SUPREME COURT OF FLORIDA

CASE NO. SCO3-382

LOWER TRIBUNAL F89-14998

RONNIE JOHNSON,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.
_____/

SECOND AMENDED 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 THE CIRCUIT COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON COUNSEL'S INEFFECTIVENESS IN FAILING TO REHABILITATE JUROR WILLIAMS.

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 STATE, 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 DENYING AN EVIDENTIARY HEARING ON WHETHER BADINI SHOULD HAVE REQUESTED A CONTINUANCE WHEN HE WAS NOT PREPARED TO PROCEED WITH THE PENALTY PHASE.

ISSUE IX

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 X

WHETHER 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.

ISSUE XI

WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT THE HOLDING OF MILLER v. STATE, 733 So.2d 955 (Fla. 1998), WOULD NOT BE RETROACTIVELY APPLIED TO THIS CASE.

ISSUE XII

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 XIII

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

ISSUE XIV

WHETHER THE TRIAL COURT ERRED IN DETER MINING 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.

JOHNSON was indicted for the first-degree murder of Tequila Larkins a/k/a "Sugar Moma", in violation of Florida Statute Section 782.04 (Count I), and burglary of an occupied structure with an assault therein, in violation of Florida Statute Section 810.02(2)(a)(b) (Count II). As to Count I, the State charged JOHNSON upon both theories of premeditation and felony-murder.

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

On November 4, 1991, a jury trial commenced. On November 7, 1991, JOHNSON was found guilty of both counts.

The penalty phase commenced on November 13, 1991. The jury recommended a death sentence by a vote of 9-3.

On December 13, 1991, the Circuit Court entered its

Sentencing Order. As to Count I, JOHNSON was sentenced to death. As to Count II, 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 death sentence he received in Case No. F89-12383B. Johnson v. State, 696 So.2d 326 (Fla. 1997), cert. denied, 522 U.S. 1095 (1998). John Lipinski, Esq., was appointed to handle the appeal.

The Motion to Vacate, Set Aside, or Correct Illegal Sentence was timely filed on February 1, 2001. It was later amended. 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 were set forth by this Court in its Opinion on JOHNSON's direct appeal, and are as follows:

> The record reflects the following. Tequila 'Sugar Momma' Larkins was the owner of the Sparkle City Laundromat in Perrine, Florida. She had owned the facility for at least three years prior to her murder. On March 11, 1989, Larkins locked the

front door of the laundromat around 9 p.m. Jerry Briggs and his wife were still finishing their laundry. Eric Bettle, the attendant, and Walter Daniel Hills, Larkins' stepson, were also present Thereafter, a man came to the locked front door asking for change. Larkins went and got her keys. She unlocked the door. A black man then barged in and started arguing with Larkins. The two started physically fighting. The man was hitting Larkins very hard in her face. Larkins fell. The man got on top of her. He pulled out a gun. Mr. Briggs heard gunshots and felt lead hitting his foot. Larkins died.

In court, Mr. Briggs identified Ronnie Johnson as the perpetrator of the crime. Prior to the in-court identification, Mr. Briggs had identified Johnson in a photographic lineup on April 1, 1989. At the earlier identification session, Mr. Briggs wrote on the back of the photograph he chose that he was eighty percent confident that the photograph reflected the black man he witnessed at the laundromat. At trial, however, Mr. Briggs testified that he was sure that the photograph reflected the culprit. On cross-examination, it was revealed that the prosecutor had reviewed the photographic lineup with Mr. Briggs one week prior to trial. Then, on redirect, Mr. Briggs clarified that the prosecutor did not influence his choice of photographs at the pre-trial review session. The defense moved for a mistrial because the pre-trial review session had not been disclosed. The motion was denied.

In addition to the identifications, Johnson confessed. Prior to trial, though, he 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 a little after 6 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. 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 confession revealed the following. After signing the Miranda form at 7:30 p.m., Johnson gave the sworn statement at 1:43 a.m. on April 2, 1989. The

statement concluded at 3:45 a.m. on the same day. Daylight savings time added one extra hour to the length of the statement. Therefore, the one hour statement appears to be two hours long.

