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SUPREME COURT OF FLORIDA

CASE NO. SC03-382

LOWER TRIBUNAL F89-14998

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RONNIE JOHNSON,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY BRIEF ON THE MERITS OF APPELLANT RONNIE JOHNSON

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TABLE OF)NTENTS

		Page
TABLE OF AUTHORITIES		iv
STATEMENT OF THE CASE		1
ARGUMENT		1
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	1
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	7
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	11
ISSUE IV	THAT THE CIRCUIT COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON COUNSEL'S INEFFECTIVENESS IN FAILING TO REHABILITATE JUROR WILLIAMS	**13**
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 . .	13
ISSUE VI	THAT THE TRIAL COURT ERRED IN APPLYING BRAM **v.** UNITED STATE, 168 U.S. 532 (1897) TO HIS MOTION TO SUPPRESS	17

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 18

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 19

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 22

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 . . . 24

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 TOTHISCASE 25

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 30

ISSUE XIII THAT THE TRIAL COURT ERRED IN DETERMINING THAT THERE WAS NO PREJUDICE IN THE COURT'S INSTRUCTIONS CONCERNING NON-STATUTORY MITIGATING CIRCUMSTANCES 32

ISSUE XIV THAT THE TRIAL COURT ERRED IN DETER MINING THAT FLORIDA'S PENALTY-PHASE PROCEDURE DID NOT VIOLATE <u>APPRENDI v. NEW JERSEY</u>, 530 U.S. 466 (2000) 32

CONCLUSION. 33

CERTIFICATE OF SERVICE 34

CERTIFICATE OF COMPLIANCE 35

TABLE OF AUTHORITIES

Pase

CASES

Adams v. Wainwright,
804 F.2d 1526 (11th Cir. 1986),
vacated on other srounds sub nom. 30, 31

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348,
147 L.Ed.2d 435 (2000) 31

