IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-496

RAY LAMAR JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Johnson lives or dies. This Court has not hesitated to allow 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.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are of the form, e.g. (Dir. ROA Vol I, 123). References to the postconviction record on appeal are in the form, e.g. (PC ROA Vol. I, 123). Generally, Ray Lamar Johnston is referred to as "the defendant" or "the Appellant" throughout this motion. The Office of the Capital Collateral Regional Counsel– Middle Region, representing the Appellant, is shortened to "CCRC."

STATEMENT OF THE CASE AND OF THE FACTS

Ray Lamar Johnston was originally tried and convicted for the first degree murder of Janice Nugent in the year 2000, and was sentenced to death following a narrow 7-5 recommendation for death. At the guilt phase of that trial, the State introduced *Williams* Rule evidence that Mr. Johnston allegedly committed another murder 6 months after the Nugent murder. Following the imposition of a death sentence for the Nugent murder, and a motion from the defense seeking a new trial, the trial court ruled that the State had argued an improper aggravator at the penalty phase, and granted a retrial of the penalty phase in January of 2001. The result of the retrial later in 2001 went from a 7-5 recommendation to an 11- 1 recommendation in favor of death.

Janice Nugent was killed in February of 1997. Ray Lamar Johnston was not indicted for this murder until 1999, actually after his conviction and death sentence in the other murder (the Leanne Coryell murder, Case SC09-780). In the Janice Nugent murder trial held in the year 2000, the State utilized *Williams* Rule evidence that Mr. Johnston had allegedly committed the August 1997 murder of Leanne Coryell. The State's *Williams* Rule application was supported by the wavering and chameleonic opinions of medical examiner Dr. Julia Martin. The decision to allow *Williams* Rule evidence of a subsequent murder into this case, using the testimony that Mr. Johnston allegedly committed another murder six months after the Nugent murder, the State

was successful in their endeavor to convict Ray Lamar Johnston of the instant offense.

The second penalty phase in this case was conducted by attorney Harvey Hyman, an attorney with a considerable disciplinary history. (*See Izquierdo v. State*, 724 So. 2d 124 at 126 n.1 (Fla. 3rdDCA 1998), *Lewis v. State*, 711 So. 2d 205 (Fla. 3rd DCA 1998), *State v. Benton*, 662 So. 2d 1364 (Fla. 3rd DCA 1995), and *Fonticoba v. State*, 725 So. 2d 1244 at 1245 n. 1 (Fla. 3rd DCA 1999)).[1] Mr. Hyman was the attorney responsible for persuading the trier of fact to spare Mr. Johnston's life at the retrial of the penalty phase. The second penalty phase of Johnston was Mr. Hyman's first capital case. Mr. Hyman summoned brother Max Allen Johnston to the penalty phase. Max Allen Johnston testified on direct examination that his brother had been through the criminal justice system so many times for violent offenses and took advantage of the "All American Plea Bargain" [Trial Transcript, Dir. ROA Vol. XIX,

[1] In *Izquierdo*, *Id*. at 126, the 3rd DCA gave the trial court an option to dismiss the case after remand if Harvey Hyman was still employed as a state attorney:

> After remand, the trial court may, in its reviewable discretion, either grant a new trial or dismiss the case outright if it finds that the prosecutorial misconduct, particularly considering the possibility that the office of the State Attorney was itself directly implicated by retaining Hyman after notice of his proclivities, was so pervasive that the defendant was deprived of due process. See *Munoz v. State*, 629 So. 2d 90, 98 (Fla. 1993).

2135] so frequently, that he wondered himself whether Ray's life was worth sparing, and pondered that maybe his brother should just be executed. [2]

The instant appeal follows the denial of Mr. Johnston's 3.851 Motion to vacate his conviction and death sentence.

SUMMARY OF THE ARGUMENTS

CLAIM I – Trial counsel was grossly ineffective at the penalty phase for calling the defendant's brother, Max Allen Johnston, to testify at the penalty phase. A pre-trial investigative memorandum clearly indicated that this witness would not be a favorable witness. Max Allen Johnston actually encouraged the jury to vote for death. Additionally, trial counsel repeatedly and sarcastically belittled the Appellant in front of the jury, made light of mitigation, took an adversarial role against the Appellant, thus further encouraging the jury to vote for death.

CLAIM II --Trial counsel was ineffective at the guilt and penalty phases for failing to present critical information to the jury regarding the Appellant's mental state and background. Trial counsel mismanaged the mental health experts, and even failed to call available vital mental health experts at the penalty phase.

CLAIM III --The *Williams* Rule evidence of a prior murder should not have been admissible at the Nugent guilt phase. The medical examiner at the urging of the State in this case knowingly misrepresented crucial facts and opinions regarding the

[2] This issue will be discussed in further detail at Claim I.

implement used to inflict wounds on the victim. This is proven through an amended notice of discovery filed by the State prior to trial, a telephone and contact log from Dr. Julia Martin admitted at the evidentiary hearing, her evidentiary hearing testimony and her obvious manufactured, recanted trial testimony on this vital issue.

CLAIM V--Trial counsel was ineffective for failing to move to suppress the pre-trial statements the Appellant made to Detectives Stanton and Noblitt following his first court appearance on the Coryell case. The statements were made to law enforcement the very same day that he signed an invocation of rights form that was introduced at the evidentiary hearing. Although the interrogation concerned a different murder investigation, the interrogation on that murder was imminent as it happened the same day that an invocation of rights form was signed in the Coryell case. The Appellant was in custody and law enforcement disregarded his invocation of rights made just hours prior to the imminent interrogation.

CLAIM VI--The Appellant was taking numerous psychotropic medications at the time of trial. Trial counsel should have informed the juries in both the Coryell case and Nugent case that the Appellant was heavily medicated and sedated. A special jury instruction should have accompanied the introduction of the Appellant's confession from the Coryell penalty phase. Trial counsel failed in this regard. This would have softened the blow of the confession as it related to the guilt phase issues in Nugent, and would have provided additional stability and support for the mental

health mitigation in the penalty phase of Nugent. The lower court was wrong to refuse to consider the testimony of pharmacologist Dr. James O'Donnell on this issue.

CLAIM VII--The lower court erred in failing to grant even an evidentiary hearing on various claims that required a factual determination. The lower court's orders run contrary to the rules of procedure and case law. As a result, the Appellant was denied due process of law and access to the courts in violation of the Constitution.

CLAIM VIII--Trial counsel was ineffective at the guilt phase for failure to consult and utilize expert witnesses to refute the forensic evidence presented by the State at trial. For example, the defense should have consulted an expert such as Dr. Simon Cole to refute the fingerprint evidence presented at trial. The lower court's refusal to consider the testimony of Dr. Cole at the evidentiary hearing deprived the Appellant of due process and hindered his ability to present evidence to prove claims of ineffective assistance of counsel.

CLAIM IX--The grave errors in this case, both individually and cumulatively, lead to the inescapable conclusion that the Appellant should be afforded relief from this unconstitutional conviction and sentence of death.

CLAIM I

THE CIRCUIT COURT ERRED IN DENYING RELIEF AT THE PENALTY PHASE. TRIAL COUNSEL WAS INEFFECTIVE FOR CALLING MAX ALLEN JOHNSTON TO TESTIFY, AND FOR FAILING TO PREPARE HIM TO TESTIFY, IF THAT WAS EVEN POSSIBLE. TRIAL COUNSEL REPEATEDLY BELITTLED THE APPELLANT, MADE LIGHT OF MITIGATION, AND GENERALLY TOOK AN ADVERSARIAL ROLE AGAINST THE APPELLANT ALL IN VIOLATION OF MR. JOHNSTON'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHT AMENDMENTS.

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review with deference only to the factual findings by the lower court.

Attorney Harvey Hyman's representation in the penalty phase was grossly deficient. Mr. Hyman had never before represented a capital defendant in a penalty phase proceeding. It became abundantly clear at the evidentiary hearing that the time and effort needed to achieve a life sentence was not put into the case. Harvey Hyman was the wrong man for the job. Attorney Gerod Hooper was close to getting a life recommendation in the first penalty phase.[3] Attorney Kenn Littman had been involved

[3]Gerod Hooper nearly obtained a life sentence for Mr. Johnston, trying the first Nugent penalty phase to a vote of 7-5.

in the two Johnston cases for about 42 months (three and a half years) before a new penalty phase was granted in Nugent. Attorney Harvey Hyman had only three months to prepare for Nugent II.[4] Mr. Hyman knew neither the law as it pertained to capital sentencing, nor the particular facts of the Ray Lamar Johnston cases. Due to the acts of misstating the law, losing credibility with the jury, alienating and belittling his client in front of the jury, taking a sarcastic and adversarial tone against his client in front of the jury, and sponsoring the testimony of perhaps the worst penalty phase witness ever in the history of capital sentencing (brother Max Allen Johnston), Harvey Hyman was the direct cause of the 11-1 vote in favor of death in Nugent II.

This claim has two main components. The first component is Harvey Hyman's failure to read the case file[5] and realize that Max Allen Johnston would be a horrible witness for the penalty phase. The second component is Harvey Hyman's sarcastic belittling of his client and his client's case for life in front of the jury. Regarding the first main component referenced above, Ms. Carolyn Fulgueira was the mitigation specialist for the public defender's office in the Johnston cases. She worked with Ray Lamar Johnston from the beginning when he was arrested for the murder of Leanne

[4]The second penalty phase in Nugent will be referred to in this brief as Nugent II.

[5]As will be discussed further in this brief, it would have been impossible for Mr. Hyman to even read the voluminous Johnston case files prior to the penalty phase, much less prepare for the penalty phase, due to time constraints.

Coryell August 22, 1997. In preparation for the penalty phase in Coryell, she generated a memorandum dated March 4, 1998 regarding a telephone conversation she had with Ray Lamar Johnston's brother, Max Allen Johnston. The memorandum was admitted as defense exhibit 8 at the evidentiary hearing. *See* PC ROA Vol. X, 1942-1944.[6] The information contained within that memorandum is obviously very damaging to Ray Lamar Johnston; in light of Max Allen Johnston's unsurprising testimony, this memorandum is the postconviction smoking gun for ineffective assistance of counsel. There were actually three penalty phases conducted in the two Johnston cases. Max Allen Johnston was only called in Nugent II by attorney Harvey Hyman, and he was a total disaster, just as the memorandum indicated he would be. Ms. Fulgueira relayed the following at the evidentiary hearing:

Q. So if Harvey Hyman -- And just to give these dates, put it in

[6]In the memorandum located at PC ROA Vol. X, 1942-1944, Max Allen Johnston relayed that his brother was a "sick individual." He informed Ms. Fulgueira that his family could do nothing more for him. He stated that Ray has "never said that he was sorry." He informed: "Life with Ray has been 100% lies, cheating, deception, heinous acts..." As to his feelings on the execution of his brother, he stated: "Not a whole lot of loss if they get rid of him by injection or other means. He serves no purpose on this earth." He stated that he does not really know his brother. With regard to coming to Tampa to testify, he warned: "if [the attorneys are] looking for a kind heart it's not him." He would want to inform the jury that he previously warned the sheriff's office of having Ray loose on the streets. He felt that "Leanne's family should know about the [uncharged] prostitute assault." He said he would only testify if he could inform the jury of this uncharged offense. He said that Ray's life was like a "horror movie full of madness." Ms. Fulgueira informed Max Allen Johnston that she would be reviewing his interview with the attorneys.

perspective, January 22nd, 2001, we have a retrial being granted in the Nugent penalty phase.

A. Okay.

Q. And then we have on April 9th we have the second penalty phase commencing.

A. Okay.

Q. So this is less than 90 days later we have a penalty phase.

. . . .

Q. So there is probably going to be approximately 12 banker's boxes involved in these years of litigation?

A. I would think that's a safe estimate.

Q. And you don't know if Harvey Hyman read everything in those 12 boxes approximately?

A. I don't know. I have no idea what he read.

Q. You don't know if Harvey Hyman read that March 14th, 1998, memorandum where you have that discussion with Max Allen Johnston?

A. It's hard for me to answer that. I really don't recall. I don't know.

Q. Do you know how many times he met with Max Allen Johnston or spoke with him by telephone prior to the testimony?

A. I don't know.

Q. If Harvey Hyman did, in fact, make a witness contact with Max Allen Johnston and if, in fact, he entered notation into the Stack system saying he had that witness contact, such documentation or notation could be printed to reflect his witness contacts, could they not?

A. Yes, if they were made.

Q. Now, you testified you have a lot of memorandums there and it seems like whatever significant action happened on the case it was memorialized in these memorandums?

A. Yes.

Q. Okay. And we have not seen any memorandum whatsoever in this case where in it discusses post January 2001 that Max Allen Johnston had a change of heart of testimony, is that correct?

A. I think so. I haven't seen one, none that's been presented to me.

[PC ROA Vol. XXXX, 1278-1281]

Ms. Fulgueira agreed, "Yes. Based on that memo, I would say that the information in that memo would not be helpful to him." [PC ROA Vol. XXXIV, 544]. Lacking at the

evidentiary hearing was any evidence that Mr. Hyman and Ms. Fulgueira got together to discuss the contents of defense exhibit 8. Lacking is any evidence that Mr. Hyman spoke with or met with Max before he flew down from Tennessee to testify at the penalty phase. Lacking is any evidence that Mr. Hyman read defense exhibit 8. Any reasonable defense attorney acting in the best interests of his client would not call Max Allen Johnston to the penalty phase. The jury recommended death for Ray Lamar Johnston in this case because Ray's brother informed the jury that Ray was a dangerous man with a long, violent criminal record, there was a danger that Ray would kill again, and prior lenient plea bargains had led to future murders. The following trial testimony from Max Allen Johnston, distinctly and explicitly previewed and forewarned in defense exhibit 8, actually encouraged the jury to vote for death:

> He's a grown man. I can't shackle him. I can't shoot him. I can't tie him down. I can't catch him while he gets in these neuropsychotic whatever they're going to call it, fits, or whatever you want to call it, but get him some help, guys. You got to get him some help. They didn't do it in Georgia. They didn't do it in Alabama, and you just get–he'll just get out again. It's not right. I wouldn't want it to happen to my wife, my daughter, my mother, my daughter. I wouldn't want it to happen to any of yours. We said, 'please get him some help.' They said twenty thousand dollars. I got my five thousand. It was the last I had. She got hers and my other brother and other brother said, 'Here, get him some help. Don't let him go,' and they plea bargained, all American plea bargain. No offense against you guys, but he was not the right plea bargain. Unfortunately it cost that girl, her mother, her life. I'm horribly sorry about that.

[Dir. ROA Vol. XIX, 2134-2135]

The above testimony, made by an actual defense witness at Nugent II, asks that

the jury make the defendant fully morally culpable because he is a "grown man," and basically calls for a lynch mob to "shackle," "tie down," "catch" or "shoot" the defendant. It diminishes the psychological mitigation in the case, characterizing the defendant's condition as "neuropsychological fits" or "whatever." It reminds the jury of the defendant's criminal history, tells them that the Appellant is incapable of rehabilitation, and places fear in the jury with the cryptic warning, "He'll just get out again." What jury would not recommend death with that warning from the defendant's brother? He then tells the jury that he would not want his own wife, mother or daughter to be killed by Ray, and would not any of the jury's family members to be killed by Ray. He paints himself as a victim, saying that he spent his last money trying to help the defendant, and that did not work. His money actually contributed to an "All American plea bargain" that cost the girl and mother their lives because Ray was not punished severely enough. The above testimony would have been grounds for mistrial on several different levels if offered by the State, yet it was incredulously provided by an ill-presented defense witness. The witness inflamed the passions of the jurors and inspired them to vote for death at the request of the defendant's own brother. Trial counsel was grossly ineffective for calling this horrible witness to the stand. No reasonable trial attorney would have placed this testimony in front of a jury during a penalty phase *unless* he was encouraging the jury to vote for death. The lower court was wrong to accept this as "strategy." At the very least, trial counsel should have

spent some time preparing this witness to take the stand and admonish him to stay away from this type of testimony. But as the witness warned in 1998, as evidenced by the investigative memorandum (defense exhibit 8), he would not agree to testify unless he could bring up his brother's uncharged attack on a prostitute.