The sworn statement indicates that Johnson was approached by an individual named 'G' and asked to shoot somebody. Johnson stated that he went to G's house prior to the murder. At that point, G gave Johnson a gun. Johnson then went to the laundromat with G and another 'stake out' person. After barging into the laundromat, Johnson recalls that he 'got nervous' and 'the gun went off.' Then he 'just got confused' and tried 'to shoot my way out of there.' Johnson stated that G paid him 'about $300 or $4.00'for the

murder. Finally, Johnson agreed that he was not threatened or coerced to give the statement and that the statement was free and voluntary.

Additionally, Termain Tift testified that Johnson told him about shooting Sugar Momma at a washhouse. Tift also said that Johnson admitted getting paid for the murder. Other testimony was offered that no money was taken from the laundromat.

After trial, the jury convicted Johnson of first-degree murder. The jury then recommended the death penalty by a margin of nine to three. On December 13, 1991, the trial judge sentenced Johnson to death. The trial judge found the following five statutory aggravators: (1) the defendant was previously convicted of a felony involving these of violence to the person; (2) the defendant knowingly created a great risk of death to many persons; (3) the murder was committed while the defendant was engaged in the commission of a burglary; (4) the murder was committed for pecuniary gain; and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial judge expressly considered, and thereafter rejected, the following two statutory mitigators: (1) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; and (2) the age of the defendant at the time of the murder. Finally, the trial judge found that the fact that Johnson was a good friend and a caring family man was established by competent evidence. The trial judge treated this as a nonstatutory mitigating factor. He found, however, that this factor was outweighed 'to the point of obliteration'by the aggravating circumstances.

Johnson v. State, 696 So.2d at 327-29 (Fla. 1997), cert. denied, 522 U.S. 1098 (1998).

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.

This Court when hearing the case on direct appeal determined that Juror Williams was properly excused for cause upon the State's motion. The Court noted that trial counsel made no effort to rehabilitate Juror Williams. Trial counsel was ineffective in failing to have attempted to rehabilitate Juror Williams.

The principal evidence against Appellant was a taped confession. The State had originally alleged that Appellant had voluntarily accompanied Officer Hull to the police station. Detective Borrego, who had dispatched Officer Hull for this task, admitted he lacked probable cause to arrest Appellant. Appellant has located three witnesses who could testify to Appellant's arrest by Officer Hull, and detention without probable cause. 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.

After 31 months, trial counsel appeared for trial having had no psychologists or psychiatrists evaluate the Appellant. He attempted to arrange it at the last minute. In a death-penalty case, trial counsel had an obligation to announce his lack of preparedness and request a continuance. Failure to have done so constituted ineffective assistance of counsel.

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.

Subsequent to Appellant's conviction for armed burglary, and with felony-murder, this Court held that the Burglary Statute cannot be applied to persons committing a crime in premises open to the public. This took Appellant's conduct outside the scope of the Burglary Statute. That holding should be applied retroactively to vacate Appellant's conviction as to Count II with the entry of judgment of acquittal, and cause Count I to be remanded for a new trial.

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 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.

Trial commenced over 31 months after JOHNSON's arrest. During that period of time, Raymond Badini, who was handling JOHNSON's case, did not have a single mental health professional evaluate JOHNSON. During voir dire, 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 (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). He testified that after the second Johnson trial and

death sentence, 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 admittedly 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. In essence, Badini began a capital case with no mitigating evidence aside from family members. As will be presented below, those family members possessed a whitewashed impression of JOHNSON because they really did not know him. Badini had not acquired the tools and 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.

