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

REPLY BRIEF OF APPELLANT

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

The State, like the trial court, misinterprets Mr. Johnson's argument here. The question is not, as the State suggests, whether the jury was aware of the defense theory that the perineal injuries could have been caused by marine life. Rather, the issue is defense counsel's failure to object to prejudicial testimony and the continual prejudicial comments by the State. As the State agrees, Dr. Diggs stated that there was no scientific or medical basis to conclude the injuries were definitively cuts. Dr. Diggs clearly stated he could not rule out marine life as the cause of the injuries. In fact, Dr. Diggs could not favor one theory or the other. (R. 2234). This means that he could not, consistent with medical certainty, favor the State's cutting theory over the defense's marine life theory. Notwithstanding a medical doctor's testimony that he could not favor the cutting theory over the marine life theory, the State consistently used the word "cuts" and "cutting" in order to mislead and inflame the jury. It is this precise evidence to which defense

counsel should have fully objected and secured a ruling thereon. Thus, counsel's ineffectiveness lies not in the fact that Dr. Diggs could not favor one theory over the other, it lies in the fact that counsel failed to object to the prosecution's prejudicial and continual mischaracterization of Dr. Diggs' testimony which, led the jury to believe that Dr. Diggs' opinion was different that in actually was.

This is an entirely different picture than presented by the State. The State seems to suggest that Dr. Diggs' testimony that the injuries could have been caused by marine life grants it the unfettered right to mischaracterize that testimony and confuse the jury. Such a contention has no basis in law or fact. Under these circumstances it was incumbent upon counsel to object to the prosecution's misleading characterizations to prevent the jury from being bombarded with prejudicial commentary and argument. By failing to object the jury was saddled with the additional task of ferreting out truth from prejudicial conjecture.

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

The State's argument here appears to be that since this Court held in the direct appeal that the finding of HAC was justified by Dr. Diggs' conclusion that strangulation was the cause of death, his declaration that the death was heinous was not prejudicial. (State's Brief at 29). This argument actually supports Mr. Johnson's conclusion. In other words, the State contends that strangulation is legally HAC and therefore, Dr. Diggs' testimony that the death was "a heinous

type death" had no impact on the jury because strangulation equals HAC. However, the State ignores the fact that 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).

The State also seems to forget that it bears the burden of proving to the jury beyond a reasonable doubt that an aggravator exists. (State's Brief at 30). If the State's contention that the jury does not decide if an aggravator is proven beyond a reasonable doubt is legally accurate then there would be no need for a sentencing phase jury and Florida's capital sentencing scheme would be unconstitutional. *See Ring v. Arizona*, 536 U.S. 584 (2002).

Nonetheless, it seems that the State, the trial court and defense counsel forget that the critical determination is how this testimony impacted the jury. Because the jury heard the medical examiner say it was a heinous death without any objection, that testimony most certainly inflamed the jury to convict Mr. Johnson because it was a "heinous type death." The fact that the State and defense counsel seem to think that "heinous" without the added modifiers "atrocious" and "cruel" is merely a sterile medical term-of-art is not supported by the record or other authority.

C. 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

The State claims that relief under this ground should be denied because the "jury could not have possibly used this act as a basis for a sexual battery conviction." (State's Brief at 31). However, since there was no special jury verdict regarding what conduct caused the sexual battery conviction, it cannot be known what the jury concluded was sexual battery. The jury could have concluded that Mr. Johnson dragged a sleeping or semi-conscious Ms. Haggin to the woods at the park to have sex with her while she was passed out or of limited consciousness. Ample evidence from witnesses who testified and were present on the night of Ms. Hagin's death established that there was significant drinking going on between all participants. Thus, the testimony that Vitale just knew Mr. Johnson wanted to have sex with Hagin even though she was not conscious is prejudicial.

