IN THE SUPREME COURT OF FLORIDA

Case No. SC12-1204
Lower Court Case No.-562001CF000793A

RICHARD ALLEN JOHNSON
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND
FOR ST. LUCIE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

CRAIG TROCINO
Special Assistant CCRC-South
Florida Bar No. 996270

SCOTT GAVIN
Staff Attorney
Florida Bar No. 0058651

OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL–SOUTH
1 East Broward Blvd. Suite 444.
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Johnson's motion for post-conviction relief following an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

"T." -- trial transcripts on direct appeal to this Court;

"PCR." – postconviction record on appeal to this Court;

"PC-T." – postconviction evidentiary hearing transcript record on appeal to this Court.

Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Johnson has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Johnson, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, entered the judgments of convictions and death sentence currently at issue.

On February 21, 2001 Mr. Johnson was arrested in St. Lucie County, Florida. (R. 3-6). On March 7, 2001 Mr. Johnson was indicted for First Degree Murder, Kidnapping, and Sexual Battery Using Great Force. (R. 1-2). Later, in 2004, Mr. Johnson was also charged by information for Robbery and the cases were consolidated. Trial occurred June 7-17, 2004 and Mr. Johnson was found guilty of first degree murder, kidnapping, robbery, and sexual battery with use of great force. (R. 625-27).

The circuit court conducted Mr. Johnson's penalty phase on June 21, 2004. At the penalty phase, trial counsel presented testimony of several family members and friends in support of non-statutory mitigation. (R. 2797-2893). Counsel also presented Dr. Theodore Williams, a forensic psychologist, who had evaluated Mr. Johnson. Dr. Williams found several diagnoses, the most important being mixed personality disorder, Personality Disorder NOS and moderate depression. (R. 2960). As a result, Dr. Williams testified that he believed Mr. Johnson met the "minimum criteria" for the statutory mitigator of extreme mental or emotional disturbance at the time of the murder. (R. 2956, 2960). Dr. Williams also testified

in support of the statutory mitigator that Mr. Johnson had been unable to conform his conduct to the requirements of law on the night of the murder. Dr. Williams based this diagnosis from his interviews with Mr. Johnson, review of school records, and documentation that on the night of the murder Mr. Johnson had been intoxicated and possibly under the influence of ecstasy. (R. 2955).

The jury recommended Mr. Johnson be sentenced to death by a vote of 11-1. (R. 656).

A *Spencer* hearing was held July 15, 2004.[1] Following the *Spencer* hearing, on August 9, 2004, the trial court accepted the jury's recommendation and sentenced Mr. Johnson to death. (R. 913-931). The court found three aggravating circumstances: the murder occurred during the course of kidnapping and sexual battery (great weight); Mr. Johnson was previously convicted of a felony and put on community control (moderate weight); and the murder was especially heinous, atrocious, or cruel (great weight). (R. 913-931). In mitigation, the court found that Mr. Johnson: had no significant history of criminal activity, particularly violent crimes (moderate weight); witnessed and was the victim of frequent physical and verbal abuse (some weight); had a history of extensive drug and alcohol abuse and was under the influence of alcohol at the time of the murder (moderate weight); was the victim of sexual abuse at a young age (some weight); was a slow learner

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

(no weight); was able to show kindness to others (little weight); exhibited good behavior in court (little weight); and would adjust well to prison and would not commit further violent crimes (little weight). (R. 920-27). The circuit court rejected the two statutory mitigators presented by Mr. Johnson. (R. 921).

U.S. Const. Amend XIVMr. Johnson filed a notice of appeal on September 1, 2004. (R. 944). Mr. Johnson's appeal raised fourteen issues.[2] This Court affirmed Mr. Johnson's convictions and sentence on direct appeal on December 13, 2007. *Johnson v. State*, 969 So.2d 938 (2007).

---

[2] Fourteen issues were raised on direct appeal: (1) grant of a challenge for cause to a potential juror over defense objection; (2) admission of a statement by the victim while she was being strangled; (3) allowing the State to proceed on a robbery count charged by information rather than indictment; (4) improper cross examination of the defendant; (5) sufficiency of the evidence of kidnapping, sexual battery, and felony murder; (6) proportionality of the death sentence; (7) imposition of a death sentence after the defendant rejected a plea bargain for a sentence of life imprisonment; (8) application of the HAC aggravator; (9) Florida's capital sentencing law is unconstitutional because the defendant bears the burden of proving death is inappropriate; (10) Florida's capital sentencing law is unconstitutional because a death sentence can rest on a nonunanimous jury recommendation based on facts that are not found beyond a reasonable doubt, contrary to *Ring v. Arizona*, 536 U.S. 584 (2002); (11) Florida's capital sentencing statute violates *Furman v. Georgia*, 408 U.S. 238 (1972), because a conviction of first degree murder without more makes a defendant eligible for the death penalty, which fails to adequately narrow the field of first degree murderers sentenced to death; (12) the instruction that a jury should find a mitigator only if it is reasonably convinced of its existence violates separation of powers; (13) an instruction to the jury that its role is advisory denigrates its responsibility, contrary to *Caldwell v. Mississippi*, 472 U.S. 320 (1985); and (14) Florida's capital sentencing law is unconstitutional because no specific number of votes is required for jurors to find aggravators or mitigators. *See Johnson v. State*, 969 So. 2d 938 (2007).

Mr. Johnson filed a Petition for a Writ of Certiorari in the United States Supreme Court which was denied on April 21, 2008. *Richard Allen Johnson v. State of Florida*, US S. Ct No. 07-9402.

Mr. Johnson initiated his state postconviction proceedings by requesting public records pursuant to Fla. R. Crim. P. 3.852. (PCR. 113-151). He timely filed his initial Fla. R. Crim. P. 3.851 Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend on April 21, 2009. (PCR. 303-401). An amended Rule 3.851 motion was filed April 22, 2010. (PCR. 493-551) The State filed a response on May 21, 2010. (PCR. 558-623). Following the case management conference the Circuit Court issued an order granting an evidentiary hearing on claims III, IV, V, and VI of Mr. Johnson's Rule 3.851 Motion. (PCR. 626-628).

An evidentiary hearing was held on November 7-9, 2011. At the evidentiary hearing Mr. Johnson presented testimony from one expert and several lay witnesses.

Mr. Johnson was represented at trial by Thomas Garland and Richard Stone. Mr. Garland testified that he was appointed to the case as a second chair in January 2003 following Mr. Albert Moore's withdrawing prior to trial. (PC-T. 406-7). Garland recalled that there were concerns regarding the issue of postmortem injuries to the victim. (PC-T. 408). He also recalled that there were issues with a

co-defendant John Vitale, and the exchange of letters written back and forth between Mr. Johnson and Vitale. (PC-T. 408). Garland could not recall the content of the letters. (PC-T. 409). He recalled receiving one box of materials from Moore's files but no close out memo detailing what work had already been prepared. (PC-T. 409-10).

Garland testified that since Stone had been retained by the family it was decided that Stone would handle the guilt phase and his duties were to assist Stone and also handle the penalty phase. (PC-T. 411). He testified that Stone was not really involved with the mitigation portion of the case and this it was "mostly" him that handled penalty phase preparation. (PC-T 411).

Garland first became aware of the letter writing campaign from talking with Moore. (PC-T. 420). He reviewed several letters authored by Vitale to the State in which he was offering information about Mr. Johnson in return for some form of plea agreement. (PC-T. 413-17) (Def. Ex.# 1-3). Garland knew that State Attorneys, Richard Seymour and Lynn Park, were prosecuting both Mr. Johnson and Vitale. (PC-T. 416). Garland learned that Vitale was trying to cut a deal with the State. (PC-T. 417). According to Garland, Vitale's letters would have indicated his bias, prejudice, and slanting of testimony to cut a deal and save himself and would have "absolutely" damaged his credibility in they eyes of the jury. (PC-T. 419).

Garland claimed he did not encourage Mr. Johnson to continue writing to Vitale and if Stone had done so, it was prior to his appointment on the case. (PC-T. 420). Garland recalled that somewhere in the letters Vitale had confessed to the crime. (PC-T. 421). Garland confirmed that a letter dated January 14, 2003 (the Burns Letter) from Vitale's attorney, Thomas Burns to the State indicated Vitale's eagerness work for the state against Mr. Johnson. (PC-T. 427). He did not recall knowledge of this letter prior to trial. Garland noted that if that did in fact happen or even were planned to happen, it would have been a violation of Mr. Johnson's Fifth and Sixth Amendment rights to counsel. (PC-T. 427). Garland said the letters between Vitale and Mr. Johnson that the State used at trial and were "damning" to Mr. Johnson. (PC-T. 428).

Garland testified that Vitale's testimony that the victim had stated she wanted to see her children surprised them and was a "problem." (PC-T. 448). He testified that part of their strategy was to attempt not to draw attention to it but that despite that, "there should have been a limiting instruction or something to that effect." (PC-T. 448). Regarding Vitale's testimony that Mr. Johnson had wanted to have sex with the victim while she was asleep, Garland recalled that they didn't object because they didn't believe it was a big deal. (PC-T. 451). Garland added that he felt Vitale was a liar and that the jury didn't take his testimony to be worth much. (PC-T. 452). The fact that Vitale may have been editorializing and adding

things to his relationship was not surprising to Garland. (PC-T. 452).

Garland was in charge of mitigation but that Stone had some involvement in the preparation. (PC-T. 452). At the time he was appointed Garland recalled that Dr. Theodore Williams had already been appointed. (PC-T. 452). Dr. Robert Brugnoli was also appointed to perform a neuropsychological evaluation. (PC-T. 452). Dr. Williams had met with Mr. Johnson and written a report but was having trouble meeting with the family. (PC-T. 453). Dr. Williams had indicated those concerns to Garland. (PC-T. 453). Garland never sought out the services of a mitigation specialist. (PC-T. 453).

Garland testified that Dr. Williams was first appointed to determine competency and later to assist in preparing mitigating circumstances. (PC-T. 454). Garland could only recall that "there were a couple of statutory mitigators and some others" found by Dr. Williams. (PC-T. 454). He stated Dr. Williams had briefly addressed the issue of post traumatic stress disorder but that he didn't testify to it at trial. (PC-T. 454). He did not recall doing anything additional to follow up on that specific diagnosis. (PC-T. 455). Garland also recalled that there was evidence of serious dysfunction in Mr. Johnson's family background as well as issues with a learning disability and that they "tried" to regard such information as a fruitful area of mitigation. (PC-T. 455-56).

Garland initially claimed Dr. Brugnolis' findings were "nothing that they

could use at trial." (PC-T. 456). Upon refreshing his recollection Garland testified that Dr. Brugnoli's report indicated that Mr. Johnson's capacity to accurately plan his actions and anticipate and understand the consequence s of his actions provided he was in a non-intoxicated state. (PC-T. 457). There was evidence in Dr. Williams' report and from Vitale's statements that Mr. Johnson had been drinking on the night of the crime. (PC-T. 457-458; 511).

Albert Moore represented Mr. Johnson's briefly. (PC-T. 587). He recalled that his involvement in the case consisted of mainly drafting and filings motions as well as handling discovery and deposition of witnesses. (PC-T. 588). Moore recalled that there was an issue with damage to the victim's genital area which they felt was going to be a "problematic and quite inflammatory to a jury." (PC-T. 588-89). He recalled that there were attempts to try and find an alternative explanation to the theory that the defendant's had "cut the area." (PC-T. 589).

Moore became aware that letters had been written Mr. Johnson and Vitale. (PC-T. 591). He had not encouraged Mr. Johnson to communicate with Vitale and could he recall if Stone had done so. (PC-T. 591). Moore testified that is was not a good idea to have his client communicate with anybody, including a co-defendant. (PC-T. 591-92). According to Moore some of Vitale's letters were confessions or "close to a confession." (PC-T. 592). He had no information that Vitale was communicating with the State and had he know he would have wanted to use that

information for cross-examination. (PC-T. 592; 594). Moore was not aware the there had been direct communication between Vitale's lawyer, Thomas Burns, and the State. (PC-T. 595). Upon reviewing the Burns Letter, he stated that if Vitale had been working as an agent for the State that would have been important for purposes of cross-examining him on his motivation for testifying at Mr. Johnson's trial. (PC-T. 599). Moore also testified that upon further reflection he would also make certain to advise Mr. Johnson to cease and further communication with Vitale because it appeared from the content of the letter that Vitale was trying to get information from Mr. Johnson. (PC-T. 601).

Robert Stone testified Mr. Johnson's family retained him. (PC-T. 693). When Moore, withdrew Garland was appointed as co-counsel and was responsible for the penalty phase. (PC-T. 693-694). Their theory of the case was that Vitale was the killer. (PC-T. 694). A letter from Vitale, in which he confessed to the murder, buttressed their theory. (PC-T. 695). Following receipt of that confession letter, Stone sent it to the State. (Def. Ex.# 7) (PC-T. 697). Just prior to trial Stone received letters from the State that indicated Mr. Johnson had been communicating with Vitale. (PC-T. 698). Stone had not been aware of any communication prior to that time. (PC-T. 698). Stone found out about the letters from Burns, Vitale's attorney, after telling Burns that Vitale confessed. (PC-T. 698). After reviewing the Burns Letter, Stone noted that had he known of this information prior to trial he

would have been extremely upset. (Def. Ex.#6) (PC-T. 699). Stone believed that the information contained in the letter would have been useful to show that Vitale was working as an agent of the state. (PC-T. 700).

Stone received letters documenting that Vitale had been attempting to directly contact the State to work out a plea deal. (PC-T. 701). Stone testified however, that he was not sure how he would use them on cross-examination, saying "[I]t would depend on whether or not I thought these would be helpful to impeach him." (PC-T. 701). He noted that generally anything you can get to impeach a witness is useful but that he wasn't sure how he used them at trial. (PC-T. 701).

Stone contacted two experts with respect to issue of the significant wounds to the victim's body. (PC-T. 705). One expert, Dr. Feagle, said it was possible the wounds could have been caused by marine life. (PC-T. 705). Stone remembered that during the examination of Dr. Diggs the State referred to the wounds as "cutting". (PC-T. 706). Although Garland did object he did not secure a ruling and Stone could not give a reason why. (PC-T. 706).

Regarding Vitale's testimony that Mr. Johnson wanted to have sex with the victim while she was in the back of the car asleep, Stone testified that he did not necessarily believe it implied that Mr. Johnson wanted to so while she was asleep. (PC-T. 709). Stone stated that the inference that Mr. Johnson wanted to have sex

with her was a suggestion by the State but that he wouldn't necessarily draw the same conclusion. (PC-T. 709). Stone also recalled that Vitale's testimony that the victim stated she wanted to see her children, was something they attempted to keep away form the jury but recall if a limiting instruction was requested. (PC-T. 710-711).

