IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

DAVID EUGENE JOHNSTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's orders summarily denying Mr. Johnston's successive Rule 3.851 motion, Rule 3.853 motion and motion for forensic testing. The following symbols will be used to designate references to the record in this appeal:

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

"PCR." - record on appeal after original postconviction summary denial.

REQUEST FOR ORAL ARGUMENT

Mr. Johnston is presently under a death warrant with an execution scheduled for May 27, 2009 at 6:00 p.m. This Court has not hesitated to allow oral argument in other warrant 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, as well as Mr. Johnston's pending execution date. Mr. Johnston, through counsel, urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND THE FACTS

Mr. Johnston was indicted on December 12, 1983 by an Orange County grand jury for the first-degree murder of Mary Hammond (hereinafter "the victim").

Mr. Johnston, thereafter, was tried and convicted. A penalty phase was conducted on May 29, 1984, during which the jury recommended a death sentence by an eight to four vote. On June 1, 1984, the trial court imposed a death sentence, finding three aggravating circumstances.[1] Although it found mitigating factors,[2] the trial court found the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. Johnston to death (R. 2412-2415). On direct appeal this Court affirmed Mr. Johnston's convictions and sentences. Johnston v. State, 497 So. 2d 863 (Fla. 1986).

On October 28, 1988, a death warrant was signed, the execution of which was ultimately stayed subsequent to the filing of Mr. Johnston's first motion to vacate judgment and sentence. After an evidentiary hearing, the circuit court denied all

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[1] (1) prior violent felony conviction; (2) offense committed during the commission of an enumerated felony; and (3) the offense was especially heinous, atrocious, or cruel (R. 2412-2415).

[2] The trial court found Mr. Johnston was the product of a broken home; he was abused; he was neglected and rejected by his natural mother; he was physically abused by his father; he was greatly affected by his father's death; he has a very low I.Q. and did not do well in school; and he was mentally disturbed (R. 2412-2415).

relief. The denial was appealed to this Court, which affirmed the circuit court's decision. Johnston v. Dugger, 583 So.2d 657 (Fla. 1991).

Mr. Johnston next filed a federal habeas petition and on September 16, 1993, the federal district court granted Mr. Johnston habeas corpus relief and ordered the state of Florida to either (1) impose a life sentence; (2) conduct a new penalty phase proceeding before a newly empaneled jury; or (3) obtain an appellate re-weighing or harmless-error analysis. This Court conducted a harmless-error analysis and thereafter reimposed a death sentence. Johnston v. Dugger, 583 So.2d 657 (Fla. 1991).[3] The federal district court subsequently denied all relief.

In the interim Mr. Johnston filed his first successive motion to vacate judgment and sentence in the circuit court. The circuit court denied relief, finding the claims time-barred and, alternatively, an abuse of process. This Court thereafter affirmed the circuit court and also denied Mr. Johnston's habeas petition. Johnston v. State, 708 So. 2d 590 (Fla. 1998).

The Eleventh Circuit Court of Appeals subsequently ruled on Mr. Johnston's appeal from the denial of his habeas petition in federal district court and denied all relief. Johnston v.

[3] A petition for writ of certiorari was filed in the United States Supreme Court, which denied the petition on February 27, 1995.

Singletary, 162 F.3d 630 (11th Cir. 1998).

Mr. Johnston subsequently filed a third state habeas petition wherein he claimed this Court applied an incorrect standard of review in its 1991 opinion (Johnston v. Dugger, 583 So.2d 657 (Fla. 1991)). This Court denied relief. Johnston v. Moore, 789 So.2d 262 (Fla. 2001).

Subsequently, Mr. Johnston filed his third motion to vacate judgment and sentence wherein he claimed the Florida capital sentencing scheme was unconstitutional under Ring v. Arizona, and that the State of Florida was barred from executing him under Atkins v. Virginia due to his mental retardation. The circuit court denied relief and this Court affirmed. Johnston v. State, 960 So.2d 757 (Fla. 2006).

On April 20, 2009, the Governor signed a warrant scheduling Mr. Johnston's execution. Mr. Johnston filed a Rule 3.851 postconviction motion on May 6, 2009. The circuit court denied relief on May 9, 2009. This appeal follows.

SUMMARY OF THE ARGUMENT

1. The trial court erred in denying Mr. Johnston's motion for postconviction DNA testing. Contrary to the trial court's determination, there can be no doubt that DNA testing could exonerate Mr. Johnston. There were no eyewitnesses to the crime nor did Mr. Johnston confess to the murder. There was no fingerprint evidence connecting Mr. Johnston to the crime.

Clearly, the presence of blood on Mr. Johnston was the primary factor in obtaining a conviction. The absence of his DNA under the victim's fingernails combined with the absence of the victim's blood on Mr. Johnston would establish his innocence.

2. Newly discovered evidence has revealed that Mr. Johnston was convicted based on infirm forensic evidence in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

3. The trial court erred in denying Mr. Johnston's request for forensic testing resulting in a violation of Mr. Johnston's rights to due process under both the U.S. and Florida Constitutions.

4. The clemency process and the manner in which it was determined that Mr. Johnston should receive a death warrant on April 20, 2009, was arbitrary and capricious and in violation of the Eighth and Fourteenth Amendments.

5. Mr. Johnston is exempt from execution under the Eighth Amendment to the U.S. Constitution because he suffers from such severe mental illness that death can never be an appropriate punishment. Mr. Johnston's severe mental illness places him within the class of defendants, like those who were under the age of eighteen at the time of the crime and those with mental retardation, who are categorically excluded from being eligible for the death penalty.

6. Because of the inordinate length of time that Mr. Johnston has spent on death row, adding his execution to that punishment would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution, as well as binding norms of international law.

7. The trial court's decision to place Mr. Johnston in shackles during trial violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

Additionally, the lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999).

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. JOHNSTON'S RULE 3.853 MOTION FOR POSTCONVICTION DNA TESTING.

Pursuant to Fla. R. Crim. P. 3.853, Mr. Johnston filed a motion for postconviction DNA testing before the circuit court.

The motion asserted that:

> 1. The only scientific evidence linking Mr. Johnston to the crime was the presence of blood on him. The State emphasized this evidence throughout Mr. Johnston's trial. Officer Stickley testified that when she interviewed Mr. Johnston at the crime scene, she noticed a red stain on his right tennis shoe and red dots on his right bicep (T. 498). Officer Kenneth Roberts testified that he observed brown colored splatters on Mr. Johnston's tennis shoe, socks and arm, which appeared to be blood (T. 507). Officer Candalaria testified that he observed speckles of blood on Mr. Johnston's left bicep, his left leg, his socks, and his shoe laces (T. 527-28). Investigator Richard Dupuis testified that he was asked by other officers to look at Mr. Johnston's clothing and render an opinion as to whether there were any bloodstains on the clothing (T. 538).[1] After explaining the concept of bloodstain analysis to the jury, Dupuis stated the he observed a reddish stain on Mr. Johnston's right sock and that the stain projected in a downward motion. He also observed a dark stain on Mr. Johnston's shoes, as well as a single red stain on the groin area of his shorts (T. 540). Dupuis then opined, based on his experience and training, that the stains appeared to be blood. He also opined that the clothing was a target for the blood, explaining that the blood was either projected or cast off something else and then came into contact with Mr. Johnston's clothing (T. 541). Dupuis further stated that the blood was in motion when it came into contact with the clothing since it was not a smear type pattern (T. 542). Officer Ostermeyer testified that he took into evidence Mr. Johnston's clothing. Additionally, he ran a presumptive blood test on the stains on the clothing; the test was positive for blood (T. 641-44). Reactions to the Luminol were also observed on the back of Mr. Johnston's shirt, his sleeves, his waistband, the front of his shorts, the back pocket area of his shorts, and his right tennis shoe (T. 648). Investigator Mundy testified that during an interview with Mr. Johnston, he noticed a couple of red stains on his clothing (T. 780). Forensic serologist Keith Paul testified that he tested Mr. Johnston's clothing for the presence of blood and determined that there was human blood present on the stretchband of Mr. Johnston's shorts (T. 854). Paul also conducted tests on the stains found on Mr.

Johnston's tennis shoes and determined that the stains were human blood (T. 867). Additionally, Paul indicated that there appeared to be minute quantities of blood on submitted fingernails, but he conducted no tests because the amount was insufficient for testing purposes (T. 879).

[1] The basis for Dupuis' expertise was that he had attended several seminars relating to bloodstains (T. 538-39).