Trying to salvage some positive points with the witness, Mr. Hyman asked if Max Allen Johnston would prefer a life sentence over a death sentence. His answer should shock the conscience of this Court. The uncertain, equivocal answer was forewarned in the 1998 memorandum defense exhibit 8. This is not a question that should have been asked at the penalty phase, especially when it was already indicated in an investigative memorandum that his answer might be "death." Normally, the State would have objected, but because Max Allen Johnston was doing so well for the State, the question went unobjected. Unfortunately for the Appellant, in response, trial counsel received a long answer (3 pages of transcript) instead of a simple short answer of "life" to this simple question that should *not* have been asked of this witness:

> Q: Would you prefer the jury recommend a life prison sentence for your brother rather than execute him?
> A: I have never been to a trial that he has had. This is the first time that I have walked into a courtroom. I've been appalled at the things he's done. I've said, 'You don't deserve anything. You don't deserve to be even caged up like an animal.' I can tell you, and when we first talked, I said, 'I'm not going to go down there. I have a business to run. I'm productive in society. We're out doing well.'
> Q: You live up in Tennessee.
> A: I live in Franklin, Tennessee. I teach my kids accountability. I teach my scouts accountability. We're all accountable for our actions. Not just because my mother is here, because it's the death penalty, and not

> because he's not totally accountable and after just soul-searching myself–I know I called the Pinellas County Sheriff's Department once myself. I turned my brother in. There was some activities that I heard from my sister-in-law and I said, I have got a duty and obligation and I called them. I lived here for seven years. I'm the one that started this whole mess of people moving to Florida. I was in the Coast Guard across the bay, saving lives. And I said, 'I'll call a friend of mine.' He said, 'Call the sheriff's department.' And I said, 'That's your man sneaking around in the bushes,' whatever was going on. I don't really recall what all was going on. I said, 'He's the man. He just got out of prison and he is running around in his neighborhood.' And my sister-in-law said there are things happening. I called and said, 'I want you to know this is your man. Go find out what's going on.' I don't even to get into why they didn't and I don't even want to get into why–it just went in one ear and out the other...And he's not normal. I'm going to tell you, he's not normal. You can look at him. You can talk to him. You can see the pictures. And I have never seen the pictures. I don't want to see them. It's atrocious."

[Dir. ROA Vol. XIX, 2135-2137]

Eventually and equivocally, the witness stated that he did not feel it was right for the State to execute his brother, but in getting there, he mentioned that his brother was involved in some unrelated preying or stalking situation in Pinellas County. He informed that he called the police on him for this incident and "turned him in," but his brother was not charged for reasons he would not disclose. The witness also encouraged the jurors to look at the photographs and stated that the instant crime was "atrocious." Trial counsel should not have placed a family member on the stand to establish an aggravator for the State and urge death as a penalty. The prior memorandum referred to the crime as "heinous." Had this witness continued, he might even have added the description "cruel" in describing his brother's conduct completing

the trifecta of the "HAC" aggravator. The State referenced Max Allen Johnston's testimony in their closing argument, pointing out that Max Allen Johnston's testimony established the defendant was a "bad apple" who was provided with many chances and opportunities all for naught. [Dir. ROA Vol. XXI, 2415-2416].

Ms. Fulgueira remembered that Max Allen Johnston was *not* called to the penalty phase in Coryell because of the damaging information in her memorandum. She testified as follows on this point:

> Q. And Allen Johnston was not called to that penalty phase in the Coryell case?
> A. Correct.
> Q. Okay. Do you remember why not?
> A. Based on his memory. Based on the memo, the information that's in the memo and based on Max Allen not wanting to come and testify.
> Q. So you would agree that this is -- the information contained within this March 4th, 1998, memorandum is not information which would be beneficial to Ray Johnston at his penalty phase?
> A. Correct.
> Q. And that is the strategic reason, the specific reason why he was not, in fact, called to that first penalty phase.
> A. Correct.

[PC ROA Vol. XXXIV, 510]

Even if Max Allen Johnston wanted to come testify, no reasonable defense attorney would call him to the stand. Any effective attorney who read the files would not call him to the stand. Harvey Hyman called him to the stand. Both Joe Registrato and Gerod Hooper knew not to call witnesses who were "not solidly behind [the defense]," as referenced in defense exhibit 10, Joe Registrato's March 12, 1998 memorandum to Kenn Littman. PC ROA Vol. X, 1948. Ms. Fulgueira confirmed

what seemed obvious:

> Q. Do you know -- do you know how much first degree murder, penalty-phase experience that Harvey Hyman had prior to handling the second phase of the second trial of Nugent?
> A. What his experience was with death penalty cases at that time?
> Q. Correct.
> A. I believe this might have been his first one, death penalty case.

[PC ROA Vol. XXXIV, 516]

The Nugent II penalty phase was a perfect illustration of Harvey Hyman's inexperience and lack of preparation. Did Harvey Hyman speak to Max Allen Johnston any time prior to the morning of the penalty phase? It is unlikely. Ms. Fulgueira testified further:

> I don't have a specific recollection that we sat and spoke with Allen.
> Q. Okay. And had you done so, you would anticipate that there would be paper record of such conversation?
> A. I would think so, yes.

[PC ROA Vol. XXXIV, 517]

Ms. Fulgueira agreed:

> Q. Would you agree with me -- as a mitigation specialist that information concerning allegations that Ray Lamar Johnston assaulted a prostitute in the past, would you agree with me that that's very damaging information that you would not want to present to a jury in the penalty phase?
> A. Yes.

[PC ROA Vol. XXXIV, 541]

Did Mr. Hyman read the March 4, 1998 bombshell memorandum entered as evidentiary hearing defense exhibit number 8? That is unlikely. Mr. Hyman testified as follows when asked by the prosecutor "what changed" that led him to call Max Allen

Johnston:

> Now, I don't -- I couldn't give you an independent recollection what memos I saw and what memos I didn't. All I can tell you is the general conversations that were had in terms of the information that was available to us.

[PC ROA Vol. XXXXI, 1341-1342]

It is inconceivable that any attorney who read defense exhibit 8 would place Max Allen Johnston on the stand, so it can therefore be assumed that Harvey Hyman failed to read the memo. Attorney Kenn Littman agreed that the evidence contained within the memo describing an uncharged assault on a prostitute would not be beneficial to Mr. Johnston, rather it would be damaging. [PC ROA Vol. XXXV, 602-603]. And the evidence *was* damaging as evidenced by the 11-1 vote for death. Joe Registrato testified that he would not have called Max Johnston as a penalty phase witness based on the information contained within the memo. He explained that you "don't want to call a person like that where you are going to hurt your own case." [PC ROA Vol. XXXX, 1276].

Carolyn Fulgueira testified that there were approximately 12 banker's boxes associated with the two Johnston cases. If one assumes that there are six reams of paper to a box, at 500 sheets per ream, that's 3000 pages of paper per box. For 12 boxes, that's approximately 36,000 pages that Mr. Hyman was confronted with. The Nugent penalty phase commenced April 9, 2001. Harvey Hyman estimated that the decision was made for him to handle the case in February of 2001. [PC ROA Vol.

XXXXI, 1365-1366]. That would give him 60 days to prepare for the penalty phase including reading 36,000 pages of material, and Harvey Hyman agreed with that logical time estimation. [PC ROA Vol. XXXXI, 1370]. Harvey Hyman stated:

> Q. And this was -- and you had never conducted a capital penalty phase ever before.
> A. I had never defended one. I never defended a penalty phase before. And the reason why I come up with February is, you know, whenever the official decision was made, it didn't feel solid. I mean clearly, you know, December and January -- you know how it is. Nothing gets done.

[PC ROA Vol. XXXXI, 1370]

The lower court confirmed that the order granting the new penalty phase in Nugent was entered January 22, 2001, and Assistant Attorney General Katherine Blanco confirmed that the discussion and the hearing setting the new penalty phase date was January 26, 2001. Mr. Hyman confirmed, "I clearly didn't investigate or participate or review any materials at all through -- up until the conclusion of that Nugent one trial." [PC ROA Vol. XXXXI, 1373].

Mr. Hyman remembers that there might have been 6 banker's boxes associated with Nugent, and 12 banker's boxes with Coryell:

> A. Well, I got all the boxes from Nugent number one. They were all moved into my office.
> Q. How many boxes were there?
> A. I couldn't tell you, but it was definitely more than two. Probably four.
> Q. There might have been six?
> A. Could have been.
> Q. We're talking about bankers boxes?
> A. Right. Just -- you don't have one there. But just, yeah, bankers boxes. And because -- I mean obviously every case is unique, but Ray's case –Mr. Johnston's case was particularly unique because it was so

> comingled with the previous homicide and the participants in terms of the litigation were the same types of players. Kind of a unique situation. So I had -- must have been 12 boxes from Coryell moved into my office and I didn't go through all of those.
> Q. There were 12 boxes just from Coryell alone?
> A. I think so. Probably around that much. I mean I couldn't tell you -- I couldn't swear to God and say, hey, it was 12 boxes. I understand I'm giving you sort of like a vague answer on that, but that's the best I can remember.
> Q. Did any of those boxes go into your office?
> A. Most of them did, but not all of them. **I didn't look at every single paper from the Coryell case**.

[PC ROA Vol. XXXXI, 1376-1377]

If there were 18 boxes associated with these two cases, that's approximately 56,000 pages of material, and one cannot be sure that the trial transcripts were included in that material. To be ready for his first capital case, one would think that Mr. Hyman would want to read all of that material to be fully prepared. Regarding defense exhibit 8, the Max Johnston memorandum, Mr. Hyman testified, "The date of that memo is before I joined Ms. Holt's office, because I didn't join her office until July of '98. So I know for a fact it was generated before I was even working there. And -- and to be as precise as I can, I definitely am not able to tell you with an independent recollection what memo I read or what memo I didn't." [PC ROA Vol. XXXXI, 1381]. Mr. Hyman was asked how long it recently took him to read 200 pages of Johnston case materials in preparation for the evidentiary hearing, and he answered 3-4 hours. [PC ROA Vol. XXXXI, 1384]. That means from the time he was chosen to handle the penalty phase, to the time the penalty phase was conducted, he could only get through 24,000 pages of

materials, and that's if he only worked on the Johnston case,[7] if he took no breaks for meetings, and if he worked on the weekends. It is understandable that Mr. Hyman would miss a memorandum such as defense exhibit 8, yet it is not excusable, not when Mr. Johnston's life is at stake. Mr. Hyman offered in excuse, "I'm Harvey. I'm only a human guy. I can only read so much, right?" [PC ROA Vol. XXXXI, 1384-1385]. Harvey Hyman, on estimate, could only have plowed through approximately 42% of the case materials prior to proceeding to the penalty phase. Defense exhibit 8 must have been amongst the 58% of the file that he did not read.

The position of assistant public defender is a *very* busy position. Due to other cases, client contacts, witness contacts, telephone calls, meetings, etc., obviously Harvey Hyman did not work seven days per week, and he obviously was not able to read 400 pages per day in this case. It is more likely that he was only able to review 15% of the case files in Johnston. A more experienced and more prepared attorney should have handled this case as a life was at stake. By the prior 7-5 vote, it was obvious that a life sentence was obtainable, but not with attorney Harvey Hyman.

Mr. Hyman did not even speak with PET scan expert Dr. Wood prior to trial. [PC ROA Vol. XXXXI, 1391]. Mr. Hyman was "certain" of that; he candidly admitted "I never talked to that guy." [PC ROA Vol. XXXXI, 1391]. Mr. Hyman claims that he

[7]Mr. Hyman estimated that he was working 6 or seven other homicide cases at the time he was representing Mr. Johnston. [PC ROA Vol. XXXXI, 1387].

placed Max Allen Johnston on the stand, and that he sarcastically belittled his client in front of the jury, to impress upon them that his client had frontal lobe damage. Mr. Hyman failed to speak with a vital defense expert, failed to read a vital memo about an extremely damaging lay witness, and sarcastically belittled his client in front of the jury, all as part of some sort of twisted trial strategy. There is an absence from the record of any clear evidence to show that Mr. Hyman spoke to Max Allen Johnston at any time prior to the morning of the penalty phase. This representation was woefully ineffective. Regarding any pre-trial contacts with Max Allen Johnston, Mr. Hyman relayed:

> Q. Can you tell us about your pretrial discussions with Max Allen Johnston.
> A. Not without reviewing the file.
> Q. Do you have -- fair to say you have no independent recollection of your conversations with Max Allen Johnston prior to trial?
> A. What I would say is in the entire topic of Max Johnston, the more you question me, the less confidence I am in any of the answers I'm giving you.
> Q. Okay.
> A. Because I'm starting to confuse myself at this point. So I'd have to at this point say that I almost-- I'm so confused, I'm like down to having no independent recollection anymore.
> Q. So no independent recollection of any substance whatsoever of any conversation that you may have had with Max Allen Johnston?
> A. I have one distinct memory of talking to Max while he was in Lolly's office, meaning Ms. Fulgueira's office. That I could swear on a stack of bibles. But at this point in the conversation, what day that happened and what were the specifics that were said back and forth, I don't have any confidence to amplify the answer any more than that.

[PC ROA Vol. XXXXI, 1405-1406]

The Appellant met his burden on this claim. The lower court was wrong to deny relief.

This claim goes beyond failure to investigate. There was a complete failure to even read the case file documenting the penalty phase investigation that had already been performed prior to Mr. Hyman's employment with the public defender's office. Max Johnston was interviewed and he was deemed a horrible witness. There was a complete failure to read a vital memorandum concerning this very damaging witness by lead trial counsel. This goes beyond failure to prep a witness. This witness had no business testifying at the penalty phase. He should not have been flown down to Tampa for trial. He should not have been presented to the Nugent II jury by trial counsel. His testimony was an absolute disaster.

The damage and prejudice to Ray Lamar Johnston in the penalty phase was devastating. Mr. Hyman placed a family member on the stand who could not unequivocally testify that his brother should receive a life sentence. Mr. Hyman reflected:

> Q. When you asked Max Allen Johnston whether or not his brother should receive life in prison or the death penalty, what were you expecting him to say?
> A. I was expecting him to be more narrow in scope than the way he answered it. Beyond that, I couldn't be more precise to you. But I do remember in my mind's eye that I was -- I was definitely disappointed with the way he gave the answer. I would have liked to have had something a little more committal and a little more enforcement leaning towards life.

[PC ROA Vol. XXXXI, 1418]

Mr. Hyman obviously was not aware of the danger lurking in the prospective testimony of Max Allen Johnston.

> Q. Okay. Now, did you know that Max Allen Johnston was going to bring up an uncharged act of an alleged assaulted of a prostitute where he called the sheriff's office?
> A. I don't have an independent memory to give you an answer to that.

[PC ROA Vol. XXXXI, 1431]

Mr. Hyman employed no strategy here. At trial, Max Allen Johnston described his brother's crimes as "atrocious," lending support for one of the State's alleged statutory aggravators. Mr. Hyman, for whatever reason, could not confirm whether such testimony was damaging to his client's penalty phase. [PC ROA Vol. XXXXI, 1432]. It obviously was damaging and prejudicial as indicted by the jury's 11-1 vote.

Regarding pre-trial discussions with the attorneys, or the lack thereof, Max Allen Johnston testified as follows at the evidentiary hearing:

> Q. Let me ask you as far as your -- your pretrial contacts prior to taking the stand in your brother's case, how much time did you spend with the trial attorney?
> A. I just sort of flew in from out of town, met -- I guess it was Lolly and -- and brought to the courthouse and had just, you know, just minor introductions and I want to say minor discussions about what I was going to say and what I thought and then I sort of was just waiting for to answer those -- I assume it was just going to be sort of just answer the questions and -- and leave it at that. I didn't have much dialogue at all – it was no.
> THE COURT: Had you spoken to them before you came to Tampa?
> THE WITNESS: I don't remember talking to the attorney.

