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

REPLY BRIEF OF THE APPELLANT

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[1]Only the Westlaw citation is currently available for this case.

STATEMENT OF THE CASE AND OF THE FACTS–REPLY

It is noted that pages 1-6 of the State's "Statement of the Case and Facts" is simply a block quote from portions of this Court's direct appeal opinion in *Johnston v. State*, 863 So. 2d 271 (Fla. 2003). The Appellant does not dispute that this was the Court's understanding of the facts of this case in 2003. But the Appellant submits that there have been significant developments since that time, and the factual and procedural landscape of this case has become more complex in this postconviction posture.

On pages 7-14 of its Answer, the State merely summarizes a fraction of the testimony, evidence, and procedural history from the penalty phase and the *Spencer* hearing. The State fails to summarize and mention vital evidence that supports relief in this case. The State cites to the testimony of brother Max Allen Johnston, but fails to mention the testimony wherein Max Allen Johnston suggested that Ray Lamar Johnston should perhaps be executed. For example, the State fails to mention the testimony where the brother says, "Don't let him out. . . . I can't shackle him. I can't shoot him. I can't tie him down. . . .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. . . .and they

plea bargained, all American plea bargain. No offense against you guys [meaning the defense attorneys], but he was not the right one to plea bargain. Unfortunately [the plea bargain] cost that girl, her mother, her life." (DA Vol. 19 / 2134-2135).

And when asked by Mr. Hyman, "Would you prefer the jury recommend a life prison sentence for your brother rather than execute him," he answered, "I have never been to a trial that he's had. . . .I've been appalled at the things he's done. . . .You don't even deserve to be caged up like an animal. . . ." (DA Vol. 19 / 2135-2136). He continues to ramble about uncharged offenses until he describes the his brother's crime as "atrocious." (DA Vol. 19 / 2137). Finally, the brother criticizes the State system for failing to get his brother some help or treatment, and concludes weakly, "I don't think it's right for that state to kill him." (DA Vol. 19 / 2138). Perhaps finally realizing that probably was not a good answer, and this was not a good witness at all for the defense at the penalty phase, Mr. Hyman announces, "I have no further questions for this witness." (DA Vol. 19 / 2138).

At pages 14-19 of its Answer, the State offers a woefully inadequate summary of the very extensive evidentiary hearing testimony. The State attempts a summary of only two of the witnesses presented at the evidentiary hearing, again failing to mention portions of the testimony that support relief in this case. This

Court should not rely on this woefully-inadequate, attempted, then obviously aborted State-summarization of the powerful evidence the defense presented at the postconviction evidentiary hearing.

The sad "facts" here are that Harvey Hyman called brother Max Allen Johnston to the penalty phase even though Carolyn Fulgeira's memo obviously advised against it. Defense Exhibit 8, Ms. Fulgeira's March 4, 1998 two page memo about Max Allen Johnston, concludes that Max describes life with Ray as "a horror movie full of madness and turmoil." (PC Vol. 10 / 1944). In Defense Exhibit 10, a March 12, 1998 e-mail from attorney Joseph Registrato to the defense team, subject heading: "Notice to State of Phase Two Witnesses, Ray Johnston Case," Mr. Registrato agreed, "I think the lay witnesses should be only those we can count on to be solidly behind us. A moment's hesitation from his own sister could be construed by the jury as her knowing something about him they don't." (PC Vol. 10 / 1948).

Max Allen Johnston obviously was not "solidly behind" the defense. Defense Exhibit 8, the Carolyn Fulgeira investigative memo, was clear that Max Allen Johnston told the defense during the pre-trial interview, "Not a whole lot of loss if they get rid of him by injection or any other means. He serves no purpose

on this earth." (PC Vol. 10 / 1943). One cannot have confidence in the penalty phase verdict viewing Max Allen Johnston's testimony. One should not have confidence in the lower court's order finding the decision to call this witness non-prejudicial, reasonable trial strategy.

At page 18 of the Answer, the State cites to a memo from the defense files regarding alleged negative information from PET scan expert Dr. Frank Wood. What the State fails to mention here is that the penalty phase attorney who called Max Allen Johnston to the stand, Harvey Hyman, *never once spoke with Dr. Wood prior to this trial*. Harvey Hyman admitted, "I never talked to that guy." [PC Vol. 41 / 1391]. And this is the same attorney with the colorful disciplinary history described in *Izquierdo v. State*, 724 So. 2d 124 (Fla. 3rd DCA 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 (Fla. 3rd DCA 1999). Mr. Hyman's conduct was so bad that the 3rd DCA gave the trial court an option to dismiss after remand:

> 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).

