IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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EDWARD EARL JOHNSON,

Petitioner

v.

J87-0277
No. ~~J84-0501(B)~~
ORAL ARGUMENT REQUESTED

DON CABANA,
Acting Commissioner of Corrections,

Respondent

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PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the petitioner, Edward Earl Johnson, pursuant to 28 U.S.C. §2254, and petitions for a writ of habeas corpus seeking to vacate his sentence of death, scheduled for execution on May 20, 1987, because it was imposed and is being carried out in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Johnson requests a hearing to present the evidence which supports the claims in this motion.

INTRODUCTION AND STATEMENT OF FACTS

Edward Earl Johnson was born in Jackson, Mississippi on June 22, 1960 of impoverished parents. His father was a long-term alcoholic and his parents did little to care for him. Eventually, his grandparents took him to their home in Walnut Grove, in Leake County, where he was brought up.

The psychological effects of Edward Earl Johnson's parental abandonment were enhanced by a physiological brain disorder. As is clear from the affidavit of Dr. Timothy Summers, a highly qualified and experienced psychiatrist who examined Mr. Johnson prior to his trial, Mr. Johnson suffers from organic brain damage encountered at an early age, and from a resulting severe brain dysfunction. (Affidavit of Dr. Timothy Summers, ¶4). This manifested itself in auditory hallucinations and in an inability to remember simple facts which his relatives would relate to him. Later on in his years, the brain damage took the form of an explosive intoxication disorder in which small quantities of alcohol would severely affect Mr. Johnson's behavior.

Nevertheless, relatives indicate that Mr. Johnson was a good child when growing up, with strong religious beliefs and regular attendance at church. He never was arrested for a crime and had no criminal record prior to the incident which led to his death sentence.

In 1979, Mr. Johnson was arrested for murder. He was 18 years old at the time. He was represented by the Hon. R. Jess Brown and the Hon. Firnist Alexander, neither of whom had tried a capital case under Mississippi's bifurcated death penalty procedure, instituted in 1976. (Affidavit of R. Jess Brown, ¶9; Affidavit of Firnist Alexander, ¶2).

Despite the fact that the defense attorneys knew of Dr. Summers' diagnosis of severe mental impairment and their access to a wealth of corroborating evidence, the attorneys prepared

none of this for presentation to the jury during the penalty phase of Mr. Johnson's capital case because they wrongly believed it was not admissible. (Brown affidavit, ¶8; Alexander affidavit, ¶9). Similarly, they failed to investigate and prepare for the penalty stage a vast amount of potential testimony from family and friends about Mr. Johnson's upbringing, character, religious beliefs, and the devotion of his family and friends. Again, the attorneys erroneously thought this evidence was not admissible (Brown affidavit, ¶9; Alexander affidavit, ¶10-11).

Mr. Johnson went to trial August, 1980 for capital murder. He was found guilty on August 15, 1980. A sentencing hearing then ensued in which Mr. Johnson's attorneys put on little defense, and he was sentenced to death on August 16, 1980.

The Mississippi Supreme Court, affirmed, with Justice Hawkins dissenting. Johnson v. State, 416 So.2d 383 (Miss. 1983). Mr. Johnson subsequently filed for post-conviction relief in the Mississippi Supreme Court, and his application was denied. Johnson v. Thigpen, 449 So.2d 1207 (Miss. 1984). His petition for a writ of habeas corpus was denied by this Court, Johnson v. Thigpen, 623 F.Supp. 1121 (N.D. Miss. 1985), and the Fifth Circuit affirmed. Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986). The United States Supreme Court denied his petition for a writ of certiorari, Johnson v. Mississippi, 41 Cr. L. Rptr. 4002 (March 30, 1987), Justices Brennan and Marshall dissenting.

Throughout all of these proceedings, R. Jess Brown remained as Mr. Johnson's attorney. (Brown affidavit, ¶2). Consequently, he never raised his own ineffective assistance, which was manifest not only in the failure to introduce critical mitigating evidence, but in a number of other errors detailed later in this petition. Similarly, the attorney who joined Mr. Brown on the first federal habeas petition, the Hon. Barry Powell, did not feel the habeas attorneys should raise Mr. Brown's ineffective assistance at trial because it would be inappropriate given that Mr. Brown was habeas co-counsel. (Affidavit of Barry Powell, ¶6). The client, Edward Earl Johnson, was never informed of this conflict and never agreed to waive any claim of ineffective assistance at trial. (Powell affidavit, ¶8; affidavit of Edward Earl Johnson, ¶4).

The Mississippi Supreme Court has now set a date of May 20, 1987 for Mr. Johnson to be executed. On May 13, 1987, Mr. Johnson filed in the Mississippi Supreme Court a motion for post-conviction relief and stay of execution. As of the end of the day of May 14, that motion had not been decided. In light of the closeness of the execution date, the failure to act on the stay has the same effect as a denial, and therefore sufficiently exhausts state court habeas proceedings so that a federal court habeas corpus petition is proper. Moreover, the doctrine which suggests that state post-conviction proceedings should be exhausted prior to federal habeas is not jurisdictional, but rather is a matter of discretionary federal court deference.

