IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

LOWER TRIBUNAL NO. 99-11338

RAY LA2MAR JOHNSTON,
Petitioner,
v.
WALTER MCNEIL,
Secretary,
Florida Department of Corrections,
Respondent,
and
BILL MCCOLLUM,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33619-1136
(813) 740-3544

Counsel for Petitioner

PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without costs." This petition for habeas corpus is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Unites States Constitution and the corresponding provisions of the Florida Constitution. This petition will show that Mr. Johnston was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.

References made to the record prepared in the direct appeal of Mr. Johnston's conviction and sentence are of the form, e.g., (Dir. ROA Vol. #, pg. 123). References to the record of the most recent postconviction record on appeal are of the form, e.g. (PC ROA Vol. #, pg. 123).

REQUEST FOR ORAL ARGUMENT

Mr. Johnston has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Johnston.

Table of Contents

page

TABLE OF AUTHORITIES

INTRODUCTION

On Mr. Johnston's direct appeal from the adjudication of guilt and the imposition of the death sentence, appellate counsel failed to raise and argue significant errors. Moreover, some of the issues raised on the direct appeal were ineffectively presented to this Court for appellate review.

Appellate counsel's failure to raise and argue certain issues and failure to present effectively other issues, was clearly deficient and actually prejudiced Mr. Johnston to the extent that the fairness and the correctness of the outcome were undermined.

This petition also presents questions that were raised on direct appeal, but should be reheard under subsequent case law or legal argument to correct errors in the appellate process that denied Mr. Johnston fundamental constitutional rights. This petition will demonstrate that Mr. Johnston is entitled to habeas relief.

PROCEDURAL HISTORY

The instant case involves the murder of Janice Nugent which occurred in February of 1997. Ray Lamar Johnston was first arrested and charged with the murder of Leanne Coryell in the early morning hours of August 22, 1997. Six months had elapsed from the time of Ms. Nugent's murder. While in custody for the Coryell murder, and after he had signed an invocation of rights form, law enforcement swiftly questioned him in jail that same afternoon regarding the murder of Janice Nugent. Mr.

Johnston made statements to law enforcement regarding his relationship with Ms. Nugent, but he denied killing her; Mr. Johnston was later questioned by law enforcement a second and third time concerning this murder, but for approximately two years he was not charged with this Nugent murder.

Ray Johnston was indicted for the murder of Janice Nugent June 30, 1999, less than a month after the conviction and death sentence in the Coryell case. [See indictment at PC ROA Vol. I, 33-36]. Soon after the indictment the State filed a "Notice of Intent to Rely on Williams Rule Evidence" of the Coryell murder on July 8, 1999. [See the Notice at Nugent Dir. ROA Vol. I, 25-30]. Over defense objections and motions, the State introduced evidence in the Nugent guilt phase that Mr. Johnston admitted to the murder of Leanne Coryell. Ray Lamar Johnston was convicted and a jury recommended a sentence of death by a vote of 7-5. The circuit court then granted a new penalty phase based on the State arguing an improper aggravator, and a second jury recommended a sentence of death by a vote of 11-1.

This petition follows the denial of the Appellant's direct appeal (*Johnston v. State*, 863 So. 2d 271 (Fla. 2003)) and an order denying his motion for postconviction relief (PC ROA Vol. VIII, 1544 - Vol. IX, 1668). Mr. Johnston is concurrently filing an Initial Brief with this Petition.

GROUNDS FOR HABEAS CORPUS

This is Mr. Johnston's first petition for habeas corpus in this Court. Mr. Johnston asserts in this petition for writ of habeas corpus that his capital conviction and death sentence were obtained in the trial court and then affirmed by this Court in violation of Mr. Johnston's rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

JURISDICTION FOR PETITION AND HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. Proc. 9.100(a). See. Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. Proc. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Johnston' death sentence.

Jurisdiction for this petition lies with this Court because the fundamental constitutional errors raised occurred in a capital case in which this Court heard and denied Mr. Johnston' direct appeal. *see, e.g., Smith v. State,* 400 So.2d 956, 960 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Johnston to raise the claims presented herein. *See, e.g., Way v. Dugger,* 568 So.2d 1263 (Fla.

1990); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987).

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this petition, as this Court has done in the past. This petition pleads claims involving fundamental constitutional error. *See Dallas v. Wainright*, 175 So. 2d 785 (Fla. 1984). This Court's exercise of its habeas corpus relief jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Johnston's claims.