Izquierdo, *Id*. at 126

And the case at bar was Harvey Hyman's first penalty phase. At the very least, the penalty phase in this case needs to be tried again due to Mr. Hyman's complete incompetence.

SUMMARY OF THE ARGUMENT–REPLY

On page 19 of the State's brief, the State in their one page "Summary of the Argument" again characterizes the Appellant's *Giglio* claim as "nefarious," and once again suggests that it should be stricken. This Court previously denied the State's "Motion to Strike Initial Brief for Failure to Comply with the Florida Rules of Appellate Procedure," and their suggestion that the claim should be stricken should again be disregarded. Merriam-Webster's online dictionary defines "nefarious" as "flagrantly wicked." That characterization is a bit harsh for a routine appeal of the denial of a lower court's order on a postconviction claim.

The record evidence in this case does support the claim that Dr. Julia Martin's testimony was improperly influenced by the State, and that it in fact changed to support the State's *Williams* Rule application. Evidence that the Appellant may have committed a completely different murder should not have been admissible at the guilt phase of this murder trial. The lower court was wrong

to deny relief on this claim, as well as the Appellant's other claims. The fact that the Appellant has chosen to appeal the lower court's order does not make his claims flagrantly wicked. Mr. Johnston has a right to appeal the denial of his postconviction motion.

ARGUMENT–ISSUE [I]–THE IAC / PENALTY PHASE CLAIM–REPLY

On page 20 of their Answer, the State cites to "*Pagan v. State*, 2009 WL 2136337 (Fla. 2009)" to support the denial of the claim involving penalty phase witness Max Allen Johnston. This is the penalty phase witness who advised in a pre-trial interview with Ms. Fulgueira: "Not a whole lot of loss if they get rid of him by injection or any other means. He serves no purpose on this earth." (PC Vol. 10 / 1943). *Pagan* does not support the lower court's unreasonable denial of this claim. *Pagan* does not hold that it might be reasonable for a defense attorney to call a witness to the penalty phase who thinks his brother should be executed.

The State then repeats the standard from *Maxwell v. Wainright*, 490 So. 2d 927, 932 (Fla. 1986) at pages 20-21. The Appellant welcomes that standard in this appeal. The Appellant submits that calling a family member who actually advocates for death is *outside* the "broad range of reasonably competent performance under prevailing professional standards." *Maxwell*, *Id.* at 932.

Furthermore, one's "confidence in the outcome is undermined" (*Maxwell. Id.* at 932) in the result of the this penalty phase in light of Max Allen Johnston's trial testimony (*see* DA Vol. 19 / 2131-2141), the pre-trial investigative memorandum that warned of his pre-trial position (*see* EH defense exhibit 8, PC Vol. 10 / 1942-1944), and defense attorney Joseph Registrato's pre-trial memorandum wherein he obviously and justifiably decided against calling Max Allen Johnston as a penalty phase witness (*see* EH defense exhibit 10, PC Vol. 10 / 1948).

On page 21 of the State's Answer, they quote the lower court's order, claiming that the lower court "cogently explained" that "[Harvey Hyman] never thought anything about Allen's testimony was going to be inconsistent with his defense theory." The problem with the lower court's order is that it gives Harvey Hyman and his testimony about his alleged strategy and defense theories completely too much credit. Defense exhibit 8 revealed that Max Allen Johnston preferred that his brother be executed. If the defense theory was that Ray Johnston should be executed, then it might be reasonable to call his brother to the penalty phase. But Harvey Hyman was supposed to be advocating for life, not death. A review of the penalty phase transcript shows that Mr. Hyman was advocating against Ray Johnston, not for him.

The State block quotes from portions of the lower court's order at pages 21-24 of its Answer. The Appellant does not dispute that this is the lower court's order. But, he submits that the findings concerning the decision to have Max Allen Johnston testify against his brother at the penalty phase are completely unreasonable unless Harvey Hyman was joining the State in seeking death for the Appellant.

On page 25 of its Answer, the State claims that Harvey Hyman "reviewed the Public Defender Files, which included the discovery materials and work product materials compiled by mitigation specialist, Carolyn Fulgueira." This is contrary to Mr. Hyman's actual testimony on this issue. Mr. Hyman testified as follows when asked by the State "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 Vol.41 / 1341-1342]

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 Vol. 34 / 510]

The State mentions on page 25 that "Hyman became involved in the decision-making for the second penalty phase by at least January 10, 2001. The problem is, that was just 90 days prior to the penalty phase in a three year old case that contained approximately 18 banker's boxes of file material. 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 Vol. 41 / 1384-1385].