The prejudice comes in several forms. First, it makes Mr. Johnson look like a person who would take advantage of an unconscious or seriously intoxicated woman. Second, the evidence is unassailable by cross-examination because Vitale "just knew" what was in Mr. Johnson's mind by how he looked. Finally, Vitale's testimony was tantamount to opinion evidence, which is inadmissible by a layperson. This evidence was just another piece of the prejudicial puzzle assembled against Mr. Johnson. Failing to recognize that such testimony was

prejudicial and objectionable amounts to ineffectiveness, which prejudiced Mr. Johnson.

D. 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.

Both the State and the trial court conclude there is no prejudice regarding this claim. However, this Court held that Vitale's testimony created and emotional basis for the verdict and was prejudicial. Specifically, this court held,

> 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.

This Court has concluded that Vitale's testimony that Ms. Hagin asked about her children while being strangled had prejudicial impact. This Court however, on direct appeal, stated that counsel should have requested a limiting instruction to ameliorate the prejudice and emotional impact of this testimony. *Id.* Thus, there is a judicial determination that such a limiting instruction would have been helpful to Mr. Johnson. Given the evidentiary hearing testimony it would seem that the State, defense counsel and the trial court all presume their conclusions regarding the

prejudicial nature of Vitale's testimony is superior to this Court's.

The standard trial counsel sawhorse that limiting instructions draw attention to the error simply has no application here. There is no evidence that juries in general, or this jury in particular, are incapable of following a limiting instruction when given. Indeed if this were the case then it would call into question a jury's ability to follow all instructions. In this case, Vitale came up with previously undisclosed testimony that is highly prejudicial and solidified the State's premeditation theory. If any trial situation called for a limiting instruction this one was it. Since the jury was not instructed otherwise, it accepted this prejudicial testimony without any guidance regarding how it should treat it. Without the instruction the jury was free to attach all manner of prejudice to the evidence. Had an instruction been requested and given, the prejudice would have been ameliorated. *Id.*

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

It seems to be overlooked that it was well known Vitale is a serial liar having given at least four different statements. At the evidentiary hearing, his own lawyer, Burns, testified that Vitale could be untruthful "against his own interest." (PC-T. 293). If he could be untruthful against his interest, the mind boggles as to how untruthful he could be for his interest. The only meaningful way to ferret out Vitale's lack of veracity is by cross-examination. 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).

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, along with his varying accounts of Mr. Johnson's statement to him when he emerged from the bedroom on the morning of Ms. Hagin's death.

Contrary to the State's position, the length of a cross examination does not equate to an effective cross-examination. Thus, the contention that counsel "spent a considerable amount of time cross-examining" Vitale does not, in and of itself, establish effectiveness. Rather a rambling unfocused cross of the State's star

witness is ineffective and prejudicial especially where, as here, Vitale's serial untruths were never fully uncovered for the jury.

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

The State claims that Mr. Johnson is not entitled to relief here because counsel never encouraged him to contact Vitale. However, the record establishes otherwise. After Stone obtained a letter from Vitale confessing to the murder, he wanted Mr. Johnson to get something in writing from Vitale and encouraged communication between the two. (PC-T. 724-25). Thus, the State's contention is factually inaccurate because Stone did encourage the letter writing.

Even if Stone did not encourage the letter writing, he knew about it and failed to stop it. Counsel is equally ineffective for failing to safeguard Fifth and Sixth Amendment rights by refusing to stop a client's behavior once he knows about it. In other words, the record is clear that all involved knew that there was a letter writing campaign between Mr. Johnson and the co-defendant Vitale. Knowing this information could expose Mr. Johnson to jeopardizing his Fifth and Sixth Amendment rights, counsel nonetheless allowed the letter writing to continue. Stone knew or should have known that allowing Mr. Johnson to communicate with Vitale was exposing his client. Indeed, after seeing the letter from Vitale's lawyer, Mr. Burns, that memorialized his cooperation with the State, Stone testified as follows:

> [the Burns 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).

The irony here is that Stone saw fit to allow Mr. Johnson to communicate with Vitale before he knew Vitale was working for the State. Only after finding out Vitale was an agent did Stone say he should have kept Mr. Johnson far away from Vitale. (PC-T. 725).