Thomas Burns testified that he appointed to represent Vitale. (PC-T. 679). He did not recall at the time he came on the case that Vitale had made any communications with the State. (PC-T. 679). Later, during negotiations with State Attorneys Park and Seymour, Burns testified that he made known to them that there had been some letters that been exchanged between Mr. Johnson and Vitale. (PC-T. 679). Burns informed the State that Vitale was willing to testify against Mr. Johnson if there could be sufficient reward for doing so. (PC-T. 680). Burns recalled that the terms of the deal were that Vitale would plea to accessory after the fact with a cap of twenty-two years. (PC-T. 680).

Burns characterized Vitale as "squirrely at times" and not "fully under my control." (PC-T. 681). Burns claimed he never saw letters written by Vitale directly to the State. (PC-T. 681). However, he admitted that two of Vitale's letters (Def. Ex.#1 and Def. Ex.#2) indicated that Vitale was attempting to directly communicate with the State. (PC-T. 682).

Burns stated that he would typically memorialize by letter his discussions

with the State about Vitale's plea negotiations. (PC-T. 684). One of those letters (the Burns Letter), dated January 14, 2003(Def. Ex.#6), he documented the possibility of Vitale wearing a wire for the State to obtain information from Mr. Johnson. (PC-T. 685). Burns stated Vitale was thought he could get Mr. Johnson to confess and that there would be:

> some information coming from Mr. Johnson that would serve to put the letters that had been exchanged in some sort of context, some sort of an order perhaps, some clarifications perhaps.

(PC-T. 685). Burns said the importance of Vitale obtaining such information would have been to deal with Vitale's previous confessions. (PC-T. 686).

Burns noted that the portion of the letter where he mentions the prospect of Vitale "muddying the waters" he was attempting to convey his belief that Vitale was never completely under his control and being emotional enough to do something against his own interests. (PC-T. 689). Burns confirmed that given that disposition under certain circumstances he believed Vitale would be less than truthful. (PC-T. 689). Burns testified that the "truest way understand the letter" would be to characterize its "primary purpose as being for me to show Vitale that, hey, I am bringing up these issues to Lynn Park that are concerning you and the ball is in their court." (PC-T. 688). However according to Vitale, Burns never showed him the letter. (PC-T. 688)

John Vitale, the co-defendant testified that he was currently serving prison sentence for his role in the Hagin murder and was due to be released some time in 2019. (PC-T. 514). He also admitted to being convicted of two prior felonies and one crime involving dishonesty. (PC-T. 514-15). Vitale stated the when he was arrested he spoke directly to the state before counsel, Burns, was appointed and continued to communicate with the state after appointment of counsel. (PC-T. 519). Vitale stated that he was writing letters back and forth with Mr. Johnson and that his lawyer was aware of it. (PC-T. 521-22). He identified several letters as ones he wrote, some of which were written directly to the state. (PC-T. 526-27). He also delivered letters written by Mr. Johnson directly to the state investigator Hamrick. (PC-T.527).

Of the letters Vitale wrote directly to the state, at least one was a confession in which he admitted he, not Mr. Johnson, killed Ms. Hagin and that he had drugged Mr. Johnson in order to frame him for the murder. (PC-T. 529). Vitale also admitted that his purpose for writing letters was to get time to elicit a confession from Mr. Johnson wile wearing a wire. (PC-T. 531). He claimed that neither he nor Burns was in communication with Park about wearing the wire. (PC-T. 532) When shown the Burns Letter he had never seen it before.

Dr. Toomer, M.D., a psychologist, became involved with Mr. Johnson's case in 2009, performing a psychological evaluation and reviewing relevant documents

in his case. (PC-T. 613). Dr. Toomer reviewed two reports by Dr. Williams, which indicated a history of family instability, physical and sexual abuse, and a lack of support and nurturance. (PC-T. 616). They reports diagnosed Mr. Johnson with personality disorder, schizoid type, and mentioned of post traumatic stress disorder as a possible diagnosis. (PC-T. 616). The reports contained notes indicating that stressful environments and the use of toxic substances were two factors which would exacerbate Mr. Johnson's diagnoses. (PC-T. 617). Dr. Toomer testified that the early onset of these factors severely affected Mr. Johnson and impacted his mental status functioning to the point that his overall behavioral, cognitive and affective functioning had been suffering for most of his life. (PC-T. 617).

Dr. Toomer reviewed a pretrial report prepared by Dr. Brugnoli detailing Mr. Johnson's neuropsychological functioning. (Def. Ex.#5, Tab, 8). While the report did not indicate any signs of neuropsychological impairment associated with organic brain damage and found Mr. Johnson had the cognitive and memory capacity to adequately plan and understand the consequences of his actions, it also indicated Mr. Johnson could perform these tasks provided they were in a non intoxicated state. (PC-T. 618). Dr. Toomer stressed that this was because toxic substances can adversely impact functioning. (PC-T. 619).

Review of Mr. Johnson's school records, documented that at a young age he was placed in learning disabled classes and was having difficulties with overall

functioning. (PC-T. 619). Dr. Toomer found these records corroborative of an individual suffering from possible underlying emotional trauma and possible neurological issues. (PC-T. 620).

Dr. Toomer conducted an evaluation of Mr. Johnson on April 16, 2009 which consisted of a clinical interview and administration of a series of tests: the Clinical Multiaxial Inventory (MCMI), the Bender, and the Carlson. (PC-T. 623). The Bender-Gestalt Dr. Toomer explained, is a screening device used to point out possible likelihood of underlying neurological involvement or brain damage in an individual. (PC-T. 623). The structured clinical interview is from the DSM-IV and is designed to assess substance abuse over a period of time. (PC-T. 623). The MCMI is a personality assessment designed to assess the degree to which there are underlying deficits in terms of personality or psychological functioning that may impact on the individual's behavior. (PC-T. 623). The Carlson Psychological Survey is an instrument designed to assess aspects of personality. (PC-T. 623-24). Dr. Toomer also administered a PTDS test which is a protocol designed to assess whether or not an individual has experienced various forms of trauma over the course of their life. (PC-T. 624).

Dr. Toomer testified that the results of the MCMI indicated that Mr. Johnson suffers from a number of psychological issues, among those being depression, psychoactive substance abuse, and personality disorder syndromes. (PC-T. 625).

Review of the scores and results of the protocol reflected personality disorder syndromes, depression, and psychoactive substance abuse. (PC-T. 625). The result of the Carlson Psychological Survey reflected significant a substance abuse problem with the underlying source likely linked to psychological deficits. (PC-T. 630).[3] Dr. Toomer testified that with such deficits often times the individual may act out and demonstrate aggressive behavior in response to stress. (PC-T. 631). The Post Traumatic Stress Disorder Scale indicated the historic pattern of abuse which Mr. Johnson suffered. (PC-T. 632). Mr. Johnson identified a number of stressors on the test, specifically stressors which focus on emotional, sexual, physical abuse and loss and lack of nurturance. (PC-T. 632).

Dr. Toomer's opinion was that Mr. Johnson suffers from borderline personality disorder. (PC-T. 634). Important to this diagnosis were Mr. Johnson's history of psychoactive substance abuse, learning disability, and diagnosis of PTSD. (PC-T. 634). Dr. Toomer explained that the diagnosis of borderline personality disorder is characterized by instability reflected across all patterns of behavior, in terms of affect, emotional behavior, interpersonal relationships, how one relates to other individuals, one's relationship to the external world, identity, and long term planning. (PC-T. 635-36). Dr. Toomer stressed that personality

[3] Dr. Toomer explained that this test looks at individual behavior and compares it to the individual's personality functioning to other individuals who are in the criminal justice system. (PC-T. 630).

disorder is lifelong. (PC-T. 635-36).

Based upon review of records, test results, and his clinical interview Dr. Toomer testified Mr. Johnson met the requirements for two statutory mitigators: severe emotional and mental disturbance and an inability to conform one's conduct to the requirements of law. (PC-T. 644). Regarding the mitigator of extreme mental or emotional disturbance Dr. Toomer explained that Mr. Johnson's personality disorder is exacerbated by his issues with substance abuse which manifests itself by instability in functioning in areas of affect, behavior, and cognition. (PC-T. 644-45). Dr. Toomer testified that these factors impact things such as "weighing alternatives, projecting consequences, modulation of emotional expression, sublimation of affect." (PC-T. 644-45).

Regarding the application of the statutory mitigator of inability to conform one's conduct to the requirements of law, Dr. Toomer testified Mr. Johnson's capacity to do so is impaired. (PC-T. 645). Dr. Toomer noted Mr. Johnson's capacity for rational thought, weighing alternatives, and projecting consequences are absent. (PC-T. 645). Dr. Toomer found these attributes were sabotaged by Mr. Johnson's personal background and history. (PC-T. 646).

Addressing the fact that these two statutory mitigators were considered and rejected by the trial court below, Dr. Toomer testified that there was significant additional information, which supported the application of these two statutory

mitigators that had not been presented to Mr. Johnson's penalty phase jury. (PC-T. 647). Dr. Toomer testified:

> "I think that PTSD is a significant factor. The PTSD traits represent a significant recurring factor that impact[s] the individuals' functioning. I think the substance abuse, the substance use [] and dependence is another factor that impacts in this particular phenomenon. Remember the neuropsychologist who evaluated him said that he was capable of functioning in terms of managing, in terms of cognitive functioning in a non-intoxicated state. Well Mr. Johnson was not in a non-intoxicated state in terms of accounts from the person with whom he lived at the time. And so those particular regulatory mechanisms described in the neuropsychological evaluation would not be applicable."

(PC-T. 647).

In support of the application of non-statutory mitigators in Mr. Johnson's case, Dr. Toomer further stressed the importance which environmental factors play in Mr. Johnson's diagnosis:

> "I think overall what we are talking about is the impact of those particular factors, the impact of the lack of stability, the lack of predictability. We are talking about the unpredictability of his early experiences and early environment. We are talking about the ferocity of what he experienced. We are talking about the frequency of what he experienced. We are talking about all of these qualitative factors that impacted on the individuals' development and developmental history as being part of the aggregate of non-statutory mitigators."

(PC-T. 647-48).

After the conclusion of Dr. Toomer's testimony, the trial court stated "Doctor, before you step down, I just want to mention you are one of the best witnesses I have ever heard" and proclaimed his testimony as "in very excellent fashion as a witness." (PC-T. 676)

Following the evidentiary hearing the Circuit Court entered an order denying relief on April 11, 2012. (PCR. 1670-89). Following the Circuit Court's order Mr. Johnson timely filed his notice of appeal to this Court on May 10, 2012. (PCR. 1692-93). This appeal follows.

SUMMARY OF THE ARGUMENT

ARGUMENT I: Mr. Johnson received ineffective assistance of counsel at guilt phase. Trial counsel failed to object to prejudicial, harmful, and probative evidence and/or argument. Trial counsel failed to object to prejudicial evidence, failed to effectively cross-examine key witnesses and failed to protect Mr. Johnson's Fifth and Sixth Amendment rights.

ARGUMENT II: Mr. Johnson's Fifth, Sixth, Eighth and Fourteenth Amendment rights to the United States Constitution and the corresponding provisions of the Florida Constitution were violated when the State improperly utilized John Vitale as a agent to deliberately elicit incriminating statements from

Mr. Johnson in the absence of counsel; and also withheld evidence pertaining to the State's pattern and practice of using inmates as agents in violation of *Massiah v. United States*, *Brady v. Maryland*, and *Giglio v. United States*.

ARGUMENT III: Mr. Johnson was denied the effective assistance of counsel at penalty phase. Trial counsel failed to adequately investigate and prepare a mitigation case. Trial counsel failed to conduct a timely investigation into Mr. Johnson's mental health background. Counsel failed to effectively utilize the mitigation evidence that was obtained and present it in a coherent and compelling mitigation theory.

ARGUMENT IV: The lower court erred in summarily denying Mr. Johnson's claims of ineffective assistance of counsel for failure to object to the admission of the kitchen knives, failure to object to Medical Examiner testimony concerning the knives and the possibility they could produce the victim's wounds, and failure to object to impermissible cross examination regarding the credibility of another witness.

STANDARD OF REVIEW

Ineffective assistance of counsel claims present mixed questions of law and fact subject to plenary review. *Occhicone v. State,* 768 So. 2d 1037, 1045 (Fla. 2000). This Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact.

ARGUMENT I

MR. JOHNSON WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING AT GUILT PHASE DUE TO COUNSEL'S INEFFECTIVE REPRESENTATION, IN VIOLATION OF HIS 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.

A. Introduction

A fair trail is one in which the evidence is subjected to adversarial testing and is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel: The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and material either to guilt or punishment," *United States v. Bagley*, 473 U.S. 667, 674 (1985) (*quoting Brady v. Maryland*, 373 U.S. 83, 87 (1963)); meanwhile, trial counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland,* 466 U.S. at 685. Where either or both fail in their obligations such that confidence is undermined in the outcome, a new trial is required. *See Smith v. Wainwright,* 799 F.2d 1442 (11th Cir. 1986).

Although counsel may provide effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance through any portion of the trial. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *see also Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) Even a single error by counsel may be sufficient to warrant relief. *See Nelson v. Estelle*, 626 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be ineffective due to a single error where the basis of the error is of constitutional dimension); *Nero v. Blackburn*, 597 F.2d 991, 994 (1979) ("...[s]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003).

When evaluating a claim of ineffective assistance of counsel, the United States Supreme Court has made it clear that the correct focus is on the "fundamental fairness" of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, **the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.** In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. 668, 696 (1984) (emphasis added).

B. Failure to Object to Prejudicial, Harmful, and/or Non-Probative Evidence and Argument

Trial counsel failed to properly object to the prosecutor's misleading comments during Dr. Diggs' testimony regarding the nature of the victim's perineal wounds. In Dr. Diggs' opinion, he could not conclusively say whether the injury to Ms. Hagin's perineum was caused by marine life or by a human cutting away at the flesh; he could not favor one theory or the other. (R. 2234). However, rather than referring to the perineal damage as a wound or injury, the State repeatedly referred to the "cutting" or "cuts" of the victim, thereby implying that the damage was definitely from a human rather than animal source (as an animal would tear the flesh, not cut). (R. 2220, 2222, 2225-26, 2235-36). After several references by the prosecutor to the term "cutting", defense counsel finally objected:

> GARLAND: Objection to the characterization, Your Honor. He [Dr. Diggs] testified that it could have been caused by cutting or by marine life.
>
> THE COURT: Let me hear the question.
>
> MR. SEYMOUR: Cutting. I'm not even sure what the objection was or I'll start the question over.
>
> THE COURT: Yes, sir.