It is coincidental that on page 26 the State mentions that Ray Johnston's mother "distanced herself from errors in Johnston's development." Both Max

Allen Johnston and Harvey Hyman distanced themselves from the errors in Ray Johnston's development as well, both in childhood and at trial, respectively. At the same page, the State mentions Mr. Hyman's testimony that the he did not view the "negative information in Ms. Fulgeira's memo as something the defense should run from." Yes, it was something the defense should run from! There was no need to put Max Allen Johnston on the stand. All of the other attorneys on the case prior to Harvey Hyman realized that they should run from the Max Allen Johnston information, from the uncharged attack on the prostitute, the mention of bad plea bargains, and advocacy for death. Whether from inexperience, lack of preparation, or a combination of both, Mr. Hyman was grossly ineffective in calling Max Allen Johnston as a witness to the penalty phase.

Also at page 26 of the State's Answer, it praises the significance of Max Allen Johnston's testimony that Ray was like a "zombie" when he returned home from the hospital one time in his youth. Counsel is unaware of any case law in this State that scores high for the "zombie mitigator." Obviously the "zombie mitigator" was outweighed in this case by this witness's wavering and vacillating testimony regarding the suitable punishment for his brother, life or death. On this point, Mr. Hyman candidly admitted:

> 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 Vol. 41 / 1418]

Had Mr. Hyman carefully read defense EH number 8, the one that mentioned "Not a whole lot of loss if they get rid of him by injection or any other means. He serves no purpose on this earth." (PC Vol. 10 / 1943), Harvey Hyman hopefully would have realized that the answer to the life or death question was something he as a defense attorney should run away from. The State would be prohibited from presenting such impermissible, inflammatory, and prejudicial evidence at a penalty phase. This Court should not accept the lower court's commendation of this attorney's substandard practice and "reasonable strategy."

On page 28 of its Answer, the State makes the very bold claim that "Mr. Hyman's decision – to call Max Allen Johnston at the second penalty phase – was the epitome of a strategic decision." The Appellant submits that this decision was actually the epitome of IAC. This Court would not tolerate the State's presentation

of such evidence, and this Court likewise should not tolerate the defense presentation of such evidence.

At pages 29-32, the State block quotes the lower court's order regarding other issues surrounding Harvey Hyman's controversial penalty phase presentation. As seen from the first paragraph of the block quote, the lower court found *Davis v. State*, 872 So. 2d 250 (Fla. 2004) and *King v. Strickland*, 748 F. 2d 1462 (11th Cir. 1984) to be "distinguishable" from the case at bar. Yet, noticeably absent from the lower court's order is any further analysis besides the mere conclusory statement that these cases are "distinguishable." The Appellant urges here that the cases are on point and warrant at least penalty phase relief. This Court, just as it did not tolerate the defense attorney's outwardly racist conduct towards his client in *Davis*, should not tolerate Mr. Hyman's outwardly belittling, dismissive and sarcastic treatment of the Appellant at trial. And just as was reminded in *King*, a case that was first affirmed by this Court, "[an attorney'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." *King, Id.* at 1468, reversing *King v. State*, 407 So. 2d 904 (1981). It was outside the extreme range of accepted professional judgment and practice for Harvey Hyman to

sarcastically belittle his client in front of the jury, to call Max Allen Johnston as a witness to advocate for death, and to repeatedly remind the jury that it was generally no picnic to represent or to live with Ray Johnston.

There can be no more "distancing" himself from a client than saying you have no further questions of a witness, then stopping, turning to an inquiring client while the jury is watching, hesitantly receiving input from that client, then turning to the jury and judge and saying sarcastically, "Hold on. It's something earth shaking I got to find out first." [DA Vol. 19 / 2171]. That not only alienates and belittles one's client but it also completely undermines the client's cause for life. Mr. Hyman candidly 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 Vol. 41 / 1447]

On page 34 of its Answer, the State reminds that "the trial court did not find that Mr. Hyman took an adversarial role against his client." This finding is clearly refuted by the record, and this Court should reverse. The derision actually came early in *voir dire* when Harvey Hyman was curiously sharing an emotional moment with the jury, strangely glorifying and previewing the victim impact evidence that the jury would hear:

> It's going to be very moving testimony. I'm telling you, you're going to be crying. I would. I mean, you're human. You're going to be– relax for a moment. I heard you (addressing the defendant).

[DA Vol. 17 / 1778]

This Court should not affirm a lower court's ruling that fails to acknowledge that Mr. Hyman was taking an adversarial role against his client. In the evidentiary hearing testimony cited above, clearly Mr. Hyman admitted that he addressed the Appellant in front of the jury with "sarcasm." PC Vol. 41 / 1447. This Court should not affirm the lower court's order denying penalty phase relief.