Badini admitted that he believed a thorough mental health examination was necessary in JOHNSON's case. He testified that his conversatons with JOHNSON caused him to believe him "always an enigma" (Tr. of 10/4/02 at 104-5). 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 in F89-12383B, the second case, "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 evaluaton, 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 impecable credentials in death-penalty cases. She has been a psychologist since 1966. She began to practice forensic psychology in 1975, and evaluates approximattely 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 Wiqqins 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.
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> * * *
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> 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:
>
> > '[S]trategic 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. Rassdale 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 eleviated 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 added nothing to the inquiry. Instead of asking questions of the venire, he praised the State's death qualification voir dire, and used a trivial analogy in an effort to explain the State's burden of proof as to aggravating circumstances. Badini described the State's burden of proof of aggravating circumstances as being akin to proving something was a particular color. He did not have an equivalent analogy to offer regarding the treatment of mitigating circumstances. 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.3f 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, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (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. From the transcripts of jury selection, however, it is clear that no effort was made to weed out those jurors who were predisposed towards death or who would reject any mitigating evidence. 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. Eight pages of a transcript talking about aggravating and mitigating circumstances in terms of colors and praising the prosecutor's questioning style and content was a sign of an attorney who did not take the death penalty seriously.[1] JOHNSON has at least raised a sufficient enough issue to deserve further inquiry at an evidentiary hearing.

ISSUE IV

THAT THE CIRCUIT COURT ERRED IN DENYING *AN* EVIDENTIARY HEARING ON COUNSEL'S INEFFECTIVENESS IN FAILING TO REHABILITATE JUROR WILLIAMS.

Contrary to what the Circuit Court stated in its Order, the only juror whom JOHNSON believes should have been rehabilitated and was not was Juror Williams. This Court on direct appeal determined that JOHNSON had not attempted to rehabilitate Juror Williams and could not, thereby, show error for is causal excusal. Johnson, 696 So.2d at 332. The suggestion was that if an effort had been made to rehabilitate Juror Williams, then he might not have been excused for cause.

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[1] In the subsequent trial in Case No. F89-12383B, Badini asked no questions at all about the death penalty. The transcript of that trial reveals that he was not even taking notes on jurors' attitudes towards the death penalty.

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 person who had killed Tequila Larkins 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 accompanyment 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 in Case No. F89-12383B. 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. His testimony about JOHNSON trying to recruit him to commit the Larkin murder was chilling, and could have had an effect on both the jury's decision to convict as well as recommend death. 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 DENYING AN EVIDENTIARY HEARING ON WHETHER BADINI SHOULD HAVE REQUESTED A CONTINUANCE WHEN HE WAS NOT PREPARED TO PROCEED WITH THE PENALTY PHASE.

For all the reasons set forth in Issue I, infra, Badini was not prepared to try the penalty phase when he began jury selection. He was under an obligation to his client to bring his level of preparedness to the attention of the trial court. He failed to do so. JOHNSON cited Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986), for the proposition that Badini had rendered ineffective assistance of counsel by not requesting a continuance.

Although there was an evidentiary hearing on Issue I, this particular issue was not before the Court. The Circuit Court seemed to believe that the fact that Dr. Miller did see JOHNSON made a continuance unnecessary. JOHNSON is entitled to an evidentiary hearing on that point.

ISSUE IX

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 X

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 XI

THAT THE TRIAL COURT ERRED IN DETERMINING THAT THE HOLDING OF MILLER v. STATE, 733 So.2d 955 (Fla. 1998), WOULD NOT BE RETROACTIVELY APPLIED TO THIS CASE.

The State proceeded on the basis of premeditation and felony-murder. The felony murder was based upon the burglary that had allegedly occurred at the laundromat owned by Tequila Larkins a/k/a "Sugar Moma". Larkins' laundromat was open to the public, and when JOHNSON sought entry, there were other customers still inside. JOHNSON was able to gain entry with Larkins' consent. The fact that the laundromat was open to the public constituted an absolute defense to the armed burglary charged in Count II, and the felony-murder theory underlying JOHNSON's first-degree murder charged in Count I. Miller v. State, 773 So.2d 955 (Fla. 1998); see also, Walton v. State, 2001 WL 121993 (3d DCA 2/14/01). Since JOHNSON's conviction for first-degree murder may have been based upon an incorrect legal theory, he must be granted a new trial despite the presence of substantial evidence of premeditation. Delgado v. State, 2000 WL 1205960 (Fla. 8/24/00), citing Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957).