GROUND I

EXECUTION OF MENTALLY ILL INDIVIDUALS SUCH AS MR. JOHNSTON VIOLATES THE 8TH AND 14TH AMENDMENTS PROHIBITING CRUEL AND UNUSUAL PUNISHMENT. MR. JOHNSTON'S CURRENT DEATH SENTENCES, IMPOSED UPON A PROFOUNDLY MENTALLY ILL INDIVIDUAL CONSTITUTES ARBITRARY, CAPRICIOUS, CRUEL, AND UNUSUAL PUNISHMENT UNDER THE 8TH AND 14TH AMENDMENTS. THE LOWER COURT ERRED IN FAILING TO CONVERT MR. JOHNSTON'S DEATH SENTENCE TO A LIFE SENTENCE

The United States Supreme Court in the new millennium has banned the execution of the mentally retarded and the execution of juveniles in the cases of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). Both

cases cited to "evolving standards of decency" in today's society as the main factors justifying vacation of those death sentences. In light of the principles announced in *Atkins* and *Simmons,* and in light of the "evolving standards of decency" in today's society, this Court should vacate Mr. Johnston's death sentences. A watershed ruling in *Roper vs. Simmons* was handed down from the United States Supreme Court since Ray Lamar Johnston was sentenced to death. This Court should reevaluate the mitigators in this case in light of a significant change in death penalty law, as well as the vast other mitigation that was presented at both the penalty phase and evidentiary hearing. This case is not the least of the mitigated of murder cases. Ray Lamar Johnston suffers from major mental disorders. In light of the *Atkins* and *Simmons* cases, and in light of Mr. Johnston's major mental disorders, this Court should reverse the death sentences now imposed.

The *Simmons* Court reaffirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. The Court outlined the similarities between its analysis of the constitutionality of executing juvenile offenders and the constitutionality of executing the mentally retarded. Prior to 2002, the Court had refused to categorically exempt mentally retarded persons from capital punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989). However, in *Atkins v. Virginia*,

536 U.S. 304 (2002), the Court held that standards of decency had evolved in the 13 years since *Penry* and that a national consensus had formed against such executions, demonstrating that the execution of the mentally retarded is cruel and unusual punishment. The majority opinion found significant that 30 states prohibit the juvenile death penalty, including 12 that have rejected the death penalty altogether. The Court counted the states with no death penalty, pointing out that "a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." In ruling that juvenile offenders cannot with reliability be classified as among the worst offenders, the Court found significant that juveniles are vulnerable to influence, and susceptible to immature and irresponsible behavior. In light of juveniles' diminished culpability, neither retribution nor deterrence provides adequate justification for imposing the death penalty. Justice Kennedy, writing for the majority, said: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."

Simmons indicates that even eighteen-year-olds may not possess the adequate maturity level to have imposed upon them the ultimate penalty:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. . . . the Court has referred to the laws of other countries and to international

> authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." . . . The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. . . . As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. In 1930 an official committee recommended that the minimum age for execution be raised to 21. House of Commons Report from the Select Committee on Capital Punishment (1930), 193, p. 44. Parliament then enacted the Children and Young Person's Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence.

Simmons at 1197, 1198-1200. The evolving standards of decency in society prohibit the cruel and unusual execution of an individual who is severely emotionally disturbed.

The aggravating and mitigating circumstances in this case must be reweighed in light of *Simmons*, considering whether the instant case was, inter alia, the "least mitigated of the mitigated." *Stringer v. Black*, 503 U.S. 222, 229-232 (1992); *Williams v. Taylor*, 529 U.S. at 398 (2000) (faulting the lower court for "fail[ing] to evaluate the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding--in reweighing it against the evidence in aggravation"). The lower court in the case at bar similarly and erroneously failed to consider Dr. Cunningham's testimony concerning the diagnosis of ADHD.[1]

[1]There was an extensive proffer regarding ADHD at PC ROA Vol. XXXVI, 798-821.

The rule announced in *Roper v. Simmons* alters the class of persons eligible for the death penalty and therefore applies retroactively. *Simmons* at 551 ("In holding that the death penalty cannot be imposed upon juvenile offenders, we ... [hold] that *Stanford* [*v. Kentucky*, 492 U.S. 361 (1989)] should no longer control in those few pending cases or in those yet to arise."). Given the overwhelming mitigation in this case, the imposition of the death penalty would violate the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment.

The Petitioner prays that the Court vacate the sentence of death in the case at bar in light of the "evolving standards of decency," reevaluate the vast mitigation in this case, impose a life sentence, grant a new penalty phase, or remand for the lower court to consider the diagnosis of ADHD and the other mitigation presented. The statutory and non-statutory mitigators related to mental illness and frontal lobe damage should be reevaluated in light of the vast mitigation in this case.

Mr. Johnston's sentence of death violates the 8th and 14th Amendments prohibiting cruel and unusual punishment, as well as the arbitrary and capricious imposition of the ultimate penalty as applied. This Court should conduct a new proportionality analysis, convert Mr. Johnston's death sentence to a life sentence in light of the 8th and 14th Amendments, or in the alternative, grant a new penalty phase to allow Mr. Johnston to present evidence of his current physical and mental health, or

grant other appropriate relief. Mr. Johnston asks this Court to perform a new proportionality analysis taking into account all of his mitigation including that which was developed and presented in postconviction, and asks that this Court vacate his death sentence.