2. Mr. Johnston is innocent of the murder in the instant case. The evidence utilized in convicting him was largely circumstantial. There were no eyewitnesses to the crime nor did Mr. Johnston confess to the murder.[2] There was no fingerprint evidence connecting Mr. Johnston to the crime.[3] Additionally, it was Mr. Johnston who called 911 upon finding the victim, who informed the victim's granddaughter of what had occurred, and who stayed until the police arrived and made a full report as to how he came to find the victim. Clearly, the presence of blood on Mr. Johnston was the primary factor in obtaining a conviction. If DNA testing were to reveal that the purported blood on Mr. Johnston did not belong to the victim, he would be exonerated of the crime.

[2] Mr. Johnston has always maintained his innocence.

[3] There were, however, fingerprints from other individuals on the items tested by the State.

3. The specific evidence Mr. Johnston seeks to be tested is as follows:

a. Mr. Johnston's tennis shoes;

b. Mr. Johnston's socks;

c. Mr. Johnston's shorts;

d. Fingernail clippings.[4]

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[4]Undersigned counsel orally amended the motion to include hair and debris folds currently held by the Orlando Police

4. The aforementioned evidence in this case was not previously tested for DNA.

5. The last known location for the evidence was the Orlando Police Department. The evidence was originally obtained by the Orlando Police Department during its investigation of this case.

(May 6, 2009 Rule 3.853 Motion for Postconviction DNA Testing).

In its order denying Mr. Johnston's motion, the circuit court stated:

> To be entitled to DNA testing, Mr. Johnston must be able to demonstrate that the test results would exonerate him or mitigate the sentence he received. *See* Rule 3.853(b)(3) and (4). However, he fails to establish that the testing would exonerate him even if the results showed that the blood did not belong to the victim and the material under the victim's fingernails did not belong to him.
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> During his January 24, 1984 statement to police, Mr. Johnston admitted holding the victim's body. Therefore, it was reasonable to expect her blood to be on his clothing, and the issue at trial was not whose blood it was but how it got there. Furthermore, there was other incriminating evidence against Defendant, including scratches on his face, discrepancies in his various statements, the discovery of his bloodstained watch on a bathroom counter in the victim's house, and the fact that a butterfly pendant he was seen wearing was entangled in the victim's hair. Additionally, Mr. Johnston admitted taking personal items from the victim's house, allegedly as a memento of the victim.
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> Based upon the totality of the evidence presented at trial against Mr. Johnston, this Court therefore concludes that even if the results of DNA testing were to show that the blood on Mr. Johnston's clothes did not belong to the victim and the material under the victim's fingernails did not belong to him, there is no reasonable probability this result would exonerate him of the crime.

Department as evidence to be examined and tested.

(May 8, 2009 Order Denying Motion for Postconviction DNA Testing, at 2)(footnotes omitted).

Mr. Johnston submits that the circuit court's finding, that there is no reasonable probability that DNA testing could exonerate him of the crime, is erroneous. First, the circuit court relied on the fact that Mr. Johnston at one point admitted to the police that he held the victim's body, thus it was reasonable to expect there to be blood on him. However, the circuit court ignores the fact that Mr. Johnston is mentally ill,[5] that he was recognized as such at the time of trial,[6] and thus his many contradictory statements to the police are simply

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[5]Among other mental issues, Mr. Johnston has been diagnosed as suffering from schizophrenia (R. 1140, 1178).

[6]On direct appeal, this Court affirmed the denial of Mr. Johnston's Faretta claim, stating,

> The trial judge made the proper inquiry in this case and correctly concluded that the desired waiver of counsel was neither knowing nor intelligent, in part, because of **Johnston's mental condition**. In fact the court's order denying Johnston's motion for self-representation and counsel's motion to withdraw specifically cited Johnston's age, education, and **reports of psychiatrist and past admissions into mental hospitals.** Clearly, the trial court was correct in concluding that Johnston would not receive a fair trial without assistance of counsel.

Johnston v. State, 497 So. 2d 863 (Fla. 1986)(emphasis added).

unreliable.[7] Here, the circuit court has erroneously decided to rely on one of many contradictory statements of a mentally ill individual[8] rather than order scientific testing which could conclusively demonstrate whether the blood on Mr. Johnston belonged to the victim, and whether the scrapings under the victim's fingernails match the DNA of Mr. Johnston.[9]

Additionally, the circuit court's determination that there is other incriminating evidence does not negate the fact that DNA testing could exonerate Mr. Johnston. For example, the circuit court relies on the fact that Mr. Johnston had scratches on his face. But it ignores the fact that DNA testing of the scrapings from the victim's fingernails could establish that the scratches didn't come from the victim.[10] Further, as has been discussed

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[7]In one statement to the police, Mr. Johnston related that he did not touch the victim (T. 494). In another statement, he did touch the victim (T. 823). In one statement to the police, Mr. Johnston related that the victim was dead when he found her (T. 494). In another statement, she was alive and appeared to be trying to speak to him (T. 845).

[8]In recent years, there have been multiple instances where DNA evidence has been utilized to exonerate a convicted mentally ill defendant. In 2007, a schizophrenic named Anthony Capozzi was exonerated through DNA testing after spending 22 years in prison for rape.

[9]Moreover, the circuit court's logic is flawed. While the circuit court has chosen to accept certain statements by Mr. Johnston as true, the court ignores other statement favorable to Mr. Johnston, such as the fact that he was emphatically consistent in his denial of the victim's murder (T. 845).

[10]Mr. Johnston stated at one point that he got the scratches from his puppy.

above, the court's reliance on the discrepancies in Mr. Johnston's statements simply verifies that DNA testing should be valued above the rants of a schizophrenic.[11]

Additionally, the circuit court's reliance on the wristwatch and butterfly necklace found at the scene is suspect. Again, in typical fashion, Mr. Johnston at various times claimed ownership of the necklace (T. 2346)[12], and at other times denied ownership of it (T. 2337). Likewise, Mr. Johnston claimed and disclaimed ownership of the watch (T. 2336, 2346, 2348).

There can be no doubt that DNA testing could exonerate Mr. Johnston. There were no eyewitnesses to the crime nor did Mr. Johnston confess to the murder. There was no fingerprint evidence connecting Mr. Johnston to the crime.[13] Clearly, the presence of blood on Mr. Johnston was the primary factor in obtaining a conviction. The absence of his DNA under the victim's fingernails combined with the absence of the victim's blood on Mr. Johnston would establish his innocence and would demonstrate that Mr. Johnston's inconsistent rants are nothing more than that. Mr. Johnston submits that this case should be

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[11]Certainly, the court didn't take at face value Mr. Johnston's prior claim that he had been attacked by Judge Powell in chambers following his evidentiary hearing.

[12]At one point, Mr. Johnson stated that he gave the necklace to the victim (R. 2353).

[13]There were, however, fingerprints from other individuals on the items tested by the State.

remanded for DNA testing in accordance with Fla. R. Crim. P. 3.853.

ARGUMENT II

NEWLY DISCOVERED EVIDENCE HAS REVEALED THAT MR. JOHNSTON WAS CONVICTED BASED UPON INFIRM FORENSIC EVIDENCE IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

> "Over the last two decades, advances in some forensic science disciplines, especially the use of DNA technology, have demonstrated that some areas of forensic science have great potential to help law enforcement identify criminals. Many crimes that may have gone unsolved are now being solved because forensic science is helping identify the perpetrators.
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> Those advances, however, also have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Morever, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.

Strengthening Forensic Science in the United States: A Path Forward (free Executive Summary), S-3, http://www.nap.edu/catalog/12589.html, last viewed May 5, 2009.

The preceding admonition was recently released February 18, 2009 in the executive summary of the pending report produced by the National Academy of Sciences after conducting a study on forensic sciences as directed by the U.S. Congress. The study panel consisted of members of the forensic science community, members of the legal community, and a diverse group of

scientists. "Experts who provided testimony included federal agency officials; academics and research scholars; private consultants; federal state and local law enforcement officials; scientists; medical examiners; a coroner; crime laboratory officials from the public and private sectors; independent investigators; defense attorneys; forensic science practitioners; and leadership of professional and standard setting organizations." (internal citations omitted) Id. at S-2.

The end product of the Committee's painstakingly thorough work was a comprehensive report. This report first became available when released by the Committee on Identifying the Needs of the Forensic Sciences Community on February 18, 2009. The final report constitutes newly discovered evidence that the "scientific" evidence used to convict Mr. Johnston is the result of methods with questionable and untested underlying scientific principles, in violation of Mr. Johnston's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. This Court has recognized that "reports" issued by governmental or other bodies that affect the integrity of a defendant's trial or penalty phase can constitute newly discovered evidence. See, Trepal v. State, 846 So.2d, 405, 409-410 (Fla. 2003)(relinquishing jurisdiction for defendant to file a new successive motion to vacate judgment and sentence based on the newly discovered information in the report released by Office

of the Inspector General, U.S. Dept. Of Justice, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosive-Related and Other Cases (1997);* receded from on other grounds, Guzman v. State, 868 So.2d 498 (Fla. 2003).