In its Order denying JOHNSON's 3.850 Motion, the Circuit Court claimed that Miller would not meet the test of retroactive application found in Witt v. State, 387 So.2d 922 (Fla. 1980). That Court stated:

> [W]e today hold that an alleged change of law would not be considered in a capital case under Rule 3.850 unless the change: (1) Emanates from this Court or the United States Supreme Court, (2) Is constitutional in nature, and (3) Constitutes a development of fundamental significance. Most law changes of 'fundamental significance' will fall within the two broad categories described earlier.

Id., at 931.

The two categores described earlier were (1) "changes of law which placed beyond the authority of the State the power to regulate certain conduct or impose certain penalties", and "those changes of law which are of sufficient magnitude to necessitate retroactive application." Id., at 929.

In Miller, this Court determined that a certain class of persons who committed what was called a "remaining in" burglary could not be liable if the premises was open to the public. This was a change of law which rendered JOHNSON not guilty of burglary. That change should be applied retroactively under Florida law.

Under Federal law, the standard for retroactivity is found in Teaque v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The Teaque Court held that decisions

would be applied retroactively on collateral review unless (1) The decision placed conduct beyond the power of the Government to proscribe; or (2) The decision announced a "watershed" rule of constitutional criminal procedure such as the right to counsel. Id., at 311, 109 S.Ct. 1060.

Again, as in Miller, the U.S. Supreme Court placed certain conduct beyond the power of the Government to proscribe, to-wit: burglary of a business premises open to the public. Under Teague, Miller should be applied retroactively, and a judgment of acquittal should be entered as to Count II, and JOHNSON should receive a new trial as to Count I.

ISSUE XII

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 XIII

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 XIV

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).

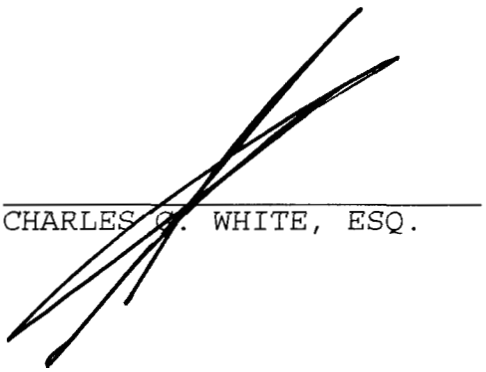
In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the U.S. Supreme Court determined that any factor which increased the maximum possible penalty for a criminal defendant was an element, and had to be determined by a jury beyond a reasonable doubt. In Ring v. Arizona, 536 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, IX, XII, and XIII, the entry of a judgment of acquittal on Count II, and a new trial as to Count I if he should prevail on Issue XI, vacation of the death penalty, and the imposition of a life sentence as to Count I if he should prevail on Issue XIV, and an evidentiary hearing of he should prevail on Issues II, III, IV, V, VII, VIII, IX, X, XII, and XIII, 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



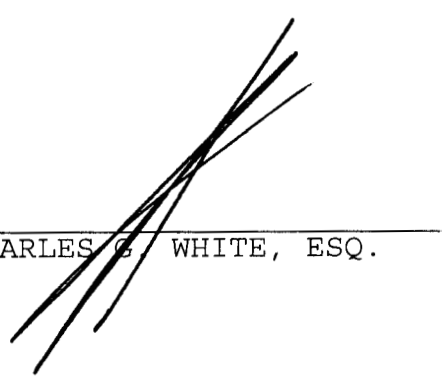
CHARLES G. WHITE, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of June, 2004, to: SANDRDA S. JAGGARD, ASST. ATTORNEY GENERRAL, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miamim, 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



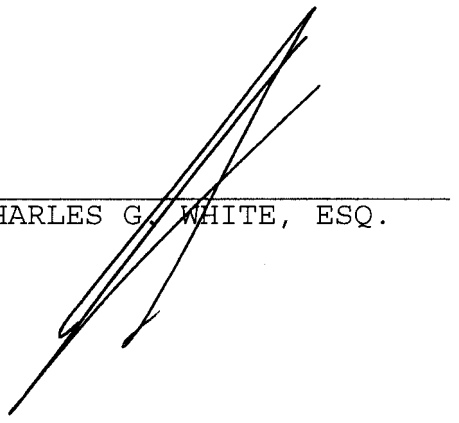
CHARLES G. WHITE, ESQ.

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.