Had counsel prevented Mr. Jonson from communicating with Vitale the State would not have been able to use the letters to eviscerate his defense. Mr. Johnson's defense was that Vitale was the killer and he confessed to it. However, permitting the letter writing to occur allowed the state to obtain letters from Mr. Johnson that portrayed him as a mastermind who was sophisticated enough to get Vitale to confess against his interests. Given the serial lying and cunning of Vitale, it is inconceivable that he would ever confess to something just for Mr. Johnson's benefit. Form the beginning, Vitale has acted only out of his self-interest. Perhaps his only bout with veracity was his confession to this murder. Allowing the letter writing campaign to continue allowed the state to destroy this defense and prejudiced Mr. Johnson.

G. Cumulative Error

The State does not address the cumulative error argument because it claims that there is not any error to consider. However, the State is incorrect. The record discloses numerous areas of ineffectiveness of counsel. Therefore, this Court can 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). No amount of counsels' post hoc rationalizations of their errors can change the fact that counsel provided ineffective assistance to Mr. Johnson. Thus, each of these errors standing alone and viewed cumulatively requires 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.

As a threshold matter, the State contends that this claim is procedurally barred as it could have been raised on direct appeal. This claim is utterly false given the postconviction record. There is no question that the Burns letter (PC-R. #6) upon which this claim is based was withheld by the state and only uncovered by postconviction counsel through public records disclosures. 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).

Other than citing cases for the proposition, the state presents no illumination for its claim of a procedural bar. Indeed, it cannot since the evidence upon which this claim is based was concealed by the state during trial. This is plainly elucidated by the fact that the letter was discovered first during postconviction and neither counsel for Mr. Johnson had ever seen it before being shown it by postconviction counsel. Therefore, the State's procedural bar argument is entirely baseless.

Turning to the merits of this claim it appears that the State, like the trial court in its order, utterly fails to address the contents of elephant in the record; the letter from Attorney Burns. This letter definitively establishes that Vitale was acting as an agent of the state in order to get incriminating evidence against Mr. Johnson and secure himself a way out of death row. The purpose of Vitale's

association with the State cannot be made any clearer than in the words of his lawyer Mr. Burns. Burns wrote to Assistant State Attorney Park and stated, "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 Bob Stone [Johnson's trial counsel] from claiming that the letters are true confessions." (PC-R. Def. Ex.#6)

In the State's zeal to discount this claim it addressed all manner of superfluous issues except for the one that answers the question of Vitale being a state agent. It matters not, as the State argues, if the contact between Vitale and Johnson started before the Burns letter. In fact the Burns letter explains this by pointing to "the assistance we discussed long ago." (PC-R. Def. Ex#6). The Burns letter is an enlightening confirming letter documenting the longstanding agreement between Vitale and the State. Obviously, Burns wanted documentary assurance for himself and his client that there would be a deal forthcoming for his cooperation. A deal, which indeed came to fruition to Vitale's extreme benefit.

In addition to the Burns letter, evidence of Vitale's agency includes the numerous letters from Vitale directly to the prosecutors seeking to execute Mr. Johnson (PC-R. Def. Ex.#1-4) and the fact that the State's investigator Hamrick visited Vitale in jail for the purpose of getting letters directly from Vitale. The fact

that Hamrick visited Vitale in the jail to obtain the letters solicited from Mr. Johnson indicates that the State was an active participant in this scheme to elicit statements form Mr. Jonson.

Mr. Stone summed up the prejudicial impact of using Vitale's illegal correspondence with Mr. Johnson when he 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 was 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.

The State advances several theories against the *Massiah* violation here. First the State contends that the letter writing started before the Burns letter so therefore there is no agency. As mentioned above, this contention is belied by the plain contents of the Burns letter where it discusses with the State "the assistance we discussed a long time ago." (PC-R. 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 State contends that it was merely passive in this process of culling information from Vitale. However, the Burns letter plainly states that there was a level of "desirability of putting his [Vitale's] letters into context, and quite

possibly getting the co-defendant to confess on tape." (PC-R. Def. Ex.#6). Here, Burns is recapping the longstanding agreement he had with the state to get Vitale to illicitly prod Mr. Johnson for incriminating evidence. Additionally, and more significantly, the State's lead investigator, Hamrick, went to the jail to visit Vitale for the express purpose of collecting Mr. Johnson's letters from Vitale. This fact, omitted by the state in its passivity argument, established that the State was active in collecting incriminating statements form Mr. Johnson. Indeed, the Burns letter explains why this was necessary. It was necessary to "remove[] a thorn in the side of [the State's] case by preventing Bob Stone from claiming that [Vitale's] letters are true confessions." (PC-R. Def Ex.#6).