[PC ROA Vol. XXXIII, 5-6]

When Max Allen Johnston was asked at the penalty phase by defense counsel whether he would prefer a life sentence or death sentence for his brother, Max Johnston not only wavered and vacillated, but he seemed to make a plea for death and provided evidence for a statutory aggravator. He went on for three pages of transcript in his

answer. [Dir. ROA Vol XIX, 2135-2137]. In response to the life or death question, he testified that his brother's acts were "appalling."[8] He said that his brother "did not deserve to be caged up." He said that we were all "accountable for our actions." He said that he had called the sheriff's office on his brother before for some neighborhood "activities," he told the police that his brother was "sneaking around in the bushes," that "he just got out of prison and he is running around in his neighborhood," that "there are things happening," he told the police that "that this is [their] man," that his brother is "not normal," that the jury can see the pictures, and that "it's atrocious." Max Johnston was asked at the evidentiary hearing:

> Q. Did trial counsel say to you, you know, I'm going to ask you, you are -- you are Ray Lamar Johnston's brother. And I'm going ask you if you think he should live or die, and it might be important to say I want him to live?
> A. I never had that conversation with him.

[PC ROA Vol. XXXIII, 17]

It cannot get any worse than this at a capital penalty phase. Defense attorneys should not put family members up on the stand in a penalty phase that cannot answer unequivocally that their supposed loved one should receive a life sentence. If the defendant's own family wants him dead, why should the jury recommend life? Max Johnston testified that he spent a maximum of five minutes with Harvey Hyman prior

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[8]These quotes from Max Allen Johnston's trial testimony are found at Dir. ROA Vol. XIX, 2135-2137.

to taking the stand. [PC ROA Vol. XXXIII, 18]. Mr. Hyman's representation was grossly ineffective. Max Johnston confirmed the obvious:

> Q. Do you ever remember talking to -- to Harvey Hyman prior to trial? And did Harvey Hyman ever tell you, please don't tell this jury that my brother will just get out of prison again?
> A. No.

[PC ROA Vol. XXXIII, 39]

Mr. Hyman did not know the law on the burden of proof in a capital case as illustrated by the penalty phase trial transcript. At the evidentiary hearing, he did not feel "comfortable" answering a question on the State's burden of proof in a capital penalty phase. [PC ROA Vol. XXXXI, 1435]. Regarding misstating the law in *voir dire*,[9] Mr. Hyman commented, "Now, that may have gone to Ray's detriment. I don't know if those imperfections on my part is what caused the jury to go against him or if the case was unwinnable. I don't know." [PC ROA Vol. XXXXI, 1437]. The case was winnable as evidenced by the 7-5 vote in Nugent I; the case was lost 11-1 by Harvey Hyman in Nugent II.

Mr. Hyman did his client a great disservice in the penalty phase by misstating the law as he began his presentation in *voir dire*. By doing so, he lost all credibility with the jury panel. He admitted at the evidentiary hearing that a "reasonable

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[9]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.

inference" could be drawn that his misstatement and the curative instruction could have caused him to lose credibility with the jury. But perhaps the greatest disservice he provided to his client was to sarcastically belittle his client in front of the jury. Mr. Hyman admitted:

> A. The earth shaking thing I remember and that was Ray passing me a note of a question I just had to ask, and that was a note of sarcasm. Beyond that, I'm not able to amplify it much more. But I do remember making that statement because it was Ray handing me a note and I saw it as an opportunity to shoe horn in some personal testimony to the jury so that they would see the unsophistication and impetuousness and immaturity.
> THE COURT: Let me ask you something. Did you ever tell Mr. Johnston that that is what your plan was?
> THE WITNESS: No.
> THE COURT: Why didn't you do that?
> THE WITNESS: It was more of a spur of the moment style type of a thing.

[PC ROA Vol. XXXXI, 1447]

Mr. Hyman was questioned about his penalty phase demeanor,

> Q. Did you -- like after this, say, the next series of witnesses, Ken Littman was questioning the next series of witnesses. Did you, you know, go over and have a little conference with Ray Lamar Johnston and say, Ray, look, I'm doing a little play acting here. I'm going to act like I'm going to be sarcastic towards you. I'm going to act like you're being a child. I'm going to belittle you and then I'm going to use that to show that you have frontal lobe damage?
> A. I know for a fact I never had a conversation like that with him.

[PC ROA Vol. XXXXI, 1450-1451]

Regarding his closing argument wherein he informed the jury that it was "no picnic" having Ray in the family, and that it was "humiliating" for the family members to

testify at the penalty phase,[10] and whether Ray knew he would be using such terms to describe interaction with his family in closing argument, Mr. Hyman stated,

> I don't have an exact recollection of the exact words that I was going to use in closing argument that I told him I was going to. But what I would say to both questions, one being about taking cheap shots and opportunities to sort of demonstrate the frontal lobe issue through his impetuousness, and that specific instance that you just asked about those words, him having no picnic in the family, that was consistent with the agreed upon defense strategy which was we were attempting to establish mental deficits based upon physical infirmities from the -- based upon the pet scan.

[PC ROA Vol. XXXXI, 1451-1452]

So rather than talk to "that guy" Dr. Frank Wood, Harvey Hyman decided to take "cheap shots" at his client during the penalty phase. Dr. Cunningham explained the danger in attorney Harvey Hyman engaging in sarcastically belittling his client in front of the jury:

> Yes, sir. The reason that the behaviors that you have listed here matter is because the jury is taking some lead from the defense attorney about who the defendant is and whether his life has worth or not, and whether the -- and how the jury should perceive him. And so for that reason at capital training conferences attorneys are instructed about being extremely aware of their behavior and demeanor in terms of interacting with or behaving around the defendant in the presence of the jury.

[PC ROA Vol. XXXVII, 923]

Dr. Cunningham explained the first instance of prejudicial conduct in *voir dire*:

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[10]Mr. Hyman made the following argument to the jury:"You heard Ray's sister, Rebecca, testify and it is humiliating for these people to have to come in. I mean, they were pretty honest; it was no picnic having Ray in the family." Dir. ROA Vol. XXI, 2428.

> [L]et me begin in the voir dire examination as defense counsel is talking about the victim impact testimony, that he anticipates will be coming in. And this is at Nugent volume 17, page 1778. And he states; [sic] [‘] it's going to be very moving testimony [’]-- well, it begins before this. He first describes, still on page 1778, that the evidence will show how the friends and families' lives, how their lives have been lessened, how the world is less of a place because this person has died. States; [‘] this is their right to grieve and tell you what a wonderful person this woman was.[’] Then goes on; [‘] it's going to be very moving testimony, I'm telling you're going to be crying, I would, I mean, you're human, you're going to be. [’] At that point Mr. Johnston is apparently attempting to interrupt this with understandable concern, I would expect, about the extent of which defense counsel is fortifying the importance and reactions to the State's evidence at sentencing. And the response of the defense counsel, Mr. Hyman, is [‘] relax for a minute, I heard you.[’] Addressing the defendant. There is another place, this in front of the jury --
> THE COURT: You consider that belittling?
> THE WITNESS: I consider that to be a scolding of the defendant for interrupting and chastising the defendant in front of the jury. And I think that's an extraordinarily --
> THE COURT: How would you have said it differently? If your client was interrupting you in the middle of your statement how would you have said it differently?
> THE WITNESS: To turn to the jury and say, [‘]just a moment. [’] And then lean down and confer with the defendant. Not to tell the defendant to relax for a moment, I heard you. Especially in the face of his talking about victim impact and the defendant being disturbed. Again, understandably about the direction this is going and then to reprimand the defendant in front of the jury about victim impact related issues I think is of -- is of significant concern. I think that has as a communication in front of a jury about who the defendant is and about your own irritation of him. That has significant prejudicial potential.

[PC ROA Vol. XXXVII, 923-925]

Dr. Cunningham explained that “something else that's discussed in these trainings that the jury is watching everything that happens in the courtroom, not just things that you say to them directly but how you interact with the client, whether you

touch them or not, the look on your face, the tone of your voice, they are gathering -- that's all also data that they are incorporating into their evaluation of the defense and their evaluation of the defendant. And it's not simply what you turn to them and say, but they are picking up all the data and are attuned to that, which is why, for example, it's the same idea as why the defendant is not brought in in front of the jury in jail garb or handcuffs." [PC ROA Vol. XXXVII, 926]. Harvey Hyman's unreasonable "strategy" to illustrate frontal lobe damage by demeaning and scolding his client in front of the jury backfired. To classify this as a "strategy" was *post-hoc* rationalization and justification for completely inappropriate and prejudicial courtroom decorum and losing of his cool. This was not sound trial strategy, it was absolute lunacy.

Dr. Cunningham described another situation that occurred during the examination of Dr. Pollock. Harvey Hyman at Nugent Dir. ROA Vol. XIX, 2171 stated that he had no further questions for Dr. Pollock, then he was prompted by Mr. Johnston to ask the doctor about the medications he was prescribed. Mr. Hyman then turned to the judge in front of the jury and sarcastically stated that there was something "earth shaking" he had to find out before he concluded his examination. Dr. Cunningham commented:

> For Mr. Hyman to turn to the defendant and say, it's something earth shaking, I've got to find out first. Is a sarcastic and demeaning response to do a defendant who is trying to get your attention.
> . . . .
> My understanding is that this is Mr. Johnston who brought this to his attention. If it was to co[-]counsel, it reflects a very serious breakdown

> in attorney relationship, this would also be inappropriate if you turn to your co[-]counsel and said, it's something earth shaking, that I've got if find out first. This also would be something inappropriate. If it occurred to Mr. Johnston, it's even more so.

[PC ROA Vol. XXXVII, 928-929]

Dr. Cunningham related that Mr. Hyman's closing argument emphasized his inappropriate and prejudicial conduct with his client.

> A. I think Mr. Hyman was reminding the jury of his having scolded Mr. Johnston in the course of the trial in front of the jury. That he's acknowledging that he did, is calling the jury's attention back to that, putting an underlying under it. It's unfortunate that it occurred in the first place and unfortunate to bring back attention to it.
> Q. Okay. And in your opinion, in reviewing this transcript, is it your view that Harvey Hyman belittled the defendant in this penalty phase?
> A. Yes, sir, I believe there are indications of that.

[PC ROA Vol. XXXVII, 932]

Harvey Hyman's prejudicial and abominable conduct in front of the jury is similar to the conduct of trial counsel in case of *Davis v. State*, 872 So. 2d 250 (Fla. 2004). In *Davis*, this Court reversed the lower court's denial of a new guilt phase because inappropriate comments undermined the confidence in attorney-client relationship and the outcome of the case. In *Davis*, defense counsel stated in *voir dire*, "Sometimes I just don't like black people. Sometimes black people make me mad just because they're black." *Davis*, at 252. Henry Davis was black and his defense attorney was white. The case at bar does not involve race, but it does involve a situation where counsel continually belittled his client and his client's case in front of the jury. As such, the confidence in the outcome is undermined and the Appellant should receive a

new trial based on obvious conflicts of interest. Dr. Cunningham stated that there was an obvious breakdown in the attorney-client relationship right in front of the jury.

In the case of *King v. Strickland*, 748 F. 2d 1462 (1984), the 11th Circuit Court of Appeals reversed a death sentence and remanded the case for resentencing for the ineffective assistance of counsel at the penalty phase, specifically, for counsel's conduct and demeanor towards his client and his client's case. The 11th Circuit stated, "Cole's closing argument served only to dehumanize his client. Cole's emphasis on the reprehensible nature of the crime and indications that he had reluctantly represented the defendant were delivered in a manner that probably caused his client more harm than good," and held that counsel "unnecessarily stressed the horror of the crime and counsel's status as an appointed representative." *King* at 1464. The Court concluded:

> We conclude that King has satisfied both the performance and the prejudice prongs of the *Washington* standard. The two specific deficiencies in Cole's conduct at the sentencing hearing both fell outside the range of reasonable professional assistance. Cole's attempt to separate himself from his client in closing argument represents a breach of his duty of loyalty to his client stressed by the Supreme Court. *Washington*, ---- U.S. ----at ----, 104 S. Ct. At 2065, 80 L.Ed. 2d at 694. King has established that Cole's errors were prejudicial to his defense. Circumstantial evidence cases are always better candidates for penalty leniency than direct evidence convictions. *Cf. Washington*, at ----, 104 S. Ct. At 2069, 80 L. Ed. 2d at 699 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). There is a sufficient probability that effective counsel could have convinced a sentencer that the death sentence should not be given to undermine confidence in the outcome. Resentencing is constitutionally required.

[*King* at 464-465]

In the case at bar, Mr. Hyman stressed that it was basically a nightmare for the family to grow up and live with Ray Johnston. He described the family's appearance at trial as "humiliating" and life with Ray was "no picnic." This argument is analogous to trial counsel in *King* as he stressed his reluctance to represent the defendant. According to Mr. Hyman, there was reluctance on the part of the family to participate at trial. Harvey Hyman clearly and candidly attempted to separate and distance himself from his client throughout the trial, thus breaching his duty of loyalty to his client. This case was circumstantial in nature, and there is a sufficient probability that effective counsel could have convinced the jury that life was the appropriate sentence as evidenced by the vast mitigation available and the jury's 7-5 vote in Nugent I.

The Lower Court's Order

On page 2 of the lower court's order [PC ROA Vol. VIII, 1545], the trial court acknowledges the *Strickland* standard, yet it erroneously fails to recognize that Mr. Hyman *did* seriously undermine the "proper functioning of the adversarial process." (*Id.* at 686). Mr. Hyman *was* acting as an adversary to the Appellant at the penalty phase, and thus he certainly was "not functioning as the 'counsel' guaranteed by the Sixth Amendment" (*Id.* at 687) as there was an obvious "breakdown in the adversary process that render[ed] the result unreliable." (*Id.* at 687). Due to the sarcastic belittling of his client before the jury at the penalty phase, and due to calling Max Allen Johnston to urge a death recommendation, this Court should award a new

penalty phase.

At page 44 of the lower court's order [at PC ROA Vol. VIII, 1587], the trial court begins to discuss at length the work that mitigation specialist Ms. Carolyn Fulgueira put into the two Johnston cases, and cites to Harvey Hyman's testimony that he relied on Ms. Fulgueira because she "more often than not [had] exclusive interaction with many of the witnesses." If this testimony from Harvey Hyman is true, it actually establishes that he was ineffective, and explains why he would have made the mistake of calling Max Allen Johnston to testify: he failed to personally meet with Max Allen Johnston prior to trial and speak with him about his prior discussion with Ms. Fulguera and his proposed testimony. From the description of the voluminous material generated in this case, and from his testimony that he could not specifically state what memos he read in the case [*See* PC ROA Vol. XXXXI, 1341-1342], it is very likely that Mr. Hyman did not review Ms. Fulgueira's memorandum documenting her discussions with Max Allen Johnston prior to trial. The fact that Ms. Fulgueria put lots of effort into the case before Harvey Hyman joined the office should not excuse Mr. Hyman's failures. There is no documentary evidence that Max Allen Johnston ever had a change of heart between the date of the memorandum and his trial testimony; in fact, the information contained within those two mediums has complete symmetry.

