (Fla. 2001). The principal evidence was the confession and JOHNSON's efforts to suppress it. This issue cannot and should not be ignored.

ISSUE VII

The State maintained that Tremaine Tift was never in any liability as an accessory after-the-fact (State's Answer Br. at 74-6). This is incorrect.

Tift testified at both trials concerning statements and comments attributed to JOHNSON that occurred before the murders considered during their respective Guilt Phases, and his comments about the other murders during the Penalty Phases. He testified to JOHNSON having attempted to recruit him to participate in these murders, but he claimed to have declined the requests. After the Lee Lawrence murder, he was asked to take JOHNSON and another defendant to a hotel so they could hide out. This was a fact brought out by the State in its direct examination of Tift at both trials. What was the relevance of this evidence if Tift did not know that JOHNSON and the other Defendants had just committed a murder? If he was assisting them in hiding out, then he had potential liability as an accessory after-the-fact.

The fact that the State elected not to charge him as an accessory after-the-fact does not end the issue. The potential liability was there, and Tift may or may not have been aware of it. We do not know whether he was aware of it because he was never questioned about it. Confronted with the potential liability as an accessory after-the-fact,

Tift's damaging testimony would have been subject to impeachment. As it stood, there was no impeachment.

Consideration of this issue shows again the lack of effective advocacy displayed by Badini. Tift was an important witness for the State. Why did not Badini expose the jury to this impeachment? Did he understand the potential liability Tift was facing? If not, should he have? If he did understand, why did he not utilize this information for JOHNSON's benefit? These are all questions that can only be answered at an evidentiary hearing.

ISSUE VIII

In its Answer Brief, the State insisted that Badini's failure to have challenged the CCP instruction erected a procedural bar from considering it now, and that ineffective assistance of counsel did not act to raise the bar (State's Answer Br. at 80). The State was incorrect in its analysis.

Badini neither challenged the jury instructions given in the case nor offer any jury instructions relating to non-statutory mitigating circumstances. JOHNSON has maintained throughout these post-conviction proceedings that Badini was ineffective as to all death-penalty issues. His ignorance as to the law surrounding the CCP instruction adds another example of his ineffectiveness.

The remaining question is whether his ineffectiveness constitutes cause and prejudice for raising the procedural

bar. The answer is "yes" if the ineffectiveness claim can stand on its own. Bruno v. State, 807 So.2d at 63. The reasoning for this principle is sound. If an attorney fails to object because of ignorance rather than design, he or she is not guilty of trying to purposely sow seeds of error by not preserving objections. Badini's failure to object should not act as a procedural bar to habeas review.

There is also the issue of fundamental error. One of the primary arguments made by the State justifying the death penalty was the cold, calculated, and premeditated manner in which the murder took place. When a law or instruction is vague, it means that there is a strong risk that it would be applied in an inappropriate situation. The principal problem with the CCP instruction was its incorporation of the term premeditation. By the time the jury was in the Penalty Phase, it had already made a determination that JOHNSON was guilty of premeditated murder. Because the instruction was vague, there was a risk that the jury's death recommendation may have been based merely upon proof of premediation.

The U.S. Supreme Court has held that a habeas court was required to consider procedurally barred claims if not doing so would cause a fundamental miscarriage of justice. Schlup v. Delo, 513 U.S. 298, 319-20, (1995), citing Sanders v. United States, 373 U.S. 1, 15-17 (1963). There can be no

more fundamental miscarriage of justice than to let a death penalty stand that might have been based upon the jury's application of an incorrect jury instruction.

ISSUE IX

In its Answer Brief, the State abandoned the position taken before the Circuit Court that this issue was procedurally barred. The State expressed some confusion over its position. If JOHNSON did not know then, neither did the State. If JOHNSON did know then, the State had no duty to list them. Finally, the State claimed that the existence of probable cause to arrest JOHNSON made these witnesses irrelevant (State Answer Br. at 82-3).

JOHNSON will address these points in reverse order. The witnesses in question had information which contradicted the State's theory that JOHNSON voluntarily accompanied Officer Hull to the station house. This was important because at the time Officer Hull was dispatched to get JOHNSON, Detective Borrego did not have probable cause to arrest him. The identification was not positive. That the eye-witness made a positive identification at trial does not change the fact that his original identification was not positive, and, more importantly, not perceived by Detective Borrego to be positive.

The State either knew of this information or was responsible for having it under the Fellow Officer Rule.

David Faison and Terrece Isom were both engaged in encounters with the police at the time of the incident. Both them and the police were likely eye-witnesses to the circumstances in question in JOHNSON's case, and under Rule 3.220 should have been listed as witnesses. Anita Brown was also observed by Officer Hull. JOHNSON does not know how much knowledge of these persons can be attributed to the State for purposes of the disclosure of expulpatory information. What he is requesting is an evidentiary hearing where this issue could be explored.

In Issue IX infra, JOHNSON accuses Badini of ineffective assistance of counsel for failing to have adequately investigated and found these witnesses. The State's claim in response to this issue that JOHNSON "knew" these witnesses appears to be a concession to Badini's ineffectiveness in not finding them and bringing them forward on the suppression issue. The State has a separate responsibility to reveal exculpatory information if it is in its possession that is not excused by an incompetent defense attorney. An evidentiary hearing to determine the State's responsibility to disclose as well as ineffective assistance of counsel and newly discovered evidence is warranted.