Third, the State claims that no witness testified that Vitale was an agent and the witnesses said exactly the opposite. (State's Brief at 53). This is an incorrect rendition of the record. Mr. 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). Stone also testified that the Burns letter established that Vitale "was working as an agent of the state." (PC-T. 699). Additionally, Vitale 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. (PC-T. 531). Therefore, an actual review of the record indicates that there is ample evidence that Vitale was acting as a State agent

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.

It is undisputed that Vitale communicated directly with the State and the State's investigator. (PC-R. 1684). 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). Therefore, the State's goal to put Vitale's confession in context, as documented in the Burns letter, caused it to use Vitale to elicit information from Mr. Johnson, information that it knew or should have know would elicit incriminating evidence.

Notwithstanding the State's attempt to cast this argument in a different light, the record establishes that Vitale was actively working as a State agent and the State was actively seeking and obtaining post-indictment incriminating statements from Mr. Johnson in violation of his Constitutional rights. *Massiah v. United States*, 377 U.S. 201 (1964).

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

A defendant is entitled to effective assistance at all stages of trial. Even a single error can support a claim for relief where the error is of constitutional dimension and so substantial that it causes the attorney's performance to fall below the standards for the Sixth Amendment. *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).

Contrary to the State's assertion, it is not necessary to show "almost total abdication of counsel's duty to investigate mitigation" (State's Brief at 70) in order to establish counsel's performance fell below professionally acceptable standards for purposes of the Sixth Amendment. Here, trial counsel's investigation, preparation, and presentation of mental health mitigation for Mr. Johnson's penalty phase were deficient for purposes of the Sixth Amendment. The trial court's order denying postconviction relief and its finding that Mr. Johnson failed to demonstrate deficiency and prejudice from counsel's failure to present all readily

available mental health mitigation is not supported by competent substantial evidence. The evidence provided in postconviction, along with the record from trial, establishes that penalty phase counsel did not fulfill his professional obligations under *Wiggins v. Smith*, 539 U.S. 510 (2003), *Ake v. Oklahoma*, 470 U.S. 68 (1985), or *Strickland v. Washington*, 486 U.S. 668 (1984).

At the outset, it is important to first address the State's contention that Mr. Johnson fails to establish a claim for relief because the evidence presented in postconviction was largely cumulative. The State's argument mischaracterizes the basis of Mr. Johnson's claim and the evidence presented at trial and postconviction. Mr. Johnson's claim is that trial counsel was ineffective for failing to conduct a timely and adequate investigation and for failing to present the readily available mitigation evidence in a cohesive theory of mitigation at penalty phase. Contrary to the State's argument, the mitigation evidence presented in postconviction had not all previously been presented at trial. Likewise, the record at trial and postconviction does not establish that Dr. Williams and Dr. Toomer "almost totally mirrored each other and [that] Johnson presented nothing new at the evidentiary hearing." (State's Brief at 65).

Specifically, as noted by Dr. Toomer in postconviction, the diagnosis of PTSD was a significant mitigating factor which counsel failed to focus upon in support of mitigation at trial. (PC-R. 647). Garland testified that he recalled Dr.

Williams had addressed PTSD in his report but that it was not brought out at trial. (PC-R. 454). The record establishes that counsel was aware of the diagnosis but did nothing with it. The State's assertion that Dr. Williams' testimony that Mr. Johnson "showed signs of post-traumatic stress disorder throughout childhood" (T. 2926) amounted to the same thing as Dr. Toomer's testimony in postconviction concenring the significance of a diagnosis of PTSD for purposes of statutory mitigation, is disingenuous.