The Committee made a number of specific recommendations for improving the many deficiencies within the forensic science community. Issues studied that are relevant to Mr. Johnston's case included pattern evidence such as fingerprints, footwear impressions and bloodstain pattern analysis. In regards to these types of analysis the study found that:

> Often in criminal prosecutions and civil litigation, forensic evidence is offered to support conclusions about "individualization" (sometimes referred to as "matching" a specimen to a particular individual or other source) or about classification of the source of the specimen into one of several categories. With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and specific individual or source. In terms of scientific basis, the analytically based disciplines generally hold a notable edge over disciplines based on expert interpretation. Id. at S-5.
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> The simple reality is that the interpretation of forensic evidence is not always based on scientific studies to determine its validity. This is a serious problem. Although research has been done in some disciplines, there is a notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods. Id. at S-6.

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The study panel then went on to suggest the need for research to establish limits and measures on performance to prevent overreaching. The panel stated:

> The development of such research programs can benefit significantly from other areas, notably from the large body of research on the evaluation of observer performance in diagnostic medicine and from the findings of cognitive psychology on the potential for bias and error in human observers. FN8 The findings of forensic experts are vulnerable to cognitive and contextual bias. See, e.g. I.E. Dror, D. Charlton, and A.E. Peron. 2006. Contextual information renders experts vulnerable to making erroneous identifications. *Forensic Science International* 156:74, 77. ("Our study shows that it is possible to alter identification decisions on the same fingerprint, solely by presenting it in a different context."); I.E. Dror and D. Charlton. 2006. Why experts make errors. *Journal of Forensic Identification* 56(4):600; Giannelli, *supra* note 6, pp. 220-222. Unfortunately, at least to date, there is no good evidence to indicate that the forensic science community has made a sufficient effort to address the bias issue; thus, it is impossible for the committee to fully assess the magnitude of the problem. Id. at S-6.[14]
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> The law's greatest dilemma is its heavy reliance on forensic evidence, however, concerns the question of whether ------ and to what extent ------ there is *science* in any given forensic science discipline. Id. at S-7.

[14] Because of these issues, and others, the first recommendation of the report is the formation of an independent federal entity: the National Institute of Forensic Sciences. Id. at S-14. This is necessary because the current "forensic science enterprise lacks the necessary governance structure to pull itself up from its current weaknesses." Id. at S-12.

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> But because accused parties in criminal cases are convicted on the basis of testimony from forensic science experts, much depends upon whether the evidence offered is reliable. Furthermore, in addition to protecting innocent persons from being convicted of crimes that they did not commit, we are also seeking to protect society from persons who have committed criminal acts. Law enforcement officials and the members of society they serve need to be assured that forensic techniques are *reliable.* Therefore, we must limit the risk of having the reliability of certain forensic science methodologies judicially certified before the techniques have been properly studied and their accuracy verified by the scientific community. Id. at S-9.

In Mr. Johnston's case, questionable expert testimony was utilized against him. For example, testimony reveals that Investigator Dupius testified as to blood spatter. Interestingly, Investigator Dupius was exclusively trained by the now discredited Judith Bunker. Ms. Bunker was revealed to have converted herself into an expert in bloodstain pattern analysis from a brief four hour workshop conducted by Mr. Herbert MacDonnell in Birmingham, Alabama. With only this minimal experience Ms. Bunker launched a career instructing law enforcement upon the complex science of blood-stain pattern analysis.[15]

Investigator Dupius testified that he observed a reddish stain on Mr. Johnston's right sock and that the stain projected

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[15] This claim was raised and rejected as to Ms. Bunker's lack of credentials in Johnston v. State, 708 So.2d 590 (Fla. 1998).

in a downward motion. He also observed a dark stain on Mr. Johnston's brown shoes, as well as a single red stain on the groin area of his shorts (R. 540). Dupius then **admitted that he conducted no testing as to whether blood was actually on the socks**, although he surmised that based on his training and experience it was blood (R 541).

Dupius further testified that the blood was projected or was cast-off and was in motion when it came into contact with Mr. Johnston's clothing since it was not a smear pattern (R. 541-42). Investigator Dupius also related that he observed several patterns within Mary Hammond's home, however, he did not mention any of it being tested. Based upon these observations he related that the three arches of staining on the west wall were cast-off stains because a bloody object had been in motion towards the right side of the body (R. 545). He also opined that the killer was right-handed (R. 553).

Officer Ostermeyer also testified regarding blood evidence supposedly upon Mr. Johnston's clothing (R. 641-44). He completed presumptive testing and found Mr. Johnston's clothing tested positive for the presence of blood. The areas reacting to the Luminol were the back of the Mr. Johnston's shirt, his sleeves, his waistband, the front of his shorts, the back pocket area of his shorts, and his right shoe (R. 648-49). The officer admitted the test was not conclusive and can give false positives

(R. 651-53).

Blood spatter is the type of evidence that is listed as suspect within the study conducted by the National Academy of Sciences. The study relates:

> However, many sources of variability arise with the production of bloodstain patterns, and their interpretation is not nearly as straightforward as the process implies. Interpreting and integrating bloodstain patterns into a reconstruction requires, at a minimum:
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> * an appropriate scientific education;
> * knowledge of the terminology employed (e.g., angle of impact, arterial spurting, back spatter, castoff pattern);
> * an understanding of limitations of the measurement tools used to make bloodstain pattern measurements (e.g., calculators, software, lasers, protractors);
> * an understanding of applied mathematics and the use of significant figures;
> * an understanding of the physics of fluid transfer;
> * an understanding of pathology of wounds; and
> * an understanding of the general patterns blood makes after leaving the human body.

Strengthening Forensic Science in the United State: A Path Forward, http://www.nap.edu/catalog/12589.html, Prepublication Copy, at 5-38.

None of these potential sources of variability were explored in Mr. Johnston's case, including the fact Investigator Dupius received virtually no meaningful instruction in this complex science. Mere conclusory allegations were made with no

meaningful cross-examination or adversarial testing. The reliability necessary to sustain the conviction and impending execution is clearly lacking.

Gene Hietchew testified that fourteen latent prints had been lifted at the crime scene of which four were usable (R. 681). The prints did not match Mary Hammond, Kevin Williams, or David Johnston (R. 682). However, the police failed to compare the prints of Jose Gutierrez who had been observed within hours of the crime sitting in the driveway looking as if he were spoiling for a fight.

The State also had Terrel Kingery testify regarding pattern evidence relating to Mr. Johnston's shoes (R. 740-52). He received plaster casts, a pair of shoes, and photographs of shoe tracks, among other things (R. 742). Subsequently, he compared the prints and expressed the opinion that Mr. Johnston's left shoe could have made the print (R. 745). Kingery described the process he utilized as inking the shoes, putting the shoes on his feet (not the same size as Mr. Johnston) and then personally making the prints. He admitted the shoes had already been tested for blood and that he did not use the same soil as that at the crime scene.

Within the National Academy of Sciences report footwear pattern evidence is specifically discussed. "Class characteristics of footwear and tires result from repetitive

controlled processes that are typically mechanical, such as those used to manufacture items in quantity. Although defined similarly by various authors, Bodziak describes footwear class characteristics as ‘an intentional or unavoidable characteristic that repeats during the manufacturing process and is shared by one or more other shoes.’” (footnote omitted), *Strengthening Forensic Science in the United State: A Path Forward*, http://www.nap.edu/catalog/12589.html, Prepublication Copy, at 5-15.

The study goes on to consider individual wear characteristics by stating, “For footwear, Bodziak writes that ‘individual identifying characteristics are characteristics that result when something is randomly added to or taken away from a shoe outsole that either causes or contributes to making that shoe outsole unique.’” (footnote omitted), Id.

In Mr. Johnston’s case these differences and methods of interpretation were either not used or not brought out in testimony. Simply testifying to a match is not enough. The aforementioned guidelines must be adhered to in order to provide the kind of reliability required to convict and execute a man.

The report further calls into question the terminology used to describe testing results. Many terms that are utilized to describe the degrees of association between evidentiary material and particular people or objects, e.g., “match,” “consistent

with," "identical," "similar in all respects tested," and cannot be excluded as the source of." Id. at S-15. The Committee concluded that "[t]he use of such terms can and does have a profound effect on how the trier of fact in a criminal or civil matter perceives and evaluates scientific evidence." Id.

When analyzing the significant advances in DNA technology and its immense importance to law enforcement to law enforcement the Committee observed that DNA advances have:

> revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence. NAS Report at S-13.

