IN THE SUPREME COURT OF FLORIDA

DAVID EUGENE JOHNSTON,

Appellant,

v. CASE NO. 88,019

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State does not accept the argumentative and incomplete statement of the case and facts contained in the Appellant's brief. The State relies upon the following factual and procedural history, as found by this Court in Johnston's last appearance before this Court:

> David Eugene Johnston is a prisoner under sentence of death. Recently, the United States District Court for the Middle District of Florida in reviewing a petition for habeas corpus found error at Johnston's original sentencing. *Johnston v. Singletary*, No. 91-797-CIV-ORL-22 (M.D.Fla. Sept. 16, 1993). The court held that the heinous, atrocious, or cruel jury instruction was constitutionally infirm under *Espinosa v. Florida*, --- U.S. ----, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). With regard to this issue, the district court stated:
>
> > Accordingly, because only the Florida courts can determine the proper approach to [Johnston's] sentencing, the writ of habeas corpus will be conditionally granted, within sixty (60) days from the date of this Order, unless the State of Florida initiates appropriate proceedings in state court. Because a new sentencing hearing before a jury is not constitutionally required, the State of Florida may initiate whatever state court proceedings it finds appropriate, including seeking a life sentence or the performance of a reweighing or harmless error analysis by the Florida Supreme Court.
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> *Johnston*, slip op. at 28. The State filed a timely motion asking this Court to review the application of the heinous, atrocious, or cruel aggravating factor in this

case. In view of the federal district court's order, we concluded to do so. We have jurisdiction under article V, section 3(b)(1) and (7) of the Florida Constitution.

In 1984, Johnston was convicted of the first-degree murder of an eighty-four-year-old woman. During the sentencing phase, the trial court charged the jury on the heinous, atrocious, or cruel aggravating factor, using an instruction identical to the one found unconstitutional in *Espinosa*. Subsequently, the jury recommended death by a vote of eight to four. The trial court, finding three aggravating factors [footnote omitted] and no mitigation, followed the jury's recommendation and sentenced Johnston to death.

On appeal, this Court affirmed the conviction and sentence. *Johnston v. State*, 497 So.2d 863, 865 (Fla.1986).

. . .

In 1988, after a warrant for his death was signed by the governor, Johnston filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. In the motion, Johnston challenged the constitutionality of the heinous, atrocious, or cruel jury instruction given in his case. The court denied Johnston's 3.850 motion, specifically finding the challenge to the heinous, atrocious, or cruel jury instruction procedurally barred because it could have and should have been raised on direct appeal.

Subsequently, Johnston appealed the denial of postconviction relief and filed a petition for writ of habeas corpus. In both, Johnston claimed that the trial court erred in failing to properly instruct the jury on the heinous, atrocious, or cruel aggravating factor. This Court affirmed the denial of 3.850 relief and denied the habeas petition. *Johnston v. Dugger*, 583 So.2d 657, 663 (Fla.1991) (hereinafter *Johnston II*). Regarding the 3.850 appeal, we rejected the jury instruction claim stating that it was "without merit or ... procedurally barred because [it has] been or should have been raised

> on direct appeal." *Id.* at 662. We stated that the corresponding habeas claim was "procedurally barred because [it was] raised or should have been raised on direct appeal." *Id.* at 663.
>
> Johnston next raised the heinous, atrocious, or cruel jury instruction claim in the federal habeas petition referred to above. The federal district court judge concluded that from the face of our opinion upholding the denial of Johnston's motion for postconviction relief, she could not determine that the rejection of this claim was based on the independent state ground that it was not preserved for appeal. Accordingly, the judge addressed the issue on the merits.

Johnston v. Singletary, 640 So.2d 1102. 1103-4 (Fla. 1994). This Court found the heinous, atrocious, or cruel issue to be procedurally barred, and, in the alternative, found that any error was harmless beyond a reasonable doubt. *Id.* On February 24, 1996, the Federal District Court denied habeas relief on procedural default grounds.