(R. 2225). The prosecutor then asked Dr. Diggs if the "cutting" that he observed of

the vaginal and rectal area was post-mortem. (R. 2226). However, rather than clarifying or renewing his objection, trial counsel said nothing, and the State continued to refer to the "cutting" of the victim throughout the remainder of the trial, as though such a finding had been made by Dr. Diggs. This misleading and prejudicial characterization of the evidence by the prosecutor was clearly improper, and contributed to the misperception (perpetuated by the State and supported by the highly inflammatory knives exhibit) that the victim had definitively been cut, and that Mr. Johnson was the individual who did the "cutting".

At the evidentiary hearing, Garland testified that his objection was based on leading question. (PC-T. 445). He maintained this position even though the question was not a leading one. While acknowledging that the state continually used the work "cutting" or "cuts" Garland agreed he failed to renew his objection. (PC-T. 447). Counsel is obligated to voice and objection and secure a ruling to that objection. Failing to secure a ruling is tantamount to abandoning the objection entirely. Thus, Garland was confronted with a prejudicial comment that warranted an objection but effectively abandoned it by failing to renew it and securing a ruling from the judge. Mr. Johnson was prejudiced because the jury was left with the inescapable impression that the Medical Examiner, Dr. Diggs, conclusively determined that the victim was cut and that Mr. Johnson was the one who did it.

The trial court mischaracterizes this claim and denied it because Dr. Diggs

agreed the injury could have been caused by marine life. This is not the precise point at issue here. The issue is that notwithstanding Dr. Diggs testimony that he could not tell if the injuries were caused by cutting or by marine life, the state intentionally and repeatedly used the word cutting as a means to solidify in the jury's mind that it was caused by human rather than animal means. The ineffectiveness comes from trial counsel failing to recognize that fact and failing to object to the State's misleading and repeated characterization of cutting and seeking a ruling from the court to prevent such mischaracterization. Counsel's failure took Dr. Diggs equivocal testimony about the origins of the perineal wounds and allowed the state to categorize them as coming only from human cutting. It matters not that Dr. Diggs said it could have been marine life. After the State's consistent and unfettered mischaracterization there is no doubt that "cutting" is all the jury heard and remembered.

C. Counsel was ineffective for failing to object to the Medical Examiner's characterization of the death as "heinous."

Still more prejudicial and misleading testimony was put before the jury during Dr. Diggs' testimony when trial counsel failed to object to the doctor's characterization of ligature strangulation as a "heinous" death:

> And what [strangulation] does, effectively shuts off the circulation to the brain and of course the vital systems of the brain start to suffer, then you die, basically. It's a heinous type death.

(R. 2213). This is problematic because under Florida's capital sentencing law, whether a murder is "heinous" is not within the provenance of an expert witness to declare, but rather a legal question to be proven by the State beyond a reasonable doubt and decided upon by a jury. *See Willacy v. State*, 696 So. 2d 693 (Fla. 1997). Dr. Diggs' use of the term "heinous" was not permissible under any circumstance. Therefore, counsel's failure to object and move to strike his inflammatory opinion testimony was prejudicial to Mr. Johnson.

At the evidentiary hearing, as during the trial, Garland failed to appreciate the impact of the use of the word "heinous." He contrasted, as if arguing for the state, that "heinous" is distinct from the legal standard "heinous atrocious and cruel." (PC-T. 441). Garland asserted there was a difference between "heinous" and "heinous atrocious and cruel" because "There is a certain kind of death, there is a heinous type of crime." (PC-T. 441) This is a distinction without a difference. Indeed, when asked if this was the reason for failing to object, Garland stated, "I don't recall specifically that we didn't object. That is what is there." (PC-T. 441). Stone had no explanation for Garland's failure to object. (PC-T. 707). Thus counsel offered no valid reason, strategy or otherwise, to explain his deficiency in his failure. The result of his failure to object is that the state's star expert witness declared, under the cloak of scientific infallibility, that a strangulation death is "heinous." Then the jury was asked to decide if the aggravators including, whether

the death was "heinous atrocious and cruel," (HAC) was proven beyond a reasonable doubt. The jury undoubtedly related Dr. Diggs' impermissible testimony and concluded that HAC was met when, without such inflammatory testimony, it would likely have concluded otherwise.

The trial court mischaracterized the ineffectiveness in this claim in an attempt to elevate form over substance. The trial court seems to be of the opinion that since Dr. Diggs's mention of "heinous" was not immediately followed by the words "atrocious" and "cruel," his statement was rendered innocuous. There is no question that the word heinous is a legal term of art in death penalty cases. Even a passing familiarity with Florida's death penalty aggravators would indicate that. The problem here is that the jury cannot be reasonably believed to parse the technical difference between a medical examiner using heinous and how it applies in the context of the death penalty jury instructions. The fact that the jury heard the medical examiner say it was a heinous death unfairly led it to conviction and a death penalty recommendation. Defense counsel's claim that he was not alarmed enough to even object is astounding. That in the cold light of reflection he was unable to admit to his mistake is cause for even more concern for any future defendant to whom he is appointed to represent.

D. Counsel was ineffective for failing to object to Vitale's embellished testimony that Mr. Johnson wanted to have sex with the victim while she was sleeping

Vitale was improperly allowed to opine that Mr. Johnson wanted to have sex with the victim even though she was sleeping. *See, e.g.*, (R. 1689-90). "[U]nless there is evidence that the witness is privy to the thought processes of the other witness, the witness is not competent to testify concerning the other's state of mind." *Knowles v. State*, 632 So. 2d 62, 65-66 (Fla.1993) . Here, the State presented no evidence to establish that Vitale was privy to Mr. Johnson's thoughts (or lack thereof) on this matter; Vitale's sole explanation for that statement was that he assumed from "the way [Johnson] looked or whatever" that he wanted to have sex with the sleeping Ms. Hagin. This statement prejudiced Mr. Johnson because it improperly led the jury to believe that he would seek to take advantage of a woman who was unable to consent to sexual intercourse – in effect, to rape her – even though Vitale had no direct knowledge of Mr. Johnson's thoughts one way or the other. This was especially damaging in light of the fact that the State was seeking to convict Mr. Johnson of sexual battery using great force. Vitale's misleading and prejudicial testimony provided illegitimate support for the State's case, improperly prejudiced the jury, and should have been objected to by counsel.

When asked why there was no objection to this inflammatory embellishment of his testimony, Garland responded "I don't think we though it was that big a

deal." (PC-T. 451). Stone argued at the evidentiary hearing that Vitale's testimony could be interpreted in other ways beyond Mr. Johnson wanting to have sex with a passed out woman. (PC-T. 709). Indeed, he acknowledged that the implication that Mr. Johnson wanted to have sex with a passed out woman was "the opinion of Vitale." (PC-T. 709). If that is the case then there should have been an objection because lay witnesses are precluded from offering opinion testimony. *See* Fla. Stat. §90.701 (2012). Furthermore, the fact that the prejudicial testimony is capable of differing interpretations does not exempt counsel from the obligation to object. The fact that Stone used that as an excuse justifying his failure to object highlights his ineffectiveness herein. The point is that counsel is obligated to object to prevent the inflammatory and prejudicial implication, not to fail to object and then engage in post hoc generalizations about interpretation in an attempt to mask the error.

E. Counsel was ineffective for failing to request a limiting instruction to ameliorate the impact of Vitale's highly prejudicial embellished testimony that Ms. Hagin asked for her children while she was being strangled.

Trial counsel also erred by not requesting a limiting instruction when Vitale claimed Mr. Johnson told him that Ms. Hagin asked for her children as she was being strangled. (R. 1997). Although the trial ruled that the statement's prejudicial tendencies were outweighed by the probative nature of the statement (which was ultimately let in to establish premeditation and HAC, (R. 1996-97), defense counsel made no effort to ameliorate the clear prejudice with a request for an

instruction that the jury consider the statement only to establish Mr. Johnson's state of mind. As recognized by the this Court on appeal, this omission prejudiced Mr. Johnson:

> We acknowledge the statement's potential to create an emotional basis for the verdict. However, the prejudicial impact of the evidence could have been ameliorated to some extent by an instruction to consider the evidence solely on the issue of the defendant's intent. Johnson complains on appeal that the trial court did not give a limiting instruction, but he made no request for such an instruction below. . . .

Johnson, 969 So. 2d at 952-953(emphasis added). The jury should have been instructed not to let the clearly emotional and heart-wrenching import of Ms. Hagin's alleged last words affect their consideration and evaluation of the statement. Counsel's failure to do so was clearly prejudicial to Mr. Johnson's case.

Garland's explanation that he did not request a limiting instruction because he did not want to highlight the prejudice of the statement is unavailing. (PC-T. 448). Stone testified that that he did not request a limiting instruction because "I guess I didn't know what kind of limiting instruction to give." (PC-T. 710). It is unreasonable to fail to lessen the impact of such a highly prejudicial and inflammatory comment. Thus, because Stone did not know what kind of instruction to request, the jury was left to consider such inflammatory testimony in an unfettered manner without the proper judicial guidance of a limiting instruction.

The notion that it is sound lawyering tactic to forgo and instruction limiting

the impact of a highly inflammatory piece of evidence because it would draw more attention to the evidence is a pedestrian attempt to explain away counsel's failing. On the one hand, the jury was told in no uncertain terms that Ms. Hagin asked for her children and this damning testimony given by the serially lying co-defendant Vitale, was left unchallenged in the eyes of the jury. Furthermore, the jury was not given any judicial basis by which to evaluate such damaging testimony. A judicial instruction limiting the impact of that testimony would have given the jury a foundation to view the evidence as it was, the imaginary embellishments by a co-defendant trying to save his own skin. Using counsel's rationale for not requesting an instruction, a court should never give one because they always have the opposite effect.

F. Counsel was ineffective for failing to Effectively Cross-Examine State Witnesses.

Effective cross-examination of the state's witnesses is a critical part of defense counsel's duty under the Sixth Amendment. Particularly in a criminal case, where the burden of proving the defendant's guilt resides with the State, and where the defendant need not present a whit of testimony or evidence, cross-examination is "an essential safeguard of the accuracy and completeness of testimony . . . .[T]he opportunity is a right and not a mere privilege." McCormick on Evidence, 3rd Ed., 19 (1984). "Indeed, were counsel . . . to forego vigorous cross-examination of the prosecution's witnesses, counsel would violate the clear duty of zealous

representation that is owed to the client." ABA Standards for Criminal Justice, "The Defense Function" (1984), Commentary to Standard 4-7.6, *citing* ABA Code of Professional Responsibility DR7-101 (A) (1), EC7-10 (emphasis added).

The Supreme Court has recognized that cross-examining state witnesses is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). "[C]ross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth." *Ford v. Wainwright*, 106 S. Ct. 2595, 2605 (1986). The absence of effective cross-examination results in a failure "to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 455 U.S. 648, 659 (1984), which is required in order for a defendant to receive a fair trial. *Strickland*, 466 U.S. at 696.

Here, defense counsel failed to effectively cross-examine star witness John Vitale. It was well known that Vitale was incapable of telling the truth. At the evidentiary hearing, his own lawyer, Burns, testified that Vitale could be untruthful "against his own interest." (PC-T. 293). However, during cross-examination the record demonstrates that trial counsel struggled to find and reference portions of Vitale's prior statements which varied significantly from what he was testifying to at trial. (R. 1752, 1755-58, 1764, 1767-70, 1776-80, 1787-92, 1795-97). On several occasions, the Court had to admonish trial counsel for failing to properly refer to

the various statements, (R. 1755-58, 1767-70), and for failing to use proper impeachment techniques on Vitale, (R. 1777-80). Numerous inconsistencies between Vitale's four documented statements and his trial testimony were never fully explained for the jury, including the fact that he never mentioned Ms. Hagin's anal area until his third statement to police, and his varying accounts of Mr. Johnson's statement to him when he emerged from the bedroom on the morning of Ms. Hagin's death. Similarly, Vitale did not mention. Further, Vitale's story that Johnson told him that Hagin asked for her children in the moments before her demise came into being not in Vitale's numerous initial statements, but only upon prompting by the prosecution at the conclusion of his proffer. This particular expansion of Vitale's story is highly problematic given the aggravating nature of this fact, which was indeed relied upon by the prosecution in arguing for a death sentence and by the trial judge in finding aggravation. (R. 3024); (PCR. 918-19).

In addition, trial counsel failed to move to have Vitale's original taped statement played for the jury. The transcripts of Vitale's first statement were incomplete due to various portions of the tape being "indiscernible." (R. 1758-63). Vitale tried to explain away several of the inconsistencies in his statement by claiming that he must have said it during the indiscernible portions of the taped statement. (R. 1771, 1777). In order for the jury to properly assess the evidence and Vitale's credibility, it was necessary for that tape to be played for the jury in its

entirety.

The end result was that the jury was left with a confusing, inarticulate cross of State's star witness, one that failed to properly impeach Vitale and demonstrate the incredible aspects of his testimony.

G. *Failure to Protect Mr. Johnson's Fifth and Sixth Amendment Rights*

Additionally, counsel was ineffective for failing to safeguard Mr. Johnson's Fifth and Sixth Amendment rights by encouraging, or failing to halt, the letter writing campaign between him and the co-defendant, Vitale. During Mr. Johnson's trial, a key element of the State's case-in-chief was the letter-writing campaign, which occurred between Mr. Johnson and his compatriot John Vitale. (R. 1807-11, 1829-45, 1893-1946.) The State relied heavily upon those letters as well as numerous oral statements by Mr. Johnson, to prove their theory that Mr. Johnson was a manipulative, calculating individual who convinced Vitale to take the blame for the murder so that Mr. Johnson could avoid prosecution and a death sentence. The State also used the letters and alleged oral statements to eviscerate Mr. Johnson's defense namely that Vitale's initial confession letters were the actual truth, and that Vitale, rather than Johnson, had in fact killed Ms. Hagin.

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Sixth Amendment countenances the need for defense counsel to protect his

client's Fifth Amendment rights: "A defendant's Sixth Amendment right to the assistance of counsel includes the protection against improper intrusions by a prosecutor . . . into the private relationship between a defendant and his attorney," such that the elicitation of "incriminating statements from him in the absence of counsel" may amount to prosecutorial misconduct and a Sixth Amendment violation. Bennett Gershman, Prosecutorial Misconduct Sec. 1:32 (2d. ed. 2008-2009). Thus, defense counsel is obligated to protect his client against "improper intrusions" by the State, as well as his right not to incriminate himself.

Here, the State violated Mr. Johnson's Fifth and Sixth Amendment rights when it used Vitale as an agent to deliberately elicit incriminating statements from him in the absence of his counsel. See Claim IV (including detailed argument establishing Vitale's role as a state agent); *see also Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Henry*, 447 U.S. 264 (1980).