ISSUE X

In its Answer Brief, the State claimed that JOHNSON did not raise the Enmund/Tison claim in the Circuit Court, which

prevented him from raising it on appeal. The State then quoted that portion of JOHNSON's Amended 3.850 Motion wherein he cited Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 104 U.S. 137 (1987), in support of his argument (State Answer Br. at 91-2). JOHNSON raised the proportionality issue under Enmund/Tison in the Court below, and is entitled to have its decision denying relief reviewed on appeal.

Although JOHNSON was a triggerman in the case, he was not Lee Lawrence's killer. For the reasons and upon the authorities set forth in his Amended 3.850 Motion and his Initial Brief, JOHNSON maintains that his death sentence was disproportionate to a life sentence handed his co-defendant, Ingraham.

ISSUE XI

In its Answer Brief, the State stated incorrectly that the U.S. Supreme Court had overruled Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), vacated on other grounds sub nom., Duqqer v. Adams, 489 U.S. 401 (1989), and Mann v. Duqqer, 844 F.2d 1446 (11th Cir. 1988) (en banc) (State Answer Br. at 88-9). The U.S. Supreme Court did not specifically overrule those cases, but clarified and modified those holdings. See, Romano v. Oklahoma, 412 U.S. 1, 114 (1994). The State claimed that JOHNSON's jury was correctly instructed as to its role in the case.

As for the State's argument that JOHNSON is procedurally barred from raising this issue, he notes that Adams and Mann had been decided prior to his trial, and Romano decided afterwards. To the extent that Badini should have been aware of the holdings of Mann and Adams, his failure to assert them at trial made him constitutionally ineffective. This is but another example of Badini's inattention to death-penalty issues in this trial. This Court needs to conduct an evidentiary hearing to determine whether his failure to effectively represent JOHNSON as to these death-penalty issues was based upon ignorance or design.

The State's argument is particularly erroneous in light of the U.S. Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (1992). Both these decisions stand for the proposition that the jury decides all elements of the crime, including the death penalty, unanimously and beyond a reasonable doubt. JOHNSON has addressed Apprendi/Ring's application *to* his case in Issue XIV, infra. The impact of these two cases on the principles set forth in Caldwell v. Mississippi, 472 U.S. 320 (1985), cannot be ignored. Caldwell was concerned with the jury being advised that their role was relatively insignificant and subject to being overruled by the Court. Apprendi/Ring now elevate the jury's decision to being

paramount. The basis for the U.S. Court of Appeals for the Eleventh Circuit's decisions in Mann and Adams have been vindicated by Apprendi/Ring, and should be applied to JOHNSON.[4]

ISSUE XII

The State's claim that JOHNSON was procedurally barred from raising this issue is incorrect (State'sAnswer Br. at 94-5). JOHNSON is complaining that the jury was not advised as to the non-statutory mitigating circumstances it could consider. The "catch-all" instruction was the only one given, and it defined no specific non-statutory mitigating circumstances. Badini's lack of objection does not preclude habeas relief. Bruno, 807 So.2d at 63.

JOHNSON is complaining that his attorney failed to request that the jury be instructed on non-statutory mitigating circumstances. As related elsewhere in this case, Badini's grasp and commitment to dealing with the death-penalty issues in this case was seriously lacking. His failure to have requested non-statutory mitigating circumstances in a jury instruction appears to have been based upon ignorance and lack of preparedness than any

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[4] In Robinson v. State, _____ So.2d _____, 2004 WL 170362 (Fla. Jan. 29, 2004), this Court determined that Caldwell and Ring addressed different issues. JOHNSON requests this Court review its analysis in consideration of his argument.

strategic choice. As to the ineffectiveness of counsel aspect of this issue, it should be part of any evidentiary hearing ordered as a result of this appeal.

ISSUE XIII

This Court most recently addressed Ring in Robinson v. State, _____ So.2d _____, 2004 WL 170362 (Fla. Jan. 29, 2004). It affirmed its previous rejection of Ring's application to Florida's death sentencing scheme in Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 536 U.S. 1067 (2002). JOHNSON acknowledges this Court's decisions on this point to date, but still advances the argument because his position may eventually prevail. If the U.S. Supreme Court has held that only juries can order death, then Florida's scheme violates the Constitution, and must be invalidated.

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,

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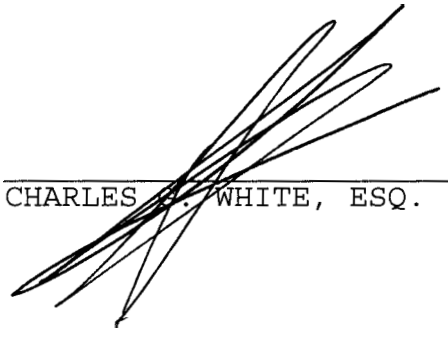

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of March, 2004, to: SANDRA S. JAGGARD, ASST. ATTORNEY GENERAL, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131; and GAIL LEVINE, ASST. STATE ATTORNEY, State Attorney's Office, 1350 N.W. 12th Avenue, Miami, FL 33125.

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CERTIFICATE OF COMPLIANCE

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

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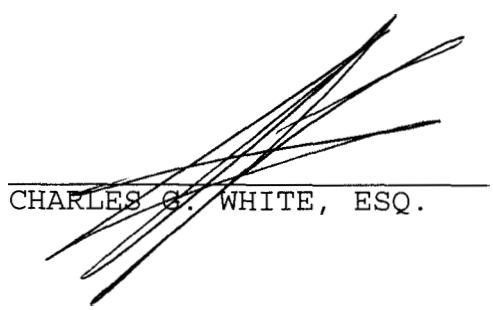

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