On March 7, 1995, Johnston filed a motion to vacate judgment and sentence in the Circuit Court of Orange County, Florida. That motion was denied on March 6, 1996, on the alternative grounds of time bar and abuse of process. (R419). Notice of appeal was filed on April 18, 1996, and Johnston filed his initial brief on February 11, 1997.[1]

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[1] At this time, Johnston's appeal to the Eleventh Circuit Court of Appeals from the denial of habeas relief is pending before that

SUMMARY OF THE ARGUMENT

Johnston's Rule 3.850 motion was properly denied as time barred because it was filed long after his conviction and sentence of death became final. The 1993 proceedings in this Court were not "resentencing" proceedings that operated to re-start the Rule 3.850 time limitation period.

Johnston waived his claim of a violation of Chapter 119, *Fla. Stat.*, when he expressly abandoned that claim in the trial court. He cannot now resurrect that claim.

The substantive claims contained in Johnston's brief are untimely because they were brought more than two years after Johnston's conviction and sentence became final. The 1993 proceedings in this Court were not "resentencing" proceedings that affected the Rule 3.850 time limitation.

The trial court's denial of the Rule 3.850 motion on the alternative basis that the motion is a successive motion that is an abuse of process is correct in all respects.

Court.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED JOHNSTON'S RULE 3.850 MOTION AS TIME-BARRED AND SUCCESSIVE

On pages 10-23 of his brief, Johnston argues that the Circuit Court erroneously denied his post-conviction motion on time-bar and successive petition grounds. That position is based upon an inaccurate, incomplete and misleading representation of the proceedings leading up to this Rule 3.850 motion. Contrary to Johnston's position, the Circuit Court properly denied the motion on procedural grounds.

This case returned to this Court in 1993, after the Federal District Court found that the jury instruction on the heinous, atrocious, or cruel aggravating circumstance was deficient under *Espinosa v. Florida*. The District Court ordered:

> Accordingly, because only the Florida courts can determine the proper approach to [Johnston's] sentencing, the writ of habeas corpus will be conditionally granted, within sixty (60) days from the date of this Order, unless the State of Florida initiates appropriate proceedings in state court. Because a new sentencing hearing before a jury is not constitutionally required, the State of Florida may initiate whatever state court proceedings it finds appropriate, including seeking a life sentence or the performance of a reweighing or harmless error analysis by the Florida Supreme Court.

Johnston v. Singletary, 640 So.2d at 1103. This Court found that the jury instruction issue was procedurally barred because it could

have been but was not raised at trial or on direct appeal from Johnston's conviction and sentence of death. *Id.*, at 1104. Alternatively, this Court held that any error was harmless beyond a reasonable doubt. *Id.*, at 1104-5. In an incredibly misleading piece of advocacy, Johnston ignores this Court's disposition of the issue on procedural bar grounds altogether and attempts to transform the alternative harmless error holding into a "resentencing" proceeding which restarted the time limitations for initiation of collateral attack proceedings.

In finding, in the alternative, that any error was harmless beyond a reasonable doubt, this Court stated:

> Even if the issue were not procedurally barred, "we are convinced beyond a reasonable doubt that the erroneous instruction would not have affected the jury's recommendation or the trial court's sentence." *Id.* The jury would have found Johnston's brutal stabbing and strangulation of the eighty-four-year-old victim, who undoubtedly suffered great terror and pain before she died, heinous, atrocious, or cruel, even with the limiting instruction. Further, there were two other strong aggravators and no mitigation present. The error was harmless beyond a reasonable doubt.

Johnston v. Singletary, 640 So.2d at 1104-5. Johnston's argument that this Court imposed sentence is wholly incredible because nothing in the decision of this Court purports to "resentence" Johnston, and the Federal District Court did not treat the decision of this Court as such a proceeding. The reason for that result is

apparent from the opinion of this Court--it is not possible to transform that decision, which is expressly based upon procedural bar grounds, into one which resentenced the defendant. Such an imaginative interpretation of this Court's decision does not survive scrutiny.