Beets v. Scott,
65 F.3d 1258 (5th Cir. 1995) 9

Bottoson v. Moore,
833 So.2d 693 (Fla.), cert. denied,
536 U.S. 1067 (2002) 33

Bram v. United States,
168 U.S. 532, 18 S.Ct. 183,
42 L.Ed. 568 (1897) 17

Bruno v. State,
807 So.2d 55 (Fla. 2001) 18, 22, 32

Bryan v. State,
748 So.2d 1003 (Fla. 1999) 10

Bunkley v. State,
833 So.2d 739 (Fla. 2002) 29

Caldwell v. Mississippi,
472 U.S. 320, 105 S.Ct. 2633,
86 L.Ed.2d 231 (1985) 31

Chandler v. United States,
218 F.3d 1305 (11th Cir. 2000) 1

Code v. Montgomery,
799 F.2d 1481 (11th Cir. 1986) 19, 20

Coleman v. Thompson,
501 U.S. 722, 111 S.Ct. 2546,
115 L.Ed.2d 640 (1991) 17

Cuyler v. Sullivan,
446 U.S. 335, 100 S.Ct. 1708,
64 L.Ed.2d 333 (1980) 9, 10

Delsado v. State,
776 So.2d 233 (Fla. 2000) 27, 28

Dusser v. Adams,
489 U.S. 401, 109 S.Ct. 1211,
103 L.Ed.2d 435 (1989) 30

Fennie v. State,
855 So.2d 597 (Fla. 2003) 12

Fiore v. White,
531 U.S. 225, 121 S.Ct. 712,
148 L.Ed.2d 629 (2001) 29

Fitzpatrick v. State,
859 So.2d 486 (Fla. 2003) 30

Jackson v. Denno,
378 U.S. 368, 84 S.Ct. 1774,
12 L.Ed.2d 908 (1964) 16

Mann v. Dugger,
844 F.2d 1446 (11th Cir. 1988)
(en banc) 30, 31

Mickens v. Taylor,
535 U.S. 162, 122 S.Ct. 1237,
152 L.Ed.2d 291 (2002) 9

Miller v. State,
733 So.2d 955 (Fla. 1998) . . . 25, 26, 27, 28, 29, 33

Murray v. Carrier,
477 U.S. 478, 106 S.Ct. 2639,
91 L.Ed.2d 397 (1986) 17

Rassdale v. State,
798 So.2d 713 (Fla. 2001) 2

Ray v. State,
522 So.2d 963 (Fla. 3d DCA 1988) 26, 27

Ring v. Arizona,
536 U.S. 584, 122 S.Ct. 2428,
153 L.Ed.2d 553 1992) 31, 32, 33

Robinson v. State,
_____ So.2d _____, 2004 WL 170362
(Fla. Jan. 29, 2004) 31, 32

Rogers v. Zant,
13 F.3d 384 (11th Cir. 1994) 1

Romano v. Oklahoma,
412 U.S. 1, 114, S.Ct. 2004,
129 L.Ed.2d 1 (1994) 30

Sanders v. United States,
373 U.S. 1, 83 S.Ct. 1068,
10 L.Ed.2d 148 (1963) 23

Schlup v. Delo,
513 U.S. 298, 115 S.Ct. 851,
130 L.Ed.2d 808 (1995) 23

State v. Byars,
823 So.2d 740 (Fla. 2002) 26

State v. Ruiz,
863 So.2d 1205 (Fla. 2003) 28

State v. Woodley,
695 So.2d 297 (Fla. 1997) 29

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984) 3, 9

Teague v. Lane,
489 U.S. 288, 109 S.Ct. 1060,
103 L.Ed.2d 334 (1989) 28

Teffeteller v. Dugger,
734 So.2d 1009 (Fla. 1999) 11

Wiggins v. Smith,
____ U.S. ____, 123 S.Ct. 2527,
156 L.Ed.2d 471 (2003) 2, 3, 4

Witt v. State,
387 So.2d 922 (Fla. 1980) 28

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

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tendencies may have also appeared in testing. The State was also 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 Wisgins 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 suggests 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 suggests 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 show 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 37). 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 just refer the case to another inferior attorney for a kickback. The case law cited supports JOHNSON's position that once a lawyer was appointed, JOHNSON 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 concern situations where, for one reason or another, the Court orders an attorney off the case and replaces him with another. That is 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 <u>en mass</u>, 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

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[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 Cuyler 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 43-4). The State also claimed that 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 Cuyler does not apply to conflict situations not involving multiple representation. The State reasoned that "applying Cuyler to alleged conflicts of interest that do not involve multiple representation would allow the Cuyler exception to swallow the Strickland rule" (State Answer Br. at 44-5). 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 Cuyler.

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 45). 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

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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's Answer Br. at 49-51). The State cited Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999), in support of its position. Teffeteller was a post-conviction claim that trial counsel was ineffective for failing to question the venire about pretrial publicity. The defendant lost his claim when this Court concluded that counsel could not be faulted for not repeating the questions already propounded the venire by the Court and the State. This situation is entirely different.

The Circuit Court 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 against the death penalty? What about those jurors who are predisposed **for** the death penalty? Who is supposed to ask those questions? The answer, of course, is the defense attorney.

The short eight-page portion of the voir dire devoted to Badini's explanation of the death penalty to the venire was pathetic. He talked about aggravating circumstances in terms of proving colors. He did not ask any juror any question at all relating to any propensity or belief on their part that death was an appropriate penalty should they find JOHNSON guilty of first-degree murder. There were no questions propounded on pre-conceptions about statutory or non-statutory mitigating circumstances. This last deficiency was likely caused by the absence of any defense to the death penalty developed pre-trial.

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

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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.

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 claims that it had peremptory challenges remaining, and would have excused juror Williams anyway even if he had not been excused for cause. JOHNSON has two responses to this argument.

Firstly, this Court on direct appeal specifically addressed Badini's failure to have attempted to rehabilitate juror Williams. This suggests that, in fact, the existence of additional unused peremptory challenges was not considered a factor.

Secondly, this failure and/or refusal to rehabilitate constitutes evidence of ineffectiveness that goes to the larger issue of Badini's failure or refusal to address death penalty issues in the case. As set forth above, Badini's death-qualification voir dire was meaningless. His failure to have pressed juror Williams, as noted by this Court, represents another example of his deficient representation.

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 59). The State does acknowledge that it was not a positive identification, but cites 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 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 61-3). 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 as 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 was 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 is 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'sAnswer Br. at 69). 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 dismissed this issue, and JOHNSON's reliance on Code v. Montgomery, 799 F.2d 1481

(11th Cir. 1986), by insisting that Badini's last-minute/ during voir dire dispatch of Dr. Miller to see JOHNSON made a continuance unnecessary (State Answer Br. at 75-6). Dr. Miller's last-minute examination did not make Badini any more prepared to proceed to trial than he would have been without it. It was Badini's lack of preparation that mandated a continuance.