Therefore, this court does have jurisdiction to entertain a federal habeas corpus petition, particularly in light of the upcoming execution date, even though the Mississippi Supreme Court may not have ruled by the time this court receives this petition.

By the present habeas corpus petition, Mr. Johnson seeks to raise a number of claims which demonstrate that his death sentence was obtained in violation of the Constitution, but which have not been presented to this Court in the earlier habeas corpus petition. All of the claims were raised in the May 13 petition to the Mississippi Supreme Court. These include the ineffective assistance claim alluded to briefly in this statement and explained in detail in Part I of this petition. Indeed, the factual support for all of the claims is detailed in this petition, and the legal basis underlying the claims is described in the accompanying memorandum of law in support of the petition.

It should be noted at the outset that the claims in this petition <u>are not an abuse of the writ of habeas corpus</u>, and therefore should be considered on their merits. The concept of abuse of the writ will be discussed more fully in the accompanying memorandum of law. Basically, the principle is that new claims asserted in a second habeas corpus petition must be entertained on the merits unless the Court finds that the writ has been abused by a deliberate withholding of the claims from the first petition, or by inexcusable neglect in failing to raise the claims earlier. Moreover, if the petitioner is able to

present some justifiable reason explaining the otherwise abusive failure to raise the claims earlier, the court must address the merits of the second petition. And even if the second petition fits within the definition of abuse of the writ, the district court nevertheless has the jurisdictional power, and even the duty, to go ahead and reach the merits in pursuit of the ends of justice. Finally, abuse of the writ is something which must be plead by the state.

Among the many circumstances which justify raising new claims on a second habeas petition are conflicts of interest which prevented the first habeas counsel from raising certain claims, ineffectiveness on the part of the first habeas counsel in not raising certain claims, newly discovered evidence, changes in the law, and intervening mental deterioration of the petitioner rendering him incompetent to be executed under the Eighth Amendment and Mississippi law.

Also, a petitioner is entitled to an evidentiary hearing to demonstrate that the writ is not being abused. (See authorities at p. 5 of the memorandum of law.). The petitioner here requests such a hearing.

The remainder of this petition will detail each of the substantive claims which require that the petitioner's death penalty be vacated. The first portion of each section will review the substance of the particular claim at issue, followed by a discussion of the reasons why the writ is not being abused by raising that particular claim.

I. MR. JOHNSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE TRIAL COURT PROCEEDINGS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Subsection A of this section lists the facts which demonstrate the substantive claim of ineffective assistance, and subsection B discusses the facts which shown that no abuse of the writ is involved in raising this claim.

A. The Substantive Denial of Effective Assistance

1. The facts detailed below demonstrate an egregious denial of the effective assistance of counsel in the trial court by Mr. Johnson's attorneys, and an evidentiary hearing is necessary to present the evidence in support of this claim of the denial of counsel.

2. Mr. Johnson was represented at trial by the Hon. R. Jess Brown and the Hon. Firnist Alexander. Neither had ever done a capital trial under the Mississippi bifurcated death penalty procedure instituted in 1976. (Brown affidavit, ¶9; Affidavit of Firnist Alexander ¶2). Despite the fact that the Mississippi death penalty statute provides that evidence of mental impairment or dysfunction may be presented in mitigation at the penalty phase of a capital case, §99-19-101 (6)(b),(e), and (f), Miss. Code, Mr. Brown and Mr. Alexander failed to present the abundant evidence of mental impairment which they had, and failed to investigate further evidence of such impairment.

a. The most striking example of this comes from the fact that the defense attorneys consulted a psychiatrist who examined

Mr. Johnson and found extensive mental impairment which could be presented in mitigation. The psychiatrist informed defense counsel of his findings, yet counsel did nothing to present the evidence to the jury. The psychiatrist was Dr. Timothy Summers, and he conducted a thorough examination of Mr. Johnson and his mental history, and concluded that Mr. Johnson suffered from organic brain damage and severe brain dysfunction. (Summers affidavit, ¶4). He informed trial counsel of these findings. (Summers affidavit, ¶6; affidavit of Firnist Alexander, ¶9; affidavit of R. Jess Brown, ¶7). However, counsel did not develop this evidence and present it at trial because of the total misperception that the only relevant evidence at trial would be that demonstrating that Mr. Johnson satisfied the M'Naghten insanity test by not knowing the difference between right and wrong. (Alexander affidavit, ¶9; Brown affidavit, ¶8). This was totally incorrect, and ignored the clear import of the Mississippi statute which allows mitigating evidence of mental impairment even though it does not meet M'Naghten. §99-19-101(6)(b),(e), and (f). It also ignored federal constitutional law permitting the introduction of such mitigating evidence. See Lockett v. Ohio, 438 U.S. 586 (1978)

b. Because of counsel's legal error, counsel did not investigate further and present to the jury the extensive evidence of mental impairment and organic brain damage which existed, and which would have corroborated Dr. Summers' compelling findings. For example, Mr. Johnson was several weeks