The lower court on pages 47 and 48 of its order (PC ROA Vol. VIII, 1590, 1591) erroneously states that "[Hyman testified that he] had reviewed 'every piece of

paper' available to him." Mr. Hyman actually testified that he "***wanted*** to look at every piece of paper that was available." [***emphasis added***]. PC ROA Vol. XXXXI, 1365. Mr. Hyman began to, but ultimately, stopped short of testifying that he had reviewed every piece of paper in the files.[11] Given the time constraints of two months, there was no way that Mr. Hyman could have reviewed every piece of paper in the Johnston files. The lower court fails to acknowledge that Mr. Hyman explicitly admitted: " I didn't look at every single paper from the Coryell case." PC ROA Vol. XXXXI, 1377. Defense Exhibit 8 was amongst those Coryell files. Mr. Hyman also testified that he did not remember "what memo I read or what memo I didn't." PC ROA Vol. XXXXI, 1381. And there can be no rational, reasonable justification for calling Max Allen Johnston to testify in light of the Fulgueira memorandum. Relief from this death sentence must be granted as this claim was wrongly denied by the trial court. The trial court was wrong to classify the decision to call Max Allen Johnston to testify as a "reasonable strategic decision." [PC ROA Vol. VIII, 1594.] Additionally, the court was wrong to find that "Mr. Hyman's use of the alleged sarcastic, belittling, and dismissive comments was part of his trial strategy." Interestingly, the trial court fails to

[11]Mr. Hyman testified as follows: "So at that time I was learning as I was going along. Once the–once it became clear that I was going to be given decision making authority, meaning when the second penalty phase was being authorized, I made sure that I went through–and I use this cliche all the time because it's my attitude. I wanted to look at every piece of paper that was available. PC ROA Vol. XXXXI, 1365.

classify this outlandish strategy as "reasonable," and resorts to *Strickland's* "strong presumption that counsel rendered adequate assistance" to deny the claim. PC ROA Vol. VIII, 1599. The trial court was wrong to fail to apply the reasoning of *Davis* and *King* to the case at bar. Mr. Hyman's conduct and performance at the penalty phase was reprehensible, and his conduct and performance should not be sanctioned by this Court.

Ineffective of Assistance of Counsel–Failure to Object to Comments that the Appellant was an Engagement Breaker

The lower court placed an unfair burden of the Appellant in the proceedings below. For example, on a separate claim of ineffective assistance of counsel for failure to object to improper closing arguments, the lower court states: "Finding the prosecutor's comments regarding Defendant's broken engagement [with a religious woman] irrelevant and improper, this Court granted an evidentiary hearing on this [claim]." PC ROA Vol. IX, 1635. The prosecutor argued the following at the penalty phase of Nugent II:

> Expelled from school, habitual liar, fights, problems with the family he caused. You heard from that lady that came in, Lynn Mundy, the woman whose life has been forever touched by her religious conviction, a very strongly, strongly devout woman. And she's put into context who only knows Ray Lamar Johnston when he's in jail, he's in prison. By her own description of herself, she indicated that she had led a sheltered life and that, quote, she felt sweet and wonderful about the world. Again, I'm not criticizing or trying to belittle what she said of her as a person, but it's easy to tell from Ms. Mundy that she sees life through her religious convictions. She looks for the good in everyone because she believes what she wants to believe and that is that Ray Johnston is a good person.

> But look at it, step back and look at it from a subjective or, excuse me, from an objective viewpoint. You have a sheltered, that I will suggest, naive Mrs. Mundy back then talking to this defendant in prison and all that Ray Lamar Johnston wants to talk about is religion. Does that suggest to you that he does have a true religious spirit? I suggest to the opposite. Dr. Krop, his own psychologist who testified, said, well, he's also narcistic, meaning everything evolves around him. He's manipulative and he's goal-oriented to satisfy his own needs. What you have there, ladies and gentlemen, is a defendant in prison being visited by a woman. He sized her up like that, probably from the letters he sent her before they met. The way to get this woman to continue to visit is to talk about religion, to sing songs to her. And what happens when he's transferred from Georgia to Alabama? What happens? What happens to tell you perhaps he wasn't really all that fired up for Mrs. Mundy but wanted the attention and exploited her for the attention and visits? He cuts off the engagement. True to his personality.

["Nugent II" Dir. ROA Vol. XXI 2416-2418].

The lower court acknowledges that Kenn Littman testified that he did not object to these comments because "Mr. Hyman was responsible for [the penalty phase]." PC ROA Vol. IX, 1636. Then the lower court apparently faults postconviction counsel for "not call[ing] Mr. Hyman as a defense witness and present[ing] evidence [] of reasons for [his] not objecting [] and requesting a mistrial, or at least requesting a curative instruction." PC ROA Vol. IX, 1636. Postconviction counsel should not be faulted for failing to give Mr. Hyman an opportunity to provide some *alleged* strategic reason for his failures and omissions at trial. In review, Mr. Hyman had previously testified at the evidentiary hearing that he sarcastically belittled his client in front of the jury as part of a some undisclosed curious strategy that he decided to employ mid-trial. Postconviction counsel should not be faulted here for failing to provide trial counsel

the opportunity to defeat his claim; *trial counsel* should be faulted here, not postconviction counsel, and a new trial should be awarded accordingly.[12]

The lower court's and Kenn Littman's reasoning that "[they] never heard the prosecutor say anything to the effect that breaking off an engagement was an aggravator" [PC ROA Vol. IX, 1636] is unsound and insufficient to cure the prejudice that these uncured, outrageous and atrocious arguments would have occurred at the penalty phase. The lower court was unfair in affording the State and Mr. Hyman the "presumption that, under the circumstances, Mr. Hyman's failure to object might be considered sound trial strategy." PC ROA Vol. IX, 1636-1637.

[12] It must be noted here that this same prosecutor argued an improper, undisclosed aggravator ("witness elimination") at Nugent I, and that is why there was a Nugent II.

CLAIM II

THE CIRCUIT COURT ERRED IN DENYING RELIEF. MR. JOHNSTON WAS DENIED HIS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND MENTAL HEALTH EXPERTS DURING THE GUILT AND SENTENCING PHASES OF HIS CAPITAL CASE, WHEN CRITICAL INFORMATION REGARDING MR. JOHNSTON'S MENTAL STATE AND BACKGROUND WAS NOT PROVIDED TO THE JURY AND JUDGE, ALL IN VIOLATION OF MR. JOHNSTON'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review with deference only to the factual findings by the lower court.

Board-certified clinical and forensic psychologist Dr. Mark Cunningham testified at the evidentiary hearing for Ray Lamar Johnston. He pointed out numerous deficiencies, acts and omissions in the penalty phase committed and omitted by rookie capital penalty phase attorney Harvey Hyman. Dr. Cunningham pointed out that the defense failed to explain to the jury that the penalty phase was not an assessment of the blameworthiness of the defendant. The jury had already assessed blame at the guilt phase, yet the defense allowed the State to argue to the jury without objection that Ray Johnston deserved death because his neurological deficits did not cause Mr. Johnston

to kill Janice Nugent. Dr. Cunningham explained:

> Now we're talking about what formed and shaped his value system. We're no longer talking about could he control himself. Every defendant, if he's found guilty, could control himself. Now we're talking about what reduced or limited the degree of control that he was able to exercise. And that's what makes hearing about the defendant's damage and impairment relevant and important to consider. Not because it caused it, but because it tilts the slope. And it's the idea that even -- that two defendants who have done identical offenses will each be evaluated individually looking at what they bring to bear, what's the raw material that they brought to the decision that they made.

[PC ROA Vol. XXXVI, 770]

The acts and omissions of Harvey Hyman at the penalty phase prejudiced Mr. Johnston and caused the jury to vote for death rather than life. The first penalty phase conducted by Gerod Hooper resulted in a close 7-5 vote for death. Because of ineffective assistance of counsel, the vote jumped to 11-1 in favor of death when Harvey Hyman conducted the penalty phase. Dr. Cunningham described how Mr. Hyman diminished the available mitigation at the penalty phase,

> Mr. Hyman describes his own -- what he was going to be putting before the jury or asking about their evaluations of the way in which he framed it in this and a couple of other spots has a quality of minimizing the significance of it or as if he has no confidence in it himself.

[PC ROA Vol. XXXVI, 776]

Dr. Cunningham felt that Harvey Hyman did not serve the best interests of his client during the penalty phase, that he minimized the available mitigation by referring to it in such terms as "stuff."

> Q. Dr. Cunningham, what do you think about Harvey Hyman referring to mitigation as stuff and saying that his past life, Ray Lamar Johnston's

> past experiences meant nothing? What is your opinion of that and what effect it had with regard to those -- to that statement you just showed about presenting the defense presenting their theory of mitigation in the case?
> A. To refer to this as stuff is a minimizing term. To say it may mean nothing, I don't suppose it's directly him saying it means nothing, but he's not providing the jury with a construct of what it will mean. In fact, he says it's a piece of the puzzle, it may fit, it may not fit, that there is not a -- there's not a road map, there's not an articulation of -- here is why this is important. This is important, here is why it's important, here is the application that it has. Here is why you need to listen to this. And as he's describing it it's up for grabs.

[PC ROA Vol. XXXVI, 777-778]

The mitigation in this case was not up for grabs, it was real. Harvey Hyman gave the jury the impression that they could go ahead and simply reject the mitigation that he placed before them at the penalty phase.

Dr. Cunningham testified that defense counsel was deficient in failing to call Dr. Frank Wood to trial to describe and explain the PET scan results [PC ROA Vol. XXXVI, 782-783]. This diminished the effect that the testimony concerning Mr. Johnston's frontal lobe impairment would have had at the penalty phase. There obviously was no strategic reason why Dr. Wood was not called in Nugent II. Harvey Hyman, the penalty phase attorney, testified that he did not even speak with Dr. Wood prior to the penalty phase. In failing to call Dr. Wood, the defense failed to lend full support to three statutory mental health mitigators:

> Now, in the absence of Dr. Wood speaking for himself about his expertise and his findings about this critical piece of information, in the absence of that, the State's arguments were to encourage a complete disregarding of that PET scan evidence, who read the PET scan, whose

> report they relied on. Was it a radiologist? Was it a physician trained in this? No, Dr. Frank Woods, some North Carolina psychologist.
> Q. And this is the transcript --
> A. Nugent II, the State's closing.
> Q. In the penalty phase?
> A. And then again, State's closing a page later, in any event, I suggest you can dismiss the PET scan, if for no other reason because the person -- let me rephrase it, you can dismiss it because a psychologist, rather than a psychiatrist or medical doctor or radiologist was the person who looked at this and interpreted it. That's a diminishing of Dr. Wood's credentials and expertise, that it's much more difficult had this man been present to testify regarding his own impressive scholarship and the procedures of this evaluation.

[PC ROA Vol. XXXVI, 784-785]

Dr. Cunningham then went on to describe how the PET scan results would lend support for the following three statutory mitigators: extreme disturbance, mental duress, and capacity to conform conduct. [PC ROA Vol.XXXVI, 785-787]. By not calling Dr. Wood, this diminished the weight that the jury assigned to the available statutory mental health mitigators.

Dr. Cunningham testified that Dr. Harry Krop's testimony was weakened and watered down in Nugent II. Dr. Krop failed to describe the specific tests he administered to Mr. Johnston in Nugent II. Dr. Cunningham said that the Nugent II testimony lacked the detail and impact that it would have had in comparison to the testimony that Dr. Krop provided in the Coryell penalty phase. [PC ROA Vol. XXXVI, 789-791]. Dr. Cunningham felt that Dr. Pollock's testimony was lacking in Nugent II. In Coryell, Dr. Pollock described in detail several instances pre-dating August of 1997 where Mr. Johnston suffered several seizures and neurological

episodes. This testimony was lacking in Nugent II, taking away from the credibility that the jury may have placed on the PET scan findings. [PC ROA Vol. XXXVI, 791-794].

Dr. Cunningham found six areas of deficiencies in the testimony of Dr. Michael Maher in Nugent II when compared to the testimony Dr. Maher provided in the Coryell penalty phase. Dr. Cunningham noted that the following six topics were discussed and covered in Coryell, but were not adequately addressed in Nugent II:

> 1. How brain impairment in the frontal lobes has a global effect on the quality of judgment, impulse control, and thought processing.
> 2. The continuum of ability to exercise inhibition.
> 3. Childhood origins of impulse control deficits – strongly demonstrating the neurological basis of this deficiency.
> 4. Expanded discussion of dissociative disorder to include a failure to integrate personality traits and behavior.
> 5. Mr. Johnston had suffered seizures - and the relationship or interaction between these seizures and frontal lobe dysfunction.
> 6. Why Mr. Johnston functioned so much better in a highly structured prison context.

[PC ROA Vol. XXXVI, 795-828]

By not covering these six available areas, trial counsel did his client a great disservice in the penalty phase. The above information lends great support to the three previously-mentioned mental health-related statutory mitigators. The lower court erroneously failed to consider Dr. Cunningham's testimony concerning the diagnosis of ADHD, and there was an extensive proffer on this area at [PC ROA Vol. XXXVI, 798-821].

The Appellant submits that the missed diagnosis of ADHD should have been

considered by the circuit court in its analysis of whether sufficient mitigation was presented to the sentencing jury in Nugent II. Dr. Cunningham explained the importance of understanding ADHD at PC ROA Vol. XXXVI, 809-810. If the jury would have heard the diagnosis of ADHD, and had trial counsel not been sarcastically belittling and alienating Mr. Johnston in front of the jury, this would have caused the jury to choose life over death. The diagnosis of ADHD lends tremendous support to the three mental health statutory mitigators (extreme mental disturbance, internal duress, incapacity to conform conduct), and gives a more focused picture of the mental landscape of Mr. Johnston and his underlying faulty neurological wiring. Ray Lamar Johnston's criminal transgressions are a result of his damaged brain, not a result of a willfully-chosen maligned heart. Dr. Cunningham testified that there was a failure of the defense to elicit testimony regarding evidence supportive of the presence of a neurological condition and brain functioning impairment. [PC ROA Vol. XXXVI, 840]. He then described at length, episodes of neurological difficulties documented throughout Mr. Johnston's life. Mr. Johnston's life is replete with fainting spells, strokes, and seizures dating back to 1969 when he was just 14 years old. Several documented episodes were not provided to the Nugent II jury.[PC ROA Vol. XXXVII, 843-844]. Dr. Cunningham marveled, "I can think of nothing more relevant and credible than historic medical records detailing such neurological findings." [PC ROA Vol. XXXVII, 845], and commented, "there's no indication that any of the experts had

reviewed these records prior to their testimony in Nugent." [PC ROA Vol. XXXVII, 848]. Dr. Cunningham found the numerous neurological episodes significant in the context of his overall global physical and mental health, and added:

> I would add as I'm identifying and describing these incident reports of Mr. Johnston's refusals of medication, that these have implications for his own poor judgment and impulse control and labile emotions which are also detailed in these records, in these jail medical records. That also go to the broader element of him having broader psychological disturbance and his poor insight, poor judgment impulsivity extending more broadly even into areas associated with his own health.

[PC ROA Vol. XXXVII, 856]

The descriptions of the neurological episodes, coupled with the above testimony, lend tremendous support for the three previously-mentioned statutory mental health mitigators. All of this information was absent from the Nugent II penalty phase, constituting ineffective assistance of counsel under *Strickland*.

The next deficiency Dr. Cunningham noted in Nugent II was the failure to elicit testimony regarding the nexus of Mr. Johnston's brain impairments and his criminal conduct. [PC ROA Vol. XXXVII, 865]. Dr. Cunningham explained, unlike the presentation in Nugent II, that Mr. Johnston's brain damage was directly related to his personality and criminal conduct. Dr. Cunningham explained this at PC ROA Vol. XXVII, 876-879. Critical information concerning Mr. Johnston's mental health was not presented to the Nugent II jury. The defense failed to correlate the nexus between Mr. Johnston's brain dysfunction and his criminal conduct as explained by Dr. Cunningham. Due to the ineffective assistance of counsel, the Nugent II jury

recommended death for Mr. Johnston by a vote of 11-1. Dr. Cunningham was questioned about sexual deviance as brought up in Nugent II. He had the following to relate:

> Q. And moving on to the next topic, the ideology of paraphilia, the State's emphasis on paraphilia and sexual affiliated inferences. What did you find of note in the Nugent penalty phase with regards to this topic?
> A. Well, there was not a discussion about the nature or causes of paraphilia, there's a discussion of Mr. Johnston having deviant sexual arousals, but not what's that about, where is this coming from? Now, number 1, paraphilias or abnormal patterns of arousal are not willfully chosen, someone doesn't decide to have a paraphilia. Instead, deviant arousal or deviant fantasy are what somebody discovers about themselves. They discover that they are aroused by deviant stimulus, not that they select it or create it within themselves.