Although counsel testified they did not know Vitale was acting as a state agent, they were indeed suspicious of it. Thus, by allowing the letter writing campaign to continue and allowing Mr. Johnson to continue corresponding with Vitale, counsel failed in their duty to protect Mr. Johnson's Fifth Amendment right against self-incrimination. The letter-writing campaign was carried out over the three-plus years that Mr. Johnson and Vitale were in jail pending Mr. Johnson's trial. Many of the letters (of which there were hundreds) were undated and

unsigned. The record demonstrates that Stone knew of at least one letter from Vitale to Mr. Johnson, in which he confessed to murdering Ms. Hagin. (PCR. Def. Ex.#7) (R. 1981). In that letter, Stone points to Vitale's admission of guilt and claims, "If that isn't a confession, I don't know what is." (R. 1981) (PCR. Def. Ex.# 7).

Trial counsel was fully aware of the letter-writing campaign, but either actively or tacitly encouraged Mr. Johnson to continue writing Vitale in an effort to obtain incriminating evidence from him. For example, Albert Moore, Mr. Johnson's initial second chair counsel, was informed by Mr. Johnson that Vitale was writing him letters. (PC-T. 591). He did not encourage the letter writing because "I don't think it would be a good idea to have my client communicate with anybody, including the co-defendant." (PC-T. 591-92). Although Moore was of the opinion that Mr. Johnson should not expose himself as early as 2001, it became known to trial counsel that Vitale had given statements against Mr. Johnson in an attempt to more favorably resolve his own charges. Therefore, trial counsel either knew or should have known that any communications between Mr. Johnson and Vitale were likely to get into the State's hands, as they ultimately did. The right to effective counsel under the Sixth Amendment necessarily includes the protection and aid of counsel from the actions of the State pre-trial, which is perhaps "the only stage when legal aid and advice would help him." *Spano v. New York*, 360

U.S. 315, 326. The need for trial counsel to protect the rights of the defendant from unwarranted interrogation and self-incrimination reflects a long-standing constitutional principle where the Supreme Court noted that:

> . . . during perhaps the most critical period of the proceedings . . . , that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself.

Massiah, 377 U.S. at 205.

To the extent that trial counsel encouraged or failed to halt communications between Mr. Johnson and Vitale counsel was ineffective. In fact, when Stone found out that Vitale had confessed Stone wanted Mr. Johnson to get something in writing from Vitale and encouraged communication between the two. (PC-T. 724-25). However, upon seeing the Burns Letter (PCR. Def. Ex.#6), Stone stated that he would not have used that tactic because the letter:

> Indicates that he [Vitale] was carrying on some kind of scheme of his own to try to get Mr. Johnson to say something in writing that was incriminating. Certainly, if I had knowledge of that, I would say stay away from him as far as you can.

(PC-T. 725)(emphasis added).

Stone, thus, without knowledge that Vitale was a state agent, encouraged Mr. Johnson to communicate with Vitale. This tactic was employed even though

Stone testified that he was "always concerned about [a codefendant] cutting a deal." (PC-T. 698). Mr. Johnson was prejudiced by this failure to safeguard and protect his Fifth and Sixth Amendment rights where numerous incriminating statements were used against him at his trial, which the State relied upon to establish its case in both guilt and in aggravation. Trial counsel's efforts to use his own client to draw out a confession from the co-defendant unnecessarily exposed Mr. Johnson to incrimination and damaging counter-evidence from the State. It is not a reasonable trial strategy for defense counsel to encourage Mr. Johnson to communicate with Vitale. The prejudice heaped upon Mr. Johnson as a result of counsel deficient performance herein is legion and requires as new trial.

The trial court in addressing this issue completely ignored the content and impact of the Burns Letter. The trial court concluded that the Burns letter was merely an attempt to control a difficult client. (PCR. 1682). However, the court makes this statement without even the slightest reference to the letter's contents. The letter, states

> My guy is exceedingly impatient and exasperated at the delay in setting up the assistance we discussed a long time ago. . . .I thought that you and I were on the same page as to the desirability of putting his letters into a proper context, and quite possibly getting the co-defendant to confess on tape. My hope, of course, is that Vitale's cooperation would earn him a lighter sentence, and yours is that Johnson would confess to Vitale, or at least acknowledge his role in the construction and content of Vitale's letters, thus removing a thorn in the

> side of your case by preventing [Johnson's trial counsel] Bob Stone from claiming that the letters are true confessions.
>
> Please let me know what you and Hamrick intend to do, if anything. . .

(PCR. Def. Ex.#6).

It is inconceivable that in a claim such as this the trial court rendered its decision while failing to detail the contents of this letter. The fact that Mr. Johnson's lawyers suspected Vitale was working for the state as evidenced by the Burns letter and allowed him to continue to communicate with Vitale effectively cast his Fifth Amendment right to the wind. Therefore, counsel was ineffective and Mr. Johnson is entitled to relief.

H. Cumulative Error

This Court can also take into consideration that all of the errors that occurred at Mr. Johnson's trial, cumulatively, establish that Mr. Johnson did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. *See Young v. State*, 739 So. 2d 553 (Fla. 1999); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991); *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991).

The common thread running through defense counsel's "explanations" for their performance seems to be that it "was no big deal." When discussing why they did not object to Vitale's testimony that Mr. Johnson wanted to have sex with a

passed out person Garland said "I don't think we thought it was that big a deal." (PC-T. 451). When asked why there was no objection to Dr. Diggs using the word heinous it was that it was not that big of a deal because it did not say atrocious or cruel too. When explaining why he did not secure a ruling upon or renew his objection to the State's repeated mischaracterizations of injuries as "cutting" Garland had no answer. In other words, it was not a big enough deal with which to be concerned. Finally, when asked why they did not request a limiting instruction regarding Vitale's self serving testimony about Ms. Hagin asking for her children counsel claimed they did not want to highlight that bad evidence again before the jury. In other words, no big deal this bad evidence was presented, the jury will just have to do without an instruction on how to assess it. Counsel may take solace in the myriad mistakes that were "no big deal" but they all added up to a very big deal indeed for Mr. Johnson – so big a deal, in fact, that the Fifth, Sixth, Eighth and Fourteenth Amendments require a new trial.

ARGUMENT II

MR. JOHNSON'S CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE WITHHOLDING OF EXCULPATORY EVIDENCE WHICH VIOLATED MR. JOHNSON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In *Massiah v. United States*, 377 U.S. 201, 206 (1964), the Supreme Court

held that the government violated the defendant's Sixth Amendment right to counsel when it "used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." The Court recognized the serious constitutional implications of the government's use of secret agents in this manner, which could amount to the functional equivalent of direct interrogation, and is often more of a threat to an accused's Sixth Amendment rights than overt questioning. *Id.* The Court enunciated a two-prong test for proving a *Massiah* violation, requiring a defendant to demonstrate (1) that the person to whom he or she spoke was a government agent, and (2) that the agent deliberately elicited incriminating information from defendant in the absence of counsel. *Id.*

Massiah's "deliberate elicitation" standard has been applied to the context of jailhouse informants in a trio of cases that comprise the modern Court's exposition of the right to counsel as it applies to undercover informants. *See United States v. Henry*, 447 U.S. 264 (1980) (holding that a defendant's post-indictment statements to his cellmate, who was an undercover government informant, were inadmissible as violating the Sixth Amendment right to counsel). While the defendant is required to "demonstrate that the police and their informant took some action, beyond merely listening" in order to elicit incriminating remarks, *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), the State and police may still be

implicated in a Sixth Amendment violation if they knew or should have known that the questioned communications would produce incriminating statements concerning the charges on which the defendant is indicted. *Maine v. Moulton*, 474 U.S. 159 (1985).

Here, the state most certainly knew Vitale was attempting to get post indictment incriminating statements from Mr. Johnson to present to the state for his own benefit. Evidence of this includes the numerous letters from Vitale directly to the prosecutors seeking to execute Mr. Johnson. (PCR. Def. Ex.#1-4). The evidence also includes the fact that the State's investigator Hamrick visited Vitale in jail for the purpose of getting letters directly from Vitale. Additionally Burns Letter firmly establishes that both the State and counsel for Vitale were aware that Vitale was engaging with Mr. Johnson in order to incriminate him. The State did nothing to prevent or dissuade Vitale's conduct and in fact used the fruits of his efforts against Mr. Johnson at trial. The State cannot, consistent with constitutional dictates, bury its head in the sand when it knows that a co-defendant is soliciting incriminating statements post indictment then use those statements against the defendant at trial all while grating the co-defendant leniency in sentencing. Such conduct flies in the face of firmly established Supreme Court law. *See Massiah v. United States*, 377 U.S. 201, 206 (1964) ; *Maine v. Moulton*, 474 U.S. 159 (1985)

There is no question that Vitale was turning letters over to the State, both on

his own, and via his counsel Thomas Burns, during the pendency of the case against Mr. Johnson. (PCR. Def. Ex.#1-3; #6). *See*, e.g., (R. 185, 1656, 1743-44, 1807-23, 1824, 1903, 1946); *see also* SAO Disk 1, File 20 (letters turned over during post-conviction discovery). *See also*, (PCR. Def. Ex.#1-4). Vitale and the State worked together extensively, and even went so far as to discuss the possibility of Vitale "getting the co-defendant to confess on tape," a fact which is indicative of both Vitale's status as an agent and of the State's active involvement in the quest to elicit statements from Johnson. (PCR. Def. Ex.#6).

Stone testified that the state "got Mr. Vitale to start communicating with Mr. Johnson to get Mr. Johnson to look as if he had requested [Vitale] to [confess]." (PC-T. 697). Thus, the state seemed to be the genesis of the continued and ongoing letter writing campaign between Vital and Mr. Johnson. The content of the letters exchanged between Vitale and Mr. Johnson also demonstrates that Vitale was an agent acting with the direct assistance of the State. As early as December 2001, there are letters from Mr. Johnson to Vitale in which Mr. Johnson questions why Vitale has not mailed him a confession, as promised, and wonders why Vitale seemed to be changing his mind about whether to help Mr. Johnson. SAO Disk 1; *see also* (R. 1743-44); (PCR. Def. Ex.#1-3; #6). However, the evolution of the tone of the letters was not able to be put into its proper context until the discovery the Burns Letter which stated:

> My guy is exceedingly impatient and exasperated at the delay in setting up the assistance we discussed a long time ago. . . .I thought that you and I were on the same page as to the desirability of putting his letters into a proper context, and quite possibly getting the co-defendant to confess on tape. My hope, of course, is that Vitale's cooperation would earn him a lighter sentence, and yours is that Johnson would confess to Vitale, or at least acknowledge his role in the construction and content of Vitale's letters, thus removing a thorn in the side of your case by preventing [Johnson's trial counsel] Bob Stone from claiming that the letters are true confessions.
>
> Please let me know what you and Hamrick intend to do, if anything. . .

(PCR. Def. Ex.#6).

Breaking the letter down is illustrative for several reasons. First, it indicates that there were long-standing discussions between the prosecution, Vitale and his lawyer regarding cooperation. Burns clearly states that Vitale wants to set up "the assistance we discussed a long time ago." (PCR. Def. Ex.#6). This is a stark indication that the state was aware of Vitale's interest in providing information about Mr. Johnson for a substantial time including the time of the letter writing campaign. Second, the letter indicates that there was a meeting of the minds between Burns, Vitale and ASA Park to whom the letter was written. Burns states, "I thought you [Park] and I were on the same page as to the desirability of putting his letters into context, **and quite possibly getting the co-defendant to confess on tape.**" (PCR. Def. Ex.#6) (emphasis added) Here, Burns is recapping the

agreement he had with the state to get Vitale to illicitly mine Mr. Johnson for incriminating evidence to use against Johnson at trial and ultimately benefit Vitale and the State. Finally, if there is any question about the meaning and intent of the letter, Burns solidifies it in the last sentence where he states,

> My hope, of course, is that Vitale's cooperation would earn him a lighter sentence, and yours is that Johnson would confess to Vitale, or at least acknowledge his role in the construction and content of Vitale's letters, thus removing a thorn in the side of your case by preventing [Johnson's trial counsel] Bob Stone from claiming that the letters are true confessions.

This declaration indicates that Vitale is offering his information to the state in a *quid pro quo* for a reduced sentence. Additionally, this statement indicates that it was known and agreed that the State would gain benefit from the ongoing letter writing campaign so as to attempt to minimize and obfuscate the fact that Vital actually confessed to the murder for which Mr. Johnson currently faces death. In other words, by knowingly having Vitale communicate with Mr. Johnson the State would be able to get rid of a thorn in its side and case.

This letter discloses the quintessence of a *Massiah* violation. The State overtly engaged in a plan with the co-defendant Vitale to obtain information from Mr. Johnson, which was used against him at trial in order to secure a conviction. In other words, Vitale and the State had "intentionally creat[ed] a situation likely to induce [Johnson] to make incriminating statements without the assistance of

counsel," thereby infringing on his Sixth Amendment right to an attorney. *Henry*, 447 U.S. at 274This was done despite the fact that Vitale had written to the state confessing to the murder. Thus, the state essentially made a deal with the devil in order to secure a conviction and death sentence against Mr. Johnson.

With regard to the Burns letter (PCR. Def. Ex.#6) Garland testified that if he had had that before trial he would have "absolutely" made and issue out of it. (PC-T. 427). Moore testified that had he seen the Burns letter he would have counseled Mr. Johnson "against any further conversation with [Vitale]." (PC-T. 601) Stone testified that he had not seen the Burns letter until postconcivtion counsel showed it to him. He characterized the letter as "going behind my back" and was upset about it. (PC-T. 699). He also said it would have been useful to show that Vitale "was working as an agent of the state." (PC-T. 699). Furthermore, Stone testified that his tactics with regard to Vitale would have been significantly different if he had the Burns letter. (PC-T. 725).

After Vitale confessed, Stone wanted Mr. Johnson to get something in writing from Vitale since he thought Vitale actually committed the murder (PC-T. 725). However, upon seeing the Burns letter, Stone stated that he would not have used that tactic because the letter:

> Indicates that he [Vitale] was carrying on some kind of scheme of his own to try to get Mr. Johnson to say something in writing that was incriminating.

(PC-T. 725).

Burns testified that Vitale was communicating with the prosecution. (PC-T. 679). Burns told the state that Vitale may be willing to testify against Mr. Johnson for "a sufficient reward." (PC-T. 679-80). Notwithstanding his desire to get Vitale to cooperate with the state, Burns claims that he neither encouraged nor discouraged Vitale from writing letters to Mr. Johnson. Vitale admitted that he wrote directly to the prosecutors Park and Seymour. (PC-T. 528-30). Even though he wrote numerous times to the state he never received a letter from the state telling him it was inappropriate to contact them. (PC-T. 529-30). Why would a lawyer allow his client to have direct unfettered contact with the State if it were not for the reason that he was acting as an agent? Thus, the state implicitly was engaging Vitale as an agent in securing information against Mr. Johnson. Eventually the plan to get incriminating information from Mr. Johnson turned to methods of recording him. One method, according to Burns was to have Vitale wear a wire while talking to Mr. Johnson. (PC-T. 685). Having Vitale wear a wire in communicating with Mr. Johnson became a plan in consideration because Burns was:

> pretty certain that if a communication face to face took place, two things might be achieved, that there might be a discussion or some sort of information coming Mr. Johnson that would serve to put the letters that had been exchanged in some sort of context, some sort of an order perhaps, some clarifications perhaps. And also he thought

he could get Rich to confess or to acknowledge that he was the one who actually did the killing.