GROUND II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE FUNDAMENTAL ERROR THAT OCCURRED IN THE READING OF THE JURY INSTRUCTIONS AT THE PENALTY PHASE THUS VIOLATING HIS 5TH, 6TH, 8TH AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION

At the very least, this particular claim should have been afforded an evidentiary hearing in postconviction. This claim was erroneously and summarily dismissed by the lower court based on the lower court's pure speculation that the jury might have later read and somehow understood the error in the erroneous verbal jury instructions they were provided initially by the trial court. Trial counsel was ineffective for failing to object to the erroneous instructions at trial and request a curative instruction. Appellate counsel was ineffective for failing to raise this issue on direct appeal. As acknowledged by the lower court in its order, this claim in part is based on the following error:

> Defendant asserts counsel was ineffective in the second penalty phase[2] for failing to object when the Court instructed the jury that 'a mitigating circumstance *may not* be proved beyond a reasonable doubt by the Defendant' when the correct instruction is that a mitigating *need not* be proved beyond a reasonable doubt (emphasis added). Defendant alleges that this erroneous instruction misled the jury to believe that mitigating circumstances must be proved beyond a reasonable doubt, and implied that Defendant may not have met this erroneous high standard of proof in his case.

[PC ROA Vol. VIII, 1554.]

Although the lower court obviously understands the error, the lower court fails to understand the gravity of this error.

The lower court agreed with the State's argument that "any challenge to the substance of the jury instructions is a matter for direct appeal." *See* lower court's Order at PC ROA Vol. VIII, 1554. If the State's argument and lower court's ruling is correct in this regard, this claim is a matter of ineffective assistance of appellate counsel. In order for most issues to be preserved for appeal, arguably like this one, there must be an objection at the trial level. In the case at bar, there was no objection, therefore it could be argued that the claim cannot be raised on direct appeal.[3] As such, this claim is properly raised in the procedural posture of this habeas petition. And this may be the

---

[2]Lower court's footnote omitted here.

[3]*Unless* it involves fundamental error, which arguably is the case here. *See Maddox v. State*, 760 So. 2d 89, 95-96 (Fla. 2000).

only forum available for raising this claim. If this claim continues to be deemed procedurally barred, Mr. Johnston is effectively being denied access to the courts.

The lower court erroneously characterizes this claim as "conclusory allegations" and simply states that "[a]s such, an evidentiary hearing was not held on this claim." PC ROA Vol. VIII, 1555. There are no simple "conclusory allegations" in this claim. The error is clear from the record. The jury instructions were erroneous, and there is a high risk that this death sentence was the result of the erroneous instructions. This claim is *perhaps* fundamental in nature. Although, recent decisions from this Court and various district courts are across the board regarding jury instructions and fundamental error. *See Davis v. State*, 895 So. 2d 1195 (Fla. 2d DCA 2005) (reversing a conviction based on an "and/or" clause in the jury instructions in a case involving codefendants, finding the error to be fundamental). To the extent that this Court's decision in *Garzon v. State*, 980 So. 2d 1038 (Fla. 2008) arguably might have abrogated the finding of fundamental error in *Davis*, the Appellant reminds that this Court *still* found error in *Garzon*, and this Court reminded in *Garzon* that the use of "and/or" clauses has been "condemned for over seventy years," and the *Garzon* "and/or" instruction was again condemned by this Court. *Id*. at 1045. Here, the jury received an erroneous instruction regarding the burden of proof for mitigation. If the error is not fundamental here, it still is proper to be advanced in this petition. Had an objection

been made at trial, certainly the issue would have been raised on direct appeal. But no objection was raised, so the Appellant concurrently advances an argument under *Strickland* in his initial brief. The Petitioner here urges that this Court reverse the death sentence and award a new penalty phase in light of the erroneous jury instruction misinforming that "[any of the] mitigating circumstance[s] [presented] *may not* be proved beyond a reasonable doubt by the Defendant." [Nugent Dir. ROA Vol. XXI, 2461]. This erroneous instruction reaches down into the heart and validity of the trial itself and the death recommendation itself, especially considering that during *voir dire*, attorney Harvey Hyman misstated the law in this area;[4] following the misstatement of the law and State's objection, the lower court had to inform the jury that they would be instructed on the actual law at the appropriate time. The erroneous jury instructions misread by the lower court provided the State an opportunity to obtain a death sentence in this case based on an unfair reversal of burden of proof at the penalty phase. This Court, at the very least, should remand this case back to the lower court for prudent fact finding concerning trial counsel's strategic reasons, if any, for failure to object to the erroneous instructions. Additionally, this case should be remanded to the lower