The starting point in Johnston's analysis is his assertion that the Federal habeas court "vacated" his sentence of death when the conditional writ of habeas corpus was issued. That claim is refuted by the order of the district court, which stated that "the writ of habeas corpus will be conditionally granted, within sixty (60) days from the date of this Order, **unless the State of Florida initiates appropriate proceedings in state court.**" *Johnston v. Singletary*, 640 So.2d 1102, 1103 (Fla. 1994). The district court left the nature of the "appropriate proceedings" open, and specifically held that "reweighing or harmless error analysis" by this Court was sufficient to avoid issuance of the writ of habeas corpus. *Id.*[2] Such proceedings were conducted, and the writ never issued. Because the writ never issued, Johnston's sentence of death

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[2] Stated in slightly different terms, the **failure** of the State to conduct the required State Court proceedings was a condition precedent to the issuance of the writ and the setting aside of the death sentence.

was not vacated.

Despite Johnston's disingenuous argument to the contrary, his 1984 death sentence has never been set aside. Likewise, there is no factual basis for the claim that the 1994 proceedings before this Court were "resentencing" proceedings. This Court obviously did not take that view, given that the single issue before the Court was resolved on procedural bar grounds. Likewise, the district court did not regard the proceedings before this Court as amounting to "resentencing" proceedings, given that the federal court disposed of the jury instruction claim on procedural default grounds. The order of the federal court stated that the State may initiate whatever state court proceedings were deemed appropriate, and did not imply that the state courts were required to ignore settled state procedural rules. As the final order of that Court makes clear, relief was denied because the jury instruction claim is procedurally defaulted. That basis for denial of relief is hardly surprising because a procedural default is a jurisdictional defect which cannot be waived. *Sochor v. Florida*, 112 S.Ct. 2114 at n. * (1992). Because the District Court was without jurisdiction to entertain the jury instruction claim in the first instance, that Court cannot have "vacated" Johnston's sentence based upon claimed instructional error. Therefore, Johnston's claim that this Court

resentenced him in 1994 is without merit. Because that is true, Johnston's successive motion for relief pursuant to Rule 3.850 was properly denied as time barred. (R419-23)

Johnston's conviction and sentence became final when the direct appeal concluded in 1986.[3] Consequently, Johnston had two years in which to initiate Rule 3.850 proceedings, which he did. *See, e.g., Johnston II*. Because this motion to vacate was not filed until almost 10 years after Johnston's conviction and sentence became final (and because Johnston has already had one Rule 3.850 motion), the trial court properly denied the motion as time barred and as an abuse of process. (R419-24) *See, Zeigler v. State*, 654 So.2d 1162 (Fla. 1995). That decision should be affirmed in all respects.

II. JOHNSTON WAIVED ANY CHAPTER 119 ISSUE IN THE TRIAL COURT, AND CANNOT NOW ARGUE THAT ISSUE AS A BASIS FOR REVERSAL

On pages 23-29 of his brief, Johnston argues that he is entitled to an evidentiary hearing on his claim that all of his public record requests were not complied with. This claim is not a basis for reversal of the trial court's order because Johnston

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[3] Johnston did not petition the United States Supreme Court for a writ of certiorari.

expressly waived any complaint of non-compliance with such requests. (R3-4; 55) Moreover, the trial court noted such waiver in the dispositive order (R423), and, even though Johnston moved for rehearing of that order, he did not take issue with the finding that the public records issue had been explicitly waived. (R430-32) Johnston's attempt to resurrect this issue by ignoring his express waiver is, at least, disingenuous. The Chapter 119 issue is not preserved for review.

To the extent that Johnston refers this Court to the record in *Correll v. State,* No. 88,474 as authority for his position that he is entitled to further proceedings concerning the role of blood spatter expert Judith Bunker, that record does not help him. This Court decided the *Correll* case on April 10, 1997, and upheld the trial court's finding that nothing about Ms. Bunker's background qualified as "newly discovered evidence". *Correll v. State,* No. 88,474 (Fla., April 10, 1997). That decision is dispositive of Johnston's claim of a Chapter 119 violation as to Ms. Bunker as well as resolving his newly discovered evidence claim which is predicated upon the same operative facts.[4]

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[4] Johnston's newly discovered evidence claim appears as Claim VII beginning on page 61 of his brief. *Correll* is in all respects dispositive of this claim, and there is no reason to dignify that

III. THE REMAINING CLAIMS ARE UNTIMELY

There are nine substantive legal claims contained in Johnston's brief, which appear at pages 30-79 of his brief. Each of those claims is untimely because none of those claims are brought within the two-year time period established by the pre-1993 version of Rule 3.850. The trial court applied the time bar in denying relief as to each claim, and that ruling should be affirmed in all respects.