(PC-T. 685)(emphasis added)

Vitale also stated in his proffer for his plea deal that he kept writing to Mr. Johnson in order to buy time so he could cooperate with ASA Park in order to wear a wire. (PC-T. 531). Vitale claims that the wire was his idea but he is less than credible. First, he is a multiply convicted felon and has admitted to committing check fraud. (PC-T. 515-16). Second, he routinely claimed not to remember matters forcing his recollection to be refreshed with letters he authored and record citations. In fact he even claimed that he did not remember the letter he wrote confessing that he killed Ms. Hagin and drugged Mr. Johnson to frame him. (PC-T. 529).

This communication between Vitale and Mr. Johnson continued for a long time by letter all the while Vitale was working as a state agent eliciting statements from Mr. Johnson and funneling the letters directly to the state. (PCR. Def. Ex.#1-3). This was done because it was important for Burns to solidify a deal for Vitale at all costs. Burns testified that Vitale was emotionally unstable and could be untruthful "against his own interest even." (PC-T. 689). Such is not the behavior of a credible and trustworthy witness. Indeed, the notion that someone would be untruthful "against his own interest" is disturbing. Vitale is nothing but a serial liar and felon who would say anything to save himself. Perhaps the only truthful thing

he ever uttered was his confession. Nonetheless, in its zest to execute Mr. Johnson, the State relied on the testimony of a man like Vitale and continued to use Vitale to attempt to get incriminating statements from Mr. Johnson in violation of the constitution.

There is no question that the inclusion of the letters and oral statements in the State's case-in-chief played a crucial role in proving the charges of first-degree murder, as well as the State's case in aggravation. The State relied heavily upon these statements to support its theory that Mr. Johnson was a manipulative, calculating individual who convinced Vitale to take the blame for the murder so that Mr. Johnson could avoid prosecution and a death sentence. The State also used the letters and alleged oral statements to eviscerate Mr. Johnson's defense, namely that Vitale's initial confession letters were the actual truth, and that Vitale, rather than Mr. Johnson, had in fact killed the victim.

All the letters, as well as numerous oral statements Vitale testified about, were obtained in violation of Mr. Johnson's Fifth and Sixth Amendment rights to counsel. The Burns Letter establishes that there was a pre-existing agreement between Vitale and the State to deliberately elicit information from Mr. Johnson, including a possible confession. Even if some of the information Vitale presented to the State was done voluntarily and without the direct instruction of the State, any information obtained after Vitale approached them to make a deal should be

properly excluded per *Massiah*. *See United States v. Stevens*, 83 F.3d 60, 64 (2d Cir. 1996). The State's failure to disclose this exculpatory information violates Mr. Johnson's Sixth Amendment rights.

The State withheld this material evidence pertaining to Vitale's role thereby depriving Mr. Johnson of his rights under the Fifth, Sixth and Eighth Amendments in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264 (1959) and *Giglio v. United States*, 405 U.S. 150 (1979). The prosecutor is required to reveal to defense counsel any and all information that is helpful to the defense, including impeachment evidence, whether that information relates to guilt/innocence or punishment and regardless of whether defense counsel requests the specific information. *See United States v. Bagley*, 473 U.S. 667 (1985). In particular, an agreement with a government witness for testimony in exchange for favorable treatment in the criminal justice system should be disclosed as impeachment evidence, especially where, as here, the witness's testimony is an important part of the government's case. *See, e.g., Giglio*, 405 U.S. at 154-55. If a failure to fully inform the jury of the interest of a witness could in any reasonable likelihood have affected the decision of the jury, a new trial is required. *Id. See also Wolfe v. State*, 190 So.2d 394 (Fla. 1st DCA 1966). *Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1994); *Swafford v. State*, 679 So. 2d 736 (Fla. 1996).

Each of Mr. Johnson's lawyers testified that the fact that Vitale communicated directly with the State was information that they should have had before trail and would have used at trial. Garland testified that that information established that Vitale was "working as an agent of the state." (PC-T. 426). Moore testified that beyond the constitutional problems, the letters between Vitale and the prosecutors could have been used during cross-examination because he anticipated Vitale backing off of his earlier confession. (PC-T. 594). Stone, lead counsel, also testified that knowledge that Vitale was communicating with prosecutors could have been used as cross-examination (PC-T. 701).

Like the previous claim, the trial court in postconviction failed to address the contents of the Burns Letter. Indeed the court adopted its flawed and factually incomplete analysis in the previous argument to deny this claim. Again, just as in the previous claim, it is unfathomable that the court would fail to address the content of the letter that is the polestar of this claim. The Burns Letter contains significant information regarding the State's *Messiah, Brady* and *Giglio* violations. Giving it such short shrift is an abrogation of the trial court's duty to engage with the facts presented at the evidentiary hearing and is an unreasonable application of those facts. *See Porter v. McCullom*, 130 S.Ct 447 (2009).

Additionally, the trial court dismissed the contents of the Burns Letter that proves the existence of the agreement between Vitale and the State. This

conclusion is reached notwithstanding the veritable smoking gun of the Burns Letter and the testimony of two proclaimed credible witnesses that that same letter indicated Vitale was acting as an agent. Stone testified that the Burns letter plainly indicated to him that Vitale was carrying on a scheme to try to get Mr. Johnson to say something incriminating in writing. (PC-T. 725). Garland, declared that Burns was "attempting to have his client work as an agent for the state to obtain evidence. And clearly if this happened or if it were [sic] planned to happen, it would have been a violation of Mr. Johnson's Fifth and Sixth Amendment rights to counsel." (PC-T. 427).

It is undisputed that Vitale communicated directly with the State and the State's investigator. (PCR. 1684). It is also undisputed from the Burns letter and the testimony of credible witness about that letter that Vitale was acting as an agent. While the defendant is required to "demonstrate that the police and their informant took some action, beyond merely listening" in order to elicit incriminating remarks, *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), the State and police may still be implicated in a Sixth Amendment violation if they knew or should have known that the questioned communications would produce incriminating statements concerning the charges on which the defendant is indicted. *Maine v. Moulton*, 474 U.S. 159 (1985). In other words, the state may not turn a blind eye to the plain facts that a co-defendant is engaging in covert

operations to gain post-indictment incriminating evidence from an accused and then use that very evidence against the accused. It is patently unfair and unconstitutional for the State to benefit from the actions of a covert agent by feigning lack of knowledge in an attempt to create plausible deniability.

Our system of constitutional protections works to ferret out the breaches of rights not to allow the government to find crafty ways to claim deniability while simultaneously using the damning evidence accumulated to secure a conviction and death sentence. These hard won constitutional rights are the bedrock principals upon which our criminal justice system is based. Such rights must be scrupulously honored and protected. Approaching these rights, as the State did here, with a "what can I get away with" or "catch me if you can" mentality is becoming all too prevalent. Such conduct gives lip service to sacred constitutional rights while expending great effort to minimize and eviscerate those rights. These rights must be viewed as inherent protections for all not as restrictive and obstructionist barriers to be circumvented on the way to a conviction.

The end result of the State's actions is that it gained the benefit of having a covert agent obtaining incriminating information from Mr. Johnson in violation of his constitutional rights and ultimately used that information against him at trial. Not only was this information obtained in violation of *Massiah* and its progeny, the information was kept from Mr. Johnson in violation of *Brady v. Maryland*. In other

words, knowledge that Vitale was actively gathering information against Mr. Johnson and systematically funneling that information to the state so that he could lessen his exposure after his confession and cut a deal with the state would have been, as all counsel acknowledged at the hearing, fruitful information to be used as during Vitale's cross-examination. Armed with this knowledge, counsel could have shown Vitale to be the opportunist serial liar that he is. But for the State's actions perpetuated by its overarching desire to execute Mr. Johnson, the jury would have seen Vitale as he truly is and rightly viewed his testimony with a jaundiced eye. The prejudice of the State's conduct cannot be understated. The State blatantly violated long established and sacred constitutional rights with its win-at-all-costs mentality. Such tactics have no place in a court and are especially pernicious in a capital case such as this. Therefore, Mr. Johnson is entitled to relief.

ARGUMENT III

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT MENTAL HEALTH MITIGATION EVIDENCE

Significant mitigation evidence relating to Mr. Johnson's mental health background, specifically diagnoses of severe borderline personality disorder and post-traumatic stress disorder, never reached his penalty phase jury. Without reasonable tactic or strategy, trial counsel failed to investigate and present readily available evidence which would have established mental health mitigation. The

mitigation that was presented by trial counsel was incomplete and not presented in a coherent and consistent theory of defense. The result is that Mr. Johnson was sentenced to death by a jury who knew very little about the man they were sentencing.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688 (citation omitted). Beyond the guilt-innocence stage, defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion). In *Gregg* and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." *Id.* at 206. *See also Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Mr. Johnson had a constitutional right to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer. *Williams*

v. Taylor, 120 S. Ct. 1495, 1513 (2000) "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (*citing Lockett v. Ohio*, 438 U.S. 586 (1978)). In Mr. Johnson's capital penalty phase proceedings, substantial mitigating evidence went undiscovered and was thus not presented for the consideration of the sentencing jury or the judge.

One of counsel's highest duties is the duty to investigate, prepare, and present the available mitigation. *Wiggins v. Smith*, 539 U.S. 510 (2003); *see also Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) (reaffirming *Wiggins* and finding that "[e]ven when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review materials that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase"). Strategic choices regarding the investigation and presentation of evidence at trial which are made after less than complete investigation are reasonable only to the extent that "reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. 510 (2003) "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." *Id* at 2538. In other words, counsel must conduct a complete investigation to know what evidence is available before a reasonable decision can be made whether or not to present it.

Throughout the Court's analysis in *Wiggins* of what constitutes effective assistance of counsel, it turned to the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See id.* at 2536-7. Under the ABA guidelines, trial counsel in a capital case "should comprise efforts to discover **all reasonably available** mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p 93 (1989) (emphasis added). *Id.* at 2537.

Under the ABA Guidelines, there are specific requirements which should be met from the initial appointment on a case through its conclusion. Guideline 11.4.1(c) states, **"The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.** This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor" (emphasis added). In order to comply with this standard, counsel is obliged to begin investigating

both phases of a capital case from the beginning. *See id.* at 11.8.3(A). This includes requesting all necessary experts as soon as possible. *See* Commentary on Guideline 11.4.1(c). In addition, when an expert or other persons working with the defense talk with the defendant, defense counsel is obligated to prepare the client for such an interview. *See id.* at 11.8.3(D).

Trial counsel is obligated to conduct a proper investigation into his or her client's mental health background when mental health is at issue. *See O'Callaghan v. State*, 461 So. 2d 1354 (Fla. 1984). As part of that responsibility trial counsel is obligated to assure that the client is not denied a professional and professionally conducted mental health evaluation. *See United States v. Fessel*, 531 F.2d 1278 (5th Cir. 1979); *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Mason v. State*, 489 So. 2d 734 (Fla. 1986); *Mauldin v. Wainwright*, 723 F.2d 799 (11th Cir. 1984). What is required is an adequate psychiatric evaluation of [the defendant's] state of mind." *Blake v. Kemp*, 758 F.2d 523, 529 (11th Cir. 1985). And just as the Fourteenth Amendment mandates that an indigent criminal defendant be provided with an expert who is professionally fit to undertake his or her task, and one who undertakes that task in a professional manner. *Ake v. Oklahoma*, 470 U.S. 68 (1985), so too does it hold that there is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States v. Fessel*, 531 F.2d 1278, 1279 (5th Cir. 1979). Where there is a

breakdown in the interrelation between the expert mental assistance provided to a criminal defendant and trial counsel's effectiveness in providing a complete and accurate presentation of that information to a judge and jury, trial counsel renders deficient performance in violation of the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668 (1984).

A. Failure to timely investigate and prepare mitigation

Almost from the beginning of Mr. Johnson's case discord, miscommunication, and lack of structure into the investigation and preparation of his mental health mitigation was evident. Defense counsel filed a stipulated motion for the appointment of a mental health expert on April 25, 2002 and the same day the court granted the order and appointed Dr. Theodore Williams. (R. 349-356). On January 24, 2003 Tom Garland was appointed as co-counsel to handle the investigation and preparation the penalty phase portion of Mr. Johnson's defense. (R. 404). At a status hearing that same day comments made on the record reflected conflict between Mr. Johnson's two attorneys and then appointed mental health expert Dr. Williams.[4] Following that hearing on May 9, 2003 trial counsel filed a

[4] Stone stated for the record: "[t]he mental health expert, he and I just didn't get along, and I – he got mad at me because I wouldn't give him certain facts because he was asking me for things I didn't think he needed and, quite frankly, I was going to ask you if somebody could appoint a mental expert for him, and he was going to do the same for me. We just didn't get along, Judge. I didn't get along with him at all, and I don't think he had Mr. Johnson's best interests at heart, and so I'm going to seek another mental health expert and I'm going to seek one

stipulated motion to appoint expert Robert Brugnoli, Ph.D to conduct a neuropsychological examination of the defendant. (R. 450-51). On May 14, 2003 the Court entered an order granting the stipulated motion and appointing Dr. Brugnoli. (R. 452-453). During a status hearing, in October 2003, trial counsel informed the court that they still had yet to provide their experts with any records nor had they yet obtained or reviewed any themselves.[5] Counsel's comments indicated a lack of communication with his mental health expert, informing the court that he had yet to even check with Dr. Williams to learn what, if anything, Dr. Williams may have obtained as part of his work on behalf of Mr. Johnson. Tellingly, following these comments by trial counsel the State reiterated to opposing counsel the importance at that stage of the case for preparation of the trial that defense counsel provide their experts with all available records before they were even deposed. (October 13, 2003 T. 194).

As the applicable professional standards set forth in the American Bar Association Standard of Criminal Procedure makes clear:

---

that the State loves, Mr. Greg Landrum (January 24, 2003 T. 36).

[5] "[w]ell, [our mental health experts] don't have any [records]. We haven't seen anything yet, so I'm not supposed to provide it to [the State] if I don't have it. . . I don't have anything right now. We don't have school records; I'm trying to get them. And I'm unaware if Dr. Williams does have anything. I haven't checked with my file to see what was turned over." (October 13, 2003 T. 193-94).

> investigations into mitigating evidence "should comprise efforts to discover **all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.** (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.41, p. 93 (1989)). (emphasis added).