ISSUE II – IAC/PENALTY PHASE CLAIM

(Mental HealthMitigation)–REPLY

Regarding Issue II, the State merely block quotes the lower court's Order at pages 38-49 of its Answer brief. The State's repeated, mere recitation of the lower court's order on these issues does nothing to support the erroneous denial of relief.

Contrary to what was stated in the lower court's order, Dr. Cunningham explained how the penalty phase presentation was lacking in this case. This Court should not affirm denial of relief in a death penalty case where, when asked if he spoke to the PET scan expert used in the first trial, the attorney answered, "I never talked to that guy." [PC Vol. 41 / 1391]. And this is the same attorney who chose to called Max Allen Johnston in Dr. Wood's stead to explain the Appellant's brain damage. The lower court was wrong to accept Harvey Hyman's strategy, and was wrong to disregard Dr. Cunningham's testimony, including his diagnosis of Attention Deficit Hyperactivity Disorder (ADHD).

ISSUE III – THE GIGLIO CLAIM

(Based on Dr. Julia Martin)–REPLY

In the State's Answer to this issue on page 52, they begin stating that "CCRC repeats their nefarious accusations against the medical examiner."

Merriam-Webster's online dictionary defines "nefarious" as "flagrantly wicked" and "evil." That characterization of this claim quite harsh, especially in light of record evidence that clearly illustrates that Dr. Martin changed her true opinions in this case to support the State's *Williams* Rule campaign. The lower court's order was wrong to deny this claim in the face of record evidence to support this claim. There is nothing nefarious about the appeal of the denial of this claim.

Once again, on pages 53-59, the State block quotes the lower court's order denying this claim. Immediately following the block quote, on page 59 of its Answer, the State says that "Johnston's renewed argument is replete with irresponsible accusations, insinuations, and *ad hominen* attacks." Certainly this is not the first appeal of the denial of a *Giglio* claim that the State has seen. The State's Answer, seemingly suggesting that Mr. Johnston has no right to appeal this claim, is actually replete with inappropriate hyperbole and histrionics. The only thing irresponsible about this claim is the medical examiner's manufactured change of opinion to suit the *Williams* Rule determination.

The puzzling aspect of the denial of this claim is that the medical examiner's change in opinion is so very clear on the face of the record (*see* defense EH exhibit 4, specifically, the 9/27/00 entry in Dr. Martin's October 2, 2000 contact log, never

disclosed prior to post-conviction, PC Vol. 10 / 1827). The State was able to effectively campaign for *Williams* Rule evidence of a prior murder based on the fact that Ms. Coryell and Ms. Nugent were both beaten in the buttocks with a belt. The 9/27/00 entry reflects that Dr. Martin later came to opine that Ms. Nugent's injuries were caused by a vacuum cleaner hose. In the State's own "Additional Notice of Discovery" filed September 28, 2000, they 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.

[DA Vol. 3 / 430]

When the *Williams* Rule evidence became threatened because of this change in opinion, Dr. Martin then retreated to her previous wavering opinion that a belt may have actually caused the injuries. Actually, she incredulously became more certain that a belt was used after her cell phone conversation with the State during the defense motion for reconsideration of the *Williams* Rule evidence. Regarding the opinion that a belt was used, the only reason she did this was because she was informed by the State that the lower court informed:

> 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.

[DA Vol.8 / 581-582]

Contrary to the State's argument on page 59 of their brief, this "renewed argument" should not be "stricken." That motion was already denied and therefore it is procedurally barred. This claim should be granted because the lower court was wrong to overlook the blatant manufactured change in Dr. Martin's opinion. The Appellant should be afforded a new trial here that does not feature or include *Williams* Rule evidence of the commission of a prior murder.

ISSUE IV–THE IAC/GUILT PHASE CLAIM

(Based on Johnston's Testimony at Coryell Penalty Phase)–REPLY

Regarding Issue IV, again, the State simply block quotes the lower court's order a pages 61-64. The testimony at the evidentiary hearing was unrefuted that trial counsel failed to admonish the Appellant that a Coryell penalty phase confession could result in its admission during the guilt phase of the Nugent trial. On page 63 of the State's Answer, it repeats that portion of the order that mentions that Kenn Littman "could not recall having specifically warned Defendant that his confession during the Coryell penalty phase might be used against him in a

separate future case." But contrary to the lower court's order, there certainly is record evidence demonstrating that defense counsel knew that a charge in the Nugent case was coming. The record evidence is clearly seen in the Coryell trial transcript where Kenn Littman actually says to the court that there is a possibility that "he's going to be charged with the murder of a woman named Janice Nugent." (*see* Coryell DA Vol. 14 / 1166-1167). It was absolutely deficient performance to fail to warn the Appellant of the dangers of a penalty phase confession in Coryell. The confession obviously prejudiced the Appellant at the Nugent trial.

