IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,019

DAVID EUGENE JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT I

The State contends that Mr. Johnston's death sentence became final when this Court's initial review of the death sentence rendered by the trial court ended in 1986 (Answer Br. at 9). The argument goes like this: Mr. Johnston's argument that his death sentence did not become final until 1996 is unsound because it implies that the federal district court "vacated" his sentence "when the conditional writ of habeas corpus was issued" (Answer Br. at 7). "Because the writ was never issued," the State goes on to say, "Johnston's sentence of death was not vacated" (Answer Br. at 7-8). There is a name for this form of argument; it is an example of the fallacy of *non causa pro causa*: Mr. Johnston's claim appears to be incorrect because it implies that the federal district court invalidated his sentence when it did not. Since Mr. Johnston remains under a death sentence, the argument goes, the federal district court did not find his sentence constitutionally infirm. In other words, Mr. Johnston's case is distinguishable from Parker, because he remains under a death sentence regardless of what the federal courts said about this Court's initial judgment affirming the trial court's sentence.

The State first goes wrong when it misrepresents an act of state-federal comity--the issuance of the conditional writ instead of the presumptively appropriate release from custody, Hilton v. Braunskill, 481 U.S. 770, 774-775 (1987)--with a conclusion that Mr. Johnston's death sentence was valid as it

stood at the time of the federal district court's first order. See Herrera v. Colling, 506 U.S. 390, 403 (1993). What the federal court granted the courts of the State of Florida was something like jurisprudential parole for the illegal sentence it imposed on Mr. Johnston. What the State now contends it received was an acquittal for the constitutional violation that occurred when Mr. Johnston's jury was given a vague and overbroad jury instruction.

This Court's 1986 judgment affirming sentence was held to be subject to federal habeas corpus review "because, although these claims were addressed by the Supreme Court of Florida, the Court was unable to determine whether the supreme court's resolution of the claims was on procedural bar grounds or on the merits." Johnston v. Singletary, No. 91-797-CIV-ORL-22, Order on Remand at 1-2 (M.D.Fla. Feb. 24, 1996). As a matter of federal law decided by the district court,

> under Harris v. Reed, 489 U.S. 255 (1989)], because there was no "clear and express" statement by the state court relying on a state procedural default, this claim is not procedurally barred.

Johnston v. Singletary, No. 91-797-CIV-ORL-22, Order Granting Writ at 24 (M.D.Fla. Sept. 16, 1993). In conditionally granting the writ, the federal court held that this Court must either correct the constitutional defect in its judgment or sentence Mr. Johnston to life imprisonment. Id. at 28.

In describing the procedural history of Mr. Johnston's case in federal court, the State distorts beyond recognition the

significance of the federal court's issuance of the conditional writ. The United States Supreme Court made it clear more than a hundred years ago that the issuance of the conditional writ secures for the habeas petitioner "[t]he end sought by him--to be relieved from the defects in the judgment rendered to his injury." In re Bonner, 151 U.S. 242, 261 (1894). Thus any claim by the State that the federal court's later disposition of Mr. Johnston's claims bears on its initial adjudication of that claim or the consequences of that adjudication for the viability of this Court's first review of Mr. Johnston's death sentence is misplaced.

The conditional writ issued by the federal district court in Mr. Johnston's case relieved him of the constitutionally defective judgment rendered by this in 1986. Bonner, supra; see also Foster v. Lockhart, 9 F.3d 722, 727 (8th Cir. 1993)("issuance of a writ is conditional when the district court delays a state prisoner's release from custody . . . to give the state an opportunity to correct the constitutional defects that make the prisoner's custody unlawful"). The federal district court's issuance of the writ represents its adjudication of the constitutional validity of this Court's first direct appeal opinion. The court held that Mr. Johnston was entitled to relief from that unconstitutional judgment. Upon the issuance of the writ, and until this Court rendered a new judgment regarding the unconstitutionally vague instruction given to Mr. Johnston's jury, Mr. Johnston was "not [] someone in [Florida's] custody

pursuant to a death sentence, but as an unsentenced person." Moore v. Zant, 972 F.2d 318, 320 (11th Cir. 1992). Upon the issuance of the conditional writ the State was disentitled to execute the sentence affirmed by this Court in 1986.