Wiggins v. Smith, 123 S. Ct. at 2536-2537 (emphasis added). This obligation also contemplates the need for such investigations to be conducted in a timely and diligent fashion:

> Defense counsel should conduct a **prompt** investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.

ABA Standard for Criminal Justice, Standard 4-4.1(a), (3d ed. 1993) (emphasis added). *See also Williams v. Taylor*, 529 U.S. 362, 395-96 (2000).

The lack of diligence into the investigation and presentation of Mr. Johnson's mental health mitigation is further corroborated by comments provided from Dr. Williams' initial report. Following appointment on April 25, 2002, Dr. Williams met with Mr. Johnson approximately six times at the St. Lucie County jail and authored two reports detailing his notes from those meetings. Following those meetings, Dr. Williams submitted a report on January 26, 2003. On the front page of that report Dr. Williams noted that despite having requested meetings with trial attorneys Robert Stone and Albert Moore on two occasions (telephone and in writing) to discuss defense strategy, at the time of authoring the report defense

counsel had declined to show any interest in scheduling a meeting with him. (PC-R. Def. Ex.#5, Tab 4, p.1).

The comments provided by defense counsel at the October 2003 status establish that even roughly ten months after having received two requests, trial counsel still had yet to provide Dr. Williams with the background information which he was seeking or spoke to him about what information he may have obtained. Despite having had almost a full year in which to do so, and having received repeated requests over the course of almost a year and half by Dr. Williams, defense counsel still had not yet obtained the requisite records and background information Mr. Johnson's appointed mental health expert had instructed were necessary to render a complete diagnosis. Trial counsel's failure to promptly investigate and provide this information rendered their representation of Mr. Johnson patently ineffective.

B. Failure to present mitigation evidence

At that penalty phase trial counsel presented the testimony of Dr. Williams but elected not to present Dr. Brugnoli. Through lay witness testimony and Dr. Williams counsel presented evidence of Mr. Johnson's abusive childhood and dysfunctional family. Dr. Williams testified that the environment in which Mr. Johnson was raised throughout his childhood was a significant factor in understanding and diagnosing his mental health issues. (R. 2924-36). Dr. Williams

testified that Mr. Johnson suffered from diagnoses of mixed personality disorder and moderate depression. (R. 2960). Dr. Williams concluded that Mr. Johnson me the minimum criteria for the statutory mitigator of extreme mental or emotional disturbance at the time of the murder. (R. 2956, 2960). Further, based upon interviews with Mr. Johnson and review of records in the case, Dr. Williams testified that he believed Mr. Johnson was intoxicated on the night the crime and also possibly under the influence of drugs such that he also met the requirements for the statutory mitigator that he was unable to conform his conduct to the requirements of law. (R. 2955, 2960-61).

In its sentencing order the trial court declined to find either statutory mitigator had been established. (R. 918-21). The court noted that nothing indicated Mr. Johnson was upset on the night of the crime or that the influence of alcohol impaired his ability to know what he was doing such that he lost control. (R. 918; 921). Despite the fact trial counsel presented the testimony of Dr. Williams to Mr. Johnson's penalty phase jury, this was not the most complete and accurate picture of all of the mitigating evidence which was available to trial counsel. Had defense counsel conducted a timely and more thorough investigation and effectively utilized the assistance of his medical expert, counsel could have presented a more compelling and expansive argument in support of statutory mitigation.

While trial counsel did present some evidence in support of statutory

mitigation, it was never put into the proper context for the jury's consideration. Trial counsel failed to effectively prepare and utilize his mental health expert to inform the jury how Mr. Johnson's mental health background contributed to his actions on the night of the crime. Had the defense effectively utilized the diagnoses provided in the reports authored by the mental health experts retained prior to trial, along with Mr. Johnson's chaotic upbringing, and tied them together with their effect on his inability to cope environmental stressors, particularly those on the night of the crime, that information would have made it more likely than not that the jury would have found statutory mitigation to have been established. The end result is that Mr. Johnson's judge and jury were presented with a disjointed theory of mitigation which failed to sufficiently explain how Mr. Johnson's diagnoses and background played a role in the events which occurred that night.

Substantial mitigation evidence never reached the jury or the Court. Prior to trial Mr. Johnson was diagnosed by Dr. Williams with mixed personality disorder and Posttraumatic Stress Disorder (PTSD). However, inexplicably, trial counsel failed to present evidence of this diagnosis during the penalty phase.6 Had trial

---

[6] To the extent that the State has attempted to assert that the diagnosis of PTSD was offered by Dr. Williams during the penalty phase at trial that is unsupported by the record. The record at trial demonstrates that Dr. Williams was asked about whether Mr. Johnson's father suffered from PTSD following his return from Vietnam and how those outbursts affected Mr. Johnson's home life. (R. 2928-29). No testimony was provided by Dr. Williams that Mr. Johnson suffered from a diagnosis of PTSD or how that diagnosis supported statutory mitigation.

counsel been effective in presentation of this diagnosis it would have provided a critical piece of mental health mitigation that, along with Mr. Johnson's diagnosis of borderline personality disorder, would have put into context the entire picture of Mr. Johnson's mental health.

Competent substantial evidence presented at trial and in postconviction demonstrates that the personality disorder from which Mr. Johnson suffers is a ***lifelong diagnosis which significantly influences his behavior***. Evidence provided by both Dr. Williams and Dr. Toomer establishes that Mr. Johnson suffers from a personality disorder which affects his ability to handle environmental stressors and regulate his conduct. At trial Dr. Williams testified that Mr. Johnson's personality characteristics suggest a mixed personality disorder, Personality Disorder NOS. (R. 2960). During the evidentiary hearing in postconviction Dr. Toomer testified that Mr. Johnson suffers from borderline personality disorder and PTSD. (PC-T. 634, 647). Both experts presented testimony that corroborated that the effect of these diagnoses manifests itself in an inability to understand how to regulate behavior in an appropriate manner (R. 2958) and an instability with respect to functioning in areas of affect, cognition, and behavior. (PC-T. 644). Most importantly, both experts also noted that depending on the given level of stressors in an environment, there is strong tendency for exacerbation of the effect of the disorder on Mr. Johnson's behavior. (R. 2957, PC-T. 644, 647).

Evidence of Mr. Johnson's diagnosis of PTSD would have provided the penalty phase jury with the necessary and appropriate backdrop in which to view the environment which he was in on the night of the crime and how that environment affected his actions for purposes of statutory mitigation. Evidence of Mr. Johnson's diagnosis of PTSD, coupled with evidence presented regarding Mr. Johnson's severe intoxication, possible illicit drug use, the hostile and argumentative dynamic between John Vitale and the victim, and the domineering and threatening relationship between Vitale and Mr. Johnson, would have demonstrated how the environmental stressors exacerbated his condition, thus inhibiting him from regulating his actions and behavior. Had counsel effectively presented this diagnosis of PTSD and tied it together with these facts and his diagnosis of mixed personality disorder, there is a reasonable probability that the jury and the court would have found the statutory mitigators that Mr. Johnson was unable to conform his conduct to the requirements of law and that he was acting under extreme mental or emotional distress on the night of the crime.

Mr. Johnson was diagnosed with PTSD by Dr. Williams in his report dated, January 26, 2003:

> Richard's symptoms suggest that he may have experienced Posttraumatic Stress disorder throughout his childhood. As he grew older, his symptoms suggest low self esteem, a negative self concept, and chronic feelings of insecurity which could result into impulsive and aggressive behaviors when he felt threatened by

> others...Furthermore, results from testing (discussed previously in this examination) suggest several personality disorders (e.g. paranoid and schizoid personality disorder traits) which are likely to be exacerbated by illicit drug and alcohol use. Indeed, it would appear that his perceived abandonment by his mother and his father, and the neglect, abuse, and trauma that were commonplace in his childhood and adolescence, have had a devastating and permanent effect upon his perceptions, identity, sense of safety as well as his basic ability to solve problems and to regulate his emotional responses, particularly when angered, threatened, or rejected."

(PC-R. Def. Ex.#5, Tab 4, pg. 15). Dr. Williams' report noted that Mr. Johnson suffered from PTSD throughout his childhood and that the trauma had a devastating and permanent effect on his emotional responses. (PC-R. Def. Ex.#5, Tab 4 pg.15). The report further noted that during the time period leading up to the murder Mr. Johnson had been involved in a compromising and threatening relationship with his co-defendant John Vitale.[7] Inexplicably, however, that diagnosis and Dr. Williams' notes were never followed up on by Mr. Johnson's trial counsel during the penalty phase.

Garland testified in postconviction that he was in charge of mitigation and

[7] "Unfortunately, this man, his co-defendant, appears to have manipulated and/or coerced Richard into sexual relations when Richards was under the influence of illicit drugs or extremely intoxicated. From my interactions with Richard, he was extremely uncomfortable and embarrassed about his relationship with his co-defendant and explained that he felt he had to continue the relationship because his co-defendant was a large, intimidating and domineering man." (PC-R. Def Ex.# 5, Tab 4, pg. 16).

that he could recall that "there were a couple of statutory mitigators and some others" found by Dr. Williams. (PC-T. 452-54). Garland thought Dr. Williams had briefly addressed the issue of post traumatic stress disorder but that he didn't testify to it at trial. (PC-T. 454). He did not recall doing anything additional to follow up on that specific diagnosis. (PC-T. 455). Garland also recalled that there was evidence of serious dysfunction in Mr. Johnson's family background as well as issues with a learning disability and that they "tried" to regard such information as a fruitful area of mitigation. (PC-T. 455-56).

At the evidentiary hearing in postconviction Dr. Toomer explained that "PTSD traits represent a significant recurring factor that impact the individual's functioning." (PC-T. 647). Dr. Toomer testified that he believed the diagnosis of PTSD was a significant factor in support of statutory mitigation which the jury should have been presented with during the penalty phase. (PC-T. 647). Evidence that Mr. Johnson suffers from a diagnosis which results in impulsive and aggressive behavior when threatened or intoxicated, and inhibits his ability to regulate his emotional responses would have provided critical information in which to put into context the actions by Mr. Johnson on the night of the crime. Failure by trial counsel to follow up on this diagnosis and present it to the jury resulted in a key piece of Mr. Johnson's mental health picture going missing before the jury.

Evidence of Mr. Johnson's diagnosis of PTSD in conjunction with his diagnosis of borderline personality disorder establishes statutory mitigation that the crime was committed while Mr. Johnson was under extreme mental or emotional distress and that on the night of the crime he was unable to conform his conduct to the requirements of law. The trial court sentencing order finding that there was no evidence substantiating that Mr. Johnson suffered from an extreme mental or emotional disturbance on the night of the murder is belied by the evidence presented at both trial and in postconviction. In denying application of the extreme emotional disturbance statutory mitigator at trial the trial court sentencing order found:

> While testimony from family members and Dr. Theodore Williams, the expert psychologist for the defense, and the written evaluation of Dr. Williams reveal that Richard Johnson experienced some physical emotional and sexual abuse as a child, no evidence was presented that such abuses produced any extreme mental or emotional disturbance that would have caused, or made it more likely, that Richard Johnson would commit murder. There is no credible evidence that Richard Johnson was emotionally upset the day before the murder or during the hours leading up to the murder. It was not until he disclosed to John that he had killed Tammy that he displayed any signs of emotional distress. Even during the hours he engaged in disposing of the body, there was not credible evidence that he was acting bizarrely.
>
> Dr. Williams never opined that Richard Johnson was under the influence of extreme mental or emotional disturbance at the time of the murder. Dr. Williams never testified or stated in his written evaluation that whatever

> mental or personality disorders Richard experienced on the day of the crime, those disorders significantly controlled or influenced his behavior in a manner the Court could construe as mitigating."

(R. 919).

Significant evidence which was readily available at trial, and has since been presented in postconviction, demonstrates that Mr. Johnson's diagnoses of PTSD and personality disorder did indeed affect his conduct on the night of the crime. Contrary to the trial court's language in the sentencing order, evidence presented at trial, as well as in postconviction, establishes that the abuse, neglect, and trauma that Mr. Johnson suffered as a child does in fact contribute his conduct the night of the crime. At trial Dr. Williams testified that Mr. Johnson suffers from moderate depression and a mixed personality disorder such that he believed Mr. Johnson met the minimum requirement for the statutory mitigator that he committed the crime while as a result of extreme mental or emotional disturbance. (R. 2960). As Dr. Toomer explained in postconviction, personality disorders are a lifelong diagnosis and without some type of intervention the behavior will persist. (PC-T 636; 646). In Dr. Williams January 26, 2003 report he noted that "it would appear that [Mr. Johnson's] perceived abandonment by his mother and his father and the neglect, abuse, and trauma that were commonplace in his childhood and adolescence, have had a devastating and permanent effect upon his perceptions, identify, sense of safety as well as his basic ability to solve problems and to regulate his emotional

responses, particularly when angered, threatened, or rejected. (PC-R. Def. Ex.# 5, Tab4, p. 15).

Testimony provided at trial from individuals present on the night of the crime also provided support that Mr. Johnson's behavior was indeed directly affected by personality disorder and PTSD. Several witnesses testified that the atmosphere on the night of the crime was filled with tension, hostility, and fueled by the participants' various levels of intoxication. This toxic atmosphere continued to escalate throughout the night. Mr. Johnson testified that throughout the night Vitale was arguing with Ms. Hagin, several times engaging in screaming bouts with her in front of Mr. Johnson. (R. 2423-25). Vitale testified that upon arrival to their house, Adrienne Parker, one of the housemates, was upset with Mr. Johnson for bringing home the Ms. Hagin to their house. (R. 1682). Parker corroborated this fact, confirming that she was upset with Mr. Johnson when he came home for bringing Ms. Hagin there. (R. 1544-45). Parker also testified that the reason she was upset with Mr. Johnson was because of the fact that she had previously been involved with him and still had an ongoing relationship with him at that time (R. 1544-45, 1548). Parker testified that they had previously had problems before and she was doing her best not to let it escalate when she had had so much to drink. (R. 1544-45; 1548).

The significance of these factors cannot be overlooked in determining Mr.

Johnson's mental state and whether he was suffering from the effects of his disorders on the night of the crime. Regardless of how Mr. Johnson was placed in that position[8], the evidence presented at trial substantiates that Mr. Johnson was severely intoxicated and surrounded by an environment which overwhelmed his ability to manage the various individual confrontations in which he was involved. As Dr. Toomer explained, "remember the neuropsychologist [Dr. Williams] who evaluated him said that he was capable of functioning in terms of managing, in terms of cognitive functioning in a non-intoxicated state....Well, Mr. Johnson was not in a non-intoxicated state in terms of accounts from the person with whom he lived at the time. And so those particular regulatory mechanisms described in the neuropsychological evaluation would not be applicable." (PC-T. 647).