Attorney Gerod Hooper testified that he saw "no reason not to" put the Appellant on the stand [Coryell PC Vol. 56 / 1075] and admit the Coryell murder. Mr. Hooper "assumed [the lead attorney] was in favor of it." [Coryell PC Vol. 56 / 1075]. Mr. Hooper testified further:

> Q. As far as any–any advice that might or might not have been given to Ray Lamar Johnston regarding his decision to testify, you don't recall any strenuous advice such as, Ray, you really don't want to take the stand in this case?
> A. Oh no, no.

[Coryell PC Vol. 56 / 1076]

Knowing that a charge was forthcoming in the Nugent case, and failing to warn the Appellant of the dangers that a confession might be introduced in that case, and

allowing him to confess to the Coryell murder without admonishments, constitutes ineffective assistance of counsel. Contrary to the lower court's finding repeated at page 64 of the State's Answer, the Appellant was pressured to testify, he was not given warnings about his testimony, and the advice encouraging testifying was ineffective. The lower court actually makes the clearly erroneous finding that "neither Mr. Registrato nor Mr. Littman knew or should have known that Defendant would be charged with the Nugent murder." [PC Vol. 8 / 1580]. This completely flies in the face of the record evidence where Kenn Littman actually says to the court before his closing argument that there is a possibility that "he's going to be charged with the murder of a woman named Janice Nugent." (*see* Coryell DA Vol. 14 / 1166-1167). These lower court's findings cannot be affirmed. Relief and reversal of the lower court's order is warranted.

ISSUE V

THE IAC/GUILT PHASE CLAIM (Failure to Seek Suppression)–REPLY

Regarding Issue V, the suppression issue, once again the State simply block quotes the lower court's order at pages 66-71. The State's argument engages in some quick double speak on page 66. At the top of page 66 they are wrong to claim that this claim is procedurally barred. The fact is, the defense failed to file a

motion to suppress in this case. The Appellant has shown that this failure constitutes ineffective assistance of counsel. The State seems to finally concede, after first raising a procedural bar argument at page 66, that this claim is "properly raised in postconviction."

Following the block quote from the lower court's order, contrary to the State's argument at page 72, the "experienced" trial counsel here did not make a reasoned strategic decision on this issue. Trial counsel failed to research the suppression issue, failed to consider that the interrogation on the case unrelated to the invocation of rights form was "imminent," and failed to move to suppress the prejudicial statements introduced against the Appellant at trial.

Regarding unreliable testimony relied upon by the lower court in its denial of relief, during the hearing Mr. Littman testified that Ray Johnston "was not in custody" at all when he made the statements [PC Vol. 35 / 596]. This is clearly erroneous testimony. At the time that Mr. Johnston made statements in connection with the Nugent case, *he was in jail*. He had been arrested on the Coryell case, and he was obviously in custody on that charge. Mr. Littman also testified that Mr. Johnston "initiated contact with the police on his own." [PC Vol. 35 / 596]. This is also clearly erroneous. After the arrest on the Coryell case, the detectives went

to the jail, summoned him, and encouraged him to speak about his relationship with Ms. Nugent.

Indeed, Kenn Littman testified as follows, "The law says he has to invoke [*Miranda*] at the time interrogation begins. He never did that." But, in reality, *Sapp v. State*, 690 So. 2d 581 (Fla. 1997) says that if questioning regarding a separate offense is "imminent," when a suspect signs an invocation of rights form in one offense, those rights will protect against the imminent interrogation on another offense. "[A]t least three federal courts of appeal agree in the wake of McNeil that the Supreme Court, presented with the issue, would not permit an individual to invoke the Miranda right to counsel before custodial interrogation has begun or is imminent. [citations omitted]. We agree with this interpretation of McNeil." *Sapp, Id.* at 585. In the case at bar, the morning that Ray Johnston signed the invocation of rights for the Coryell murder, the police wanted to speak with him about the Nugent murder. And they did in fact question him that very same day. As such, trial counsel *should have* filed a motion to suppress, and the statements *should have* been suppressed.

The lower court analyzed *Sapp, Id.* as follows, as repeated by the State at page 70 of the Answer: "The Court concluded the claim of rights form executed

before custodial interrogation had begun or was imminent was ineffective to invoke Fifth Amendment Miranda right to counsel." Because it is obvious here in the case at bar that interrogation in the Nugent case was imminent, the accompanying constitutional protections should have been afforded with the Petitioner's signed invocation of rights form.