premature at birth. After he had been released from incubation in the hospital, his day babysitter failed to feed him. He lost weight dramatically, and was afflicted with a serious cerebral disease. (Affidavit of Jessie Mae Lewis, ¶¶12-14; Summers affidavit ¶¶2-4). At the pretrial hearing on mental competence, evidence was presented of the diagnosis by a local doctor who felt not long after Mr. Johnson was born that Mr. Johnson would never be mentally normal. (Tr. 217) However, counsel never presented this to the jury at trial. A cursory investigation would also have revealed that Mr. Johnson exhibited some classic traits of brain dysfunction. He had frequently reported auditory hallucinations, asking his grandmother what the voices were which he heard and nobody else did. He suffered from longterm and severe insomnia, an important indicator of mental illness. Furthermore, he would often revert to trances, sitting alone staring at nothing, another vital factor in a psychiatric expert's evaluation.(Jessie Mae Lewis affidavit, ¶¶21-22).

c. Counsel might also have prepared overwhelming evidence of Mr. Johnson's idiosyncratic alcohol intoxication disorder, which was interrelated with and compounded by his organic brain dysfunction. See, Diagnostic & Statistical Manual of Mental Disorders, Third Edition (D.S.M.-III) §291.40. This is not simply a species of alcholism, though that in itself would support a jury's finding of a serious mitigating circumstance. However, Mr. Johnson's reaction to the ingestion of alcohol is far more severe than a normal person, and his physiological make-

up causes him to react unpredictably and uncontrollably. (Summers affidavit; MacVaugh affidavit). While counsel at the penalty phase attempted to adduce the bare fact that Mr. Johnson drank at least one beer on the night of the crime, (tr. 1966, 1969), counsel also knew that Mr. Johnson had a long-term alcohol problem. This information was transmitted to the defense attorneys by the court-appointed psychiatric expert four months prior to trial, (see tr. 473) yet counsel never presented it to the jury. Further investigation would have provided compelling corroboration for this evidence. Mr. Johnson's father was a chronic alcoholic, and this gave Mr. Johnson a genetically loaded predisposition to alcoholism. (Statement of Bettye Lou Johnson, ¶8; affidavit of Robert Hairston). Also, Mr. Johnson's friends would have told how Mr. Johnson was introduced to alcohol at the age of fourteen, and subsequently became increasingly dependent upon it. (See affidavits of Federick Smith, ¶¶10-14; affidavit of Terry Lee Fortuner ¶10; Hairston affidavit). Finally, rather than one beer, counsel would have found that Mr. Johnson came to the card game on the night of the crime with several quarts of beer, and consumed much of it over the course of the evening. (Affidavit of Cleve Johnson, ¶12, Hairston affidavit). Although this all would have constituted important mitigating evidence, none of it was presented to the jury.

3. In addition to omitting this fundamental mitigating evidence of mental impairment and brain damage, trial counsel failed to present a wealth of mitigating evidence about

Mr. Johnson's upbringing, character, and religious beliefs. This stemmed from counsel's totally erroneous assumption that they could not go beyond statutory mitigating circumstances in presenting evidence at the penalty phase. This view, of course, had been soundly rejected by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978), which recognized that non-statutory mitigating evidence about the background and character of a defendant could be the most important evidence to be presented by a defendant at the penalty phase of a death penalty trial.

a. Had counsel not been shackled by this fundamentally wrong understanding of the law, they could have presented the testimony of family and friends describing Mr. Johnson's religious devotion and attendance at church, his efforts to achieve in school despite his mental problems, his efforts to earn money to support his grandparents, his many friendships, and his passivity in the face of aggression from other youngsters. (See attached affidavits). The affidavits also demonstrate that testimony could have been presented about the difficult circumstances of his upbringing, the fact that he was raised in poverty where the main source of income was picking cotton, that he was good to his relatives and respectful to elder relatives, and that he was strongly affected by his parents' abandonment of him at an early age.

b. In addition, had counsel not been operating under their misperceptions of law, they could have presented the most

important testimony of all -- testimony from family and friends that they love Mr. Johnson and do not want to see him die. It is absolutely imperative to the proper defense of a death penalty case to present testimony to the jury from those who know the defendant best and who love him, and who can tell the jury they do not want to see him die. Because of counsel's misunderstanding, the jury never heard the expressions of love from his family and friends, and never knew that his family and friends would visit him every week if he were given a life sentence. The jury never learned that executing Mr. Johnson would have a terrible effect on his loved ones. Attached to this motion are the affidavits of many family members and friends who would have been willing to testify in Mr. Johnson's behalf about his character, his upbringing, how he was a good child, his religious beliefs, and about how they loved him and did not want to see him die. Because counsel did not know the law, none of these vital witnesses were called.

4. Had counsel known the rudimentary parameters of the law in capital cases, they would have presented the powerful evidence of mental impairment, organic brain damage, and brain dysfunction, as well as the compelling non-statutory mitigating evidence from family and friends. Rather than do this, counsel only presented three witnesses at the penalty phase, all very brief. One addressed the statutory mitigating circumstance of age -- that Mr. Johnson was 18 years old at the time of the crime -- and the other two addressed the circumstance of acting under

the influence of alcohol by testifying that Mr. Johnson had one beer on the night of the crime. (Firnist Alexander affidavit, ¶11). The presentation of such a negligible defense amounted to no defense at all at the penalty phase.