In Code, the U.S. Court of Appeals for the Eleventh Circuit held that counsel was ineffective for failing to have moved for a continuance when he was assigned the case one week before trial. The State argued that since Badini had been on the case for far longer, Code does not apply. The State's argument ignored the real reasoning in Code.

The reason why the attorney in Code should have moved for a continuance was because he was unprepared for trial. The reason he was unprepared for trial was because he had only been recently appointed to the case. If there had been another reason why he was not prepared for trial, the Court's holding would have remained the same. In other words, if counsel had been on the case for a year, but had done nothing to prepare for trial, he would have been ineffective for failing to ask for a continuance under Code. Rather than focus on the amount of time Badini represented JOHNSON, the relevant inquiry is his state of readiness at the time of trial. The Record shows that he was not ready,

and he was constitutionally required to request a continuance to get ready.

Badini had plenty of time to get ready for JOHNSON's trial. The Record shows that he did not use that time wisely. Despite his self-serving testimony at the evidentiary hearing concerning the difficulties he was allegedly experiencing getting mental health professionals to assist him in the case, he had filed no motions seeking the Court's assistance. Nonetheless, Badini waited until he was in the middle of jury selection in this case before taking action. To suggest this type of last-minute half-measure satisfies counsel's constitutional obligations in a capital case is ludicrous.

If Badini had requested a continuance after representing JOHNSON for so long on the grounds that he was not prepared, the trial judge would have been understandably angry and upset. He would have been justified in punishing Badini. The trial judge would have been justified in reporting Badini to The Florida Bar. He might have questioned why Badini was there at all when Huttoe had been appointed. None of that happened because Badini pretended to be ready for trial. He chose not to request a continuance. Counsel had an obligation *to at least* tell the trial court that he could not proceed unless he had a continuance rather than "wing it" in a death-penalty case.

JOHNSON would take this opportunity to reiterate the position he has taken throughout these proceedings that his accusations of ineffective assistance of counsel against Badini are interrelated. In order to properly evaluate the competence of his attorney, all aspects of his ineffective assistance need to be explored in an evidentiary hearing.

ISSUE IX

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 77). 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 X

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 79-84).

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 V 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 XI

JOHNSON is not maintaining that Miller v. State, 733 So.2d 955 (Fla. 1998), was the law at the time of his trial. There was no doubt that Miller was decided almost seven years later. Although the "open to the public" affirmative defense was set forth by statute, Florida Statute Section

810.02(1), the holding of the Third District Court of Appeal in Ray v. State, 522 So.2d 963 (Fla. 3d DCA 1988), and other courts, had created legal confusion. Miller, 773 So.2d at 957. This Court resolved the conflict by stating:

> We hold that if a defendant can establish that the premises were open to the public, then this is a complete defense.

733 So.2d at 957.

As this case was tried in Miami-Dade County, the Ray case was binding upon the trial court. Under Ray, while the "open to the public" affirmative defense would act to establish consent to enter the premises, that consent would be withdrawn once the intent to commit a crime therein had manifested itself. As stated above, the Miller Court resolved the conflict and made the "open to the public" defense an absolute bar to prosecution for burglary. See, e.g., State v. Byars, 823 So.2d 740 (Fla. 2002) ("open to the public" affirmative defense acted as absolute bar to burglary prosecution despite existence of domestic violence injunction prohibiting defendant from entering his wife's place of employment).

Since Miller was decided after JOHNSON's trial, it wasnot the law. JOHNSON is not prevented from raising the issue in habeas proceedings.

Miller is a decision which must be applied retroactively. The State's argument to the contrary

overlooks the full breadth of the Miller decision. This Court in Miller excluded from burglary prosecution any entry or remaining in that occurred in a premises open to the public even if the defendant was barred, had no consent, or had consent revoked after the entry. Miller cast aside the legal fictions established in Ray, and created a bright-line rule. This was clearly a substantive change in the law. Miller was also an interpretation of the statute that was consistent with legislative intent. The limitations on the "open to the public" affirmative defense had been established by judicial opinion, not legislation.