The information, analysis, and ultimate conclusions contained in the NAS Report reveal that "scientific" evidence produced by methods with questionable and untested underlying scientific principles is being used to convict defendants.

The use of this questionable "scientific" evidence, coupled with the utter lack of standardized reporting and terminology in forensic disciplines renders both the conviction as well as the death sentence unreliable. Under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Furman v. Georgia, 408 U.S. 238, 310 (1972)(per

curiam). Furman stands for the proposition most succinctly explained by Justice Stewart in his concurring opinion: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. Id. at 310 (Stewart, J. concurring). Differences in terminology, for example, could mean the difference between life and death: two experts in the same field of forensic science may testify in two different cases and use differing terminology to describe the same results so that one defendant is convicted or sentenced to death on the basis of that evidence and the other is not. The imposition and carrying out of the death penalty in cases in which untested and unreliable "scientific" evidence is used to convict defendants also constitutes cruel and unusual punishment. When the myriad of problems with so-called "scientific" evidence are considered together in analyzing its ability to produce a reliable result, the conclusion is inescapable: as Justice Brennan wrote in his concurring opinion in Furman, "it smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring). The use of "scientific" evidence produced by methods of questionable and untested underlying scientific principles cannot "assure consistency, fairness, and rationality" and cannot "assure that sentences of death will not

be ‘wantonly’ or ‘freakishly’ imposed.” Proffitt v. Florida, 428 U.S. 242, 259-260 (1976).

Mr. Johnston submits that this issue should be remanded for an evidentiary hearing and thereafter, Rule 3.851 relief should issue.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING MR. JOHNSTON’S REQUEST FOR FORENSIC TESTING RESULTING IN A VIOLATION OF MR. JOHNSTON’S RIGHTS TO DUE PROCESS UNDER BOTH THE U.S. AND FLORIDA CONSTITUTIONS.

Mr. Johnston was charged with the murder of Mary Hammond and convicted and sentenced to death in June 1, 1984. Numerous articles of evidence were collected and tested by the State of Florida. At trial, the State introduced numerous items of evidence and adduced expert testimony regarding the evidence.

Officer Ostermeyer testified regarding blood evidence supposedly upon Mr. Johnston’s clothing (R. 641-44). He completed presumptive testing and found Mr. Johnston’s clothing tested positive for the presence of blood. The areas reacting to the Luminol were the back of the Defendant’s shirt, his sleeves, his waistband, the front of his shorts, the back pocket area of his shorts, and his right shoe (R. 648-49). The officer admitted the test was not conclusive and gives false positives (R. 651-53).

Gene Hietchew testified that fourteen latent prints had been

lifted at the crime scene of which four were usable (R. 681). The prints did not match Mary Hammond, Kevin Williams, or David Johnston (R. 682). However, the police failed to compare the prints of Jose Gutierrez who had been observed within hours of the crime sitting in the driveway looking as if he were spoiling for a fight.

The State also had Terrel Kingery testify regarding pattern evidence relating to Mr. Johnston's shoes (R. 740-52). He received plaster casts, a pair of shoes, photographs of shoe tracks, among other things (R. 742). Subsequently, he compared the prints and expressed the opinion that Mr. Johnston's left shoe could have made the print (R. 745). Kingery described the process he utilized as inking the shoes, putting the shoes on his feet (not the same size as Mr. Johnston) and then personally making the prints. He admitted the shoes had already been tested for blood and that he did not use the same soil as that at the crime scene.

Mr. Johnston has had numerous attorneys over the years and been effectively without counsel for the last couple of years. None of these attorneys did any independent testing. Indeed, many of the testing procedures available now did not exist during the time period when many of these attorneys represented Mr. Johnston or the science and protocols have since progressed to allow a greater degree of reliability. See, Claim II, *supra*.

When considered in conjunction with the newly discovered evidence claim that the testing procedures used in capital cases such as Mr. Johnston's have been exposed as oftentimes fraught with error, it becomes glaringly apparent that Mr. Johnston's case requires an independent forensic review of the evidence in by his own forensic experts.

The trial court clearly erred when it found that, "As this Court concluded in the Order Denying Motion for Postconviction DNA Testing, there is no reasonable probability that the results of additional forensic testing would exonerate Mr. Johnston of the crime." Order Denying Motion to Produce Evidence for Forensic Testing and Request for Hearing at 1.

The forensic evidence in this case was circumstantial in nature.[16] Mr. Johnston has always maintained his innocence in this case. Mr. Johnston's postconviction forensic experts will review the facts and evidence in this case and conduct forensic testing to utilize the most modern testing and science to ascertain the validity of the prior testing conducted 25 years ago. Additional testing of the evidence listed above is critical to Mr. Johnston's claim of innocence, and would in no way harm the State. It would be a violation of due process for Mr. Johnston to be denied access to independent forensic testing in

[16] Mr. Johnston adopts and re-alleges the argument regarding the exculpatory nature of the proposed testing as argued in Claim I, *supra.*

this case.

The U.S. Court of Appeals for the Ninth Circuit recently found that a state prisoner has a right to postconviction access to biological evidence used to convict him. Osborne v. District Attorney's Office, 521 F.3d 1118 (9th Cir. 2008), cert.granted, (currently pending) District Attorney's Office v. Osborne (U.S. Sup. Ct., Case No. 08-6). The biological evidence in Osborne related to DNA testing and was the subject of a civil rights action filed pursuant to §1983. The State of Alaska had blocked Osborne's access to DNA testing.[17] In granting Osborne access to the biological evidence the Ninth Circuit observed that:

> The evidence in question can be produced easily and without cost to the State and, if favorable to Osborne, would be strong evidence in support of post-conviction relief. Nonetheless, the State seeks to foreclose such relief by its simple refusal to open the evidence locker . . .
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> The State supports its position with the argument that the circumstantial and eyewitness evidence in this case is also strong evidence of Osborne's guilt, and thus granting access is not likely to "further the truth seeking function of our criminal justice system." As recent history has shown, however, DNA evidence has the capability of refuting otherwise irrefutable inculpatory evidence, and as we have already established this case is no exception.
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> If the inculpatory evidence has been correctly interpreted, further DNA testing will confirm that Osborne is guilty as charged and convicted. But it remains a very real possibility that further DNA testing will be exculpatory and may even lead to

[17] Mr. Johnston adopts the due process argument within this claim as if fully argued in Claim I as well.

> Osborne's exoneration. In the former case, the State will have lost nothing; indeed, it will gain even more definitive proof of Osborne's guilt and will be relieved of the burden of further post-conviction litigation. In the latter case, however, Osborne will obviously gain a great deal, as will the State, whose paramount interests are in seeking justice, not obtaining convictions at all costs, and which will then have strong evidence for use in catching and punishing the real perpetrator. Importantly, the State is prejudiced in neither case, and the truth-seeking function of the criminal justice system is furthered in either case. Osborne at 1141.

Osborne, 521 F.3d at 1141. The same holds true in Mr. Johnston's case. The minimal amount of time required for DNA and forensic testing relative to the twenty-six years Mr. Johnston has spent on Florida's death row does little, if anything, to prejudice the State of Florida. However, this requested testing, if the results are exculpatory, has the potential to save Mr. Johnston's life. Clearly, the requested testing should be allowed and relief should issue.

ARGUMENT IV

THE CLEMENCY PROCESS AND THE MANNER IN WHICH IT WAS DETERMINED THAT MR. JOHNSTON SHOULD RECEIVE A DEATH WARRANT ON APRIL 20, 2009, WAS ARBITRARY AND CAPRICIOUS AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam). At issue in Furman were three death sentences: two from Georgia and

one from Texas. Relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, it was argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death schemes were then operating to be arbitrary and capricious. Furman, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); Id. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); Id. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); Id. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); Id. at 365-66 (Marshall, J., concurring)("It also is evident that the burden of

capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.")(footnote omitted). Thus, as explained by Justice Stewart, Furman means that: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. Id. at 310.

On April 20, 2009, the Governor signed a warrant scheduling Mr. Johnston's execution for May 27, 2009. This decision was conducted without Mr. Johnston's counsel's knowledge[18] or for that matter without Mr. Johnston having a clemency attorney who could provide information that may warrant a decision that the Governor should not proceed with Mr. Johnston's execution. A

[18]Mr. Johnston was effectively without counsel at that time as CCRC-MR had filed a motion to withdraw that had been languishing for months.

one-sided process such as this cannot operate as the "fail safe" that the United States Supreme Court explained in Harbison v. Bell, – U.S. – (April 1, 2009), was expected and required. Such a process means that executions will be carried out on a completely arbitrary and random basis.