The premise underlying each substantive claim is Johnston's position that this Court "resentenced" him to death in 1994. For the reasons set out at pages 5-9, above, Johnston was not "resentenced", but rather has remained under a death sentence that was imposed in 1984 and was affirmed by this Court on direct appeal in 1986. Johnston's conviction and sentence became final in 1986, with the issuance of this Court's mandate, and Johnston had two years from that time in which to initiate Rule 3.850 proceedings.[5] This motion, which was filed in **1995**, it time barred because it was not filed until long after the two-year time limitation had expired. *See, In re Rule 3.850 of Florida Rules of Criminal*

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claim, which should have been withdrawn after *Correll* was released, with further discussion.

[5] As set out above, Johnston did file a timely Rule 3.850 motion.

Procedure, 481 So.2d 480 (Fla. 1985); *Huff v. State*, 569 So.2d 1247 (Fla. 1990). The trial court's ruling that this motion is time barred is fully in accord with settled Florida law, and should be affirmed in all respects.

To the extent that Johnston argues that his claim that he was abused in some fashion by the judge that presided over his capital trial and that that is "new evidence" of his mental state at that time, that claim fails. That "information" was obviously available at the time of trial as well as at the time of the first Rule 3.850 motion. This "issue" is time barred under settled Florida law. *Zeigler v. State*, 654 So.2d 1162 (Fla. 1995). The trial court's denial of relief should be affirmed in all respects.

IV. JOHNSTON'S RULE 3.850 MOTION WAS PROPERLY DENIED AS SUCCESSIVE

In addition to denying Johnston's Rule 3.850 motion on time-bar grounds, the trial court also denied the motion because it is a successive motion. (R424) That ruling is correct in all respects and should be affirmed.

Under settled Florida law, it is an abuse of process to raise a claim, in a successive Rule 3.850 motion, that was decided in a prior motion. *See, Bundy v. State*, 538 So.2d 445 (Fla. 1989); *Christopher v. State*, 489 So.2d 22, 24 (Fla. 1986). Ineffective

assistance of counsel claims are treated no differently, and the law is clear that such claims cannot be litigated on a piecemeal basis. *Jones v. State*, 591 So.2d 911, 913 (Fla. 1991); *Spaziano v. State*, 545 So.2d 843 (Fla. 1989).

Johnston's claim that he was incompetent at the time of trial, sentencing, and at the time of the 1994 appellate proceedings is procedurally barred because it could have been but was not raised on direct appeal. When Johnston attempted to raise this claim in his first Rule 3.850 motion, this Court applied settled Florida law and found the claim to be procedurally barred. *Johnston v. Dugger*, 583 So.2d 657 (Fla. 1991).[6]

Johnston's claim that penalty phase counsel rendered constitutionally ineffective assistance is procedurally barred because it was raised in Johnston's first Rule 3.850 motion. *Johnston v. Dugger*, *supra*. Florida law is clear that Johnston may not relitigate this claim in a successive Rule 3.850 motion. *Spaziano*, *supra*.[7]

On pages 42-58 of his brief, Johnston argues that this Court, in sentencing him to death, gave great weight to a tainted jury

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[6] This claim appears at pages 30-32 of Johnston's brief.

[7] This claim appears at pages 32-42 of Johnston's brief.

recommendation. As set out above, this Court did not sentence Johnston to death at all, much less impose that sentence in 1994. This claim is based upon a flawed premise, and is not a basis for relief. In any event, this claim is not properly before this Court because is it raised for the first time on appeal from the denial of Rule 3.850 relief. *Doyle v. State,* 526 So.2d 909, 911 (Fla. 1988).