The evidence at trial and in postconviction establishes that not only does Mr. Johnson suffer from a diagnosis of personality disorder and PTSD but that on the night of the crime these diagnoses played a significant role in his ability to regulate his conduct and behavior. As a result of his intoxication and the confrontational nature of the atmosphere in which he was embroiled, Mr. Johnson became distressed and was unable to "engage in the normal kinds of behavior that are

[8] In the trial court's sentencing order one reason it noted for rejection of this statutory mitigator was the fact that Mr. Johnson voluntarily drank that evening. The circuit court's order notes that voluntary intoxication is no longer a legal defense for a criminal charge in Florida.

necessary to function in organized, rational, and sequential fashion. Things such as weighing alternatives, projecting consequences, modulation of emotional expression, sublimation of affect" (PC-T. 644-45) became impossible for Mr. Johnson to perform. As such, at the time of the crime Mr. Johnson was suffering from the effects of an extreme mental or emotional disturbance. (PC-T. 645). Trial counsel's failure to effectively present this evidence in a comprehensive and detailed manner through use of the appointed mental health expert and witness testimony available at the time of trial constituted deficient performance. The resulting prejudice is that the trial court ultimately rejected application of the extreme emotional disturbance statutory mitigator despite the existence of competent substantial evidence to support its application.

Similarly, substantial competent evidence has been presented at both trial and in postconviction also establishes statutory mitigation that Mr. Johnson was unable to conform his conduct to the requirements of law on the night of the crime. This statutory mitigator was rejected at trial because the trial court found that while evidence showed Mr. Johnson was intoxicated on the night of the crime, evidence also showed that Mr. Johnson was capable to significantly control the activities he engaged in, exert purposeful influence over others around him, and otherwise engage in purposeful behavior. (R. 920). The trial court further noted that "when one voluntarily drinks alcohol to remove the restraints, and there is no evidence

that alcohol has impaired his ability to know what he is doing, one bears the responsibility for unrestrained actions resulting from the consumption of alcohol, particularly when one harms someone else." (R. 921).

Contrary to the findings in the trial court sentencing order, ample evidence existed that Mr. Johnson was in fact severely intoxicated on the night of the murder and the extent of his intoxication rendered him incapable of conforming his conduct to the requirements of law. Evidence presented at trial and in postconviction establishes that with individuals who suffer from personality disorders, such as Mr. Johnson, the use and influence of alcohol and/or drugs has a significant effect on their ability to control and moderate the behavior. In the January 26, 2003 report by Dr. Williams', he indicated that the results from Mr. Johnson's tests suggested several personality disorders which are likely to be exacerbated by illicit drug and alcohol use. (PC-R. Def. Ex.#5, Tab 4, p.15). At the evidentiary hearing in postconviction Dr. Toomer testified that environmental stressors play a significant part in Mr. Johnson's inability to cope with his PTSD and borderline personality disorder. Dr. Toomer explained that Mr. Johnson's personality disorder is exacerbated by his issues with substance abuse which manifests itself by instability in functioning in areas of affect, behavior, and cognition. (PC-T. 644-45). Dr. Toomer testified that these factors impact things such as "weighing alternatives, projecting consequences, modulation of emotional

expression, sublimation of affect." (PC-T. 644-45). Specifically, Dr. Toomer remarked "[r]emember the neuropsychologist, [Dr. Brugnoli], who evaluated him said that he was capable of functioning in terms of managing, in terms of cognitive functioning in a non-intoxicated state. Well Mr. Johnson was not in a non-intoxicated state in terms of accounts from the person with whom he lived at the time. And so those particular regulatory mechanisms described in the neuropsychological evaluation would not be applicable." (PC-T. 647).

Testimony provided at trial by several witness including Adrienne Parker (R. 1551-52, 1554), Mr. Johnson's codefendant John Vitale (R. 1686-87), Anthony Carrick (R. 1497-98, 1500-02), and Thomas Beakley (R. 1604-05) substantiate that Mr. Johnson had been drinking constantly and excessively throughout the night of the crime. Moreover, as Dr. Williams noted during his testimony, there were also letters authored by co-defendant John Vitale prior to trial in which he confessed to having slipped a tab of ecstasy into Mr. Johnson's drink. (R. 2955).

Evidence of the extreme levels of Mr. Johnson's intoxication would have provided argument in support of the application of the statutory mitigator that on the night of the murder Mr. Johnson was incapable of conforming his conduct to the requirements of law.[9] Had trial counsel effectively highlighted the extent of Mr.

[9] As noted above, evidence of extreme intoxication would also support the application of the statutory mitigator of extreme mental or emotional disturbance.

Johnson's drinking and possibly being under the influence of drugs, this evidence would have vitiated any argument that Mr. Johnson was in control of his own actions or capable of controlling the actions of others. Evidence of severe intoxication would have demonstrated that personality disorder and PTSD diagnoses from which he suffers were significantly exacerbated at the time of the crime thus causing him to have difficulty regulating his emotions and actions. Trial counsel's failure to effectively capitalize on the numerous corroborative sources of Mr. Johnson's state of intoxication and present it in a cohesive picture in support of this statutory mitigator denied Mr. Johnson a reliable adversarial testing at penalty phase.

The evidence presented during postconviction establishes both statutory and non-statutory mitigation. The testimony from Dr. Toomer supports the statutory mitigators of extreme mental or emotional disturbance and an inability to conform one's conduct to the requirements of law. Evidence of Mr. Johnson's diagnosis of borderline personality disorder along with presentation of his diagnosis of PTSD supports statutory mitigation. The circuit court order in postconviction finding that the cross examination of Dr. Toomer undermined the credibility and novelty of his testimony is unreasonable and unsupported by the record. In reaching the determination that Dr. Toomer's postconviction testimony was largely cumulative and unsupportive of the two statutory mitigating circumstances presented in

postconviction, the court erroneously relies upon several factors which are contradicted by the record at trial and in postconviction.

In denying postconviction relief the trial court found that cross examination of Dr. Toomer undermined the credibility and novelty of his testimony. (PC-R. 1688). In doing so the trial court focused on several factors, one which was the fact that Dr. Toomer did not prepare a written report. This factor however, does not render his testimony incredible or his diagnoses invalid. Dr. Toomer testified that he based his testimony and diagnoses upon his own clinical evaluation and testing of Mr. Johnson, review of school records, review of testimony at trial, and his review of test results from Dr. Williams and Dr. Brunoli. (PC-T. 614). Dr. Toomer testified that relying upon reports of other doctors is standard in the field of psychology and a practice which is regularly employed. (PC-T. 670). Dr. Toomer explained in detail the battery of tests he conducted, their results, and the significance of those results. (PC-T. 622-648). The State was provided opportunity to cross examine Dr. Toomer on those results and in fact did so. Every source of information and basis for his diagnoses and expert opinion were thoroughly presented, discussed, and scrutinized. The simple fact that he did not prepare a written report does not discredit his testimony or his expert opinion and diagnoses in any way.

The circuit court's determination in postconviction that his diagnoses were

unsupported by the DSM-IV is also unsupported by the record. Dr. Toomer testified in postconviction that his diagnoses and supporting opinion are supported by the DSM-IV. During cross examination when asked whether he utilized the DSM-IV diagnostic criteria for diagnosing Mr. Johnson's personality disorder, Dr. Toomer testified:

> Here is the thing. You have to be careful when you use a DSM-IV. First of all, the DSM-IV, and I can say this because I was a university professor for thirty ears and I trained numerous clinicians, the DSM-IV has a number of shortcoming. It is a cookbook. It is designed to allow different people in different related specialties, psychiatry, psychology to have a common parlance.
>
> But you have to be careful because, first of all, the DSM-IV or the DSMI-IV-TR only deals with behavior. It only deals with behavior. The category, the diagnostic categories are not discreet categories. The DSM-IV does not consider history. It does not consider etiology. It does not consider theory. It does not consider the evolution of the particular mental illness. So you have to be very, very careful in terms of how to use that.

(PC-T. 659). Dr. Toomer explained that the DSM-IV is generally accepted as a "basis for parlance between professionals in the mental health field but not in terms of rendering a definitive diagnosis. (PC-T. 660). Dr. Toomer then explained that Mr. Johnson in fact did "met some of the criteria" for borderline personality disorder in the DSM-IV. (PC-T. 660). Dr. Toomer testified that he utilized a theory in diagnosing Mr. Johnson with borderline personality disorder. He explained that in rendering a diagnosis he utilizes the DSM-IV but then also utilizes the common

accepted practice in the field, which is the basis for rendering a diagnosis. (PC-T. 662). Dr. Toomer further explained that his diagnosis did not simply look to the characteristics found in the DSM-IV, and that he was certain that his diagnosis contained overlap and went far beyond what was in the DSM-IV. (PC-T. 664).

On re-direct Dr. Toomer explained that the reason he utilized a theory rather than a strict diagnosis from the DSM-IV is because the diagnosis from the DSM-IV is a shortcut that doesn't take into account all aspects of functioning. (PC-T. 674). Dr. Toomer explained that the DSM-IV leaves out and misses all of the data that can be obtained from other sources: history, people who knew the person, collateral data, it misses all of that. (PC-T 674). He explained that omitting such information can change the diagnosis and why it is so important to remain focused upon the totality of the data rather than a strict DSM-IV only diagnosis. (PC-T. 674). Dr. Toomer explained that the theory approach he employed is in fact the standard method in the field and the one taught when training clinicians. (PC-T. 674).

Dr. Toomer's testimony establishes that not only were his diagnoses supported by the DSM-IV but that in reaching those diagnoses, he employed a more thorough and comprehensive method for diagnosing Mr. Johnson which took into account additional areas of significance such as history, people who knew Mr. Johnson, etiology, and other collateral data. The trial court's characterization of Dr.

Toomer's diagnoses as being unsupported by the DSM-IV is not only unsupported by the record in postconviction, but also ignores the fact that his diagnoses are more comprehensive, extensive, and the standard in the field of psychology. In short, the trial court's finding that his diagnoses are unsupported by the DSM-IV is unreasonable in light of the evidence in postconviction.

Likewise, the fact that Dr. Toomer did not ask Mr. Johnson about the facts of the crime also does not render his diagnosis invalid or incredible. Dr. Toomer testified in postconviction that as part of his review of records in Mr. Johnson's case he reviewed the Florida Supreme Court opinion as well as the reports from Dr. Williams and Dr. Brugnoli and testimony from witnesses at trial. The facts of the crime, especially with respect to this Court's recitation of them in the direct appeal opinion, were laid bare in an objective manner for his review. The trial court's reliance upon the fact that Dr. Toomer did not directly ask Mr. Johnson about them during his clinical interview as grounds to support the finding that his diagnoses somehow lack credibility, or all necessary sources of information to render a complete diagnosis, is simply without merit.

Furthermore, contrary to the trial court's postconviction order denying relief, Dr. Toomer did link the diagnoses to the timeframe of the crime. Dr. Toomer specifically noted throughout the course of his testimony that one of the most important aspects which had been overlooked at trial was the fact that there was

credible evidence that Mr. Johnson was intoxicated and possibly under the influence of illegal drugs on the night in question. (PC-T. 647). Dr. Toomer also noted that both the diagnoses of borderline personality disorder and PTSD were exacerbated by the influence of alcohol and drugs and that under such situations Mr. Johnson was incapable of coping with stressors in his environment. (PC-T. 617, 644-45). In fact, it was specifically during his testimony in support of both statutory mitigators that Dr. Toomer noted the impact which Mr. Johnson's intoxication on the night of the crime would have on his mental health:

> Remember the neuropsychologist who evaluated him said that he was capable of functioning in terms of managing, in terms of cognitive functioning in a non-intoxicated state. Well Mr. Johnson was not in a non-intoxicated state in terms of accounts from the person with whom he lived at the time. And so those particular regulatory mechanisms described in the neuropsychological evaluation would not be applicable."

(PC-T. 647). The circuit court's finding that Dr. Toomer failed to link his diagnoses to the timeframe of the crime is simply not supported by the record in postconviction.

The finding by the circuit court in its order denying postconviction relief that Dr. Toomer did not test for organic brain damage and failed to acknowledge that Dr. Brugnoli's test findings failed to find any organic brain damage both misinterprets the evidence in the record and misunderstands Mr. Johnson's claim

for postconviction relief. Dr. Toomer's diagnosis is clear in that he did not find any "hard" signs of organic brain damage. (PC-T. 664). The failure to do so has absolutely no impact on the validity of either his diagnosis of borderline personality disorder or PTSD. Organic brain damage is neither a pre-requisite nor a component of the diagnostic criteria under the DSM-IV or any other standard in the field of psychology for either diagnosis to which Dr. Toomer testified. Lack of any "hard" indicia of organic brain damage does not rule out a diagnosis of borderline personality disorder or PTSD. The circuit court's reliance upon this argument is simply irrelevant for purposes of evaluating the credibility and validity of Dr. Toomer's diagnoses.

Moreover, the trial court's finding that Dr. Toomer failed to rebut any of the evidence presented at trial by Dr. Wiliams and Dr. Brugnoli is unavailing. Dr. Tooomer testified that he was not attempting to rebut Dr. Brugnoli's or Dr. Williams' findings from their previous testing. (PC-T. 664). Dr. Toomer testified during cross examination that he was in agreement with much of Dr. Williams and Dr. Brugnoli's reports. (PC-T. 664-666). Dr. Toomer noted that he agreed with Dr. Williams' assessment and was aware that Dr. Williams had also diagnosed Mr. Johnson with PTSD and had found the same two statutory mitigators. (PC-T. 666). However, he noted that he did not see in Dr. Williams report how the PTSD factors impacted Dr. Williams' final decision. (PC-T. 666). Dr. Toomer noted this factor

was critical given the caveat in Dr. Brugnoli's report in terms of his findings that Mr. Johnson's ability to function cognitively in a way that would allow him to plan was in the context of a non-intoxicated state. (PC-T. 666-67).

The record of Dr. Toomer's testimony in postconviction makes clear that he was not attempting to rebut the findings of Dr. Williams or Dr. Brugnoli. Instead, his testimony establishes that while in agreement with the diagnoses contained in their reports, Dr. Toomer did not believe the diagnoses, especially the diagnosis of PTSD, were properly presented by trial counsel at the penalty phase of trial in a coherent and consistent theory of mitigation in light of the circumstances surrounding Mr. Johnson's background and the night of the crime. The trial court's order denying postconviction relief attempts to discount to irrelevance the significance of both the previously non-presented diagnosis of PTSD and how that diagnosis factored into both the night of the crime and Mr. Johnson's mental health background.