In fact, the signing of Mr. Johnston's warrant on April 20, 2009, was nothing more than a lottery. There were over fifty death row resides whose cases were as ready for a warrant as Mr. Johnston's. From the Capital Commission website it can be determined that the list at a minimum includes: Gary Alvord, Richard Anderson, Jeffrey Atwater, Chadwick Banks, McArthur Breedlove, Jim Eric Chandler, Oba Chandler, Loran Cole, Danny Doyle, Charles Finney, Charles Foster, Konstantinos Fotopoulose, John Freeman, Guy Gamble, Louis Gaskin, Olen Gorby, Robert Gordon, Marshall Gore, Martin Grossman, Jerry Haliburton, Robert Hendrix, John Henry, Paul Howell, James Hunter, Etheria Jackson, Edward James, Ronnie Johnson, Randall Jones, William Kelley, Gary Lawrence, Ian Lightbourne, John Marquard, Sonny Oats, Dominick Occhiccone, Norman Parker, Robert Patten, Daniel Peterka, Kenneth Quince, Paul Scott, Richard Shere, Kenny Stewart, William Sweet, Melvin Trotter, William Turner, Manuel Valle, William Van Poyck, Peter Ventura, Anthony Wainwright, Robert Waterhouse, Johnny Williamson, and William Zeigler. So along with Mr. Johnston and John Marek who both got warrants on April 20th, at least an

additional 51 inmates were passed over. Mercy was extended to these other inmates and they were allowed to continue to live. Certainly, there may be very good reasons for extending mercy to a number of these individuals. That is not the point. The point is there are no standards. There is no guidance. There is absolutely no way to distinguish whose name the Governor places on warrant from the 50 plus names that are not placed on a warrant. The process can only be described as a lottery; the very kind of system that the United States Supreme Court in Furman v. Georgia said would no longer be allowed.

Most states have the judicial branch in charge of scheduling execution dates. Either the trial court or the highest appellate court to hear death appeals determines when an execution date should be set. At that point, the condemned can petition for clemency before those charges with considering clemency applications. However in Florida, the Governor has the power to schedule executions and within that power has the power to not schedule an execution, which is by its very nature an act of clemency. When the Governor has as he does now a pool of some fifty candidates for execution and no governing standards for determining how to exercise that power, there is no basis for distinguishing between those who are scheduled for execution and those who are not. The Florida procedure violates Furman v. Georgia.

When Mr. Johnston presented this issue to the circuit court, it was summarily denied on the basis of being "procedurally barred as successive." (May 8, 2009 Order denying 3.850 motion, at 10). According to the circuit court, Mr. Johnston could have raised this issue in his previous postconviction motions or on direct appeal (May 8, 2009 Order denying 3.850 motion, at 10).

Mr. Johnston submits that the circuit court's ruling is erroneous. This issue did not become ripe for review until the Governor arbitrarily signed Mr. Johnston's warrant. Moreover, until the decision in Harbison, collateral counsel was precluded from seeking clemency on behalf of Mr. Johnston. See Sections 27.51(5)(a); 27.511(9); and 27.5303(4), Fla. Statutes.

Additionally, the circuit court's reliance on the fact that Mr. Johnston had a clemency proceeding in 1987 and that he was represented by counsel (May 8, 2009 Order denying 3.850 motion, at 10), misses the point. In Harbison v. Bell, the United States Supreme Court explained that federal habeas counsel may develop in the course of his representation "the basis for a persuasive clemency application" which arises from the development of "extensive information about his [client's] life history and cognitive impairments that was not presented during his trial or appeals." Slip Op. at 13.

In Mr. Johnston's case, minimal investigation as to his

background was conducted by trial counsel.[19] There was no presentation of mental health evidence to the jury. Consequently, the process that occurred in 1987 before the life history was fully developed cannot be the "fail safe" that is envisioned by the United States Supreme Court.[20]

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[19]During the penalty phase, trial counsel presented the testimony of Ken Cotter, an attorney who had represented Mr. Johnston on occasion, and Corinne Johnston, Mr. Johnston's step-mother.

[20]During Mr. Johnston's postconviction proceedings, evidence was presented that Mr. Johnston has been diagnosed as schizophrenic at least twenty times, and, since early childhood, has been committed for psychiatric treatment at least twelve times. He has received medication for his mental illness since he was eight years old; however, both the medication and the psychotherapy that were repeatedly recommended were administered only sporadically. Records from the State of Louisiana show that during his adolescence, when schizophrenia first manifests itself, Mr. Johnston was shuttled back and forth between the county jail and psychiatric hospitals as different state agencies avoided responsibility for him. When his aggressive, hostile, and self-destructive behavior at the jail became too much to handle, he would be sent to the hospital where he would improve under medication. However, in a matter of days, or even on the same day, Mr. Johnston would be discharged back to the jail without the medication that had enabled him to improve.

This pattern of mistreatment began during his early childhood when Mr. Johnston was diagnosed as mentally retarded and brain damaged. At the age of seven, when he started school, his I.Q. was tested at 57 and he was classified as educable retarded. When he was twelve, his I.Q. was tested at 65, still within the educable retarded range. During his childhood, Mr. Johnston's behavior was a problem both at school and at home, but the responses of his family and school officials only exacerbated his problem. Although he was diagnosed as brain damaged and mentally retarded, Mr. Johnston was simply treated as a bad boy who intentionally misbehaved and deserved to be punished. When he was seven, Mr. Johnston's school records state that he was "an extremely frightened and anxiety-ridden youngster" who is "generally frightened for his physical well being." The report states that his "fears may be quite realistically based as there appears to be some definite physical neglect and abusement towards this youngster by his parents." A later record indicates

In denying relief, the circuit court also found that "the April 20, 2009, death warrant expressly states that 'it has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution, is not appropriate.'" (May 8, 2009 Order denying 3.850 motion, at 11). Ironically, this is the point that Mr. Johnston has been alleging all along, that the clemency process was conducted without his counsel's knowledge or for that matter without Mr. Johnston having a clemency attorney who could provide the information that may warrant a decision that the Governor should not proceed with Mr. Johnston's execution. Such a process means that executions will be carried out on a completely arbitrary and random basis.

Finally, the circuit court relied on the notion that pardon powers reside in the domain of the executive branch (May 8, 2009 Order denying 3.850 motion, at 10). Yet, Mr. Johnston has a continuing interest in his life until his death sentence is carried out, as guaranteed by the Due Process clause of the Fourteenth Amendment to the United States Constitution. See Ohio Adult Parole Authority, et al. v. Woodard, 523 U.S. 272, 288 (1998)(Justices O'Connor, Souter, Ginsburg and Breyer concurring)("A prisoner under a death sentence remains a living

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that Mr. Johnston was also whipped by the principal at a state school until an arrangement was made "with the mother so that whenever he does need discipline they will call her and she will come to the school and whip him."

person and consequently has an interest in his life"). This constitutionally-protected interest remains with him throughout the appellate processes, including during clemency proceedings:

> Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, **or in a case where the State arbitrarily denied a prisoner any access to its clemency process**.

Woodard, 523 U.S. at 289 (emphasis added). Here, the lower court's determination ignores Ohio Adult Parole Authority, et al. v. Woodard, in which the Supreme Court held that judicial intervention was warranted in a case where a clemency system was arbitrary. This claim should be remanded for and evidentiary hearing and thereafter, Rule 3.851 relief should issue.

ARGUMENT V

MR. JOHNSTON IS EXEMPT FROM EXECUTION UNDER THE EIGHTH AMENDMENT BECAUSE HE SUFFERS FROM SUCH SEVERE MENTAL ILLNESS THAT DEATH CAN NEVER BE AN APPROPRIATE PUNISHMENT.

Mr. Johnston is exempt from execution under the Eighth Amendment to the U.S. Constitution because he suffers from such severe mental illness that death can never be an appropriate punishment. Mr. Johnston's severe mental illness places him within the class of defendants, like those who were under the age of eighteen at the time of the crime and those with mental retardation, who are categorically excluded from being eligible for the death penalty. Cf. Roper v. Simmons, 543 U.S. 551 (2005)

(holding that the death penalty is unconstitutional for defendants under 18 at the time of the crime); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the death penalty is unconstitutional for mentally retarded defendants).