[4]At Dir. ROA Vol. XVII, 1756, Harvey Hyman was interrupted and a curative instruction was provided when Mr. Hyman misinformed the jury that they would be deciding if the State proved beyond a reasonable doubt that the aggravators outweighed the mitigators.

court, and a non-speculative inquiry and determination should somehow be made to ensure that the jury understood the penalty phase's burden of proof. Had the jury been erroneously instructed at the guilt phase that "the State *need not* prove their case beyond a reasonable doubt," or, "the defense *may not* have proved their case beyond a reasonable doubt," this conviction would surely be reversed. Because "Death is Different," and because vital jury instructions regarding the burden of proof for mitigation were botched in this case, this death sentence should be reversed. The lower court was wrong in its order to deny this claim based on pure speculation that the jury in this case might have actually read the correct written instructions, realized the court's error, and applied the correct burden of proof to the evidence they heard presented at the penalty phase. The lower court's reliance on *Peterka v. State*, 890 So. 2d 219, 240 (Fla. 2004) is misplaced because unlike the situation in *Peterka*, the Appellant's jury was *not* "properly instructed" by the trial court.[5]

At the very least, a remand for a prudent, rather than speculative evidentiary determination is appropriate here.

Ironically enough, this Court amended the particular jury instruction at issue in this case less than 30 days ago in Cases No. SC05-960 and SC05-1890; *see* "IN RE:

[5]*Peterka* was upheld because the jury was "the jury was properly instructed at the penalty phase." *Id.* at 240. In the case at bar, the jury obviously was *not* properly instructed.

STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES–REPORT NO. 2005-2" and "IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES–PENALTY PHASE OF CAPITAL TRIALS," citing to the 2006 American Bar Association report finding that nearly 50 percent of Florida capital jurors "believed that the defense had to prove mitigating factors beyond a reasonable doubt." (opinion at pages 3-4). This Court stated at page 11 of this opinion, "these areas of confusion are a cause for concern," and hoped that through the amendments "juror confusion in this area" would be "eliminate[d]." The lower court obviously was wrong to dismiss this issue without an evidentiary hearing, and was wrong to speculate that because written jury instruction were furnished to the jury the error and confusion concerning the burden of proof for mitigation was cured. *Also, see Spera . State,* 971 So. 2d 754 (Fla. 2007)(extending the holding of *Bryant v. State*, 901 So. 2d 810 (Fla. 2005) to all initial postconviction motions). "While defendants should not be given an unlimited opportunity to amend [their 3.851 motions], due process demands some reasonable opportunity be given to defendants who make good faith efforts to file their claims in a timely manner and whose failure to comply with the rule is more a matter of form than substance." *Bryant* at 819.

Mr. Johnston was prejudiced as a result of the ineffective assistance of appellate counsel. Had this crucial issue been fully presented on direct appeal, this Court would

have reversed the judgment, conviction and sentence of death. As a result, Mr. Johnston was prejudiced as his direct appeal was denied.

GROUND III

THE INTRODUCTION OF RAY LAMAR JOHNSTON'S STATEMENTS TO LAW ENFORCEMENT AT TRIAL VIOLATED HIS 5TH, 6TH, 8TH AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION. RAY LAMAR JOHNSTON AND HIS COUNSEL HAD INVOKED HIS RIGHTS, AND LAW ENFORCEMENT CONTINUED TO QUESTION HIM ABOUT THIS MURDER CONTRARY TO LAW. FURTHERMORE, THE INTERROGATION OF A SEVERELY MENTALLY ILL INDIVIDUAL SUCH AS MR. JOHNSTON SHOULD RENDER HIS STATEMENTS INVOLUNTARY AND INADMISSIBLE AT TRIAL.

The trial court was wrong to deny this claim. On page 107 of the court's order [PC ROA Vol. IX, 1650], the court states:

> Defendant testified that he signed the invocation of rights form at first appearance court for the Coryell case on the morning of August 22, 1997. He also testified that he was first interrogated by Detectives Noblitt and Stanton regarding the Nugent case in the afternoon of that same day. This testimony was uncontroverted. There was no evidence presented that at the time Defendant executed the invocation of rights form at first appearance court, a custodial interrogation had begun or was imminent.

Although a custodial interrogation regarding Nugent had not begun as of the signing of the invocation of rights form in Coryell, a custodial interrogation obviously *was*

imminent. (See *Sapp v. State*, 690 So. 2d 581 (Fla. 1997). This interrogation violated *Edwards v. Arizona* 451 U.S. 477 (1981).

In the very early morning hours of August 22, 1997, Ray Johnston was interrogated regarding the Coryell murder, and was arrested. Much later that morning, Ray Johnston was in jail[6] when he signed the invocation of rights form dated August 22, 1997, he appeared in court on the Coryell case [see defense exhibit 11, PC ROA Vol. X, 1950]. Shortly thereafter he was interrogated by law enforcement regarding the Nugent murder.[7] Mr. Johnston had just been arrested in connection with the Leanne Coryell murder, and law enforcement desperately wanted to interrogate him regarding his possible connection to the Janice Nugent murder, a murder that occurred approximately 6 months prior to this arrest.