On pages 59-61 of his brief, Johnston raises various claims relating to the guilt phase of his capital trial. The majority of those issues were disposed of in Johnston's first Rule 3.850 proceeding. *Johnston v. Dugger, supra*. In any event, the guilt phase claims are time barred and successive, as the trial court found. Johnston's creative argument that the habeas court "vacated" his sentence does not help as to the guilt phase claims--Johnston cannot make any sort of argument that the habeas court "vacated" his conviction. The claim to the contrary is frivolous.

Johnston's claim, on pages 61-73 of his brief, concerns what he claims is "newly discovered evidence" about Judith Bunker. This precise claim was decided adversely to Johnston's position in *Correll v. State, supra*. See p. 10, above. This Court's decision in that case is controlling as to the issue contained in Johnston's brief.

On pages 73-74 of his brief, Johnston argues that he is entitled to the issuance of a new sentencing order based upon the opinion of this Court in *Ferrell v. State*, 653 So.2d 367 (Fla. 1995). Putting aside the obvious inconsistency of this issue with Johnston's claim that this Court resentenced him in 1994, the claim is procedurally barred because it could have been but was not raised on direct appeal. *Johnston I, supra*. That is a procedural bar under settled law. *See, e.g., Lambrix v. State*, 559 So.2d 1137 (Fla. 1990). In any event, *Ferrell* did nothing more than reiterate the requirements of *Campbell v. State*, 571 So.2d 415 (Fla. 1990), as to the form of capital sentencing orders. *Campbell* has expressly been held not to constitute a retroactively applicable change in the law. *Gilliam v. State*, 582 So.2d 610, 612 (Fla. 1991).

On pages 75-76 of his brief, Johnston repeats his allegations concerning various instances of physical abuse that he claims to have suffered during his pre-trial incarceration. These claims concern events that are alleged to have occurred in 1989, some five years after trial. (R112) These "claims" could have been but were not raised in Johnston's first Rule 3.850 motion and, because they were not, are not cognizable in a successive motion for post-conviction relief. *Fla. R. Crim. P.* 3.850(f). Further, because the claims concern events years after trial, and because the claim was

not made until years after the events allegedly took place (even though Johnston had personal knowledge of them), Johnston's claims do not qualify as newly discovered evidence of his mental state. *See, e.g., Mills v. State,* 684 So.2d 806 (Fla. 1996). Further, Johnston does not even argue that the facts upon which this claim is based are facts which were unknown and could not have been ascertained through the exercise of due diligence. *Fla. R. Crim. P.* 3.850 (b), (f). Finally, as the trial court found, the probative value of these claims is "extraordinarily weak." (R422-3) The trial court's finding that this claim is time barred is correct in all respects and should be affirmed.

On pages 76-7 of his brief, Johnston claims that he is "innocent", and that the State did not introduce sufficient evidence to establish his guilt beyond a reasonable doubt. This Court rejected a sufficiency of the evidence claim on direct appeal, and Johnston is not entitled to relitigate a claim that has already been decided adversely to him. *Johnston v. State,* 497 So.2d at 866. *See also, Fla. R. Crim. P.* 3.850(f). This claim is time barred, procedurally barred, as well as being an abuse of process. The trial court's denial of relief should be affirmed.

On pages 77-79 of his brief, Johnston sets out a claim that purports to be one of "cumulative error", but is no more than a

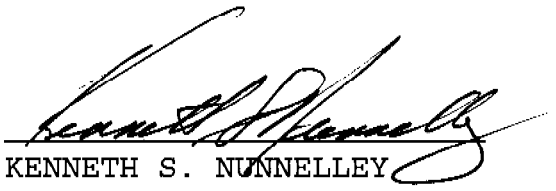
replay of the claim contained at pages 75-6 of his brief. In any event, this claim is time barred because it could have been raised in Johnston's first Rule 3.850 motion. His failure to raise this claim at that time is an abuse of process which disentitles him to relief. The trial court's denial of relief should be affirmed in all respects.

CONCLUSION

Based upon the foregoing the trial court's denial of relief should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Martin J. McClain, Litigation Director, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, on this 19th day of May, 1997.

Of Counsel