The United States Supreme Court has long cautioned that the Eighth Amendment's prohibition against cruel and unusual punishment is not simply a fixed ban on certain punishments, but rather depends on evolving standards of decency for its substantive application. Trop v. Dulles, 356 U.S. 86, 100 (1958) (noting that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); Weems v. United States, 217 U.S. 349, 368 (1910) (recognizing that the words of the Eighth Amendment are not precise, and that their scope is not static.). The 2006 American Bar Association's Resolution 122A, urging states to exempt from the death penalty those defendants with severe mental illness at the time of their crimes as described in the resolution, evinces an evolution in standards of decency which must be considered in a proper Eighth Amendment analysis.[21]

[21]It bears noting that prior to the United States Supreme Court's decisions holding that mentally retarded defendants and defendants under the age of eighteen at the time of the crime are categorically excluded from eligibility for the death penalty, the ABA passed resolutions urging the exemption of both classes of defendants from the death penalty. See American Bar Association, Report with Recommendations No. 107 (adopted February 1997); American Bar Association, Recommendation (adopted February 1989); American Bar Association, Recommendation (adopted

Mr. Johnston has suffered continuously from severe mental illness since before the time of the crime for which he was convicted and sentenced to death. He has been diagnosed with organic brain damage with aphasia (indicating left hemisphere brain damage effecting language functions); schizophrenia with 1st order symptoms of hallucination, delusion, thought disorder, and paranoid features (PC-R. 243-42). He falls within the class of persons who are so much less morally culpable and deterrable than the "average murderer" as to be categorically excluded from being eligible for the death penalty, no matter how heinous the crime. Cf. Simmons, supra; Atkins, supra. Given his severe mental illness, Mr. Johnston is constitutionally protected from execution because the death penalty is an unconstitutionally excessive punishment for Mr. Johnston for the same reasons delineated in Atkins and Simmons. In Gregg v. Georgia, 428 U.S. 153, 183 (1976), the United States Supreme Court identified retribution and deterrence of capital crimes by prospective offenders as the social purposes served by the death penalty. In Atkins, the U.S. Supreme Court stated that "[u]nless the imposition of the death penalty on a mentally retarded person measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."

August 1983).

526 U.S. at 320, quoting Enmund v. Florida, 458 U.S. 782, 798 (1982). The Atkins Court ultimately found that neither justification for the death penalty was served by its imposition on mentally retarded individuals.

As to the first justification, retribution, the court concluded that the legislative trend against imposition of the death penalty on mentally retarded offenders "provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." Id. at 316. The Atkins Court opined that "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." 526 U.S. at 319. The court explained some reasons for the lesser culpability of mentally retarded offenders:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. ... [T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318. Similarly, in Simmons, the United States Supreme

Court listed several reasons for juveniles' diminished culpability:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, ... "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and illconsidered actions and decisions." It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior."
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> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.
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> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Simmons, 543 U.S. at 569-570 (internal citations omitted).

The reasoning in Atkins and Simmons applies with equal force to severely mentally ill offenders such as Mr. Johnston, as some judges across the county have begun to recognize.[22] Mr.

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[22]In a concurring opinion in State v. Ketterer, 855 N.E. 2d 48 (Ohio 2006), Justice Stratton addressed the ABA resolution and noted that "[t]here seems to be little distinction between executing offenders with mental retardation and offenders with severe mental illness, as they share many of the same characteristics." Id. at ¶ 245. He concurred in the court's judgment upholding the death sentence of a severely mentally ill offender, however, because "while [he] personally believe[s] that the time has come for our society to add persons with severe mental illness to the category of those excluded from application of the death penalty, [he] believe[s] that the line should be drawn by the General Assembly, not by a court." Id. at ¶ 247. See also Corcoran v. State, 774 N.E. 2d 495, 502 (Ind. 2002)

Johnston's severe mental illness and neurological impairments cause him to suffer from the very same deficits in reasoning, judgment, and control of impulses that lessen his culpability and render the penological justification of retribution ineffective against him.

As to the deterrence justification for capital punishment, the Atkins Court also found that as a result of the limitations on the ability of a person with mental retardation to reason and control himself, the death penalty would have no deterrent effect on his actions. Id. at 2251. Specifically, the Court found that a mentally retarded individual's "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" makes it less likely that he will conform his conduct to avoid the possibility of execution. Id. Similarly, in Simmons, the Court noted that "the

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(Rucker, J., dissenting) ("I respectfully dissent because I do not believe a sentence of death is appropriate for a person suffering a severe mental illness. Recently the Supreme Court held that the executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment of the United States Constitution. There has been no argument in this case that Corcoran is mentally retarded. However, the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency.") (internal citations omitted); State v. Scott, 748 N.E. 2d 11 (Ohio 2001) (Pfeifer, J., dissenting) ("As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so…. I believe that executing a convict with severe mental illness is a cruel and unusual punishment.").

same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." 543 U.S. at 571. In particular, the Court opined, "[t]he likelihood that the teenage offender has made the kind of costbenefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." Id. at 572, quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988).

Likewise, the justification of deterrence is not served by executing severely mentally ill individuals, as severe mental illness can impair an individual's ability to control impulses or understand long-term consequences. At his evidentiary hearing, Mr. Johnston presented evidence of his severe mental illness. Dr. Merikangas, a psychiatrist and neurologist experienced in evaluating criminal defendants, testified that Mr. Johnston was "psychotic and has been, at least since he was 17, that he has brain damage, probably from early childhood and that as a result of the organic brain damage and the psychosis, he's more susceptible to the effects of drugs and alcohol and emotional stress and distress" (PC-R. 365). Dr. Merikangas went on to explain Mr. Johnston's complex mental history:

> A. Well, very important in his evaluation is the, is the historical record and the medical records. He was tested at age seven and a half in schools having an I.Q. of 57. And he was labeled at that time as an educably retarded child. He was noted at that time to be hyperactive, inattentive, difficult to be directed, not benefitting from learning. He was held back in school. And he began almost immediately to get in

trouble with the authorities.

> When he was 13, it was recommended that he be institutionalized because of his psychiatric difficulties, his learning difficulties and his violent behavior. And then he was, in fact, hospitalized a number of different places, including the Central Louisiana State Hospital and the Conway Memorial Hospital, in particular. And all of these people, or most of all these people agreed that he had a severe mental illness. They varied in light details. Many of them calling him schizophrenic, which does summarize fairly well the thought disorder that he has.
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> He suffers from delusions, hallucinations and a complex disorder of logical thought, which causes him not to be able to judge his environment and react to it in a way that normal people do. In addition to that, though, he has the physical findings of brain damage. Which include his being, if I could refer to the, my notes, he has trouble with coordination on the left side of his body. Moving his left hand and arm is done with difficulty. He has changes in his reflexes. Hyper reflexia. Particularly at the left knee. He has an altered sensitivity to pin prick. The test is to touch the patient with a sharp object and have him report. The entire left side of his face, arm and leg. There is an asymmetry to his head and his face, which if you look at him, you will see that the right eye appears somewhat smaller than the left. He has, when moving his face spontaneously, it moves asymmetrically. The right side of his face moving more than the left.
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> These physical signs are things that accompany brain damage. The psychological testing also bears that out. But in my own examination of him, he also has scoliosis, which is spinal curvature, and although this is a disease of the bone, the growth of the spine is controlled by the nervous system and is probably as a result of his brain damage that he has the spinal curvature.

(PC-R. 363-67). Dr. Merikangas also testified that Mr. Johnston's "ability to conform his conduct to any kind of standard, including the requirements of law, is impaired because

he has idiosyncratic delusional thinking, with hallucinations and that he does things based upon fantasies, dreams and thoughts that he cannot distinguish from reality." (PC-R. 387-88). Further, Dr. Merikangas explained that Mr. Johnson "does not have the mind of an adult. He has a brain damaged mind which is less than that of a normal adult person. . . he is, in a sense a, a child-like person." (PC-R. 389-91).

Additionally, Dr. Hyman Eisenstein, a neuropsychologist, completed a preliminary neuropsychological evaluation at the direction of undersigned counsel on May 5, 2009. Dr. Eisenstein found that Mr. Johnston operates at a mental age between 6.6 years and 11.8 years based upon the administration of the Peabody Picture Vocabulary Test, Third Edition and the Wide Range Achievement Test, Revision 3.[23] Mr. Johnston cannot distinguish between addition and subtraction nor perform the most basic spelling tasks. This is also evidenced by the fact that Mr. Johnston cannot even compute the amount in his canteen account; other inmates must assist him in this task.

Dr. Eisenstein found that Mr. Johnston is very "primitive" in his ability to care for himself and has extreme difficulty in adaptive functioning, both now and in the past. Dr. Eisenstein opined that Johnston's adaptive functioning places him in the

[23] Dr. Eisenstein also administered the TOMM test and there were no indications of malingering whatsoever.

same class of persons as those diagnosed as mentally retarded. Dr. Eisenstein did not have enough time to give the newest IQ test, the WAIS-4. Dr. Eisenstein believes that prior IQ scores artificially inflated Mr. Johnston's scores. The new test, the WAIS-4, has accounted for the factors that may have artificially inflated these scores. This is due to a reconfiguring of the method in which attention concentration is scored. At an evidentiary hearing this evidence can be produced.