Mr. Johnson does not contest that portions of the testimony and evidence presented in postconviction were similar to what was presented at trial. Indeed, portions of Mr. Johnson's sister Danielle Fernandez's testimony are similar to her testimony from trial. Similar to Dr. Williams, Dr. Toomer did also diagnose Mr. Johnson with personality disorder, as well as testify that Mr. Johnson met the requirements for the same two statutory mitigators. (PC-T. 644). Much of the basis for the background information regarding Mr. Johnson's traumatic upbringing and dysfunctional family life had in fact been presented through the testimony of Mr. Johnson's immediate family members and Dr. Williams at the penalty phase.

However, counsel failed to present that information into a theory of mitigation which supported statutory and non-statutory mitigation. Essentially, counsel presented evidence of Mr. Johnson's dysfunctional family history and an incomplete portion of his entire mental health background and left the jury to

discern exactly how it supported the statutory mitigation Dr. Williams testified about. No link was provided in the sense of attempting to explain or detail how such a volatile and traumatically chaotic upbringing could have impacted his behavior on the night of the crime. Most significantly, nothing was presented to explain how a diagnosis of PTSD was critical to understanding Mr. Johnson's inability to cope with environmental stressors and his ability to regulate his behavior under extreme stress. In essence, counsel aired out Mr. Johnson's negative family history and presented incomplete portions of his mental health background and then provided no explanation how it related to the statutory mitigators advanced by Dr. Williams. Such a presentation is hardly cumulative to that which was advanced by Mr. Johnson in postconviction.

The case law which the State relies upon in support of its argument that Mr. Johnson's claim is entirely cumulative is likewise also misleading. First, this is not a case where all the evidence presented in postconviction was previously presented at trial. Unlike *Gilliam v. State*, 817 So. 2d 768, 781 (Fla. 2002), evidence of Mr. Johnson's PTSD and how it exacerbates his inability to regulate conduct and handle environmental stressors was not presented at trial. Second, the evidence introduced in postconviction was not merely additional facts that lent insight into Mr. Johnson's unfortunate upbringing. Cf. *Downs v. State*, 740 So. 2d 506, 516 (Fla. 1999). Dr. Toomer's testimony regarding the significance of the diagnosis of

PTSD, as well as the evidence of Mr. Johnson's severe intoxication on the night of the crime, went far beyond merely providing information about a traumatic upbringing.

Third, this is not a situation where counsel elected not to present the entire picture of Mr. Johnson's mental health as part of a strategy to guard against potentially damaging evidence in his background from being introduced by the State. Cf. *Rutherford v. State*, 727 So. 2d 216, 225 (Fla. 1998). Garland admitted he was unsure of why PTSD did not come out at the penalty phase. (PC-R. 454-55). His failure to present evidence of PTSD and its impact on Mr. Johnson's behavior on the night of the crime was simply not the result of any reasonable strategic decision. Last, this is also not a scenario where Mr. Johnson is now attempting to present mitigation evidence that was available to counsel at the time of trial but never obtained by counsel and presented to the appointed expert for review. Cf. *Woods v. State*, 531 So. 2d 79, 82 (Fla. 1988). Evidence of Mr. Johnson's PTSD, along with evidence of his extreme intoxication on the night of the crime and how that impacted his behavior, was in Dr. Williams report and notes and was readily available to counsel at penalty phase. He simply did nothing with it. Counsel had only to effectively bring out that information during examination at penalty phase yet failed to do so.

The record at trial and in postconviction establishes that the mitigation

presented by Mr. Johnson in postconviction was not cumulative. The State's dismissal of his claim, and the trial court's order denying postconviction relief, are not supported by competent, substantial evidence.