Similarly, the trial court's denial of relief predicated upon the finding that Dr. Toomer failed to testify to any facts unknown to Dr. Brugnoli or Dr. Williams at the time of their evaluations is also indicative that the court entirely misses the point of Dr. Toomer's testimony in postconviction. The focus of Dr. Toomer's testimony throughout the course of his postconviction was that Dr. William's and Dr. Brugnoli's testimony not the complete and entire picture of Mr. Johnson's

mental health background. Dr. Toomer never attempted to discount their findings. Rather, the focus of his testimony was that their diagnoses were not completely put into focus before the jury due to trial counsel's failure to focus upon the previous diagnosis by Dr. Williams of PTSD in conjunction with the facts on the night in question and his previous diagnosis of borderline personality disorder. Dr. Toomer's testimony wasn't an attempt to discount their testimony but to provide a more detailed and accurate picture of Mr. Johnson's mental health than what was presented by trial counsel. If anything, it was an indictment on counsel's failure to effectively draw upon readily available mitigation evidence which would have supported statutory mitigation had counsel effectively capitalized on the available mitigation. As such, the trial court's order finding that Dr. Toomer's testimony was completely discredited on cross examination is unreasonable in light of the record at trial and postconviction. This is especially so in light of the trial court's comments at the close of the evidentiary hearing in postconviction that Dr. Toomer was "one of the best witnesses [the court has] ever heard." (PC-T. 676).

C. Conclusion

In Mr. Johnson's capital penalty phase proceedings, substantial mitigation evidence never reached the jury or the judge. Counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings. Because readily available mitigation was either not presented to the sentencer or counsel

was ineffective in presenting it in a cohesive manner, the resulting death sentence is unreliable. If the Supreme Court's findings in *Strickland* and *Wiggins* are to stand for anything, it is that counsel is obligated to bring to the trial the skill, preparation, and knowledge necessary to provide a defendant a fair and reliable proceeding. If that responsibility is to have any meaning it must contemplate that counsel be diligent and effective not only in investigating a defendant's background but also in their presentation of all available favorable evidence to the judge and jury in a coherent, compelling, and engaging manner. Had that occurred in Mr. Johnson's case and had counsel effectively discharged those duties, "there is a reasonable probability that but for counsel's unprofessional errors, the results would have been different." *Strickland,* 466 U.S. 668, 694 (1988).

ARGUMETN IV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SEVERAL OF MR. JOHNSON'S MERITORIOUS POSTCONVICTION CLAIMS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Johnson sought an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851 and for all claims requiring a factual determination. Pursuant to Fla. R. Crim. P. 3.851(f)(5)(A)(i), an evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *See also Amendments to Fla. R. Crim. P. 3.851*, 772 So. 2d 488, 491 n.2 (Fla. 2000)

(endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"). *See also Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

"Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). A court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

As set forth below, Mr. Johnson's rule 3.851 motion pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively refute Mr. Johnson's claim and that an evidentiary hearing is required.

A. Ineffective Assistance of Counsel: Failure to object to admission of kitchen knives into evidence

In his motion for postconviction relief Mr. Johnson alleged that trial counsel was deficient for purposes of the Sixth Amendment when he failed to object to admission of kitchen knives into evidence where the State had failed to establish that the knives belonged to Mr. Johnson and their relevancy. The trial court denied this claim finding that the knives were properly admitted into evidence "where Johnson told police he owned the knives and testified at trial that his roommate Vitale owned the knives (T: 2320-30; 2397); and where there was testimony that the knives could have been used for cuts on the victim's face and perineum. (T: 2023024; 22021-04). Thus the claim is summarily denied because Johnson fails to allege a legally sufficient claim of deficient performance and prejudice." (PC-R. 1676). This was error.

During the guilt phase of Mr. Johnson's trial the State admitted two knives into evidence which according to State witness Tracy Morris has been brought to her house when Mr. Johnson and Vitale had moved in. (R. 2020-22) (State Ex.#54 and #55). Defense counsel raised no objection to the admission of the knives despite the fact the State had failed to establish they belonged to Mr. Johnson. No forensic evidence or testimony was presented which established that the knives were used in the crime. The knives were entirely irrelevant, prejudicial, and inflammatory evidence that never should have been put in front of the jury.

At sidebar, on an unrelated issue, trial counsel Stone attempted to provide comment on the knives:

> STONE: You got two knives entered in here that belong to Vitale,[10] **that have no relevance whatsoever in this case.**
>
> THE COURT: Well, then why did you agree [they] could come in?
>
> STONE: Well, because, you know, I mean, they can tie some relevance, I guess, but I've [still] got a right to question [Morris on the other matter]. . .

R. 2023-24 (emphasis added). Thus, despite trial counsel's acknowledgment that the knives had "no relevance," (or, at best, that the State could "I guess" "tie some relevance" to their admission), these highly prejudicial and completely non-probative pieces of evidence were put before the jury. Even after he recognized their irrelevancy, counsel unreasonably never moved to strike their admission into evidence. As a result, the jury was allowed to improperly infer that one or both of those knives were used in the murder and mutilation of Ms. Hagin, when nothing of the sort had been remotely demonstrated by the evidence.

Counsel's failure to object to the inclusion of the knives was compounded during the testimony of medical examiner Dr. Charles Diggs. On direct examination regarding the perineal wounds, the State showed Dr. Diggs the knives

[10] Assistant State Attorney Seymour rejected the contention that the knives belonged to Vitale. (R. 2024). However, there was absolutely no evidence presented that the knives belonged to Mr. Johnson.

and asked "if these objects or something similar could have caused that kind of an injury, that kind of cutting?" (R. 2202). Dr. Diggs responded, "Yes, something similar to that. Now I"m not saying that these are the objects that did it. . . .But a weapon such as this can produce the wound that I've just described." (R. 2202-03). This error was further compounded by counsel's ineffectiveness in failing to object to the State's repeated and misleading reference to "cuts" or "cutting." *See* Argument I, B *infra*. Thus, the state used the irrelevant knife evidence in conjunction with its references to cutting compounded by counsel's ineffectiveness to poison the jury against Mr. Johnson.

Nothing in the record conclusively establishes either that the knives entered into evidence at trial belonged to Mr. Johnson or that they were used in the murder of the victim. The trial courts' determination that the knives were properly admitted into evidence because Mr. Johnson told police he owned knives during his taped interrogation entered into evidence at trial is unreasonable. During his taped interrogation with police Mr. Johnson stated that he owned kitchen knives (R. 2330) but that he did not own a fishing knife or a hunting knife. (R. 2330-31). During his testimony at trial Mr. Johnson testified that the knives entered into evidence by the State belonged to Vitale. (R. 2397). At no time during that interview or his testimony at trial does Mr. Johnson ever state that he owned the knives which the State entered into evidence at trial. There is simply nothing in the

record upon which to base the circuit court's assumption that he confessed to owning the knives in question.

Contrary to the trial court's order, Mr. Johnson is capable of establishing a legally sufficient claim of deficient performance and prejudice. Evidentiary hearing is warranted unless the claim does not involve a disputed issue of fact. *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

B. Trial Counsel failed to object to the Medical Examiner's testimony concerning the knives and the possibility that the knives could produce the victim's wounds

Mr. Johnson alleged in his motion for postconviction relief that trial counsel was deficient for failing to object to misleading and prejudicial testimony by the State's medical examiner. The trial court summarily denied this claim because the court determined that no prejudice could be found where "the medical examiner testified that the wounds were consistent with being caused by a knife, although he could not rule out other causes (T: 2219-21); and where other testimony indicated that the wounds were inconsistent with trauma caused by animals and marine life. (T: 1378-81; 1385-86; 1405-07; 2222-24; 2232-36)." (PCR. 1677). The court's findings and its rationale for denying evidentiary development are in error.

Trial counsel failed to properly object to the prosecutor's misleading comments during Dr. Diggs testimony regarding the nature of the victim's perineal wounds. In Dr. Diggs opinion, he could not conclusively say whether the injury to

Ms. Hagin's perineum was caused by marine life or by a knives used to cut away at the flesh; he could not favor one theory or the other. (R. 2234). This was exacerbated by counsel's failure to object to the state's repeated misleading references to cutting. *See* Argument I, B *infra.*

The trial court's reliance upon Dr. Diggs testimony that he could not rule out "other causes" along with non-expert testimony by two police officers to conclude that Mr. Johnson cannot prove prejudice misses the point. The proper focus in assessing the prejudice which resulted from the State's misleading and improper characterization of the testimony and evidence is the effect which it had on the jury. By improperly and repeatedly characterizing the wounds as "cuttings" the State invaded the fact finding province of the jury on a disputed issue solely for them to resolve.

The trial court's reasoning in determining that Mr. Johnson is incapable of proving prejudice misses the point. In summarily denying his claim the trial court relied upon the fact that Dr. Diggs provided testimony that "he could not rule out other causes" of the injury and that testimony provided by other witnesses indicated that the wounds were inconsistent with trauma caused by animals and marine life. (PCR. 1677). However, the resulting prejudice from the State's continued mischaracterization of the wounds as "cutting" cannot be refuted by simply relying upon portions of testimony which indicated other possible

explanations. The prejudice which results from the State's repeated mischaracterization, and trial counsel's failure to object, is that it impermissibly left the jury with the understanding that it was a resolved factual issue when in fact it was not. The jury is the finder of fact and the testimony in the record at trial demonstrates that the issue of whether the perineal injuries to the victim were caused by cutting through use of knife or some other source, i.e. marine life, was not conclusive. (R. 2220-21; 2233).

Furthermore, the trial court's reliance for its summary denial upon the determination that "additional testimony in the record indicated the wounds were consistent with trauma caused by marine life" (T: 1378-81; 1385-86; 1405-07)" (PCR. 1677) is unreasonable. Dr. Diggs' testimony at trial clearly stated repeatedly that he was unable to come to any definitive finding ruling that the injuries were attributable to "cutting" by a knife or not the result of marine life. (R. 2220-211, 2223). Neither Sgt. James Tedder nor Lt. John Morris were experts in forensic pathology nor tendered to the court and accepted as such. Sgt. Tedder testified about his opinion as to the nature of the perineal wounds based on his experience working homicide and training in two investigations courses. (R. 1377). However, he confirmed that he was neither certified as an expert in marine life as it relates to attacking human bodies nor had he ever been declared an expert in the field. (R. 1378). Lt. John Morris testified that he was not trained as a medical examiner or a

marine biologist, nor had he ever been qualified to testify as an expert. (R. 1385; 1388). Lt Morris also admitted that he only saw the trauma area of the victim "from a distance, not close up." (R. 1406). Their testimony as to the nature of the victim's perineal wounds was at best based upon pure speculation and lay opinion. The trial court's reliance upon their testimony, along with selective portions of Dr. Diggs', to determine that the record corroborates the finding that the wounds were in fact "cuttings" is unreasonable and unsupported by the record. As such, the trial court's summary denial of Mr. Johnson's claim denied him the opportunity for evidentiary development and resolution of disputed facts at issue. Relief is proper.

C. *Trial counsel failed to object to impermissible cross examination regarding a prior witness' credibility*

Mr. Johnson sought evidentiary development on his sub-claim that trial counsel was deficient for failing to object to impermissible cross examination of Mr. Johnson regarding the issue of a prior witness' credibility. The trial court denied Mr. Johnson evidentiary development relying on the fact that this issue was raised in the direct appeal and this Court found the error to be harmless. The trial court determined that Mr. Johnson was incapable of establishing prejudice and summarily denied the claim.

Trial counsel unreasonably failed to object to impermissible cross-examination of Mr. Johnson, when the prosecutor twice asked Mr. Johnson whether witness Thomas Beakley was truthful when he testified that Ms. Hagin

was crying. On appeal, the Florida Supreme Court recognized the error inherent in this type of improper cross-examination:

> "[A]llowing one witness to offer a personal view on the credibility of a fellow witness is an invasion of the province of the jury to determine a witness's credibility. Second, although the fact that two witnesses disagree does not necessarily establish that one is lying, such questioning may lead the jury to conclude that the witness being questioned is actually lying. Finally, unless there is evidence that the witness is privy to the thought processes of the other witness, the witness is not competent to testify concerning the other's state of mind. *Knowles v. State*, 632 So.2d 62, 65-66 (Fla. 1993). In *Knowles*, the State improperly asked the defendant whether two State witnesses were lying. *Id.* at 65. Here, the prosecutor's question of Johnson as to whether Beakley was truthful conveys the same improper message: that the witness being questioned is actually lying.

Johnson, 969 So.2d at 954-55. Trial counsel's failure to object to the State's improper cross-examination resulted in prejudice to Mr. Johnson, in that the jury was exposed to questioning and testimony, which invaded their provenance and erroneously conclude that Mr. Johnson was a liar.

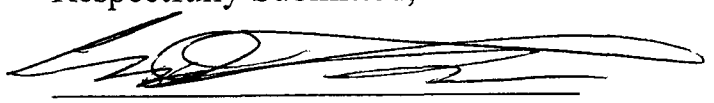
Mr. Johnson properly pled this issue in his amended Rule 3.851 motion filed on April 21, 2009. It was therefore properly before the trial court in postconviction. The record at trial does not conclusively refute the claim, especially in light of the fact that this Court found that the issue was not properly preserved by counsel at trial. *Johnson*, 969 So. 2d at 945-55. Despite this Court's finding that it amounted

to harmless error on direct appeal that does not support the trial court's summary denial of Mr. Johnson's claim in postconviction. A postconviction court is required to conduct a cumulative analysis of instances of ineffective assistance of counsel to consider their cumulative effect on the jury. *Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1994); *Swafford v. State*, 679 So. 2d 736 (Fla. 1996). The trial court's reliance upon this Court's previous consideration of the issue on direct appeal failed to take into account both its obligation to conduct a cumulative analysis as well as the different standards employed in harmless error review and ineffective assistance of counsel under *Strickland*. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Johnson respectfully urges this Court to reverse the lower court, grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

Respectfully Submitted,



CRAIG TROCINO
Special Assistant CCRC-South
Florida Bar No. 996270

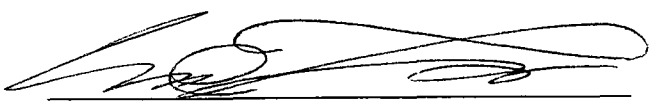
SCOTT GAVIN
Staff Attorney
Florida Bar No. 0058651

CCRC-South
1 East Broward Blvd, Suite 444
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

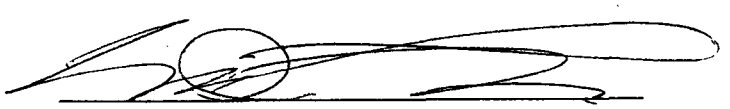
I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first-class postage prepaid to Lisa Marie Lerner, Assistant Attorney General, Concourse Center 4, Suite 200, 3507 East Frontage Road, Tampa, Florida 33607-7013, this 16th day of November, 2012.



CRAIG TROCINO
Special Assistant CCRC-South

CERTIFICATE OF FONT

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.



CRAIG TROCINO
Assistant CCRC-South