Dr. Eisenstein's tentative diagnosis is organic brain damage, paranoid schizophrenic, rule out pervasive developmental disorder and autism. This is consistent with prior diagnoses leaving no doubt that Mr. Johnston is severely mentally ill, brain damaged, and operates at a child-like mental level.

Capital punishment's twin goals of retribution and deterrence would not be served by executing Mr. Johnston. The extensive and compelling evidence of Mr. Johnston's severe mental illness presented at his evidentiary hearing demonstrates that his significant impairments in reasoning, judgment, and understanding of consequences puts him in the same class as mentally retarded and juvenile offenders in terms of diminished culpability.

Additionally, mental illness, like mental retardation and youth, can impair a defendant's ability to consult with and assist counsel at trial. Cf. Atkins, 536 U.S. at 321 ("Mentally

retarded defendants may be less able to give meaningful assistance to their counsel…"). Such was certainly the case with Mr. Johnston, as is demonstrated by the fact that his trial attorneys felt he was "continually incompetent" (PC-R. 150). [24]

Furthermore, because severely mentally ill defendants, mentally retarded defendants, and juvenile defendants are similarly situated with respect to the goals served by capital punishment, and because there is no rational basis for

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[24]Trial counsel Warren explained:

> I could tell him something, and fifteen minutes later, it would become clear that he did not understand what I had said. In fact, really couldn't -- I don't know if remember is the right word, but did not incorporate it into his consciousness. He made bizarre comments and statements. Was very childish; very demanding.
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> It was -- and then, of course, he had a, as the case developed, you know we learned that he had been committed and had received psychiatric treatment earlier.
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> I had, at that point, I had been practicing law about four years. One of the first cases that I ever became involved in was a first-degree murder case. In fact, the day after I was sworn in, I appeared for initial appearances for that particular person where we, where the insanity defense was a defense.
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> I have family members who are schizophrenic and I have had a lot of, had had even then, a fair amount of experience with clients who had psychiatric problems. And he just seemed to me to have severe mental problems.

(PC-R. 143-45).

distinguishing severely mentally ill defendants from mentally retarded and juvenile defendants, executing Mr. Johnston would not comport with equal protection under the United States Constitution. See e.g., City of Cleburne, Texas, et al.v. Cleburne Living Center, Inc., et al., 473 U.S. 432, 439 (1985), citing to Plyler v. Doe, 457 U.S. 202, 216 (1982)("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."). Mr. Johnston's severe mental illness and neurological impairments render him ineligible for the death penalty under the Eighth Amendment and the Supreme Court's reasoning in Atkins and Simmons.

ARGUMENT VI

BECAUSE OF THE INORDINATE LENGTH OF TIME THAT MR. JOHNSTON HAS SPENT ON DEATH ROW, ADDING HIS EXECUTION TO THAT PUNISHMENT WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND BINDING NORMS OF INTERNATIONAL LAW.

Mr. Johnston is set to be executed almost 25 years after his conviction was returned and a sentence of death was imposed.[25] The Eighth Amendment's prohibition on cruel and unusual

[25]Mr. Johnston was convicted on May 18, 1984, and he was sentenced to death on June 1, 1984.

punishment precludes the execution of a prisoner who has spent so much time on death row. This conclusion is derived from the fact that the Eighth Amendment requires that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976). Punishments that entail exposure to a risk that "serves no 'legitimate penological objective'" and that results in gratuitous infliction of suffering violate the Eighth Amendment. Farmer v. Brennan, 511 U.S. 825, 833 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part).[26]

In Lackey v. Texas, Justice Stevens wrote:

> Though novel, petitioner's claim is not without foundation. In *Gregg v. Georgia*, this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers and (2) the death penalty might serve "two principal social purposes: retribution and deterrence".
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a

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[26]Where, as here, the inherent cruelty of living under a sentence of death is prolonged for almost 25 years, such suffering cannot be considered incidental to the processing of the appeals. It is unnecessary and thus unconstitutional. Such long-term suffering becomes a separate form of punishment, which is equivalent to or greater than an actual execution. See Coleman v. Balkom, 45 1 U.S. 949, 952 (1981)(Stevens, J., concurring in denial of certiorari); cf. In re Medley, 134 U.S. 160, 172 (1890).

> sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley, 134 U.S. 160, 172, 33 L. Ed. 835, 10 S. Ct. 384 (1890)*. If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, that description should apply with even greater force in the case of delays that last for many years. Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

Lackey v. Texas, 514 U.S. 1045 (1995) (J. Stevens, memorandum respecting denial of certiorari) (citations omitted).[27]

In a subsequent denial of certiorari review in another case, Justice Breyer echoed the concerns voiced by Justice Stevens in

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[27]Certainly, the Framers of the United States Constitution would not have envisioned that a condemned man would spend 25 years awaiting execution. The Eighth Amendment's prohibition on cruel and unusual punishment on the 1776 Virginia Declaration of Rights was based on the 1689 English Bill of Rights. Harmelin v. Michigan, 501 U.S. 957, 966 (1991). The English Bill of Rights said "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" when executions took place within weeks of a death sentence, and if a delay in carrying out the execution was unduly prolonged, it could be commuted to a life sentence. Riley v. Attorney Gen. of Jamaica, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarsman, dissenting); Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc) .

Lackey. Justice Breyer wrote in a case involving a defendant who had been on Florida's death row over 23 years that: "After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise may provide a necessary constitutional justification for the death penalty." Elledge v. Florida, 119 S. Ct. 366 (1998) (J. Breyer, dissenting). In yet another case involving an extended stay on Florida's death row, Justice Breyer stated:

> Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades. See *Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc)* (Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence).

Knight v. Florida, 528 U.S. 990, 995 (1999) (J. Breyer, dissenting from the denial of certiorari). Justice Breyer described the psychological impact of a long stay on death row:

> It is difficult to deny the suffering inherent in a prolonged wait for execution -- a matter which courts and individual judges have long recognized....The California Supreme Court has referred to the "dehumanizing effects of . . . lengthy imprisonment prior to execution." In *Furman v. Georgia, 408 U.S. at 288-289* (concurring opinion), Justice Brennan wrote of the "inevitable long wait" that exacts "a frightful toll." Justice Frankfurter noted that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."

Knight, 528 U.S. at 994-995.

Most recently, in a concurring opinion denying certiorari

review, Justice Stevens explained:

> In sum, our experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out an execution after the lapse of so much time, reinforces my opinion that contemporary decisions "to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process."

Thompson v. McNeil, 556 U.S. ___ (2009)(Stevens, J., concurring in judgment)(citation omitted).

Additionally, a review of international law strongly suggests that the execution of a condemned individual after almost 25 years on death row is not consistent with evolving standards of decency. For example, in 1993 two Jamaican death row inmates challenged their death sentences on the basis that their 14 year incarceration on death row violated the Jamaican Constitution's prohibition against inhuman punishment. The Privy Council of the United Kingdom invalidated their death sentences and indicated that a stay on death row of more than five years would be excessive, and commuted their sentence from death to life in prison. Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc). As a result of the prolonged stays on death rows in the United States, combined with the inhumane conditions typical of death row, some foreign jurisdictions have refused extradition of criminal

suspects to the United States where it was likely that a death sentence would result, on the grounds that the experience of years of living on death row would violate international human rights treaties. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989). In Soering, the European Court of Human Rights held that the extradition of a capital defendant, a German national, to the United States would violate Article 3 of the European Convention on Human Rights, which bars parties to the Convention from extraditing a person to a jurisdiction where they would be at significant risk of torture or inhumane punishment. The Court cited the risk of delay in carrying out the execution, which in Virginia averaged between six and eight years. The Court found that "the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." Id. at §106. Since the U.S. government could not assure that the death penalty would not be sought in the Virginia courts, extradition was barred by the United Kingdom.