A. Deficient Performance

The State contends that Garland's preparation for the penalty phase was constitutionally proper. However, absent throughout the State's brief is any mention of the timeline of the mitigation investigation following Garland's appointment in January 2003. The State does nothing to address the ample evidence in the record from trial that establishes both predecessor counsel and counsel at penalty phase were dilatory in investigating Mr. Johnson's mental health and in providing assistance to the appointed expert Dr. Williams. The State fails to acknowledge the fact that following appointment in January 2003, roughly 10 months later in October 2003 Mr. Johnson's attorneys had yet to provide Dr. Williams with any records regarding Mr. Johnson's mental health history. (October 13, 2003 T. 193-94). The State also fails to address the comments in Dr. Williams' initial report in January 2003 in which he noted his repeated requests to meet with Mr. Johnson's attorneys yet receiving no feedback. (PC-R Def. Ex.#5, Tab 4, p.1). The evidence in postconviction establishes this was not a case where counsel diligently investigated and prepared a mitigation defense.

The State seems to argue that as long as something was done, that is enough

for purposes of the Sixth Amendment. Yet, the evidence in postconviction establishes that Garland failed to perform even some of the most basic tasks for investigating a client's mitigation background. Garland testified in postconviction that he didn't hire a mitigation expert because he didn't know it was the practice to do so at that time. (PC-R. 453-54). Garland did not provide any explanation as to why he believed that to be the case, even despite the fact he admitted the family was "very closed" during the interviews he conducted. (PC-R. 455).

From those family members who were willing to be forthcoming and provide information, Garland provided little to no support or direction. Danielle Fernandez, Mr. Johnson's sister, testified that she received little, to no instruction from Garland about her testimony at the penalty phase at trial. (PC-R.547-48). Fernandez met with counsel Bob Stone three times in his office and spoke with him briefly on the phone but never about the substance of her testimony. (PC-R. 548). She also received no preparation from anyone prior to her meeting with Dr. Williams or the State's deposition of her prior to trial. (PC-T. 5-7). In short, Fernandez confirmed that none of her brother's other attorneys had much contact with her nor did they adequately prepare her for her involvement in her brother's trial. All of this, despite the fact she was one of only three family-member-witnesses who were being relied upon at the penalty phase.

The State's argument that all the mitigating evidence came in through Dr.

Williams at the penalty phase is belied by the record at trial. Likewise, the trial court's findings that Mr. Johnson failed to demonstrate deficiency in any of the mental health mitigation is not supported by competent and substantial evidence. Contrary to the State's argument, Dr. Toomer's and Dr. Williams' testimony and diagnosis did not totally mirror each other to the point that nothing new was presented at the evidentiary hearing in postconviction. (State's Brief at 65). The mitigation evidence presented in post-conviction proceedings "paints a vastly different picture of his background" than the picture painted at trial. *Williams v. Allen*, 542 F. 3d at 1342.

The record at trial and in postconviction establishes that significant mitigating evidence was never presented to Mr. Johnson's jury. Both the trial court and the State overlook the fact that while Dr. Williams noted that Mr. Johnson "suffered from PTSD symptoms during childhood" and that there was some evidence that he was inebriated on the night of the crime, he failed to inform the jury or the court about the significance of those factors. As Dr. Toomer noted in postconviction, PTSD was significant factor which the jury should have been presented with during the penalty phase." (PC-R. 647). Dr. Toomer further explained that the significance of that diagnosis became greater given the fact that Williams' noted in his own report that while Mr. Johnson was capable of functioning when in a non-intoxicated state, accounts from individuals present on

the night of the crime indicated Mr. Johnson was in fact intoxicated. (PC-R. 647). Under those circumstances, Dr. Toomer testified, the regulatory mechanisms detailed in Dr. Williams report would not be applicable. (PC-R. 647). That evidence and explanation were never provided to Mr. Johnson's penalty phase jury.

The trial court's findings of fact relied upon to discredit Dr. Toomer's testimony are also not competent, nor substantial. They are conclusory and arbitrary. The trial court based its findings that Dr. Toomer's testimony and diagnosis lacked reliability on several factors that were either inaccurate or did not legitimately discredit his testimony and diagnosis.