Detective Noblitt first testified as to the statements taken from Mr. Johnston as a proffer at trial, outside the presence of the jury [Dir. ROA Vol. VII, 777-792]. The court overruled the defense objection regarding the Appellant's reference to the psychological aspects of his split personality "Dwight" living inside of him.[8]

---

[6]Mr. Johnston submits that being in jail would constitute state custody.

[7]The afternoon Nugent interrogation would have occurred mere hours after Mr. Johnston's first court appearance in Coryell.

[8] The defense never challenged the pre-trial statements based on a *Miranda/* Invocation of Rights violation. The challenge was based solely on the following

Following that ruling, the jury returned to the courtroom and heard the full fruits of the interrogation of Mr. Johnston [See Dir. ROA Vol. VII, 805-842], including statements that he had "blackouts and seizures," and his specific statement: "Sometimes I get to doing something and doing it and when it's over, I can't believe what I've done." [Dir. ROA Vol. VII, 817]. Trial counsel was ineffective for failing to move to suppress all of the statements Mr. Johnston made to law enforcement based on *Miranda* violations, his Invocation of Rights form, the defense letter to law enforcement again reminding them not to question M. Johnston, and the defense "Motion for Protective Order" renewing the requests again. [See Coryell Dir. ROA Vol. I, 80-83]. The court was wrong to find that this failure was part of some strategy to have the statements introduced. Any alleged strategy to have the statements introduced is refuted by trial counsel's half-hearted efforts to suppress the statements in their motion *in limine*. Law enforcement violated the Appellant's rights by failing to honor his invocation of his right to counsel and right to remain silent, and his "demand that [law enforcement *not*] attempt to engage [him] in any conversation whatsoever, concerning any crime [], without first providing [him] an attorney and having that attorney present." [see defense exhibit 11, PC ROA Vol. X, 1950].

---

argument: "Where the Defense has chosen not to put that into evidence, you cannot introduce of a psychiatric condition; the State can't do that. The defendant has to choose that." Dir. ROA Vol VII, 797.

The trial court's reliance on *Sapp v. State*, 690 So. 2d 581 (Fla. 1997) to deny this claim is misplaced because *a whole week elapsed* in *Sapp* following the invocation of Mr. Sapp's rights before he was questioned about an unrelated offense. That case describes how "A week later while Sapp remained in jail on the original robbery charge, he was taken to the 'homicide office,' where a police detective initiated an interrogation concerning the facts of the present case." *Sapp* at 583. In the case at bar, *mere hours had elapsed* between the signing of the invocation of rights form and the interrogation. Although the interrogation in *Sapp* may not have been imminent, the interrogation on the Nugent murder was imminent following the Appellant's first court appearance on Coryell.[9] Law enforcement trampled upon Mr. Johnston's constitutional rights, disregarded his unambiguous, signed invocation of rights directives, and following court, immediately approached him in jail and questioned him about the Nugent murder. This Court should reverse.

Because Mr. Johnston is severely mentally ill, the statements should be inadmissible

Ray Lamar Johnston is a severely mentally ill individual, and law enforcement knew that he was psychologically unstable at the time they questioned him. As such, any alleged waiver of his *Miranda* protections while in jail should be rendered involuntary

9 Detective Noblitt confirmed at trial that he first questioned Mr. Johnston on August 22, 1997 [Dir. ROA Vol. VII, 806], the very same day that Mr. Johnston appeared in court and signed the Invocation of Rights form in Coryell.

and invalid. See *Blackburn v. State of Alabama*, 361 U.S. 199 (1960) and *Colorado v. Connelly*, 479 U.S. 157 (1986). The Petitioner advances that his severe mental illness, coupled with his long list of prescribed medications, and coupled with the repetitive, unlawful contacts made by law enforcement rendered the imminent and continued questioning of Mr. Johnston coercive and unconstitutional.

GROUND IV

THE INTRODUCTION OF THE *WILLIAMS* RULE EVIDENCE OF THE CORYELL MURDER IN THIS TRIAL RENDERED THE RESULTS OF THIS TRIAL UNRELIABLE. RAY LAMAR JOHNSTON WAS CONVICTED PRIMARILY DUE TO THIS HIGHLY INFLAMMATORY AND IMPROPER EVIDENCE IN VIOLATION OF HIS 5TH, 6TH, 8TH AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION. AN IMPROPER PROCEDURE UTILIZING OFF-RECORD HEARSAY STATEMENTS REGARDING DR. MARTIN'S OPINIONS WAS UTILIZED BY THE TRIAL COURT.