Moreover, a proscription against "torture or cruel, inhuman, or degrading treatment or punishment," is contained in both the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treament or Punishment. Since the early 1990s, the United States has been a signatory of both treaties. Under the Supremacy

Clause, those two treaties are binding on the states as well as the federal government. See Missouri v. Holland, 252 U.S. 416 (1920).[28] Numerous leading international law tribunals have held that the prohibition against "cruel, inhuman or degrading punishment or treatment" prohibits a state from keeping a condemned person on death row for an inordinate period of time. See, e.g., Pratt & Morgan v. Attorney General of Jamaica, 2 A.C. 1 (British Privy Council 1993) (en banc) (citing numerous decisions of courts around the world); Soering v. United Kingdom, 11 European Human Rights Reporter 439 (1989)(extradition to U.S. to face capital murder charges refused because of time on death row if sentenced to death); Vatheeswarren v. State of Tamil Nadu,

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[28]The U.S. has filed "reservations" with respect to both treaties, which contend that the U.S. understands the language "torture or cruel, inhuman or degrading punishment or treatment" to mean the same thing as the phrase "cruel and unusual punishments" in the Eighth Amendment. See David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DePaul L. Rev. 1183 (Summer 1993). No other signatory nation has filed a "reservation" or otherwise objected to that particular language in the treaty. Michael H. Posner & Peter Shapiro, Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1209, 1216 (Summer 1993). Numerous signatory nations have lodged objections to the U.S. "reservations" in the United Nations. The fact that well over 100 nations are signatories of the International Covenant on Civil and Political Rights, see id. at 1212, means that the language in Article VII of the Covenant has assumed the status of a "peremptory norm" of international law, or jus cogens. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715-16 (9th Cir. 1992). Such a fundamental norm of international law is binding on the federal government and the states even in the absence of a treaty. See The Paquete Habana, 175 U.S. 677, 700 (1900).

2 S.C.R. 348 (India, 1983)("dehumanizing character of delay"); Sher Singh v. State of Punjab, 2 SCR 582 (India 1983)(Prolonged delay in the execution an important consideration in considering whether sentence should be carried out); Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimbabwe 1993) [reported in 14 Human Rights L. J. 323 (1993)].

Here, to execute Mr. Johnston after he has already had to endure almost 25 years of incarceration under sentence of death, would be unconstitutionally cruel and unusual punishment. See, e.g., Schabas, Execution Delayed, Execution Denied, 5 Crim. L. Forum 180 (1994); Lambrix, The Isolation of Death Row in Facing the Death Penalty, 198 (Radelet, ed. 1989); Millemann, Capital Postconviction Prisoners' Right to Counsel, 48 MD. L. Rev. 455, 499-500 (1989)("There is little doubt that the consciousness of impending death can be immobilizing... this opinion has been widely shared by [jurists], prison wardens, psychiatrists and psychologists, and writers.")(Citing authorities); Mello, Facing Death Alone, 37 Amer. L. Rev. 513, 552 and n. 251 (1988) (same)(citing studies); Wood, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U. L. Rev. 35, 37-39 (1986)("The physical and psychological pressure present in capital inmates has been widely noted... Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself

or is an element in making the death penalty cruel and unusual punishment.")(citing authorities); Stafer, Symposium on Death Penalty Issues: Volunteering for Execution, 74 J. Crim. L. 860, 861 & n.10 (1983)(citing studies); Holland, Death Row Conditions: Progression Towards Constitutional Protections, 19 Akron L. Rev. 293 (1985); Johnson, Under Sentence of Death: The Psychology of Death Row Confinement, 5 Law and Psychology Review 141, 157-60 (1979); Hussain and Tozman, Psychiatry on Death Row, 39 J. Clinical Psychiatry 183 (1979); West, Psychiatric Reflections on the Death Penalty, 45 Amer. J. Orthopsychiatry 689, 694-695 (1975); Gallomar and Partman, Inmate Responses to Lengthy Death Row Confinement, 129 Amer. J. Psychiatry 167 (1972); Bluestone and McGahee, Reaction to Extreme Stress: Impending Death By Execution, 119 Amer. J. Psychiatry 393 (1962); Note, Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L. Rev. 814, 830 (1972); G. Gottlieb, Testing the Death Penalty, 34 S. Cal. L. Rev. 268, 272 and n. 15 (1961); A. Camus, Reflections on the Guillotine in Resistance, Rebellion and Death, P. 205 (1966)("As a general rule, a man is undone waiting for capital punishment well before he dies."); Duffy and Hirshberg, Eighty-Eight Men and Two Women, P. 254 (1962) ("One night on death row is too long, the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all

go stark, raving mad.")(Quoting former warden of California's San Quentin Prison). Here, relief is warranted.

In its order denying relief, the circuit court found that the claim lacks merit based on this Court's decision in Tompkins v. State, 994 So. 2d 1072, 1085 (Fla. 2008), and on the court's finding that the delay in carrying out Johnston's execution is attributable in large part to Johnston's continuous litigation (May 8, 2009 Order denying 3.850 motion, at 10). While recognizing this Court's decision in Tompkins, Mr. Johnston submits that in his case, nothing has been pending in state or federal court since May 4, 2006. Moreover, Mr. Johnston has been eligible for execution since 1999, when his first round of postconviction appeals were exhausted in state and federal court. Thus, the delay in carrying out Mr. Johnston's execution is not attributable to him.

ARGUMENT VII

THE TRIAL COURT' DECISION TO PLACES MR. JOHNSTON IN SHACKLES DURING TRIAL VIOLATED THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Prior to voir dire of the jury on May 14, 1984, counsel for Mr. Johnston objected to the shackling of Mr. Johnston's legs since there was a possibility that the jury might see Mr. Johnston at some point in that condition and be prejudiced against him (R. 4-9). The court overruled the objection on the

ground that Mr. Johnston had proved troublesome to his jailors in the past and thus presented a security risk to the bailiffs during the trial, although he had caused no disturbances in the courtroom as of that point (R. 9). At the close of the proceedings for the day, counsel for Mr. Johnston again requested the court to allow removal of the shackles from Mr. Johnston's legs for the remainder of the trial. The court denied the request (R. 156-57).

The court's actions violated Mr. Johnston's right to a fair trial. See Deck v. Missouri, 125 S. Ct. 2007, 2009 (2005). "[C]ourts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503 (1976). Procedures or practices which are not "probative evidence" but which create "the probability of deleterious effects" on fundamental rights and the judgement of the jury thus must be carefully scrutinized and guarded against. Id. at 504.

The Supreme Court analyzed the effect of security measures in Holbrook v. Flynn, 475 U.S. 560 (1986):

> Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

Holbrook, 475 U.S. at 567.

The Court in Holbrook ultimately found that the defendant had failed to show prejudice from the security. Holbrook, 475 U.S. at 572. Nonetheless, Holbrook recognized that "certain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.'" Holbrook, 475 U.S. 568 (quoting Estelle v. Williams, 425 U.S. 501, 503-504 (1976)). The Holbrook court approved Estelle's recognition that where a defendant is forced to wear prison garb before a jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgement." Holbrook, 475 U.S. 568, quoting Estelle, 425 U.S. at 504-505.

In Deck, the Supreme Court's review of precedent regarding the use of shackles at the guilt phase showed that "[t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." Deck, 125 S. Ct. at 2010. Lower courts have generally agreed that during a guilt phase, "a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum." Id. at 2012. The rule regarding guilt phase shackling is "a basic element of

the 'due process of law' protected by the Federal Constitution," specifically by the Fifth and Fourteenth Amendments. Id.

Because shackling is "inherently prejudicial" and will often have negative effects which "cannot be shown from a trial transcript," the defendant is not required to show actual prejudice. Deck, 125 S. Ct. at 2015, quoting Holbrook, 475 U.S. at 568, and Riggins v. Nevada, 504 U.S. 127, 137 (1992). The Supreme Court thus held:

> [W]here a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967).

Deck, 125 S. Ct. at 2015.

In the case at bar, the trial court committed reversible error by placing Mr. Johnston, without adequate justification, in physical restraints for the entire trial. The court made no inquiry of Mr. Johnston concerning his ability to remain calm in the courtroom and Mr. Johnston even stated to the court that he would remain calm and speak only when addressed by the court. Mr. Johnston's right to a fair trial was denied.

In its order denying relief, the circuit court found that,

> When a court orders a defendant to wear shackles visible to the jury without adequate justification, the defendant need not demonstrate actual prejudice to make out a due process violation. *Id*. at 623. Here, however, Defendant

> does not claim that the jury actually saw the leg shackles and thus was prejudiced against him, but instead contends that he *might* have been seen in leg shackles, which is not enough to meet the *Deck* threshold.

(May 8, 2009 Order denying 3.850 motion, at 10)(emphasis in original). In making this determination, the circuit court ignores the fact that Mr. Johnston was denied the opportunity to prove his claim. Factual allegations as to the merits of a constitutional claim set forth in a Rule 3.851 motion 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). Whether the jury actually saw Mr. Johnston in leg shackles is a disputed issue of fact that can only be resolved through an evidentiary hearing.

CONCLUSION

Based upon the record and his arguments, Mr. Johnston respectfully urges the Court to reverse the lower court, order a new trial and/or resentencing, impose a sentence of life imprisonment, and/or remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic transmission and overnight mail, postage prepaid, to Kenneth S. Nunnelley, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 on May 13, 2009.

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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