[PC ROA Vol. XXVII, 882-883]

The failure of trial counsel to elicit from the mental health experts that Ray Lamar Johnston did not willfully choose to have a personality disorder, and did not willfully choose to have paraphelia, constitutes ineffective assistance of counsel. These omissions caused the Nugent II jury to recommend death over life. Dr. Cunningham explained, unlike the mental health experts in Nugent II, that "[t]here is, in fact, a nexus between having a brain dysfunction and being at increased risk for violent criminality." [PC ROA Vol. XXXVII, 889].

Dr. Cunningham illustrated that the frontal lobe brain damage in Mr. Johnston leads him to act out uncontrollably in many aspects of his life. Dr. Cunningham also cited to the defense failure to elicit testimony regarding evidence of effective anxiety disorders in Mr. Johnston [PC ROA Vol. XXXVII, 892], as well as elicit testimony

regarding the dysfunctional factors of Mr. Johnston's family and origin. [PC ROA Vol. XXXVII, 895]. This prejudiced the defense because the State was able to argue that Mr. Johnston had "every benefit of a good, loving, providing and supportive family." [Nugent ROA Vol. XXI, 2415-2416]. To the contrary, not pointed out to the jury in Nugent II, the Johnston family was plagued by alcoholism, marital infidelity, and domestic violence. Mr. Johnston's sister relayed that Ray Johnston is prone to increased aggressive reactivity when drinking. [PC ROA Vol. XXXVII, 898]. Mr. Johnston was known to frequent establishments that served alcohol, such as Malio's at the time of this murder. Dr. Cunningham offered the opinion that Mr. Johnston's propensity for violence in the community would not relate to violence in the prison setting, that he could adjust well to life in prison without involvement in prison violence. [PC ROA Vol. XXXVII, 902-913]. This type of testimony was lacking in Nugent II. Dr. Cunningham concluded on the issue of ineffective assistance of counsel in Nugent II as follows:

> I think the mental health evidence in this case was not put before the jury in sufficient detail for the jury to have informed weight to bring to bear in their sentence determination. Whether that represents a failure to adequately investigate, a failure to confer with his experts regarding what the referral issues were, a failure to elicit particularly important testimony from them. I don't know what the nature of that deficiency was, whether it was investigatory or more associated with the mental health experts, but it did result in the jury not being provided with the very important data to weigh the death worthiness of Mr. Johnston and to give proper weight to the things they did hear testimony about.

[PC ROA Vol. XXXVI, 932-933]

The Lower Court's Order

On page 17 of the lower court's Order [PC ROA Vol. VIII, 1560] the lower court mentions that Mr. Hyman testified "that Dr. Woods [sic] was not called in the first Nugent penalty phase, he recalled the defense team was concerned they would not be able to get the PET scan results in through Dr. Woods [sic] because he lacked a medical license." First of all, Dr. Wood *was* called in the Coryell penalty phase, and there was no problem associated with the admissibility of his testimony. Secondly, Harvey Hyman never had one conversation with Dr. Wood prior to trial. He cannot be deemed to have thoroughly considered and explored the possible detriments and benefits of Dr. Wood's testimony. Dr. Wood could have added support for the two aforementioned statutory mental health mitigators.

On page 28 of the Order, the lower court places an unfair and unnecessary requirement and burden on the Appellant: "Because post conviction counsel conceded that he did not have an expert to testify that despite the absence of an ADHD diagnosis, trial counsel should have known about Defendant's ADHD and should have managed his mental health expert so as to include a diagnosis of ADHD and presentation of such at trial, this Court disallowed Dr. Cunningham's testimony regarding ADHD." [PC ROA Vol. VIII, 1571]. Using the above logic, all of Mr. Johnston's claims should fail because no expert was presented to testify that counsel was ineffective. There is no burden in postconviction to present such an expert, and the court was wrong to place

such a burden on the Appellant. Just because no expert was presented does not warrant exclusion of the presentation of any ineffective assistance of counsel claim. As a further example, just because no expert testified that the presentation of Max Allen Johnston's testimony was ineffective does not preclude the consideration of that claim. Regarding the lack of presentation of mitigating evidence that Mr. Johnston would adapt well to the prison environment, on page 31 of the Order [PC ROA Vol. VIII, 1574], the court cites to Dr. Cunningham's admission that that would open the door to aggravating evidence. Absent testimony from Mr. Hyman that he considered the benefits and detriments, weighed them, and made an informed strategic choice, Dr. Cunningham's admission that some door may have been opened is irrelevant. This evidence should have been presented at the penalty phase.

On page 32 of the Order [PC ROA Vol. VIII, 1575], the lower court found Dr. Cunningham's opinion regarding what information the defense should have presented at the penalty phase to be irrelevant. The Appellant asks this Court to find Dr. Cunningham's testimony to be relevant in light of *Panetti v. Quarterman,* 551 U.S. 930 (2007). In *Panetti*, the United States Supreme Court reversed a ruling that disregarded Dr. Cunningham's testimony. Dr. Cunningham's opinions are absolutely relevant to the question of whether an effective presentation of available mitigation was made at the penalty phase. Had all available mitigation been presented at the penalty phase, there is a reasonable probability that the result would have been a life recommendation.

CLAIM III

THE CIRCUIT COURT ERRED IN DENYING GUILT PHASE RELIEF. MR. JOHNSTON WAS DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE THE STATE KNOWINGLY MISREPRESENTED FACTS TO THE COURT TO OBTAIN A FAVORABLE RULING ON THEIR *WILLIAMS* RULE APPLICATION [13]

Under the principles set for by this Court in *Stephens v. State,* 748 So. 2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review with deference only the factual findings by the lower court.

Because trial counsel was in the extremely difficult position of having to ask the jury panel at *voir dire* if they could be fair and impartial after hearing *Williams* rule evidence that Mr. Johnston was convicted of another murder, due process at this particular trial was a farce. This evidence should not have been admitted at trial. With the solicited assistance of chameleonic, misleading and manufactured opinions of medical examiner Dr. Julia Martin, the State was able to convince the lower court to

[13]Although an aspect of the *Williams* rule issue was raised on direct appeal, this specific issue has never been raised because it concerns an October 2, 2000 contact log never disclosed to the defense prior to post-conviction. See PC ROA Vol. X, 1822-1838.

allow them to retain their favorable *Williams* evidence ruling and present evidence of an unrelated prior murder.

The above-listed claim will be referred to as the "Dr. Julia Martin Claim." At the urging of the prosecutor, Dr. Julia Martin knowingly misrepresented her opinions regarding the implement used to beat the victim. This plan was hatched quickly and without premeditation when the State was threatened in court with the exclusion of their *Williams* rule evidence of the prior murder. Regarding the *Williams* rule evidence, the trial court stressed pre-trial the importance of the testimony concerning whether a belt or some other item was used:

> 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 belt issue was a critical factor, and was a critical factor that was manufactured and manipulated by the State. The telephone logs from the Medical Examiner's Office document conclusions different from the State's representations to the court. For example, the State informs the court in a pleading filed 5/2/00:

> Ms. Nugent and Ms. Coryell [were] beaten about the buttocks with a belt. . . .Dr. Martin has opined that Ms. Nugent's injuries were consistent with having been caused by a belt.

["State of Florida's Response to 'Defendant's Motion in Opposition to State's Notice of Intent to Rely Upon Williams Rule Evidence' With Attachments," [Dir. ROA Vol. II,

371]. In contrast, Dr. Martin's 9/27/00 telephone log entry states in part:

> Mr. Pruner, Mr. Dick Hurd and I met for a pretrial conference to discuss which photographs to use in the trial and to compare injury patterns with possible weapons. Dr. Scott McCormick was also in attendance. They brought in a vacuum cleaner hose which was recovered from the scene. The left upper buttocks injury did correspond to the vacuum hose. The lower left buttocks injury corresponded to the hose portion which was attached to the connecting recepticle [sic] for the vacuum cannister. The left upper lateral hip injury corresponded to the metal attachment at the other end of the hose with the electrical cord hooked to it. The right upper buttocks injury may have been from the looped electrical cord. Mr. Hurd will bring in the hair curling iron for additional comparison to this injury.

[Defense Exhibit 4, PC ROA Vol. X, 1837]

Without the *Williams* rule evidence of the prior murder, Ray Lamar Johnston would have been acquitted of the murder of Janice Nugent. The case against Ray Lamar Johnston in the Nugent murder was weak and circumstantial. There were no confessions and no eyewitnesses. The DNA and fingerprint evidence found in the Nugent home could be easily explained by the defense because Mr. Johnston was known to have been a social guest inside the Nugent home.[14] Although the instant murder occurred in February of 1997, it remained a cold case until August of 1997 when the authorities set their sights on Mr. Johnston.

The *Williams* rule evidence of the prior murder was the key to this conviction, without this, there would have been an acquittal. This evidence gave the State the

[14] Witness Fran Aberle testified at trial that the victim, Ms. Janice Nugent, returned Mr. Johnston's jacket to him at Malio's in her presence prior to the murder [Dir. ROA Vol. IX, 725].

unfair advantage of revealing a prior murder conviction at the guilt phase, and placed the defense in the awkward position of having to ask the venire in *voir dire* if they could set aside the fact that Mr. Johnston was already a convicted murderer, and yet be fair and impartial as they deliberated his guilt on a second and unrelated murder charge.

To review a brief procedural perspective of this claim, after securing a conviction in the Coryell murder case (Case No. 97-CF-13379, SC09-780), the State sought to introduce this conviction in the Nugent murder case as *Williams* rule evidence. In support of their motion, the State argued that each of the victims were beat in the buttocks with a *belt*. Shortly before the Nugent trial, medical examiner Dr. Julia Martin clearly came to opine that the victim, Janice Nugent was beaten with a *vacuum cleaner hose and attachments, or maybe a curling iron*. This opinion was memorialized in her written telephone logs and then duly reflected by the prosecutor in an amended notice of discovery. In response, the defense renewed their motion to exclude the *Williams* rule evidence based on the apparent change of opinion. See Dir. ROA Vol. III, 427-430. The court had previously relied on the State's representations that Dr. Martin would testify that a belt was used to beat Ms. Nugent in its ruling. When the court informed the State that it might change its ruling based on Dr. Martin's apparent change in opinion, the State panicked. After several off-record, in-court cellular telephone calls and urging by the State, Dr. Julia Martin reportedly through

hearsay statements backed off of her true opinions concerning the vacuum cleaner to conform to the State's wishes. In the State's own "Additional Notice of Discovery" filed September 28,2008 the State revealed:

> On the afternoon of September 27, 2000, associate Medical Examiner, Dr. Julia Martin compared photographs of the patterned injuries to the buttocks of Janice Nugent to the vacuum hose and cord retrieved by crime scene technician, Joan McIlwain from the floor of Ms. Nugent's bedroom. In Dr. Martin's opinion, the patterns of several of the injuries to Ms. Nugent's buttocks are consistent with the structure of various parts of the vacuum hose and cord.

[Dir. ROA Vol. III, 430]

Even though Dr. Martin's written log dated 9/27/2000[15] states that the upper right buttocks injury may have been caused by the looped electrical cord of the vacuum cleaner, and that a curling iron would be used in a subsequent analysis, she testified at trial that there was a 51% or greater probability that a belt may have caused the injury to the upper right buttocks.[16] No one ever presented a belt to her for comparison, and

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[15]The telephone logs were introduced at the evidentiary hearing as defense exhibit 4.

[16]The trial testimony proceeded as follows:

Q: [By Mr. Pruner]: Now, specifically pertaining to State's 46, the pattern injury to the upper right buttock, for the purpose of this question, take the meaning of the phrase more probable than not to mean a degree of certainty, of 51% or greater. It is your opinion–do you have an opinion as to whether it's more probable than not that this injury depicted in State's exhibit 46 was caused by a belt?

A [by Julia Martin]: Yes.
Q: What is your opinion?
A: That it was.

she was truly "at a loss" as to the implement used. Dr. Martin cannot explain the discrepancy because the belt testimony is a falsehood, not a true reflection of her opinion. When confronted with the facial contradictions in her opinion regarding the injuries, Dr. Martin curiously stated that her written statements were merely "comments," not opinions. PC ROA Vol. XXXIII, 70. It is clear that Dr. Martin provided false testimony at trial concerning her opinions of what caused the injuries to the upper right buttocks. The relevant injury is the injury to the upper right buttocks, and that injury is clearly depicted in the photographs introduced at the evidentiary hearing [See PC ROA Vol. X, 1809] and the photograph (State's trial exhibit #46) introduced at trial.

The undersigned understands that Dr. Martin did not admit at the evidentiary hearing that she misrepresented her true opinions at trial concerning the cause of the injuries to the upper right buttocks. But this claim should not fail because it lacks this impossible-to-obtain admission. Dr. Martin's credibility should be closely scrutinized by this Court. Regarding her opinions clearly stated in her telephone log that a vacuum cleaner hose and attachments caused certain injuries, she stated at the evidentiary hearing those entries in her telephone log were simply "comments," not opinions. PC ROA Vol. XXXIII, 70. Dr. Martin said she would stick by her sworn trial testimony

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[Dir. ROA Vol. VIII, 577]

regarding a belt. Of course she would! To testify otherwise would expose her to a perjury in a capital case charge. Dr. Martin stated in her April 2000 deposition that the upper right buttocks injury was "consistent" with having been made by a belt, but that she was truly "at a loss" on this issue because no belt had been presented to her for comparison. "Consistent" does not rise to the level of "probable." And no belt was *ever* presented to her, no belt was ever recovered from this crime scene. In September of 2000, a vacuum cleaner hose and attachments were presented to her, and she clearly opined in her telephone logs that those items caused certain injuries on the buttocks. Dr. Martin apparently did not rule out the possibility that a curling iron may have been used. When the prosecutor called her on the telephone from court subsequent to that meeting and effectively encouraged her to opine that a belt was used to beat the victim, she provided such an opinion and testimony even though such testimony contradicted her previously sworn and written opinions. Dr. Martin's true opinions were blatantly misstated at trial to afford the State their *Williams* Rule evidence. As such, Mr. Johnston should receive a new trial free from the taint of any evidence that he committed a prior murder.

Dr. Julia Martin cannot truthfully have testified that a belt was used to cause the injury to the right upper buttock any more than a curling iron, as illustrated by the following evidentiary hearing testimony:

> Q. And with regards to this injury in 3-A above 97-733, you said there that they were going to bring a curling iron to you to compare to this

injury, right?

A. I don't know if that was what they were bringing it for or not. I don't remember.

Q. That's what it says on your entry of 9/27/2000, right?

A. Where is that?

Q. In your telephone contact log entry dated 9/27/2000. You say the right, upper buttocks injury may have been from the looped electrical chord.[sic] Mr. Herd will be bringing in a hair curling iron for -- the hair curling iron for additional comparison to this injury?

A. That is correct.

Q. Okay. So it appears that in this note of 9/27/2000, you did not know what may have caused the injuries the right side, correct?

A. I don't think it says that.

Q. Is there any opinion here wherein you say that belt was used to a 51 percent or greater probability?

A. No. And it also doesn't say the curling iron or wire or cord or whatever was also 51 percent or greater. It doesn't say that either.

Q. Okay. Was a curling iron used to cause this injury?

A. My opinion in trial testimony was that it was from a belt.

Q. Uh-huh.

A. So that would be, no, it wasn't.

Q. I'm asking you about the probability that a curling iron was used to cause this injury?

A. Evidently I didn't think so or I would have not have testified that it was a belt in court.

Q. As we sit here today, can you place a percentage of the probability that a curling iron might have been used to cause this wound?