A similar situation arose in the case of *Thompson v. State*, 987 So. 2d 163 (Fla. 3rd DCA 2008). In that case, a DUI suspect invoked his right to counsel during a DUI investigation. Then the next morning, he was contacted by detectives regarding an unrelated robbery, he waived his rights, and he confessed to a robbery. The lower court's order suppressing the confession was upheld based on the following reasoning:

> When Thompson invoked his right to counsel several times in the DUI intake room, he could no longer be questioned, as the trial court found, "on any matter." We can only assume that Thompson's unwillingness to answer police questions continued during his twelve-hour stay in jail. The fact that police reinitiated contact, and not Thompson, creates a presumption of coercion in Thompson's subsequent waiver, and this presumption does not dissipate with a later reading of *Miranda.* We therefore find that the trial court was correct in suppressing Thompson's confession.

Thompson, Id. at 166.

> Miranda rights are not investigation-specific; once invoked, they apply to subsequent custodial interrogations even if those interrogations are unrelated to the offense for which the suspect is in custody. *See Arizona v. Roberson*, 486 U.S. 675 (2008) (holding that a suspect's request for counsel indicates an unwillingness to answer without an attorney present any questions police may pose, and this unwillingness is not investigation-specific). Finally, prolonged police custody of a suspect after that suspect requests counsel creates a presumption that any subsequent waiver of *Miranda* rights is the result of police coercion.

Thompson, *Id*. at 165.

In the case at bar, the Petitioner's Invocation of Rights form (see Defense Exhibit 11 at PC Vol. 10 / 1950) signed August 22, 1997 should act to invalidate any waiver that might have been attempted by Detectives Stanton and Noblitt on the Nugent case. The first interrogation on the Nugent case actually took place the very same afternoon of first appearance court, August 22, 1997. It must be noted that Kenn Littman was not even Ray Johnston's attorney at the time these interrogations were taking place, therefore he should not be attempting as he did at the evidentiary hearing to suggest that Mr. Johnston was making contact with law enforcement in the first place . (*see* Coryell DA Vol. 1 / 80-83, *attorney Deb Goins* filed the "Motion for Protective Order" with accompanying 9/4/97 letter to Stanton and Noblitt admonishing them that she represents him, she is aware they "have been to the jail to see [him]," and that "he does not wish to talk to any law enforcement personnel concerning any matter.")

The fact that Assistant State Attorneys Nick Cox and Shirley Williams were contacted by the detectives and asked about interrogating the Appellant on the Nugent murder further shows that the Nugent interrogation was imminent at the time the Appellant signed the form on Coryell. The lower court was wrong to find as recited on pages 70-71 of the State's Answer: "There was no evidence presented that at the time the Defendant executed the invocation of rights form at first appearance court, a custodial interrogation regarding the Nugent case had begun or was imminent." The timing of the signing of the form and timing of the interrogation, mere hours lapsing in between those two events, is enough supporting evidence to show that the Nugent interrogation was imminent.

ISSUE VI--REPLY

THE IAC/GUILT & PENALTY PHASE CLAIM (Failure to Inform of the Psychotropic Medications)

Regarding Issue VI, the medication issues, the State block quotes the lower court's order at pages 73-79 of its Answer. The point here is that because the Appellant's trial testimony from the Coryell case was read at the guilt phase of the Nugent case, steps should have been taken to negate the effects of that prejudicial testimony and confession. The jury in Nugent should have been informed that the Appellant was heavily medicated and sedated at the time that he testified in Coryell. This would further support Mr. Johnston's mental health mitigation as well.

On page 79 of the Answer, the State claims that "although Johnston was taking medications for various medical complaints, the experienced defense team had no indication that Johnston 'was on any kind of medication that affected his ability to knowingly, intelligently and voluntarily testify. That was never an issue'." The "experienced defense team" here apparently did not think to even ask Mr. Johnston what medications he was taking at the time of trial. Gerod Hooper said that he was not informed that Mr. Johnston was taking psychotropic medications, and had he known that, he might have requested a jury instruction to be provided in conjunction with Mr. Johnston's testimony. [Coryell PC Vol. 51 / 1076-1079]. If trial counsel is unaware of the medications that the client is taking, trial counsel is obviously going to miss that issue. This case involves an individual with a severely-damaged brain who was taking numerous medications at the time of his trial testimony. This Court should consider Dr. O'Donnell's testimony and grant appropriate relief.

ISSUE VII

SUMMARY DENIAL OF REMAINING CLAIMS–REPLY

Regarding Issue VII, at the very least, the Appellant should have been afforded an evidentiary hearing pursuant to Fla. Rule Crim. Proc. 3.851(f)(5)(A)(i). This was not a successive 3.851 motion, therefore the summary denial provisions

of 3.851(f)(5)(B) should not have been considered or utilized by the lower court to deny an evidentiary hearing.