5. In addition to a totally inadequate performance at the penalty phase, trial counsel failed even to show up for two pretrial hearings. (Tr. 244, et. seq.; tr. 484, et: seq.). One of these hearings, held on November 19, 1979, was for the purpose of resolving defense counsel's own motion for a determination that the defendant was incompetent to stand trial. (Tr. 245). Neither Mr. Brown nor Mr. Alexander bothered to attend, yet the trial court went ahead with the hearing in the absence of defense counsel and ordered Mr. Johnson sent to the State Hospital at Whitfield for psychiatric evaluation, even though neither of his attorneys knew about it. As a result, Mr. Johnson was questioned by the state's psychiatrist without being warned of his constitutional rights as required by Estelle v. Smith, 451 U.S. 454 (1981) and without being able to exercise his right to counsel during this questioning and evaluation. Moreover, since counsel were unaware of the evaluation, they were unable to inform the Whitfield psychiatrists of Mr. Johnson's history of mental impairment. Also, they were unable to give the psychiatrists information about the difficulties they were having communicating with Mr. Johnson because of his mental impairment-- information which is crucial to an evaluation of competence. (Firnist Alexander affidavit, ¶8). Finally, because counsel did

not know of the evaluation, they were unable to request that the state hospital also evaluate for psychological mitigating circumstances which might have proven useful to the defense.

6. Mr. Johnson's attorneys provided ineffective assistance of counsel to him in connection with the offer of a plea bargain to life imprisonment made by the prosecution. The district attorney conveyed an offer of a life sentence to Mr. Johnson's attorney. (R. Jess Brown affidavit, ¶5; Firnist Alexander affidavit, ¶7). Counsel advised Mr. Johnson that a life sentence would mean that he would never again be eligible for parole. (Id.) On the basis of this advice, Mr. Johnson decided that he should not accept the offer. (Id.). Mr. Johnson had no prior convictions and could not have received life without parole. See, Miss, Code Ann. §§ 99-19-81, 99-19-83 (Supp. 1986). Indeed, Mississippi's life without parole statute - reserved only for habitual offenders - was not even in place at the time of Mr. Johnson's trial. Had Mr. Johnson not been wrongly advised on this point, he would have accepted the plea bargain. (Affidavit of Edward Earl Johnson ¶8). Therefore, but for counsel's unprofessional advice, the outcome of the penalty proceeding would have been different.

7. Had counsel properly investigated, they would have discovered that one of the prosecution's chief witnesses -- the brother of the victim -- had stated that he thought it impossible that Mr. Johnson had committed the crime. (See affidavit of Thelma Johnson ¶ 16). Defense counsel could have used this to

advantage in persuading the jury that a residual doubt existed which, if insufficient to create a not guilty verdict, could nevertheless cause the jury to spare Mr. Johnson's life.

8. Counsel also rendered ineffective assistance in the closing argument of the penalty phase. In closing argument, counsel failed totally to point out to the jury what ought to be considered mitigating. Counsel misstated Mr. Johnson's age, saying that he was twenty years old (Tr. 2057, 2060, 2069), when the relevant age for the jury to consider was his age at the time of the crime, when he was barely an adult, just eighteen. See, Miss. Code Ann. §99-19-101(6)(g). See, e.g., Peek v. State, 395 So.2d 492 (Fla. 1980) (while jury could properly consider the age of 18 mitigating, Peek's age of 19 not mitigating); Quince v. State, 414 So.2d 185 (Fla. 1982) (same where defendant 20 at time of crime). This was the only-mitigating circumstance which was obliquely argued to the jury, and yet it was stated incorrectly and downplayed by the defense. Also, counsel had planned to address what little evidence had been adduced in mitigation at the end of his closing argument. However, the trial court strictly enforced a limit of forty-five minutes previously set for either side to argue:

> [BY MR. BROWN:] Now, those instructions . . . [i]t takes time to read those instructions. Even a lawyer has to read them over and over a lot of times to understand them.
>
> BY MR. McMURRAY, CIRCUIT CLERK: Time is up.
>
> BY MR. BROWN: You can't read them --

> BY THE COURT: (interposing) Your time is up. Sir, your time is up. You have used all of your time.
>
> BY MR. BROWN: I would appreciate --
>
> BY THE COURT: (Interposing) Have a seat. No, sir, your time is up. You have 45 minutes to each side, and you have used your 45 minutes.

(Tr. 2079-80) Thus counsel was rendered ineffective as a matter of law, for failure to argue the most critical aspect of Mr. Johnson's defense. In addition, counsel failed to argue any of the other statutory mitigating circumstances that were reflected in the testimony, including the critical fact that the defendant had no prior history of criminal activity, Miss. Code Ann. § 99-19-101(6)(a). Naturally, since counsel did not understand their significance, and therefore did not make any effort to introduce evidence outside the ambit of the statute, counsel totally failed to argue <u>any</u> non-statutory mitigating circumstances.

