IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 65168

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PETITION FOR REHEARING

Appellant Donte Johnson hereby petitions this Court for Rehearing pursuant to NRAP 40(c)(2), following this Court's Order of Affirmance, filed October 5, 2017. "The court may consider rehearings in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2).

A. THE COURT HAS FAILED TO CONSIDER A DECISION DIRECTLY CONTROLLING A DISPOSITIVE ISSUE IN THE CASE.

This Court's finding that Mr. Johnson cannot show deficient performance with regard to counsel's failure to present evidence that his coconspirators received lesser penalties ignores a decision directly in conflict with the Court's holding. This Court's holding cites to *Cullen v. Pinholster*, 563 U.S. 170, 196 (2001), for the proposition that a court reviewing counsel's performance is required to "affirmatively entertain the range of possible reasons...counsel may have had for proceedings as they did" (internal quotation marks omitted)) (Order

of Affirmance, p. 21). Based upon this language, this Court concluded that a reasonable attorney may have decided to forego presenting this evidence because it would have reinforced the State's contention that Johnson deserved a more significant sentence due to his role in the crimes (Order of Affirmance p. 21).

The rational of this Court's holding is in conflict with *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003). In *Wiggins*, the United States Supreme Court granted a new penalty phase after determining that trial counsel failed to adequately investigate and present mitigating background information. 539 U.S. at 519. The United States Supreme Court found the Fourth Circuit's holding – that the failure to present mitigating background information was the result of a strategic decision, was flawed because the court's concern is not whether counsel should have presented a mitigation case, but whether the investigation supporting the decision not to introduce mitigation evidence was itself reasonable. *Id. at* 518–19, 523. In analyzing the investigation conducted for Wiggins, the Court found the investigation fell short of professional standards. *Id.* at 524. The Court noted the record emphasized counsel's unreasonableness by suggesting that the failure to investigate resulted from inattention, and not reasoned strategic judgment. *Id.* at 526. Dismissing the "strategic decision" argument invoked by the state courts and the government to justify counsel's failure to investigate, the Court found this type of justification to be mere post-hoc rationalizations, rather than an accurate description of what actually occurred. *Id.*

Here, this Court is making the same error in analysis found by the *Wiggins* Court. This Court's holding – that counsel may have decided to forego presenting the evidence concerning proportionality for tactical reasons, is premised on a post-hoc rationalization that is not evidenced in the record. Similarly as in *Wiggins*, the record in this case demonstrates that counsel's deficient investigation resulted from inattention and *not* reasoned strategic judgment. During the post-conviction evidentiary hearing before the district court, when

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counsel was questioned about the failure to call the co-defendant's attorneys to introduce this vital mitigation information, counsel explained, "...I made a mistake. I thought that evidence was in. I neglected to even introduce the JOCs, which would have been admissible. It just was I made a mistake". (A.A. Vol. 42 pp. 8224). Thus, the record is clear that this was not a strategic decision, rather a "mistake". Counsel's "mistake" in failing to conduct a proper investigation resulted in the jury not hearing this vital mitigation evidence. *Wiggins* specifically rejects the post-hoc justifications for counsel's inaction that this Court has adopted. Thus, rehearing is warranted as this Court failed to consider *Wiggins*, a decision which undermines this Court's holding.

B. THE COURT'S DECISION FAILS TO CONSIDER MORGAN V. ILLINOIS, A HOLDING SUPPORTING THE FACT THAT THE DISTRICT COURT'S DENIAL OF CHALLENGES FOR CAUSE RESULTED IN MR. JOHNSON RECEIVING AN IMPARTIAL JURY.

In the Order of Affirmance, this Court held Mr. Johnson was not entitled to relief because an appellate challenge to the trial court's denial of for-cause challenges to veniremembers who indicated they would automatically impose the death penalty would not have been successful because Johnson has not demonstrated the impaneled jurors were not impartial (Order of Affirmance p. 12). This Court further held that appellate counsel was not ineffective for failing to litigate a claim based on unsettled questions of law; here, forcing the defendant to use a peremptory challenge to correct the court's error (Order of Affirmance p. 12-13).

Rehearing is warranted as this Court's decision overlooked *Morgan v. Illinois*, 504 U.S. 716, 112 Sup. Ct. 2222, 119 L. Ed. 2d 492 (1992). The Court's decision construes Mr. Johnson's argument as counsel's failure to appeal the district court's denial of challenges for cause based upon unsettled law under United States v. Martinez-Salazar, 528 U.S. 304, 120 Sup. Ct. 774, 145 L. Ed. 2d. 1792 (2000). However, it is clear that Mr. Johnson contended he was also entitled

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to relief under Morgan. In fact, trial counsel specifically cited to Morgan at the time of their objections, yet counsel failed to raise the issue on appeal (A.A. Vol. 8 p. 1826). The Morgan Court determined that any juror who would automatically vote for death is entitled to have a defendant challenge for cause that perspective juror. 505 U.S. 719, 729. The Court ultimately reversed "because the inadequacy of voir dire leads us to doubt that the petitioner was sentenced to death by a jury impaneled in compliance with the Fourteenth Amendment, his sentence cannot stand." 504 U.S. 719, 739.

Similarly here, the inadequacy of the district court in failing to grant the defense's challenges for cause should leave this Court in doubt whether or not Mr. Johnson was sentenced to death by a jury in compliance with the Fourteenth Amendment. In the instant case, Mr. Johnson's voir dire was unconstitutional because the judge systematically precluded the granting of defense counsel's challenges for cause, a blatant violation of Morgan.

CONCLUSION

For the foregoing reasons, Mr. Johnson requests this Court grant his Petition for Rehearing and reverse his convictions and sentence.

DATED this 21st day of November, 2017.

Respectfully submitted by:

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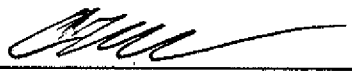
CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word Perfect Times New Roman 14 font.

I further certify that this brief complies with the page limitations of NRAP 40 because it does not exceed ten (10) pages, to wit, four (4) pages.

Dated this 21 day of November, 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 21, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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