At page 81 of its Answer, the State seems to concede that an evidentiary hearing was warranted on at least one of the summarily denied claims "sub-claim (b) (IAC/penalty phase/failure to object to a verbal [jury] instruction and failure to request additional [jury] instructions)." As such, this issue should be remanded back to the lower court for an evidentiary hearing on that issue. The remaining summarily denied claims should also be remanded back to the lower court for an evidentiary hearing.

On page 82 of the Answer, the State mentions that the lower court held that any challenge to the substance of the of the jury instruction was "procedurally barred." It should not be procedurally barred because lacking in the transcripts is any objection. Therefore trial counsel was ineffective for failing to preserve this issue. As for fundamental error, indeed appellate counsel should have raised this issue on direct appeal. But, in addition, an evidentiary hearing should have been granted to see why trial counsel failed to object to the jury instructions in the first place. The State then mentions at page 82 that as to the "IAC/sub-claim," the lower court failed to find prejudice because the written instructions included the correct mitigation standard.

The prejudice here is clear. Trial counsel's failure to object to the erroneous jury instruction contributed to appellate counsel not believing that this grave error could be raised on direct appeal as fundamental error. When appellate counsel failed to raise this issue as fundamental error on direct appeal, he failed to get the Appellant relief from his sentence of death. The failure to raise this claim as fundamental error on direct appeal led to the death sentence being affirmed.

As our United States Supreme Court reasoned while evaluating whether a lesser-included instruction should be given in a capital case, and they feared the *risk* of an unwarranted conviction in the absence of the jury instruction: "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). In the case at bar, there certainly is, at the very least, a *risk* that the jurors who recommended death did so with the mis-guidance of an erroneous jury instruction. The particular jury instruction at issue governs the standard of proof for mitigation. Because it was incorrect, the jury could have completely misapprehended the Constitutional bedrock of the law of capital sentencing. As such, relief is proper, and a new penalty phase should be granted due to the erroneous penalty phase jury instruction.

The State again block quotes the lower court's order at pages 82-86 of its Answer concerning this issue. The Appellant has already stated in his initial brief

why the lower court's order was wrong on this issue, therefore no additional discussion will be made here.

The State cites to *Doorbal v. State*, 983 So. 2d 464 (Fla. 2008) on page 86 of its Answer to support summary denial. *Doorbal* does not authorize the sweeping summary denials that were made by the lower court in this case. Remand is warranted.

ISSUE VIII

IAC/GUILT PHASE CLAIM–FINGERPRINTS/DNA–REPLY

Regarding Issue VIII, the fingerprint issues, the State relies heavily on *State v. Armstrong*, 920 So. 2d 769 (Fla. 3rd DCA 2006) to support the denial of this claim. The Appellant submits that trial counsel was ineffective for failing to consult an expert such as Simon Cole to refute the perceived reliability of fingerprint identification. The State points out that the lower court relied on *Armstrong* to deny relief.

The State cannot rely on *Armstrong* to refute this claim because that is a 2006 case. When this trial was pending, *Armstrong* had yet to be issued. There was no bar on the admissibility of expert testimony in this area at the time this case was tried. Furthermore, *Armstrong* was decided wrongly. In the case at bar, the core issue if defense counsel's failure to consult a fingerprint expert such as Dr. Simon Cole to cast doubt on the reliability of the forensic evidence in this case.

The reality is, at the time of the Appellant's trial, Dr. Cole and other experts in the field were available to testify. At the time of trial, there was no opinion in the State of Florida that would have barred the admissibility of Dr. Cole's testimony. As such, trial counsel was ineffective for failing to consult an expert in Simon Cole's field. Before the release of the 3rd DCA's opinion in *Armstrong*, an Eleventh Circuit (Miami-Dade) judge made the following findings concerning Dr. Simon Cole:

> Dr. Cole's Education and Professional Background
>
> The witness hold a Ph. D. degree from one of the oldest and most prestigious universities in America. In order to offer a Ph.D. in a discipline, its proponents typically undergo years of preparation and a lengthy process of justification before various university committees before accepted by the final approving authority. When a credible university offers a degree, especially one which seeks to graduate the next generation of faculty, the university puts its reputation on the line. This is not something that the trustee of Cornell would view lightly.
> . . . .
>
> In the United States alone, there are currently 26 universities offering programs in science and technology. They include the Massachusetts Institute of Technology, the California Institute of Technology, Kennedy School of Government, Harvard University, the Georgia Institute of Technology, Princeton University, Stanford University, Vassar College and other major universities.
> . . . .
>
> A review of [Dr. Cole's] CV details years of work on fingerprint evidence with a book, many peer reviewed journal articles, book chapters, encyclopedia entries, and magazine articles, many of which relate to his proffered testimony. His CV reveals [a] number of grants and fellowships including three from National Science Foundation.