A. As it is here today, I stand by my trial testimony that it was a belt. Period.

Q. Fifty-one percent or greater probability?

A. That it was a belt, yes.

Q. And I'm asking you about that other probability, that other percentage of probability that another item such as curling iron might have been used to cause this wound?

A. Evidently I did not think so then, so I don't think now I guess. I don't remember. I have no recollection. **For some reason, it was my opinion that it was a belt**. (**emphasis added**)

[Evidentiary Hearing, PC ROA Vol. XXXIII, 74-76]

The Appellant submits that ***the*** **reason** why she opined a belt was used was because of

the pressure from the State to provide such easily-skewed, conveniently-tailored, difficult-to-disprove, subjective opinion. The Appellant submits that Dr. Julia Martin's trial testimony opinion has been sufficiently disproved by her own prior sworn statements and telephone log entries. Because it is clear that Dr. Martin provided false testimony concerning her opinion of what instrument may have caused the rectangular injury to the victim's upper right buttock, Mr. Johnston should receive a new trial free from the taint of the extremely and ultimately prejudicial *Williams* Rule evidence. Just as the "arson theory" has been ruled out in the Cameron Todd Willingham case in Texas, the "belt theory" in this case has been shown to be false. The lower court was wrong to deny this claim.

The Lower Court's Order

Regarding this claim, on page 6 of the order [PC ROA Vol. VIII, 1549], the lower court states that "it is unclear from the record whether the actual contact log was disclosed prior to trial." During the evidentiary hearing, Ken Littman testified as follows:

> Q. I don't think you -- I don't think you saw. There was a document that's been introduced in this hearing, a Julie -- Dr. Julia Martin's telephone log. You don't remember seeing that at or about the time of the Nugent trial?
> A. No.

[PC ROA Vol. XXXV, 704]

There simply is no record that the telephone log was furnished to the defense.[17] It simply was not furnished at trial, it was nowhere in the possession of the trial attorney files. Any reasonable defense counsel would have utilized that written document to support their motion to exclude the *Williams* Rule evidence. It was clear, and it was written, that Dr. Martin obviously opined that a vacuum cleaner and accompanying hose, *not* a belt, were used to inflict the injuries on Ms. Nugent.[18] Dr. Martin only changed her opinion when the State needed a change in opinion in order to support their continued efforts to introduce prejudicial evidence at trial that Mr. Johnston committed another murder.

Confirmed at the evidentiary hearing, in her pretrial deposition, Dr. Martin testified that she was "at a loss" as to what caused the injuries on the victim's buttocks because no instrument was actually presented to her for comparison. [See PC ROA Vol. XXXII, 60 (line 19)]. Leading up to the trial, some instruments were presented to her: the vacuum cleaner, hose and attachments. It was then that she came to opine that those instruments caused the injuries, not a belt. No belt was *ever* presented to her for comparison. As such, with regards to a belt causing the injuries, she still should have

[17]The Dr. Martin contact log documenting her true opinions was introduced as defense exhibit 4, and is located at PC ROA Vol. X, 1822-1838.

[18]See PC ROA Vol. X, 1837, entry dated 9/27/00 wherein Dr. Martin talks about how the vacuum she inspected "correspond[s]" to various injuries on the victim's buttocks.

been "at a loss." With regards to a vacuum cleaner hose and attachments, she should have been at an opinion of 51% or greater as *those* instruments having caused the injuries. But instead, she testified otherwise to help the State preserve their *Williams* rule evidence. After the State filed their Amended Notice of Discovery on this point, the much better procedure would have been to place Dr. Martin on the record to explain her opinion. Instead, the State was allowed to have an *ex parte*, off-the-record conversation with her, and was allowed to improperly influence and change her opinion. Had Dr. Martin been called, questioned, and placed on record at the time this issue arose, such a procedure would have resulted in an unadulterated, true opinion that would have warranted reversal of the prior *Williams* rule evidence ruling.

The main thrust of this claim is that the State knowingly misrepresented the cause of the victim's injuries in order to further their campaign for the admission of the *Williams* rule evidence. This was a calculated pre-trial *Giglio* violation. Although the State filed an amended notice of discovery revealing Dr. Martin's true opinions (that a vacuum cleaner and hose were used to cause the injuries), and that opinion was even documented in the contact log, that opinion was later changed and fraudulently tailored to allow the State to retain their favorable *Williams* evidence ruling. No belt was ever presented to Dr. Martin for comparison, therefore she could not honestly have testified that there is a 51% or greater probability that a belt was used to cause the injuries on the buttocks. In reality, her documented opinions state otherwise, therefore this

constitutes a State-solicited *Giglio* violation.

CLAIM IV

THE CIRCUIT COURT ERRED IN DENYING GUILT PHASE RELIEF. MR. JOHNSTON'S CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR PROVIDING ILL-ADVICE TO THE DEFENDANT CONCERNING THE NEED TO CONFESS TO THE CORYELL MURDER. THIS CONFESSION PREJUDICED THE DEFENDANT IN THE NUGENT CASE WHEN IT WAS INTRODUCED AS *WILLIAMS* RULE EVIDENCE IN VIOLATION OF MR. JOHNSTON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Under the principles set forth by this Court in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), this claim is a mixed question of Law and fact requiring *de novo* review with deference only to the factual findings by the court.

This is a Nugent guilt phase claim based on ineffective representation at the Coryell penalty phase. The trial court clearly and erroneously held that trial counsel had no reason to know about a future murder charge in Nugent notwithstanding record evidence to the contrary. Without the *Williams* rule evidence, Mr. Johnston would have been acquitted of the Nugent murder. Not only did the State have evidence of a prior conviction of murder, but the State had the ability to actually read Mr. Johnston's Coryell penalty phase confession to the jury that was deciding his guilt in the Nugent case. This evidence of the confession was devastating to the defense in the Nugent

guilt phase. The Nugent guilt phase jury heard all of the details of the ill-advised Coryell confession, including trial testimony that Mr. Johnston kicked Ms. Coryell in the crotch during the murder to make it look like Ms. Coryell had been badly assaulted. [Coryell, Dir. ROA Vol. XVIII, Trial Transcript at 1716-1717]; [Nugent, Dir. ROA Vol. XI, Trial Transcript at 1003 read from the Coryell Transcript].

Absolutely no advice was given to Mr. Johnston by trial counsel warning him that a confession in the Coryell penalty phase could be used against him in a future prosecution. Kenneth Littman was aware at least as early as five months after Ray Lamar Johnston's arrest in the Coryell case that he was a possible suspect in the Nugent case. Ray Johnston was arrested for Coryell in August of 1997 after he was observed drawing money from her bank account on ATM surveillance footage. Defense exhibit 12 introduced at the evidentiary hearing is a memorandum dated February 13, 1998 from Kenn Littman [See PC ROA Vol. X, 1952-1953] wherein Mr. Littman memorializes his conversation with Mr. Johnston concerning Mr. Johnston's fears in the Coryell case that he may be charged in the Nugent murder.[19] Mr. Littman informed him that if the State had intentions of charging him in the Nugent case, they

[19]Mr. Littman memorializes the following in the 2/13/98 memorandum: "Johnston expressed concern that he would be charged with the Feb. 1997 murder of Janice Nugent [].....Told him I believed[]they would have done so already, the Nugent murder having occurred six months prior to the Coryell homicide. Johnston stated he has an alibi for the weekend that Nugent was murdered, because he was with a woman who works at MacDill AFB that weekend."

would have done so already. Mr. Littman even confirmed the following at the evidentiary hearing, contrary to the lower court's factual finding:

> Q. So obviously, you did have some knowledge of at least the specter of a charge coming down the pipe for this Janice Nugent case?
> A. That's always a possibility, sure.

[PC ROA Vol. XXXV, 562]

And before Mr. Littman provided his closing argument in the guilt phase of the Coryell case, he asked that the trial court inquire of the jury if they had seen news reports the night before reporting that should Mr. Johnston be acquitted in Coryell, charges in the Nugent murder would follow. The Appellant points to the following discussion held on the record on June 11, 1999, just prior to the closing arguments in the guilt phase of the Coryell case:

> MR. LITTMAN: Judge, we have one brief matter, please.
> THE COURT: What is it?
> MR. LITTMAN: Judge, my client, Mr. Johnston, brought to my attention that last night he was contacted by Mr. Ladale Lloyd, who is a reporter for the Tribune, wanting Mr. Johnston's comments or reaction to the fact, apparently, on the TV and radio is announced that if he is acquitted of the murder of Ms. Coryell, he's going to be charged with the murder of a woman named Janice Nugent. He told Mr. Johnston that this report came from someone in the State Attorney's Office and someone from the sheriff's department or the police department and, obviously, the timing of this would be most suspicious because we're about in our closing argument, and I believe could only serve to possibly prejudice the jurors. I wanted the Court to be aware of this. And I would also ask the Court to make a close inquiry as you have everyday of the jury before we begin to see if they've heard anything about this.
> THE COURT: I will inquire of the jury. I saw it on the 11:00 news, too, and I'll inquire of the jury as I have everyday.

[Coryell Dir. ROA Vol. XIV, 1166-1167]

So obviously trial counsel had full knowledge that an indictment in Nugent was on the horizon. Yet no warnings were provided to Mr. Johnston concerning the danger of confessing to the Coryell murder, absolutely no advice was were given that such a confession could possibly be used against him in the Nugent case. Had counsel provided such advice, the Nugent jury would not have heard a Coryell confession because he would not have taken the stand and admitted that offense.

Ken Littman readily admitted at the evidentiary hearing that no advice was given in this regard:

> Q. Okay. Prior to -- so you knew he was going to take the stand there in the penalty phase of the Coryell case, and you knew that he was going to basically admit to this murder?
> A. Yes.
> Q. Okay. Did you warn him that that might be used against him in a subsequent trial?
> A. I can't say that I specifically recall that admonition being given. We were focusing on this one murder case that we had in front of us, the Coryell case.
> . . . .
> Q. But for instance, when I say, did you give him admonitions, did you give him warnings that what he may say in the penalty phase, i.e., if he admits that he committed the Coryell murder, you're saying you didn't warn him that, one thing you got to watch out for is this could be used against you in a subsequent trial, be it the Nugent case?
> A. No. Because again, there was no Nugent case pending at that time.

[PC ROA Vol. XXXV, 614-615]

The defense team knew that there was a great possibility that Mr. Johnston would be charged in the Nugent case. They should have warned him that his Coryell confession might be introduced in the future Nugent case. Mr. Littman admitted, "Had

there been another case pending, it would have been more likely that I would have thought to [provide an a warning]." [PC ROA Vol. XXXV, 615].

Ray Lamar Johnston was in custody in Coryell, law enforcement had already questioned him about the Nugent case, and television news reports revealed the night before the guilt phase closing arguments in Coryell that either the state attorney's office or sheriff's office was reporting that charges were forthcoming in Nugent. The reports were all over the news. The writing was on the wall, the warnings should have been provided. The warnings were not provided, which renders Mr. Johnston's decision to admit to the Coryell murder unknowing and unintelligent, without the benefit of knowing the possible consequences in the Nugent case. As such, counsel was ineffective under *Strickland*, and Mr. Johnston accordingly should receive a new trial that does not include this overwhelmingly prejudicial confession to another murder. Mr. Johnston testified at the evidentiary hearing that no warnings were provided to him:

> Q. Let me ask you, Mr. Johnston --
> THE COURT: Go ahead.
> BY MR. HENDRY:
> Q. -- during these discussions prior to the penalty phase did Kenn Littman or any other of the trial attorneys advise you that if you confess to the murder of Leanne Coryell that it could be used against you should you receive a future trial in the Leanne Coryell case?
> A. No, they did not.
> Q. And the same question --
> THE COURT: In regards to a future trial in Coryell?
> MR. HENDRY: That's correct.
> THE COURT: Okay.

BY MR. HENDRY:
Q. Mr. Johnston, did Kenn Littman or any other members of the trial team advise you that if you confessed to the murder of Leanne Coryell that it could be used against you in -- if there would have been a charge, a subsequent trial in the Janice Nugent case?
A. No, they did not.
Q. Did they give you any admonishments whatsoever about the testimony, confession of the Leanne Coryell case being used against you in the future?
A. No, they did not.
[PC ROA Vol. XXXIX, 1079-1080]

Mr. Johnston testified that he had no idea what *Williams* rule evidence was when he made the decision to admit to the Coryell murder during the Coryell penalty phase.

Q. And did your trial attorneys -- did your trial team ever indicate to you -- did they ever talk to you about what Williams Rule evidence was?
A. No, not at that time. I had no idea what it was then. I do now.
[PC ROA Vol. XXXIX, 1085].

Ray Lamar Johnston's decision to testify at the Coryell penalty phase was obviously not knowing and intelligent due to his counsels' ineffectiveness and failure to warn.

Attorney Joe Registrato testified that he did not provide any warnings concerning the possibility of the Coryell confession being used against Mr. Johnston in the Nugent case because he claimed he had no knowledge that there was another murder case out there. But Mr. Registrato would have, or *should* have, heard Mr. Johnston's concerns about the Nugent case, he would or should have heard the news reports of the Nugent case, and he would presumably be at the counsel table when Mr. Littman stood before delivering his guilt phase closing argument, complaining about

the previous night's news reports that Mr. Johnston may soon be charged in the Nugent murder. Mr. Registrato testified as follows:

> Q. So there is one thing you can be sure of is there was no admonishment to Ray Lamar Johnston about a confession to Coryell case being used against him in the Janice Nugent case?
> A. Sir, we had no idea about Janice Nugent or any other murder case that was pending against Ray Johnston. There is no way we could have admonished him, listen, they will use this against you in the other case that's out there. We didn't know about any other case that was out there.

[PC ROA Vol. XXXX, 1269]

The Nugent murder charge against Mr. Johnston was no surprise to anyone. The entire media-viewing public knew about the specter of the Nugent case. The attorneys knew about it as evidenced by Mr. Littman's file memorandum and the trial record. From Mr. Littman's comments before his closing argument, he knew that Johnston may soon be charged with the Nugent murder. As reflected in defense exhibit 12 [PC ROA Vol. X, 1952-1953], Mr. Littman obviously knew that Mr. Johnston might be charged in the Nugent murder. It is inconceivable that Mr. Registrato would not have known about the specter of the Nugent case. He had a duty to warn Mr. Johnston of the dangers of a confession in the penalty phase in light of the specter of Nugent.

Trial counsels' attempts to refute these claims based on a lack of knowledge should fail. There is an abundance of evidence in the record to show that there indeed was knowledge of the forthcoming Nugent murder charge. As such, trial counsel was ineffective in failing to warn Mr. Johnston about the devastating effects a Coryell confession might have in the Nugent case. The prejudice to Mr. Johnston was

overwhelming, causing the jury to convict him on prejudicial propensity evidence in a case involving only very weak circumstantial evidence.

The Lower Court's Order

On page 35 of the order, the court erroneously accepts that "neither [Joe Registrato] nor any other member of the defense team knew about Ms. Nugent . . . so there was no way he or the defense team could have given Defendant such an admonishment." [PC ROA Vol. VIII, 1578]. Joe Registrato's testimony regarding lack of knowledge of the upcoming Nugent murder charge was disingenuous at best. The trial team obviously knew about the specter of the Nugent murder charge. As cited above in the trial record, Ken Littman actually stood up before his closing argument at the guilt phase of the Coryell case and expressed concern because it was being reported by the media that should Mr. Johnston be acquitted of the Coryell murder, he would be charged in the Nugent case. Mr. Registrato presumably would have discussed this situation with his co-counsel.

The Appellant urges that this Court reverse the lower court's erroneous decision that blindly accepts on page 37 of the order that "neither Mr. Registrato nor Mr. Littman knew or should have known that Defendant would be charged with the Nugent murder." [PC ROA Vol. VIII, 1580]. The trial attorneys certainly did know of that possibility, and their knowledge is actually part of the official Coryell record as cited in this brief. The failure to provide admonishments to their client in this regard was

deficient performance under *Strickland*, and this Court should grant relief accordingly.