In arguing that Dr. Toomer's testimony lacked credibility, the State points to the trial court's finding that Dr. Toomer's diagnoses were not supported by the DSM-IV criteria. The State argues that Dr. Toomer acknowledged that his diagnosis of borderline personality disorder did not comply with the diagnostic criteria listed in the DSM-IV. (State's Brief at 63-4). The State's argument, however, is unsupported by the record and completely disregards Dr. Toomer's testimony in postconviction. Dr. Toomer explained that his use of a "theory" based diagnostic approach was the standard in his field and the method even used to teach and train new students and doctors. (PC-R. 674). Dr. Toomer further explained that while there may be some criteria that he did not diagnose Mr.

Johnson with under the listed diagnostic criteria in the DSM-IV for borderline personality disorder or PTSD, that did not rule out reaching such a diagnosis. Dr. Toomer then explained his approach was actually more extensive and more comprehensive than that of the general DSM-IV criteria. (PC-R. 664). Contrary to the trial court's findings and the State's argument, Dr. Toomer's diagnosis was not unsupported by the DSM-IV.1

The State also relies upon the trial court's order taking issue with Dr. Toomer's failure to ask Mr. Johnson about the facts of the crime, his failure to prepare a written report, or link the diagnoses to the timeframe of the crime. (PC-R. 1687-88). The State relies upon these findings of fact to argue that Dr. Toomer lacked the basis to support the mitigating circumstances he testified about. (PC-R-1687-88). However, Dr. Toomer did learn about the facts of the crime from his review of this Court's direct appeal opinion, as well his review of the other background materials that included police reports and prior mental health experts' written reports. Dr. Toomer also explained that it was not uncommon to not write

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1 To the extent that the State also focuses upon the fact that Dr. Toomer's testing only revealed "soft signs" of organic brain damage and that Dr. Brugnoli's testing found none to exist, that does not undermine the credibility of Dr. Toomer's diagnoses or testimony in support of statutory mitigation. A finding of organic brain damage is not a prerequisite to establishing a diagnosis of borderline personality disorder or PTSD. The absence of any "hard signs" of organic brain damage, as mentioned by the State and in the trial court's order, is simply irrelevant to the validity of Dr. Toomer's diagnoses and findings of statutory mitigation.

reports following meetings with clients as part of his work as a court appointed mental health expert. (PC-R. 648-49). His failure to write a report following his clinical examination with Mr. Johnson had absolutely no bearing on the diagnoses he reached or the credibility of the testimony he provided. Last, as the record in postconviction resoundingly reflects, Dr. Toomer absolutely linked the diagnoses to the timeframe of the crime. (PC-R. 644-45; 647). It is precisely because of this fact, as argued *supra*, that his diagnoses were not cumulative as incorrectly advanced by the State.

Here counsel failed in discharging his responsibilities. Trial counsel failed to conduct a reasonably competent investigation into Mr. Johnson's mental health background. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *O'Callaghan v. State*, 461 So. 2d 1354 (Fla. 1984). Counsel failed to conduct an adequate and timely investigation. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins*, 539 U.S. 510 (2003). Counsel did not timely or adequately provide Mr. Johnson's mental health experts with all the necessary records and information regarding his mental health mitigation so that the experts could provide assistance in preparation of his defense. *See Ake v. Oklahoma*, 470 U.S. 68 (1985); *Schwab v. State*, 814 So. 2d 402, 414 (Fla. 2002). The cumulative effect of these repeated errors rendered counsel's performance well below objectively acceptable professional standards for purposes of the Sixth Amendment.

B. Prejudice

The State' argument, and the trial court's findings of fact that Mr. Johnson is incapable of proving prejudice under *Strickland* are not supported by competent, substantial evidence. The mental health mitigation evidence presented in postconviction establishes that significant portions of Mr. Johnson's mental health background, specifically PTSD, which played a critical factor in his conduct on the night of the murder, never reached the jury or court. As a result, Mr. Johnson was denied a constitutionally adequate individualized sentencing recommendation to which he was entitled. *Furman v. Georgia*, 408 U.S. 238, 310 (1972); *Lockett v. Ohio*, 438 U.S. 586 (1978).