The retroactivity of Miller should be contrasted with the decisions of this Court that have addressed the retroactivity of Delqado v. State, 776 So.2d 233 (Fla. 2000). In Delsado, this Court disapproved Ray for all "remaining in" burglaries, and not just those where the premises were open to the public. The Court held that consent could not be withdrawn by a defendant's intention to commit a crime in any premises where he or she was allowed to enter unless the remaining in was done surreptitiously. After the Court decided Delsado, the Florida Legislature amended the burglary statute to overrule its holding. The statute nullifying Delsado stipulated that it would "operate retroactively to February 1, 2000", a couple of days before Delsado was decided, and that Delqado did not represent the

original intent of the Florida Legislature when the burglary statute was enacted. Based only upon those statutory mechanisms, this Court has concluded that Delqado is not retroactive. State v. Ruiz, 863 So.2d 1205 (Fla. 2003).

The Ruiz Court clearly saw that Delqado represented a change in the law that removed a whole class of offenders from the reach of the burglary statute. It was only because of the actions of the Florida Legislature that Delqado was determined not to be retroactive. If the Florida Legislature had left the Delqado decision alone, it would have met this Court's retroactivity test in Witt v. State, 387 So.2d 922 (Fla. 1980), and the related U.S. Supreme Court standard set in Teaque v. Lane, 489 U.S. 288 (1989).

In its Answer Brief, the State claimed that Miller did not remove certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe because it was characterized as only a "matter of statutory construction'' (State Answer Br. at 87). The State argued that because Miller did not invalidate the burglary statute in toto, it only acted to "refine" the statute. Miller was not a mere refinement of the burglary statute. JOHNSON's due process rights under the Florida and U.S. Constitutions have been violated because he is suffering conviction and a sentence of death, based upon conduct that the burglary statute, as properly interpreted

by Miller, did not prohibit. Fiore v. White, 531 U.S. 225 (2001).[3] Since JOHNSON's due process rights have been violated, Miller should be applied retroactively.

Finally, the State maintained that because Tequila Larkins had to unlock the doors, the laundromat was not open to the public (State Response Br. at 89). Miller does not hinge upon whether the door to the business was locked or not. If the premises was open to the public, then the Miller holding applies. The evidence was uncontroverted that the laundromat was in operation. While it was close to closing time, there were customers doing their laundry at the time. When JOHNSON came to the door, he was invited in because the laundromat was open to the public. There are some businesses that keep the front door locked, even during business hours. This may reflect a desire to screen people seeking entry, but the locked door does not make the business any less "open to the public".

Once Miller is determined to apply in JOHNSON's case, the first-degree murder and burglary counts must be vacated.

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[3] The State cited State v. Woodlev, 695 So.2d 297 (Fla. 1997), as supporting its position that Miller should not be applied retroactively. This Court has previously identified its holding in Woodlev as an "evolutionary refinement" in the law rather than a change in the law. Bunkley v. State, 833 So.2d 739, 744, n. 11 (Fla. 2002). Miller was a change in the law when it discarded judicially imposed limitations and placed JOHNSON's conduct outside the ambit of the statute.

Since he was convicted by general verdict, the first-degree murder conviction cannot stand based merely upon evidence of premeditation. A general jury verdict cannot stand where one of the theories of prosecution is legally inadequate. Fitzpatrick v. State, 859 So.2d 486 (Fla. 2003).

ISSUE XII

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., Dugger v. Adams, 489 U.S. 401 (1989), and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc) (State Answer Br. at 92-3). 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]

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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.

ISSUE XIII

The State's claim that JOHNSON is procedurally barred from raising this issue is incorrect (State's Answer Br. at 93-4). 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 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 XIV

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). The Court noted that the existence of aggravators relating to the underlying felony, which are decided by the jury beyond a reasonable doubt, can justify the rejection of a Ring challenge. Id., at *5. In this case, as more fully set forth in Issue XI, infra, the underlying burglary is violative of Miller.

JOHNSON acknowledges this Court's decisions on this point to date, but still advances the argument because the issue seems self-evident and 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, 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 if he should prevail on Issues II, III, IV, V, VII, IX, X, XII, and XIII, with the final

result of a remand for a new trial on either the Guilt or Penalty Phases or both.

Respectfully submitted,

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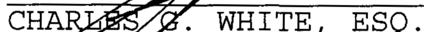

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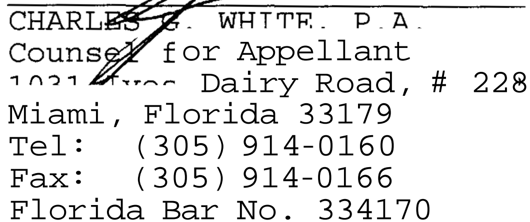
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 19th 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.

Respectfully submitted,



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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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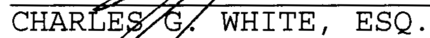

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