9. The sum total of counsel's ineffective assistance was devastating. Had the compelling evidence of mental impairment and the abundant testimony about Mr. Johnson's character and upbringing been presented to the jury, the jurors would have had a very different picture of Mr. Johnson. He would have been humanized for the jury, and it would have been much more likely that they would have refrained from imposing the death penalty and would have spared his life. However, with the negligible penalty phase defense which actually was put on -- amounting to no defense at all -- the jury came back with a death sentence.

These evidentiary failures, combined with the failure to appear at hearings, the factually erroneous miscommunication of a plea bargain, the failure to investigate evidence of residual doubt, and the inadequate closing argument, render the outcome of the sentencing phase a mockery, and create a strong probability that the jury would have imposed a life sentence had they been properly apprised of the facts.

10. The strong case of ineffective assistance presented by these facts requires the Court to hold an evidentiary hearing on this issue to ascertain the extent and impact of this ineffective assistance, and to determine if the sentence of execution in this case was the product of a fundamentally unfair trial.

B. Raising The Issue In This Petition Does Not Constitute An Abuse Of The Writ

11. The primary reason why no abuse of the writ exists is that Mr. Johnson's counsel in his first habeas corpus petition had a conflict of interest which prevented them from raising the ineffective assistance of counsel claim. In the first habeas corpus petition, Mr. Johnson was represented by R. Jess Brown (Brown affidavit, ¶2), who also was trial counsel and could not be expected to raise his own ineffective assistance as a ground for relief. Similarly, Barry Powell, who was habeas co-counsel with Mr. Brown, felt that it would be inappropriate to raise an ineffective assistance of counsel claim directed at Mr. Brown's trial performance since Mr. Brown was counsel on the habeas petition. (Affidavit of Barry Powell, ¶6). Mr. Brown and Mr.

Powell never informed Edward Earl Johnson of this conflict of interest. (Powell affidavit, ¶8; Brown affidavit, ¶14; affidavit of Edward Earl Johnson, ¶4). Had Mr. Johnson been apprised of this conflict, he would have requested Mr. Brown's withdrawal rather than risk forfeiture of this constitutional issue which might have relieved him of the burden of his sentence of death. (Johnson affidavit, ¶4).

12. In addition to the conflict of counsel on the first habeas petition, Mr. Johnson was provided with ineffective assistance on his first habeas corpus petition by the total failure of habeas counsel to investigate and present an ineffective assistance claim. As the facts in section I-A of this petition and the legal authorities cited in the memorandum of law make clear, a very strong claim of ineffective assistance of trial counsel exists in this case. Had the first habeas counsel investigated and presented this claim, Mr. Johnson's death sentence likely would be vacated. Yet habeas counsel undertook no such investigation. (Powell affidavit, ¶6).

13. The affidavits of the first habeas counsel, Mr. Brown and Mr. Powell, make it clear that the decision to omit the ineffective assistance claim was not one of strategy, and was not based on any assumption that the claim lacked merit. (Powell affidavit, ¶6; Brown affidavit, ¶14).

14. Mr. Johnson did not know, nor reasonably could have known, the facts which could be adduced in support of this claim,

or their legal significance. (Powell affidavit, ¶8; Brown affidavit, ¶14; Johnson affidavit, ¶4).

15. Even if the raising of this claim constitutes an abuse of the writ, the ends of justice require that this Court nevertheless exercise its rightful jurisdiction and review the merits of this claim. Nothing can be more fundamental to a fair trial in the penalty phase of a death penalty case than a defense advocate who knows the law and renders effective assistance by investigating the case and presenting all of the evidence in his client's favor which he can present. When the mitigating evidence is as strong as it was in this case, an effective advocate is able to present that evidence to the jury in a way that significantly heightens the possibility of a life sentence. But where the advocacy falls as short as in this case, a death verdict is bound to result. Justice requires that the imposition of the death penalty be based on evidence about the defendant, and not on the fortuity of the attorney's performance. Given the severity of the death penalty, this Court should review the merits of this claim rather than allow the execution to occur because of prior mistakes by counsel.

II. MR. JOHNSON IS SO MENTALLY INCOMPETENT AS TO RENDER IT CRUEL AND UNUSUAL PUNISHMENT TO EXECUTE HIM, BOTH UNDER THE FEDERAL CONSTITUTION AND THE MISSISSIPPI CODE, AND A HEARING IS REQUIRED TO ASCERTAIN THE EXTENT OF THAT INCOMPETENCE

A. The Merits of the Claim

16. The United States Supreme Court has held that it is cruel and unusual punishment under the Eighth Amendment to

execute someone who is mentally incompetent, Ford v. Wainwright, 91 L.Ed.2d 335 (1986), and Mississippi law also provides that one who is mentally incompetent should not be executed. Section 99-19-57, Miss. Code. Moreover, under the Eighth and Fourteenth Amendments as interpreted in Ford, and under Mississippi law, section 99-19-57(2)(a), Miss. Code, a person is entitled to a hearing on his competence to be executed -- a hearing at which he may present evidence and be heard.