Ray Lamar Johnston never really had a chance at trial. Once the ruling was granted, then revisited, then re-granted concerning the State's motion to introduce *Williams* Rule evidence of the Coryell murder in this case, Mr. Johnston was possibly destined to be convicted and sentenced to death in the instant case. This *Williams* Rule evidence should have been *per se* inadmissible due to the inherent enormous prejudice it carried. The Nugent jury actually heard testimony that the Appellant kicked victim Leanne Coryell so hard in the crotch area that his shoe was damaged [Nugent, Dir. ROA Vol. XI, Trial Transcript at 1003]; [read from Coryell, Dir. ROA Vol. XVIII, Trial Transcript at 1716-1717].

Before the prospective jury entered the courtroom, a pre-trial re-hearing was held concerning the *Williams* Rule evidence on October 2, 2000. See Dir. ROA Vol.

II, 94- 117. The court was inclined to rule that unless Dr. Julia Martin could opine that a belt was used to beat the victim, the court would have reconsidered its ruling on this issue. Regarding the *Williams* rule evidence, the trial court later stressed the importance of the testimony concerning whether a belt or some other item was used to beat the victim:

> However it is such–I'll be very frank with you–if the doctor was unable to say within a reasonable degree of medical probability it is of such high importance and such a critical factor, then I would reconsider my opinion in regard to the Williams Rule.

[Dir. ROA Vol.VIII, 581-582]

The State knew that this was the case. As explained in great detail in Claim III of the Initial Brief being filed concurrently with this petition, after the State filed their notice of "Amended Discovery" that Dr. Martin was opining that some item other than a belt was used to beat the victim, the defense renewed their motion to exclude the evidence of the Coryell murder. As the prospective jurors waited outside, the court allowed the prosecutor to call Dr. Julia Martin on his cell phone, off the record, to ensure that her opinions regarding a belt had not changed. Mr. Pruner called Dr. Martin and informed the court, "They're beeping her at lunch." Dir. ROA Vol. II, 113. The court responded, "While we're waiting her to respond with a call, are there any [juror issues]." Dir. ROA Vol. II, 113. Basically, at this point, the prospective jury awaits

entry into the courtroom as the court decides the *Williams* Rule issue through reported hearsay statements on the prosecutor's cellular telephone. This was an improper procedure, violating Mr. Johnston's due process rights including his right to confrontation. The more prudent and constitutional procedure would have been to place Dr. Martin on record.

Instead, the record describes how the prosecutor, Mr. Pruner, asks, "May I answer this? (Referring to the cell phone.)" And the court responds, "Yes. Go ahead." Dir. ROA Vol. II, 114. This is not a proper procedure in a death penalty case to decide an issue as important as this *Williams* Rule issue. This conversation should have been on the record. The record reports that "Mr. Pruner exits the courtroom momentarily," then he returns to inform the court, "I'm not having good reception. It broke off, it cut off. Hopefully she'll call back." Dir. ROA Vol. II, 115. Apparently Dr. Martin calls right back, and the prosecutor informs the court, "She cannot say anything is the probable cause without seeing the item. She says, 'What does probable mean? Fifty-one percent?' And I told her, I don't know what–" The court then asks the prosecutor to call Dr. Martin back, and instructs that "More probable than not is 51 percent." Dir. ROA Vol. II, 115. The record then indicates that the prosecutor informs the court, "Judge Barbas, I have her on the phone. She indicates it does meet that criteria of 51 percent. I have her here if you want to speak to her directly yourself." At that point

the lead defense attorney indicates that he has "no problem with that," and apparently the court does not speak directly to Dr. Martin. At that point, no discussion about this takes place on the record. Dir. ROA Vol. II, 115. The court then announces, "I'm going to allow the Williams Rule testimony." Dir. ROA Vol. II, 116.

Such a procedure that allows obviously improperly influenced hearsay opinions to decide such a critical issue in a death penalty case should not be tolerated. This Court should remand for a retrial that does not include the *Williams* Rule evidence of the Coryell murder.

GROUND V

THE INTRODUCTION OF THE FINGERPRINT EVIDENCE IN THIS TRIAL RENDERED THE RESULTS OF THIS TRIAL UNRELIABLE. RAY LAMAR JOHNSTON WAS CONVICTED BASED ON UNRELIABLE FINGERPRINT EVIDENCE THAT WAS MISSING FOR SEVEN MONTHS, AND VIOLATED CHAIN OF CUSTODY PROCEDURES IN VIOLATION OF HIS 5TH, 6TH, 8TH AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

The fingerprint evidence should not have been admissible at trial. Testimony from the evidentiary hearing revealed that the Tampa Police Department misplaced the fingerprint cards in this case for seven months, and violated numerous standard operating procedures regarding chain of custody protocol. As such, the evidence is unreliable and unworthy of admission in a capital case.