CLAIM V

THE TRIAL COURT ERRED IN FAILING TO GRANT RELIEF AT THE GUILT PHASE. THE INTERROGATION BY DETECTIVES NOBLITT AND STANTON AFTER MR. JOHNSTON INVOKED HIS CONSTITUTIONAL RIGHTS WAS UNCONSTITUTIONAL, AND COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO SUPPRESS THE STATEMENTS OBTAINED IN THE VIOLATION OF THE FIFTH, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS AS WELLAS THE *EDWARDS* RULE.[20]

The Lower Court's Order

Under the principles set forth by this Court in *Stephens v. State,* 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review with deference only to the factual findings by the lower court.

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.

[20] *Edwards v. Arizona*, 451 U.S. 477 (1981).

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. 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[21]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.[22] 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.[23]

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

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

[23]The defense never challenged the pre-trial statements based on a *Miranda/* Invocation of Rights violation. The challenge was based solely on the following argument: "Where the Defense has chosen not to put that into evidence, you cannot

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 and his Invocation of Rights form. 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*. See Dir. ROA Vol. III, 406-408. 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]. Law enforcement was even specifically requested by follow up letter written September 4,1997 by his attorneys requesting that law enforcement "not attempt to talk with or have any type of contact with Ray Johnston about any cases." [Coryell Dir. ROA Vol. I, 82].

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introduce of a psychiatric condition; the State can't do that. The defendant has to choose that." Dir. ROA Vol, VII, 797.

Law enforcement violated the Appellant's rights when they ignored the invocation of rights form signed 8/22/97, ignored the attorneys' follow-up letter dated 9/4/97 and even ignored a "motion for protective order" on this issue filed 9/26/97; law enforcement interrogated the Appellant on 8/22/97, 8/28/97, and 10/2/97. [See Detective Noblitt's trial testimony regarding the interrogations at Nuget Dir. ROA Vol. VII, 776-842].

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. *Edwards v. Arizona*, 451 U.S. 477 (1981) controls this issue, not *Sapp*. *Sapp* 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.[24] Law enforcement trampled upon Mr. Johnston's constitutional rights, disregarded his unambiguous, signed invocation of rights directives, and following court, almost

[24]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.

immediately approached him in jail and questioned him about the Nugent murder. This Court should reverse.

CLAIM VI

THE TRIAL COURT ERRED IN FAILING TO GRANT GUILT AND PENALTY PHASE RELIEF. MR. JOHNSTON'S CONVICTIONS AND SENTENCES ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM THE JURY DURING THE CORYELL AND NUGENT CASES THAT THE DEFENDANT WAS HEAVILY MEDICATED AND SEDATED. SPECIFICALLY, THIS INFORMATION SHOULD HAVE BEEN MENTIONED AT THE VERY LEAST DURING HIS CONFESSION IN THE PENALTY PHASE OF THE CORYELL TRIAL. THIS OMISSION VIOLATED MR. JOHNSTON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Under the principles set forth by this Court in *Stephens v. State*,748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review with deference only to the factual findings by the lower court.

The Appellant had hoped to develop this particular claim further in this case through the testimony of Dr. James T. O'Donnel during the week of January 28, 2008 at the evidentiary hearing in SC09-780, lower Case 97-13379 ("the Coryell case"). Although Dr. O'Donnell testified in postconviction in the Coryell case, the lower court refused to consider Dr. O'Donnel's testimony in connection with this case and this claim. Procedurally, in the lower court, the Nugent evidentiary hearing was

concluding,[25] and the Appellant requested from the court an opportunity to have an expert pharmacologist perform a comprehensive review of the medical records to determine if there were issues regarding with the medications that might have affected Mr. Johnston's mental state during the Coryell trial. That issue is quite relevant to Nugent because the confession from the Coryell trial was read into the Nugent guilt phase.

The lower court was wrong to deny the Appellant's motion to hold the Nugent postconviction proceedings in abeyance to allow the presentation of additional evidence on this issue. [See Appellant's "Motion to Reopen Evidentiary Hearing, Or in the Alternative, Motion to Hold These Proceedings in Abeyance Pending Judicial Notice of Forthcoming Testimony Concerning the Defendant's Mental State at the Time of His Coryell Testimony in Light of the Prescription Medications He was Taking," [PC ROA Vol. VIII, 1437-1445], and, Order signed January 25, 2008 denying that motion. [PC ROA Vol. VIII, 1497-1507].

The Court abused its discretion in this regard. In its order denying the Appellant's Motion to present Dr. O'Donnell's testimony in the Nugent case, the lower court stated, prior to hearing the testimony:

> The Court is unable at this time to discern how Dr. O'Donnell's opinion will tend to make more or less likely that trial counsel's performance in

[25]The Nugent postconviction evidentiary hearing was conducted first, then the Coyell postconviction evidentiary hearing followed.

> the Nugent guilt phase was deficient in any respect, or that this alleged deficiency prejudiced Defendant. The Court does not find that Dr. O'Donnell's opinion adds anything to the testimony presented at the evidentiary hearing on claim XVI of Defendant's postconviction motion that would aid the Court in deciding the issue of ineffective assistance of counsel. Accordingly, the Court in its discretion will not reopen the evidentiary hearing case, nor will the Court take judicial notice of Dr. O'Donnell's testimony at the upcoming evidentiary hearing scheduled in the Coryell case. The Court has considered the attached report of Dr. O'Donnell to the extent necessary to exercise its discretion in ruling on the present motion before it.

[PC ROA Vol. VIII, 1499.]

Without actually hearing Dr. O'Donnell's testimony, any ruling the court may have made on this issue was incomplete and premature.[26] That would be like summarily denying a factual postconviction claim without an evidentiary hearing. The Appellant suggests that *at the very least*, this Court remand this matter back to the lower court for full consideration of Dr. O'Donnell's testimony found at the Coryell PC ROA Vol. LV, 951-1025].

Although the lower court may have considered the written report of Dr. O'Donnell, it failed to consider Dr. O'Donnell's evidentiary hearing testimony wherein his opinions concerning the effect the medications had on the Appellant became even stronger. This claim raises issues of ineffectiveness of trial counsel for failure to inform the juries that Mr. Johnston was heavily medicated at the time of trial. The juries should have been made aware of these facts concerning the medications. It is

[26]The lower court did in fact enter its order denying consideration of Dr. O'Donnell's testimony before even hearing Dr. O'Donnell's testimony.

troublesome that the lower court would fail to recognize the significance that, as Dr. O'Donnell described in part in his report, and expounded further in his evidentiary hearing testimony in Coryell that the lower court did not consider:

> [T]here is a high probability that Mr. Johnston experienced mental and cognitive impairment as a result of the prescribed medications that were consumed at the time of the June, 1999 Proceedings. Such impairments would have impeded Mr. Johnston's ability to think rationally, and adversely affected his ability to reason and make sound judgments during his confinement and trial.

[See Dr. O'Donnell's report at PC ROA Vol. VIII, 1504-1507]

Ray Lamar Johnston testified at the Nugent evidentiary hearing at PC ROA Vol. XXXIX, 1045-1191. Mr. Johnston provided extensive, unrefuted testimony that he was heavily medicated at the time he was attempting to make the decision whether to testify in the Coryell penalty phase, and at the time he testified in the penalty phase. He testified that the medications were numerous, and indicated the psychotropic nature of the medications. Contrary to Mr. Littman's assertions at the Nugent evidentiary hearing,[27] Mr. Johnston *was* on psychotropic medications at the time he testified. Had the Nugent jury been informed that Mr. Johnston was heavily medicated at the time he provided his confession at the Coryell penalty phase, this would have softened the blow and prejudice of his penalty phase confession. It was ineffective for trial counsel fail to so inform the jury, and Dr. O'Donnell's

[27]Mr. Littman testified, "[A]s I recall, the medication that he was on had nothing to do with–it's not psychotropic medication. It's for physical ailments." PC ROA Vol. XXXV, 608.

enlightening testimony in this regard aids in an understanding of this claim. The lower court should have considered this testimony, and was wrong to preclude the consideration of this crucial testimony in its January 25, 2008 order.

In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins v. Smith*, 539 U.S. 510 (2003). The United States Supreme Court has explained:

> [i]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantage background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. at 319 (internal quotation marks and citation omitted); *see also Penry v. Johnson*, 532 U.S. at 797; *Johnson v. Texas*, 509 U.S. 350, 375 (1993) (O'Connor, J., dissenting). The sentencer's constitutionally prescribed task is thus to render "a reasoned moral response" to the unique individual circumstances of the capital defendant. *Penry v. Lynaugh*, 492 U.S. at 327; *see also California v. Brown*, 479 U.S. 538 (1987) (O'Connor, J., concurring); *Eddings*, 455 U.S. at 111 (consideration of offender's life history is a "constitutionally indispensable part of the process of inflicting the penalty of death").

Without informing the jury of the medications that Mr. Johnston was taking for

his mental and physical conditions, the jury was precluded from fully understanding the unique circumstances and challenges that Mr. Johnston faced in his life. Without considering the testimony of Dr. O'Donnell in the Nugent case, the lower court was precluded from fully considering this particular claim of ineffective assistance of counsel. Ironically, as the Appellant urged Mr. Hyman to ask a mental health witness about the medications he was taking in Nugent, the Appellant was basically dismissed with the sarcastic "earth-shaking" comment in front of the jury. The jury was not led to fully understand Mr. Johnston's unique circumstances and challenges through a description of the medications he was taking. The jury was merely led to believe that "[un]remorse[ful]" Ray had "humiliat[ed]" his family who had to live with him and testify at his penalty phase, and Ray also humiliated his defense attorney who obviously found it "no picnic" to represent him at trial. Mr. Littman testified that he did not discuss with Ray Lamar Johnston the medications that he was on taking prior to him testifying in the Coryell penalty phase. [PC ROA Vol.XXXV, 623]. Kenneth Littman claimed that he could not point out to the Nugent jury that Ray Lamar Johnston was on 10 medications at the time he testified in Coryell, and could not argue to the jury that the medications may have clouded his mind at the time of his testimony because there would be a "serious ethical problem in doing that." [PC ROA Vol. XXXV, 621]. There is no ethical problem in that. There was a failure to investigate, and a failure to ask the right questions of his client prior to his testimony. There was

ineffective assistance of counsel in counsel's failure to appreciate the number of medications his client was taking, to know the types of medications he was taking, and to adequately challenge the Coryell confession once he knew it was coming in as *Williams* rule evidence in Nugent.

The Appellant was taking high doses of Xanax, Tegretol, Dilantin, Lasix, Sinequan, Cardizem, Isordil, Cropoten, Nitroglycerin, Aspirin, Verapamil, Vitamins, and Rocephin. The combination of these medications causes confusion, depression, fatigue, restlessness, inability to sleep, disruptions in sleep, impaired memory, dizziness, disorientation, nervousness, seizures, tremors, hallucinations, ringing in the ears, vertigo, angina, headache, low blood pressure and high blood pressure. The jury should have been provided with this information in conjunction with the testimony of Ray Lamar Johnston. The failure to provide his testimony without this caveat constituted ineffective assistance of counsel, and prejudiced the defendant in both the Coryell and Nugent cases.

As the trial attorney from Nugent penalty phase I, Gerod Hooper testified at the Coryell evidentiary hearing regarding the psychotropic medication issue and the decision to have Mr. Johnston testify in Coryell. He said that he was not informed that Mr. Johnston was not taking psychotropic medications, and that he might have requested a jury instruction to be provided in conjunction with Mr. Johnston's testimony. [Coryell PC ROA Vol. LVI, 1076-1079].

Had a special jury instruction been requested and read to the jury prior to Mr. Johnston testifying, this would have strengthened the case for life and acted to soften the blow when Ray Johnston appeared non-remorseful for his actions on the stand in front of the jury. The jury should have been informed that Ray Lamar Johnston was taking psychotropic medications from the time he was arrested in Coryell through his penalty phase testimony in Nugent II. Trial counsel was ineffective in this regard, and the lower court erred in granting relief.

CLAIM VII

THE LOWER COURT ERRED IN REFUSING TO GRANT AN EVIDENTIARY HEARING ON SEVERAL CLAIMS THAT REQUIRED A FACTUAL DETERMINATION. REMAINING UNCURED ARE VIOLATIONS OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHICH DENIED MR. JOHNSTON'S RIGHT TO DUE PROCESS, HABEAS CORPUS AND ACCESS THE COURTS UNDER FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

This Court should apply *de novo* review as per *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000).

In 2001, Florida Rule of Criminal Procedure 3.851 was revised and became effective. In 2006 the lower court, with not even a remote claim of authority, revoked the newly revised Rule and turned the calendar back to before 2001.

Mr. Johnston's case entered postconviction in 2003 and accordingly filed a motion under the effective Rule in place at the time. Mr. Johnston fully complied with the Rule and filed a motion which met all of the pleading requirements contained in Rule 3.851 (e)(1). In other words, Mr. Johnston did exactly what the Rule required, when it was required. Mr. Johnston, however, was the only party to this litigation which complied with Rule 3.851 and suffered with the Rule's burdens without being afforded any of its benefits.

As an initial matter it is important to consider what the apparent purpose of the

2001 revision of Rule 3.851 was not; it was not an attempt to make postconviction more cumbersome. It was not an attempt to make it easier for the circuit courts to dispense with claims which the death sentenced raised, nor to deny those with claims of constitutional violation access to the courts of this State or this Nation. And while the commentary mentions "the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process," the commentary gives no indication that the drafters chose expediency over the remedy of constitutional violations in capital cases.

Mr. Johnston asks this Court to remand Mr. Johnston's case for the hearing that he deserves so that he may obtain the remedy to which he is entitled.

MR. JOHNSTON WAS ENTITLED TO A HEARING ON ALL CLAIMS DESIGNATED AS REQUIRING A FACTUAL DETERMINATION UNDER RULE 3.851.

The revision of Rule 3.851 became effective on October 1, 2001. At issue here and as the commentary stated is the following:

> Most significantly, [new subdivision (f)]requires an evidentiary hearing on claims listed in an initial motion as requiring a factual determination. [This] Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process and has determined that, in most cases, requiring an evidentiary hearing on initial motions presenting factually based claims which will avoid this cause of delay.

In *Allen v. Butterworth*, this Court stated:

> In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of

> delay in postconviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. This failure can result in years of delay. This Court has been compelled to reverse a significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal there from takes many additional months in order for the record on appeal to be prepared and the briefs to be filed in this Court. In order to alleviate this problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a substantial amount of the delay that is present in the current system.

756 So.2d 52, 67 (Fla. 2000).

Reflecting this Court's concerns expressed in both the commentary to Rule 3.851 and in *Allen*, Rule 3.851(5)(A)as effective on October 31, 2001 states in relevant part: "**At the case management conference, the trial court shall schedule an evidentiary hearing, to be held within 90 days, on claims listed by the defendant as requiring a factual determination . . ..**" Fla. R. Cr. Pro. 3.851(5)(A)(i)(emphasis added).

Based on the language of Rule 3.851 and the Rule's commentary it could not be clearer - - the lower court should have granted Mr. Johnston an evidentiary hearing on all claims listed by Mr. Johnston as requiring an evidentiary hearing. This was most all of Mr. Johnston's claims. Accordingly, this Court should reverse the lower court's summary denial of these claims and remand for the evidentiary hearing which the rule requires. *See Spera v. 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.

CLAIMS WRONGLY AND SUMMARILY DENIED WITHOUT AN EVIDENTIARY HEARING

a) LOWER COURT CLAIM I–PUBLIC RECORDS

The Appellant concedes that this claim was not suitable for an evidentiary hearing.

b) LOWER COURT CLAIM III– INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO ERRONEOUS JURY INSTRUCTIONSERRONEOUS JURY INSTRUCTIONS

This claim should have been afforded an evidentiary hearing *at the very least*. 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 verbal jury instructions provided by the court. Trial counsel was ineffective for failing to object to the erroneous instructions at trial and request a curative instruction. 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[28] 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 and correct the error.