The State argues that Mr. Johnson is incapable of establishing prejudice because of the weight and significance of the aggravators and the assumption that the mitigation presented in postconviction would not have resulted in a life recommendation. (State's Brief at 70). Both the State and the postconviction court discount the mitigation presented in postconviction based upon the assertion that Mr. Johnson presented nothing that was not previously presented at trial. (State's Brief at 64, 69; Postconviction Order PC-R p. 1687-88).

No competent or substantial evidence supports the trial court's finding that the mitigation evidence presented in postconviction would not have been persuasive to the jury. Cf. *Porter v. McCollum*, 130 S. Ct. 447 (2009). If trial

counsel had been effective in utilizing the diagnosis of PTSD presented in postconviction, the jury would have known more accurate information about Mr. Johnson than what they were provided with at trial. Trial counsel presented information about Mr. Johnson's background but provided no explanation how it influenced his behavior on the night of the crime. Contrary to the State's argument and the postconviction court's order, the record does not establish that the diagnosis of PTSD was presented at trial. Despite the fact that Dr. William's report had indicated Mr. Johnson suffered from PTSD and the significance which alcohol could play in affecting his ability to cope with environmental stressors, Garland failed to follow up on that information. The jury learned of his chaotic and traumatic upbringing and that Mr. Johnson struggled with PTSD-like symptoms as a child, but they were not given any direction about how that factored into their determination of mitigation.

The State fails to acknowledge that the jury and sentencing judge did not have the full story of Mr. Johnson's mental health background. Instead, the State and the trial court in postconviction discounts to irrelevance the significant mitigation that was presented in postconviction as cumulative. This is precisely the practice that was rejected by *Porter. Porter*, 130 S. Ct. at 449. The State and the trial court ignore the mandate in *Porter v. McCollum* that it is not what the trial judge (or the prosecutor) finds compelling, but what jurors could have gleaned

from the omitted information. This analysis entails that the focus remain upon the affect which the additional mitigation evidence would have had on the jury. *Porter*, 130 S. Ct. 447 (2009).

While the State argues "more is not necessarily always better," information, specifically incomplete information on a given subject, without proper context and explanation can be far more misleading or damaging to gaining an accurate understanding of something. That is precisely what occurred here. Jurors were given an incomplete picture, pieces of the mosaic that was Mr. Johnson's mental health background and then asked to come to an understanding of that picture without any context or adequate explanation. The result is an inaccurate depiction of Mr. Johnson's mental health, discounting to irrelevance significant portions of that background, specifically his diagnosis of PTSD. Mr. Johnson had the right, indeed a constitutionally protected right, to a particularized and individualized sentencing determination. By failing to provide the jury and the court with a complete picture of his mental health background and failing to present significant portions of the mitigation that he did have, counsel rendered deficient performance. The resulting prejudice is that Mr. Johnson was deprived of the particularized and individualized sentencing recommendation to which he was entitled. As a result, Mr. Johnson is entitled to relief in the form of a life sentence, or in the alternative, a remand to the lower court for new penalty phase proceedings.

CONCLUSION

For the reasons stated herein, Mr. Johnson respectfully requests that this court grant his motion for postconviction relief and order a new penalty phase proceeding and grant any other relief that this Court deems just and proper.

Respectfully Submitted,

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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 13th day of March, 2013.

Bar # 0058651
for

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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.

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March 13, 2013

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BY FEDERAL EXPRESS

RE: *Richard Allen Johnson v. State of Florida*, Case No. SC12-1204; SC12-2464

Dear Ms. Williams:

Enclosed for immediate filing in the above-referenced case are

1. The original and seven (7) copies of Appellant's Reply Brief;

2. The original and seven (7) copies of Petitioner's Reply to State's Response to Petition for Writ of Habeas Corpus;

3. Copies of the first and last page of the documents for date-stamp and return to CCRC-South, and;

4. A self-addressed, stamped envelope for use in returning the date-stamped pages to us.

A copy has been provided to opposing counsel on this date by electronic mail.

Thank you for your assistance.

Sincerely,

Scott Gavin
Staff Attorney
CCRC-South
cc: Lisa-Marie Lerner, Assistant Attorney General