Testimony and Comments Concerning the Fingerprint Evidence

The lower court heard the testimony of Tampa Police Department evidence technician Joan McIlwaine Green and evidence room supervisor Lincoln Peterson. Lincoln Peterson testified that his job was to "ensure [that] evidence is brought in safely and stored appropriately." PC ROA Vol. XXXII, 420. With regards to the fingerprint evidence in this case, the evidence was not brought in safely and it was not stored appropriately. Mr. Peterson testified that when items of evidence are checked into his property room, there would be documentation of that event. PC ROA Vol.

XXXII, 422. If there were a particular piece of evidence that was checked into the property room, there "absolutely" would be a document reflecting that. Lincoln Peterson testified that if there were no such document, "[the property] didn't come to us." PC ROA Vol. XXXII, 422. He searched, and could find no record that any latent fingerprints were checked into the property room in February of 1997. PC ROA Vol. XXXII, 423. He did have records that show that fingerprint cards from Mr. Johnston and two other individuals were returned to the property room on September 16, 1997 from FDLE. PC ROA Vol. XXXII, 424. He also had a record that Mr. Johnston's latent print card was sent to the state attorney's office in late September 2000, then was returned to the property room from court in October of 2000. There is no record of the latent print card going from the crime scene to the property room. PC ROA Vol. XXXII, 425.

Joan McIlwaine Green testified that on February 8, 1997, she dusted and collected fingerprints in the Johnston case. PC ROA Vol. XXXII, 432. She lifted a total of 13 prints from the bathtub nobs at the Nugent home. PC ROA Vol. XXXII, 433. She says that she did not place latent fingerprints in the property room, rather she placed them in a lock box at the Tampa Police Department. PC ROA Vol. XXXII, 434. She says that she slid them into a sealed slot. PC ROA Vol. XXXII, 435. The latent print examiners then obtain the prints from this lock box. Shoe prints actually

get checked into property, but not latent finger prints. PC ROA Vol. XXXII, 436. In the Johnston case, she placed all of her evidence into an evidence locker. The evidence was "put into the latent examiners" "probably [on] the 10th or 11th [of February]." PC ROA Vol. XXXII, 438. The evidence technicians make a record that they place evidence in the "closet." She says that there would be a record where she placed the evidence in her supplemental report. PC ROA Vol. XXXII, 439. Her supplemental report says that her evidence was "placed in the drying room." PC ROA Vol. XXXII, 440. There is a drying room and an evidence closet. PC ROA Vol. XXXII, 440. Her fingerprints in this case went into the lock box. PC ROA Vol. XXXII, 440. When asked specifically what her supplemental report says was done to the latent fingerprints after collection, she testifies:

> Our supplement says I processed the latent prints. It tells me what I have lifted. We don't put on our supplement where we turn them in, because of the protocol where we turn them in. That's part of what our job, what we're trained for. So, on our supplements, what we have been trained to do is just to write where we have collected and how many. That's all I would do.

PC ROA Vol. XXXII, 444.

She agrees that her supplemental report does not in fact reflect where she placed the latent fingerprints. PC ROA Vol. XXXII, 445. She placed the shoe prints from the kitchen floor into the property room on the 11th of February. PC ROA Vol. XXXII,

446. Other various items collected from the Nugent home were placed in the evidence closet on the 10th of February, then were placed in the property room on February 11th. PC ROA Vol. XXXII, 452. The lock box can be picked up. PC ROA Vol. XXXII, 456. She did not recall what the Tampa Police Department's policies and procedures manual said about submission of latent finger print cards to the property room in 1997. PC ROA Vol. XXXII, 465. With regards to any documentation reflecting that a latent examiner removed a finger print card from the lock box and examined it, she says, "you would have to ask the latent examiners." PC ROA Vol. XXXII, 467. Joan McIlwaine's documentation regarding her handling and transfer of the fingerprint evidence in this case is woefully inadequate.

Herbert Bush, the supervisor of the latent finger print section of Tampa Police Department, was called to the evidentiary hearing by the State concerning this issue. He testified that the latent fingerprint section is responsible for maintaining the latent fingerprint cards. PC ROA Vol. XXXXII, 1473. He says that the crime scene technicians are to place the latent cards into a lock box. PC ROA Vol. XXXXII, 1474. He did not bring any records to court documenting that he received any latent prints on the Johnston case. PC ROA Vol. XXXXII, 1474. The written protocols say nothing specifically about a lock box. PC ROA Vol. XXXXII, 1475. The two individuals responsible for removing the latent print cards from the lock box would not

have generated a record documenting that they removed the cards. PC ROA Vol. XXXXII, 1476.

Mr. Bush was asked, and answered,

> Q. [W]hat did your department do there to record the submission and record the retrieval of those prints from that lock box?
> A. Well, the submission would have been in the person's supplement who submitted the fingerprints to the latent fingerprint section. [] As far as them receiving them, they kept no record of that.