17. Under Ford, a person is incompetent to be executed for purposes of the Eighth Amendment if he does not comprehend "the reasons for the penalty" and "its implications," 91 L.Ed.2d at 351; if he has "no comprehension of why he has been singled out and stripped of his fundamental right to life," id. at 346; or if he has "no capacity to come to grips with his own conscience or deity." Id. See also id. at 354 (concurring opinion of Powell, J.) (death row inmates are incompetent to be executed if they are "unaware of the punishment they are about to suffer and why they are to suffer it"). Similarly, Mississippi law forbids the execution of one who does not understand "the purpose of his punishment" or "the impending fate which awaits him" or who does not have "a sufficient understanding to know any fact which might exist which wold make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court." §99-19-57(2)(b), Miss. Code.

18. The evidence here demonstrates that Mr. Johnson fits within these definitions, and that an evidentiary hearing should

be held to determine his competence to be executed. Dr. Gilbert MacVaugh, a highly qualified clinical psychologist from Greenville, thoroughly examined Mr. Johnson recently, and concluded that Mr. Johnson is suffering from mental disease. (MacVaugh affidavit, ¶10). According to Dr. MacVaugh, Mr. Johnson does not appear to be fully aware of the impending execution. (Id. ¶¶ 6-7). Dr. MacVaugh's testing demonstrated significant mental impairment, and Dr. MacVaugh added that "Mr. Johnson's present condition may severely impair his ability to discuss his case sensibly with his attorneys, and offer them useful information concerning evidence which might show his conviction or sentence of death to be unjust and unfair." (Id. ¶¶ 8-9). Most importantly, Dr. MacVaugh's examination led to the following conclusion:

> Edward Johnson is unable to relate any punishment through execution to his own conduct, or the conduct alleged against him. He does not understand why he is being singled out, and does not have the proper mental framework to come to grips with his own conscience. It is quite clear that his is the product of mental disease or defect.

(Id., ¶10, emphasis added). This current condition of severe mental incompetence is not surprising given the organic brain damage and brain dysfunction which psychiatrist Dr. Timothy Summers also diagnosed in Mr. Johnson. (Summers affidavit, ¶¶ 3-4).

B. The Failure To Raise This Claim In A Prior Petition Is Not An Abuse Of The Writ

19. The incompetence suffered by Mr. Johnson has set in over time. Therefore, this is a claim which really has arisen since the earlier filings in the case, and could not have been presented until now. Moreover, under Mississippi law, a person may present a claim of incompetence to be executed in a successive post-conviction petition. Section 99-39-27(9), Miss. Code.

20. In addition, the claim is based on new law to the extent that Ford v. Wainwright held in 1986, for the first time, that the Eighth and Fourteenth Amendments prohibit the execution of those who are mentally incompetent. Therefore, the federal constitutional claim is based on new law arising since the first federal court habeas corpus petition.

21. Alternatively, and in the event the court concludes that this claim should have been raised in the first habeas petition, the failure to raise it constitutes ineffective assistance of counsel. Prior habeas counsel admits that the attorneys on the first habeas failed to investigate Mr. Johnson's mental condition even though they were aware of Dr. Summers' evaluation. (Powell affidavit, ¶7). Such incompetence explains an omission and justifies review of the issue on a second habeas petition.

22. Finally, even if the Court concludes this is an abuse of the writ, the ends of justice require that the Court examine the merits of the incompetence claim. As Ford v. Wainwright

makes it clear that it is a fundamental precept of American law that the execution of those who are mentally incompetent is cruel and unusual. Such an execution should not occur because of procedural default by attorneys.

III. THE JURY INSTRUCTIONS AT THE PENALTY PHASE OF MR. JOHNSON'S TRIAL UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT IN VIOLATION OF THE UNITED STATES SUPREME COURT'S RULING IN FRANCIS v. FRANKLIN.

A. The Merits Of The Claim

23. Under the Mississippi statutory scheme, a homicide qualifies as a capital murder, punishable by the death penalty, only if it fits within certain defined circumstances, such as the murder of a police officer (which was the allegation in this case). §97-3-19(2), Miss. Code. Once a person is found guilty of capital murder, he then proceeds to the sentencing phase, at which the jury is required to weigh various aggravating and mitigating circumstances. Before imposing the death penalty, the jury must find the existence of at least one aggravating circumstance, and the jury may not impose the death penalty simply because the defendant was found guilty of capital murder. §99-19-103, Miss. Code.

The trial court gave the jury an instruction which shifted the burden of proof to the defendant simply because he had been found guilty of capital murder:

> Proof beyond a reasonable doubt . . . of the statutory elements of the capital offense with which the accused is charged shall constitute sufficient circumstances to authorize imposition of the death penalty

unless mitigating circumstances shown by the evidence outweigh the aggravating circumstances.

(Tr. 2001, emphasis added).

24. In the recent decision of Francis v. Franklin, 85 L.Ed.2d 344 (1986), the United States Supreme Court held that such a shifting of the burden of proof through a mandatory rebuttable presumption violates the Constitution. (This is discussed more thoroughly in the memorandum of law).

B. The Raising Of This Claim Does Not Constitute An Abuse Of The Writ.

25. Francis v. Franklin is new law and claims pursuant to its holding could not have been raised in the prior habeas corpus petition.