> His subject relevant lectures have been provided to Cardiff University, the University of Toronto, University of Western Australia, Griffith University Law School (Australia), Australian National University, Criminal Justice Institute, Harvard Law School, John Jay College of Criminal Justice, the Society of Medical Jurisprudence and many others. He has presented 25 conference papers around the world, mostly on fingerprint evidence. He has testified in many courts, and his testimony was discussed at length and the possibility of its admissibility recognized in United States v. Mitchell, 365 F. 3d 215 (3rd Cir. 2004).
> . . . .
>
> IV. This Court's Ruling
>
> Dr. Cole is fully qualified as an expert to testify about the issues which the defendant seeks his opinion. His testimony is clearly relevant to the jury who must weigh the fingerprint evidence the State will offer. This is especially so since it appears the fingerprint identification is crucial to the State.
>
> From a consideration of the [] proffered testimony [] and the undersigned's 40 plus years of experience as a prosecutor, defense lawyer and trial judge in the criminal arena, this court has no doubt that a Miami-Dade County jury will not be confused nor lead down the primrose path.

[Sr. Judge Charles D. Edelstein, July 24, 2005, State v. Armstrong Case F01-033070, 11th Circuit, Miami-Dade County]

If this Court is not inclined to grant relief to the Appellant, the Appellant would still ask that this Court reverse the 3rd DCA's decision in *Armstrong* on the admissibility of this Dr. Cole's testimony in this State. Simon Cole may not be a latent fingerprint examiner, but he is a world-renowned scholar and expert in the field of the science of fingerprinting. Latent fingerprint examiners do not hold the credentials of Simon Cole. His testimony should be admissible (see *United States*

v. Mitchell, 2007 WL 1521212,[2] (E.D. Pennsylvania 2007); ("The Court therefore believes that Mitchell's claim is better understood as seeking to introduce expert testimony that would *raise questions* as to the general reliability fingerprint identification []. And so contrary to the Government's suggestion, Mitchell certainly has experts who could offer such (relevant) testimony." *Mitchell, Id.* at 7.)).

The Appellant asks this Court to consider Dr. Simon Cole's extensive and reliable proffer in this case at PC Vol. 32 / 349-419, and at the very least, remand this case for a proper consideration of Dr. Cole's testimony as it relates to this claim.

Regarding the trial testimony of fingerprint examiner Tom Jones, again the State merely recites the lower court's order at pages 92-95 of its Answer. Because the State in its Answer provides nothing more than a simple recitation of the lower court's order that the Appellant has challenged in his initial brief, no reply to the State is necessary here.

Regarding the break in the chain of custody, the State claims at page 95 that the lower court properly held this claim procedurally barred. But because trial counsel failed to raise the objection at trial, this issue was not preserved for direct

[2]Only the Westlaw citation is currently available.

appeal. This constitutes ineffective assistance of counsel and this claim is ripe for review in postconviction. This claim was proven and relief should be granted.

Regarding the Appellant's CODIS claim, at page 97 the State mentions that the trial court found that a CODIS submission was not possible at the time of trial. The blood DNA found on the table in the victim's home *was* capable of CODIS submission. 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 Vol. 9 / 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. Contrary to the lower court's order, trial counsel

was ineffective for failing to ask that the known DNA sample (blood found on a glass table in the victim's home) be submitted to CODIS for comparison.

Mr. Littman's testimony cited at page 97 that the blood DNA was "meaningless" shows his bias and desire to avoid any admission that he may have provided ineffective assistance of counsel in this case. The State tested this blood for DNA in hopes that it might have matched the Appellant. It did not. Therefore trial counsel should have engaged in efforts to determine if the blood belonged to a third-party felon registered in the CODIS system. The State characterizes the blood DNA as a "red herring" on page 98 of its Answer. If the blood DNA would have matched the Appellant, the State would be classifying the evidence as a "smoking gun," not a "red herring." Just as the State did in *Hildwin v. State*, 951 So. 2d 784 (Fla 2006), once the DNA was found to exclude the petitioner, the State then claimed that the relevance of the DNA was completely diminished. Just because the Appellant here is excluded as the source of the DNA on the table does not diminish its relevance.

FDLE, essentially the State here, or an agent of the State, should be required to make a CODIS comparison of this blood sample.

ISSUE IX

CUMULATIVE ERROR–REPLY

On page 98, the State takes issue with the cumulative error claim because it is a "perfunctory one sentence complaint." Any further argument on this claim would be cumulative. But the Appellant does submit that when all of the trial errors are considered cumulatively, relief must be granted.

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 Reply Brief has been furnished by U.S. Mail to all counsel of record on this 12TH day of May, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply 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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