PC ROA Vol. XXXXII, 1477-1478.

As noted above from Ms. McIlwaine Green's testimony and the discussion on her inspection of her supplemental report, there is absolutely no notation documenting to whom, when, and where she submitted her fingerprint evidence.

At the evidentiary hearing, Herbert Bush claimed that "section 3391" [sic 339] of the standard operating procedures [see defense exhibit 5 and 6 at PC ROA Vol. X, 1921-1939] excludes fingerprints from the mandates concerning the evidence room. PC ROA Vol. XXXXII, 1478. But he agreed that section "2" of procedure 339 defines "physical evidence" under section "A" as "any tangible property that can be used to establish a point of fact in a court of law." PC ROA Vol. XXXXII, 1479. Obviously fingerprint evidence falls under this all-encompassing definition of "physical evidence." The lower court noted at this point of the testimony that under the defense argument, no matter what is done with the fingerprint evidence, one of the procedures

would be broken. PC ROA Vol. XXXXII, 1479. The Petitioner maintains that *that* argument that should have been made to the jury. Mr. Bush answers that to his knowledge, there has been no discussion at Tampa Police Department regarding the conflict in their two written policies. PC ROA Vol. XXXXII, 1480. Mr. Bush does not know who retrieved the latent fingerprint cards in this case from the lock box. Under section two, subsection three of 339, the policy states that property room personnel will accept "homicide evidence." He agrees that latent fingerprints could be classified as "homicide evidence" in this case. PC ROA Vol. XXXXII, 1481. He claims that as long as he has been with Tampa Police Department, actually since 1980, "never" has fingerprint evidence ever gone into the property room. PC ROA Vol. XXXXII, 1482.

Under section 4 of standard 339, Herb Bush curiously claims that fingerprints are excluded from "all property" that is mandated to be stored in the property room under the written protocol. PC ROA Vol. XXXXII, 1482. The standard operating procedures mentions special handling procedures for cash and jewelry, including a placement in a "secure drop box," but this section does not actually mention special handling procedures for latent fingerprints. PC ROA Vol. XXXXII, 1483-1484. Section 5B mentions that the "latent investigator [] may remove property [from the property room.]" Mr. Bush does not feel that these procedures apply to latent prints.

PC ROA Vol. XXXXII, 1484. Under section 7A, it says that "officers or employees that temporarily check out property for any reason will complete a property transfer form." He would not have a record of anyone checking out fingerprints from the property room because he maintains that "fingerprints do not go in the property room." PC ROA Vol. XXXXII, 1485. He says that latent fingerprint cards have been submitted to the property room before, but that "is a violation of [the] standard operating procedure." PC ROA Vol. XXXXII, 1487. The defense marks the property records as a proffer (See PC ROA Vol. XI, 2045-2046) based on the State's sustained objection of relevance and lack of nexus. PC ROA Vol. XXXXII, 1502.

Further Discussion and Argument

As the testimony from the above witness Herb Bush illustrates, and as revealed by the records introduced at the evidentiary hearing on this issue, there was clear confusion and break in the chain of custody of the latent fingerprint evidence in this case. Although Joan McIlwaine Green lifted fingerprints from the crime scene in early February of 1997, the records from Tampa Police Department only account for their admission into the property room on September 16, 1997. [See the proffered exhibit "24" at PC ROA Vol. XI, 2045]. As such, there is no accounting for this crucial fingerprint evidence in a 7 month time span. There is no record of Joan McIlwaine Green transferring the evidence to anyone after collecting it from the crime scene, there

is no record of anyone of anyone recovering the fingerprint evidence from a "lock box," and there is no record of where this evidence was for seven months after collection.

The fingerprint evidence is unreliable and should not have been admissible at trial. At the very least, trial counsel should have pointed out to the jury that Tampa Police Department's written procedures concerning the storage, preservation and transfer of fingerprint evidence are in conflict. [See defense exhibits 5 and 6 at PC ROA Vol. X, 1921-1939 compared to State exhibits "18" and "18A" at PC ROA Vol. XI, 2038-2043]. The trial court was wrong to refuse to consider all of this evidence. This Court should grant relief.

CONCLUSION

This Court should grant all relief requested in this petition for the reasons stated above. Moreover, this Court should grant any other relief that allows this Court to do justice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States mail to all counsel of record on this ____ day of November 2009**.**

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
Capital Collateral Regional Counsel - Middle
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
813-740-3544

Copies furnished to:

Katherine Blanco
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, FL 33607-7910

Ray Lamar Johnston
DOC# 927422; P3201S
Union Correctional Institution
7819 NW 228th Street
Raiford, Florida 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS of the Appellant was generated in a times new roman 14 point font, pursuant to Fla. R. App. P. 9.210**.**

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive,
Suite 210
Tampa, Florida 33619-1136
813-740-3544