The lower court erroneously 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. This is an incorrect ruling because 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.[29] As such, this claim is properly raised in the procedural posture of postconviction. And this may be the 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

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[28]Lower court's footnote omitted here.

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

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 postconviction. 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 here justifiably advances an argument under *Strickland*. The Appellant 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." 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, and after the State objected, the lower court had to provide a curative instruction and 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.

Ironically enough, this Court amended this particular jury instruction less than 30 days ago in Case No. SC05-1890; see "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 "jurors confusion in this area" would be "eliminated [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.

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 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 trial 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.[30]

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

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[30]*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.

Regarding the second component of this claim, the failure to ensure that the jury was provided with *complete* jury instructions on available mitigation, the trial court was wrong to fully consider this claim and wrong to deny an evidentiary hearing. A factual determination and record should have been made on this important issue. Trial counsel was ineffective in the second penalty phase for failing to request instructions on two major mental health statutory mitigators. At penalty phase *number one* in the Nugent case, where the vote was only 7-5, the jury was instructed on following three statutory mitigators:

> Among the mitigating circumstances you may consider, if established by the evidence, are:
> 1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
> 2. The defendant acted under extreme duress or under the substantial domination of another person.
> 3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired.

["Nugent I" Dir. ROA Vol. XIV, 1492].

The trial court then discussed the non-statutory mitigators that could be considered by the jury ["Nugent I" Dir. ROA Vol. XIV,1493]. The above instructions from "Nugent I" illustrate that there were three possible statutory mitigators that the jury could have been instructed upon. At the second penalty phase, Harvey Hyman inexplicably neglected to have the jury instructed upon the "under the influence of extreme mental or emotional disturbance" instruction as well as the "acted under extreme duress"

instruction. The jury was only instructed upon the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law" mitigator. Trial counsel's inexperience and omissions prejudiced the Appellant's case for life. This is illustrated as follows from the limited instructions in the second penalty phase, "Nugent II": "One of the mitigating circumstances you may consider, if established by the evidence, is the capacity of the defendant to conform his conduct to the requirements of law was impaired." ["Nugent II" Dir. ROA Vol. XXI, 2458]. The Court then goes on to discuss non-statutory mitigation. ["Nugent II" ROA Vol. XXI, 2458-2459].

Obviously lacking in the instructions are the two vital statutory mitigators found in the Nugent penalty phase number one. Trial counsel was ineffective in failing to ensure that the proper instructions were read, and failing to ensure that the jury was instructed on all possible statutory mitigators. Evidence of the Appellant's "extreme mental or emotional disturbance" and "duress" was presented throughout all three penalty phases, and even specifically during the second penalty phase of the Nugent case when Dr. Maher testified regarding the defendant's inability to react well in times of stress ["Nugent II" ROA Vol. XX, 2258-2317]. As such, trial counsel's performance fell way below *Strickland* in failing to request instructions on available statutory mitigators. If trial counsel failed to present evidence in "Nugent II" that the Appellant had an "extreme mental or emotional disturbance," trial counsel was

ineffective. This statutory mental health mitigator goes hand in hand with the "[in]ability to conform" statutory mitigator. Mr. Johnston was obviously prejudiced as evidenced in the disparity in the votes in the two penalty phases.

Due to the ineffective assistance of counsel, the jury was not instructed on two vital statutory mitigators, and the court likewise did not consider two vital possible mitigators at sentencing. [Nugent ROA Vol. XXIII, 2594-2595]. Counsel's representation fell below the dictates of *Strickland v. Washington*, 466 U.S. 668 (1984). Trial counsel's failure to ensure that instructions on two major statutory mental health mitigators were read to the jury was error. At the very least, an evidentiary hearing was warranted. At the very least, a remand is appropriate as this claim requires a factual determination.

c) LOWER COURT CLAIM VI--INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO MOVE FOR A CHANGE OF VENUE

At PC ROA Vol. VI, 1125, the lower court denied an evidentiary hearing on this claim apparently because "Defendant has not demonstrated [] prejudice" and because "Defendant makes conclusory allegations that certain members of the jury panel were tainted by pre-trial publicity." The lower court cites to *Griffin v. State*, 866 So. 2d 1 (Fla. 2003); but *Griffin* does not stand for the proposition that such claims should be denied an evidentiary hearing. This Court should remand for an evidentiary hearing on this claim.

d) LOWER COURT'S CLAIMS VIII AND IX–INEFFECTIVE

ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO STATE'S BURDEN SHIFTING AT CLOSING ARGUMENT, "GOLDEN RULE" VIOLATIONS, AND FAILURE TO ENSURE THAT RELEVANT FINGERPRINT TESTIMONY WAS READ BACK TO THE JURY FOLLOWING THEIR QUESTION POSED DURING DELIBERATIONS

All of these claims require a factual determination. The lower court was wrong to deny an evidentiary hearing.

e) LOWER COURT'S CLAIM XI–INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO JURY INSTRUCTIONS THAT IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANT AT THE PENALTY PHASE

This claim requires a factual determination. The lower court was wrong to deny an evidentiary hearing.

f) LOWER COURT'S CLAIMS XIII, XIV, XV–*RING*, LETHAL INJECTION, *SIMMONS VS. SOUTH CAROLINA*

The Appellant concedes that these claims were not suitable for an evidentiary hearing. But, the Appellant wishes to preserve these issues for federal review. There should be a requirement of a unanimous vote by 12 jurors to impose a death sentence in Florida, not simply a jury recommendation; furthermore, Florida's judicial override capability make its death penalty system unconstitutional.

Regarding the lethal injection claim, the Appellant would direct this Court's attention to the recent events in Ohio where yet another attempted, botched lethal injection occurred in Rommel Broom's case, indicating that due to the inherent high risk of great pain, suffering, and torture, state-imposed lethal injection violates the 8th

Amendment prohibition against cruel and unusual punishment.

g) LOWER COURT'S CLAIM X (SUBCLAIM7)–INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ARGUE BREAK IN THE CHAIN OF CUSTODY OF FINGERPRINT EVIDENCE.

This claim requires a factual determination. The court was wrong to deny an evidentiary hearing.

h) CONCLUSION

At the very least, a remand for an evidentiary hearing is warranted for these claims at issue under these circumstances and under the rules.

CLAIM VIII

THE TRIAL COURT ERRED IN FAILING TO GRANT RELIEF. MR. JOHNSTON'S CONVICTIONS ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO DEFENSE COUNSEL'S FAILURE TO CONSULT AND UTILIZE NECESSARY EXPERT WITNESSES TO SCIENTIFICALLY REBUT THE STATE'S THEORY OF THE CASE, TO OTHERWISE OBJECT AND CHALLENGE THE STATE'S EXPERTS. THE COURTS SHOULD CONSIDER THE TESTIMONY OF FINGERPRINT EXPERT DR. SIMON COLE

Fingerprint Evidence–Failure to Consult an Expert and Challenge the Reliability of the Forensic Evidence--Dr. Simon Cole

Under the principles set forth by this Court in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review with deference only to the factual findings by the lower court.

Due to a lower court's evidentiary ruling based primarily on this Court's November 29, 2006 denial to accept jurisdiction in *Armstrong vs. State*, Case SC06-549, the lower court refused to consider Dr. Simon Cole's evidentiary hearing testimony regarding the fallibility of fingerprint science and evidence. The Appellant here relies on the extensive proffer of Dr. Simon Cole located at PC ROA Vol. XXXII, 349-419, presented at the evidentiary hearing to support the claim that trial counsel was ineffective in the case at bar for failure to consult an expert such as Dr. Simon Cole to rebut the State's forensic fingerprint evidence in this case. The Appellant asks this Court at the very least to remand this case back to the lower court for consideration of Dr. Simon Cole's testimony regarding fingerprint science and trial counsel's omissions in this regard (*See* Appellee's Motion to Exclude Testimony of Doctor [Cole] at PC ROA Vol. VI, 1116-1118, Appellant's Response at PC ROA Vol. VI, 1178-1200, and PC ROAVol. VII 1201-1221).[31]

Prior to this Court's denial of jurisdiction in the *Armstrong* case regarding the

[31]No written order was rendered on the issue of the admissibility of Dr. Simon Cole's testimony. Dr. Cole testified as a proffer at the evidentiary hearing. The Appellant urges this Court to in effect reverse the 3rd DCA's ruling in *Armstrongv. State*, 920 So. 2d 769 (Fla. 3rd DCA 2006), and side with the lower court's ruling on that issue: *see* Miami-Dade11th Circuit Senior Judge Charles D. Edelstein's Order, attached to Appellant's Response at PC Vol. VI, 1195-1199. Judge Edelstein justifiably found Dr. Cole's testimony to be "relevant," he found Dr. Simon Cole to be "fully qualified" as an expert, and regarding scientific reliability of his testimony, the judge assured that "the jury will not be confused nor led down the primrose path" with Dr. Cole. [PC ROA Vol. VI, 1199.]

admissibility of Dr. Simon Cole's testimony, there was a complex federal case that addressed issues of the admissibility of the science of fingerprinting and surrounding issues of Dr. Simon Cole's proposed testimony. *See U.S. v. Mitchell*, 365 F. 3rd 215 (3rd Cir. 2004). In that particular case, Mitchell challenged the admissibility of fingerprint evidence under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) using the testimony of Dr. Cole and other experts in the field; once the pre-trial challenge to the fingerprint evidence was denied, Mitchell sought to have Dr. Cole testify at trial about the unreliability of fingerprint evidence. The trial court ruled that Dr. Cole would not be permitted to specifically testify that fingerprinting was not a "science." The defense in *Mitchell* argued that in effect, the trial court improperly excluded the testimony of Dr. Cole. The 3rd District Court of Appeal ruled that there was a failure to preserve the issue at trial:

> Mitchell could have asked the Court whether Prof. Starrs and Dr. Cole would be permitted to testify as to the reliability of fingerprint identification, provided that they did not opine on the irrelevant issue of whether it was science. Instead, he accepted their exclusion. Mitchell could have proffered the subject matter of testimony he would like to present. Instead, he proffered the witnesses he would like to call. Mitchell could have attempted to put his witnesses on the stand to preserve his objections. Instead, they never appeared at trial.
> *Mitchell* at 251.

Implicit in the 3rd Circuit Court of Appeal's ruling is the notion that Dr. Cole *would* be permitted to testify about the unreliability of fingerprint evidence. His testimony could aid the trier of fact, and it is relevant. But, the defense in *Mitchell* failed to request that

he be permitted to testify on the issue of fingerprint unreliability. So in effect, the issue was not preserved for appeal regarding the admissibility of Dr. Cole's general testimony. In the case at bar, Dr. Simon *did* testify as a proffer at PC ROA Vol. XXXII, 349-419. As his testimony shows, Dr. Cole is well-qualified, and his testimony is relevant to the issue of reliability of fingerprint evidence. His testimony would certainly meet the requirements of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) as it has a general acceptance in the scientific community.

Fingerprint Evidence--Failure to Object–Tom Jones' Testimony

Regarding this claim, in a nutshell, a defense objection regarding fingerprints was sustained at trial, and the trial court ruled that because a direct examination question to the State's fingerprint expert would yield only layman knowledge and not expert knowledge, the court would not allow the expert to answer a certain question regarding the length of time that a fingerprint may remain on a faucet. [Nugent Dir. ROA Vol. IX, 706]. The State then crafted a similar question that queried how long a print may last on a metal water pitcher after multiple touches by different people. No objection was made and the State expert testified that one may not leave traceable prints behind if someone else touched an object after one person touched it. [Nugent Dir. ROA Vol. VI, 718]. The lower court basically ruled in its Order that because these trial questions were not identical, PC ROA Vol. VII, 1604-1607, it was not ineffective for counsel to fail to object to the second question.

But the premise of the question was the same, and trial counsel should have objected. The water pitcher question still involved pure layman knowledge, not expert knowledge. This issue was critical as the jury returned from their deliberations and inquired about the fingerprints located on the hot and cold water faucets in Ms. Nugent's home. [Nugent Dir. ROA Vol. XII, 1232-1233.] Through improper expert testimony, the State was able to convince the jury that because the Appellant's fingerprint was found on the faucet, and Ms. Nugent's print was not on the faucet, the Appellant was the last person to touch the faucet, and therefore he killed her. This was improper, and the lower court's ruling on this issue erroneous.

Fingerprint Evidence–Break In the Chain of Custody

Regarding the fingerprint cards and the break in the chain of custody in the submission of these items to the property room at Tampa Police Department, the lower court failed to acknowledge the clear violations of standard operating procedures in this regard. There is a clear break in the chain of custody on these important items from February through August of 1997. Tampa Police Department could not account for these items during a seven month time frame. [See Evidentiary Hearing testimony of Tampa Police Department's Lincoln Peterson and Joan McIlwaine Green at PC ROA Vol. XXXII, 419-468, as well as Herbert Bush at PC ROA XXXXII, 1471-1503].

DNA Evidence–Denial of Request for CODIS Submission

Regarding a DNA sample extracted from blood found on the victim's glass chrome table, trial counsel was ineffective for failing to request that this DNA sample be submitted into CODIS to see if it matched any known violent felons who might have committed this murder. The lower court erred in refusing to grant postconviction counsel's request for CODIS submission and comparison of this DNA sample (*see* Motion for CODIS Submission at PC ROA Vol. VII, 1237-1245, the State's Response to Motion and Supplement to Response at PC ROA Vol. VII, 1227-1236, 1224-1226, the Appellant's Reply to State's Response at PC ROA Vol. VII, 1251-1254, and finally the Order denying same at PC ROA Vol. VII, 1453-1496). The Appellant urges reversal of the lower court's Order on this issue. Just this year in Illinois, a federal court ordered that the FBI perform a manual keyboard search and submit a particular DNA sample in a criminal case to the FBI national criminal databank to identify a possible perpetrator of a rape and murder (*see Rivera v. Mueller*, 596 F. Supp. 2d 1163 (U.S. Dist. Ct., N.D. Ill, 2009) (held, "The court thus concludes that the FBI acted arbitrarily in refusing to proceed with the keyboard search." *Id.* at 1173.) This Court should reverse the lower court and Order the State to submit the known DNA profile in this case extracted from the blood lifted from the victim's table into the CODIS databank.

On page 72 of the Order, PC ROA Vol. IX, 1619, the lower court finds that the Appellant failed to show that the DNA profile from the blood on Ms. Nugent's table

could have been submitted into the CODIS system. It *could* have been submitted into CODIS, there should be no disputing that. Author Dennis J. Reeder, Ph.D. wrote an article in 1999 that was submitted to the "Archives of Pathology and Laboratory Medicine" (Vol. 123, No. 11, pp. 1063-1065) entitled "Impact of DNA typing on Standards and Practice in the Forensic Community." In that article, the author stated,

> A DNA data bank was first used in 1991 to identify a criminal suspect accused of the rape and murder of a 23-year-old Minneapolis woman. A sperm sample was the only clue police had to go on. However, a search of Minnesota's data files of DNA RFLP profiles from convicted offenders revealed the link that detectives needed. The DNA profile from the sperm sample matched the DNA profile obtained from a formerly convicted sexual offender, Martin Perez. Perez was swiftly tried and convicted.

CODIS *was* available to the criminal justice system in Florida since the early 1990s, as described in the above article. The lower court was wrong to find in its Order that the blood was "[in]capable of submission to CODIS." [PC ROA Vol. IX, 1619]. It should have been submitted to CODIS at the time of trial. Had the blood on the table matched a known violent felon, that would have placed this case in a entirely different perspective.

CLAIM IX

CUMULATIVE ERROR

Due to the errors that occurred individually and cumulatively in the lower court, this Court should grant relief from this unconstitutional conviction and death sentence, and/or remand for further postconviction proceedings.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Johnston respectfully urges this Honorable Court to reverse the circuit court's order denying a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by U.S. Mail to all counsel of record on this ____ day of November, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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