26. Alternatively, and in the event the Court holds that it is not new law, it was ineffective assistance of counsel not to raise this claim in the prior habeas petition.

27. Even if the raising of this claim otherwise constituted an abuse of the writ, the burden of proof is so fundamental to the notions of a fair trial in American criminal jurisprudence that this Court should exercise its jurisdiction and reach the merits in order to achieve the ends of justice.

IV. THE PROSECUTION FAILED TO REVEAL THAT ONE JUROR HAD A SUBSTANTIAL REASON TO FAVOR THE PROSECUTION, AND FAILED TO CORRECT A JUROR'S ANSWERS ON VOIR DIRE WHICH THE PROSECUTION KNEW TO BE MATERIALLY ERRONEOUS.

28. The prosecution knew of a juror's substantial reason to favor the prosecution, and failed to correct her inaccurate answers when she failed to admit this coercion on voir dire. This misconduct was a fundamental deprivation of Mr. Johnson's right to a fair trial, and violated his rights secured by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In addition it was a violation of the prosecutor's duty to disclose under Brady v. maryland, 373 U.S. 83 (1963), and denied him the proper use of his peremptory challenges.

29. One of the members of the venire was Ms. Eddie Leflore, and she ultimately was chosen to serve on the jury. Her stepson, Ollie Leflore, had been adjudged guilty of grand larceny in the Circuit Court of Leake County on May 13, 1980 -- just three months prior to Mr. Johnson's trial in the same court. (See affidavit of Clive Stafford-Smith, ¶7; affidavit of Robert McDuff, ¶4). The case had been prosecuted by the same district attorney who prosecuted Mr. Johnson, and it is clear the prosecutor knew of these facts.

30. The fact that Ms. Leflore's son was already in the clutches of the criminal justice system in Leake County rendered her particularly susceptible to extraneous influence as a juror, and put her in the position of having to curry favor -- or

thinking she might have to curry favor -- with the prosecution in order to protect the well-being or improve the lot of her stepson. Despite the fact that this information may have been highly relevant to the defense and the trial court in jury selection, the prosecution did not disclose it to the defense. Moreover, when the panel was asked questions relating to this, Ms. Leflore did not answer truthfully. While various other jurors admitted close relatives' problems with the law, she failed to admit -- even when the panel was directly asked -- that a member of her immediate family had been prosecuted for a crime (Tr. 547), or that she had had any contact with the Sheriff's Department. (Tr. 548-49) The prosecution did nothing to correct these untruthful answers.

31. Although juror Leflore's stepson, Ollie Leflore, received a three year prison sentence in the state penitentiary at Parchman, he never had to serve that sentence at Parchman. Instead, he spent approximately six months in the Leake County jail and approximately four months in a satellite halfway house in Hattiesburg. He then was released. (See Stafford-Smith affidavit, ¶¶7-8; McDuff affidavit, ¶4).

32. Juror Leflore's failure truthfully to divulge information had earlier been the subject of a motion for new trial because she had not disclosed that she was illiterate and therefore was not a competent juror in Mr. Johnson's case. (Tr. 2101). Although her daughter-in-law testified that she could not read or write (tr. 2124 et seq.), and Ms. Leflore was unable to

read the instructions when requested to do so by defense counsel (tr. 2207-08), Ms. Leflore insisted that she really could read and write, and the trial court found that she was sufficiently literate to serve as a juror.

33. Whenever there is a possibility that extraneous influences could corrupt a juror's verdict, relief must be granted. Here, there is a strong possibility of such extraneous influence, and the problem was created and compounded by the prosecution's failure to disclose information which should have been revealed to the trial court and the defense. At the very least, the petitioner is entitled to an evidentiary hearing to present the evidence supporting this claim.

B. The Raising Of This Claim Does Not Constitute An Abuse Of The Writ

34. This issue is controlled by facts which were not and could not reasonably have been known to the defense prior to this stage in the proceedings. The evidence was only discovered on May 9, 1987, after a witness volunteered the information that a juror's vote may have been affected by fear for the welfare of her incarcerated stepson. Since the evidence was peculiarly in the domain of the prosecution, it would be fundamentally unfair to preclude Mr. Johnson from raising an issue which has been withheld from him by the prosecution for seven years.

V. MR. JOHNSON'S CONVICTION AND SENTENCE OF DEATH WERE SECURED BY USE OF A STATEMENT WHICH WAS TAKEN IN VIOLATION OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

A. The Merits Of The Claim

35. The statement used against Mr. Johnson at trial, which was the sole predicate of his conviction, was exacted in violation of his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution as interpreted in Michigan v. Jackson, 106 S.Ct. 1404 (1986).

36. When law enforcement agents came to Mr. Johnson's house on Saturday, June 3, and Sunday, June 4, 1979, to interrogate him, they were told that before Mr. Johnson submitted to interrogation, his family would secure him an attorney. (Tr. 1792-96). At the time that the statement was allegedly taken from Mr. Johnson, he was the only suspect in the case, had been taken into custody, and the authorities had secured a warrant for his arrest. (Tr. 50) His right to counsel had therefore attached. The police officers initiated the questioning of Mr. Johnson, coercing him by telling him things would go better "in Heaven" and "in the court" if he would cooperate. The alleged statement purportedly lead to the discovery of the officer's weapon. Absent this evidence, and the statement illegally exacted from Mr. Johnson, Mr. Johnson could not have been convicted and sentenced to death. Indeed, Mr. Johnson could never have been arrested absent this statement, so every piece of

subsequently-obtained evidence should have been excluded as the fruit thereof.

37. Similarly, the highly prejudicial statement of the jailhouse informant (tr. 1651-66), relied upon heavily by the prosecutor in closing argument (See, e.g., tr. 2092), was exacted in violation of Mr. Johnson's Sixth Amendment rights. Jamison, the informant, was a jailhouse trusty and therefore an agent for the prosecution, and deliberately elicited the alleged statement from Mr. Johnson. (Tr. 1656)

B. This Claim Does Not Constitute An Abuse Of The Writ

38. This claim is based upon the recent Supreme Court decision in Michigan v. Jackson which is new law. Thus, the failure to raise the claim prior to now is justifiable.

VI. THE IMPOSITION OF THE DEATH SENTENCE UPON A PERSON EIGHTEEN YEARS OLD AT THE TIME OF THE CRIME AND TOO YOUNG TO SIT ON A MISSISSIPPI JURY VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, AND THIS COURT SHOULD GRANT A STAY AND HOLD THIS CASE IN ABEYANCE PENDING THE UNITED STATES SUPREME COURT'S RESOLUTION OF THIS ISSUE IN THOMPSON v. OKLAHOMA, CERT GRANTED 55 U.S.L.W. 3569 (1987).

A. The Merits Of The Claim.

39. Mr. Johnson was eighteen years old at the time of the offense in this case. He was not old enough to serve on a jury in Mississippi. Sections 13-5-1 and 13-5-2, Miss. Code. The United States Supreme Court recently has granted certiorari to determine whether the youthful age of a person at the time of the

offense renders his death sentence cruel and unusual under the Eighth Amendment. Thompson v. Oklahoma, 55 U.S.L.W. 3569 (1987). Given the pendency of Thompson, and its potential bearing on this case, this Court should stay the execution and await the Supreme Court's decision in Thompson before resolving this issue.

B. The Raising Of This Issue Does Not Constitute An Abuse Of The Writ.

40. The Supreme Court's grant of certiorari in Thompson v. Oklahoma obviously portends new law, and constitutes justification for the failure to raise the claim until now.

VIII. THE MISSISSIPPI CAPITAL STATUTE IN FORCE AT THE TIME OF MR. JOHNSON'S TRIAL WAS FACIALLY UNCONSTITUTIONAL

A. The Merits Of The Claim.

41. The Mississippi statute authorizing the imposition of the death penalty in force at the time of Mr. Johnson's trial was facially unconstitutional, in violation of his Sixth, Eighth and Fourteenth Amendment rights as interpreted in the recent decision of Hitchcock v. Duggar, 55 U.S.L.W. 4567 (April 22, 1987).

42. The Mississippi statute authorizing the imposition of capital punishment at the time of Mr. Johnson's trial explicitly limited the consideration of mitigating circumstances to those enumerated in the statute. See, Miss. Code Ann. §99-19-101(6) (Supp. 1980). The pertinent part of the statute read as follows:

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Miss. Code Ann. §99-19-101(6) (emphasis supplied).

43. Hitchcock strikes down any statutory scheme or practice which operates to limit the presentation of mitigating evidence in the manner of the Mississippi statute at the time of Mr. Johnson's trial.

44. When combined with trial counsel's ineffectiveness regarding the presentation of mitigation evidence (as outlined in Section I), the statute operated to preclude the defense presentation of non-statutory mitigating evidence.

B. This Claim Does Not Constitute An Abuse Of The Writ

45. To the extent this claim is based on Hitchcock, it is new law, justifying the raising of the claim now.

46. Alternatively, it was ineffective of counsel on the first habeas not to raise this claim, thus justifying consideration of the claim on this subsequent petition.

47. Finally, the ends of justice require review of this claim because it goes to the fundamental fairness of the death penalty scheme in Mississippi as it operated in Mr. Johnson's case.

CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully requests that this Court order the following relief:

(a) That an evidentiary hearing be held to determine the timeliness and sufficiency of Mr. Johnson's claims;

(b) That this court grant him relief from his unconstitutional sentence of death.

Respectfully submitted,

ROBERT B. MCDUFF
Lawyers' Committee for Civil
Rights Under Law
1400 Eye Street, N.W., #400
Washington, DC 20005
(202) 371-1212

CLIVE A. STAFFORD SMITH,
185 Walton Street, N.W.
Atlanta, GA 30303
(404) 688-1202

Attorneys for Mr. Johnson

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foreoing Petition For Writ Of Habeas Corpus has been hand-delivered this 15TH day of May, 1987 to Marvin L. White, Jr., Office of the Attorney General, P.O. Box 220, Jackson, MS 39205.

ROBERT B. MCDUFF