Whatever the federal district court said of the judgment this Court rendered after the writ issued is irrelevant here. Moreover, each federal court order was only concerned with the state judgment that immediately preceded it. See Cave v. Singletary, 84 F.3d 1350, 1358 (11th Cir. 1996)(Kravitch, C.J., dissenting). When the State moved this Court to "reweigh or perform the requisite harmless error analysis" (Motion for Expedited Reweighing or Harmless Error Analysis at 3)(emphasis added), either this Court reopened the direct appeal or it issued a new judgment affirming sentence. Those are the only two possibilities and either way the final state court judgment of Mr. Johnston's death sentence was this Court's opinion in 1994. The State conceded as much when it said "[t]he State has no preference as to which case number this case will fall under since the issue to be reviewed remains the same" (State's Reply Brief on Motion for Expedited Reweighing, etc. at 2). That judgment did not become final until the United States Supreme Court denied certiorari review in 1995. Thus the State also commits the fallacy of arguing, at least implicitly, that as long as a successful habeas petitioner ultimately ends up with a death sentence the original death sentence was final. This is the fallacy of begging the question. The question begged by the

State's argument is "Didn't the federal court find the claim barred in 1996?" The fallacy lies in not revealing what judgment of this Court the federal court was considering when it found the claim barred. The federal court only held that this Court, after the issuance of the writ, made what the district judge thought was an adequate statement that the claim was procedurally barred. Johnston v. Singletary, No. 91-797-CIV-ORL-22, Order on Remand at 3-4 (M.D.Fla. Feb. 24, 1996). That holding is currently being appealed by Mr. Johnston.

The question of whether the federal district court initially erred in granting the writ because this Court found the claim barred is not relevant. It is a dead issue. The State chose not to seek appellate review of the district court's holding on that federal question. In fact, the district court expressly rejected the State's reliance on Sochor v. Florida, 112 S.Ct. 2114 (1992), reliance that the State reasserts here.[1] Johnston v. Singletary, supra, Order Granting Writ at 24-25. Instead of seeking to have

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[1]Whether a state procedural default is jurisdictional or not is not irrelevant because the federal district court distinguished Mr. Johnston's case from Sochor when it rejected the procedural bar defense. It is not a question of whether the State could have waived the defense when it dismissed its appeal of the district court's order. For the defense to be available in the first place, federal law requires that the district court find a "clear and express" statement from this Court relying on the procedural default. Harris v. Reed, 489 U.S. 255 (1989); Bowser v. Boggs, 20 F. 3d 1060 (10th Cir. 1994). The district court held that as a matter of federal law there was no bar to its consideration of the claim That discrete finding remains intact. It is not a question of whether the State waived the defense; the defense was not available to it to waive as a matter of law. Johnston v. Singletary, Order Granting Writ at 24. The waiver "issue" as it therefore raised here is a non sequitur.

that holding overturned, the State elected (or invented) the remedy of having this Court "open a case" so that this Court could "perform the requisite harmless error analysis" called for in the federal court's order granting the conditional writ. Making that election was a concession. The State conceded that Mr. Johnston was not, at that time, in custody under a valid sentence of death because as a matter of federal law there was no procedural bar to the consideration of his meritorious claims. Whether this Court's initial direct appeal opinion contained an adequate statement that the claim was procedurally defaulted was a federal question, Harris v. Reed, 489 U.S. 255 (1989), which the district court decided adversely to the State. Johnston v. Singletary, supra, Order Granting Writ at 24-25 (M.D.Fla. Sept. 16, 1997); Johnston v. Singletary, supra, Order on Remand at 1-2 (M.D.Fla. Feb. 2, 1996). Rather than seek appellate review of the federal question of whether there had been an adequate state default judgment, the State sought to obtain what it considered an adequate remedy. It sought and obtained a new judgment from this Court. That new judgment of default is the only one reviewed by the federal district court when it ultimately denied relief. See Cave v. Singletary, 84 F.3d 1350, 1358 (11th Cir. 1996). Thus, the State's contention here that "the District Court was without jurisdiction to entertain the jury instruction claim in the first instance" is unsupportable and disengenuously made; the federal court rejected that defense, distinguishing Mr. Johnston's case from Sochor. The district court's judgment that

there was no procedural bar to its consideration of the claims in 1993 remains intact. The district court's order in 1996 relates to a different statement from this Court.

In sum, when the federal district court rejected the procedural bar defense and conditionally issued the writ, Mr. Johnston's death sentence was unenforceable. However this Court's 1994 judgment is characterized, whether as a reopened direct appeal or a new adjudication of sentence, that is the only judgment of this Court that has so far withstood federal habeas corpus review. This Court's initial direct appeal opinion did not. Again, as the State itself asserted, the characterization of this Court's 1994 judgment is of no consequence because either way it was that judgment that currently places Mr. Johnston under a sentence of death. The former judgment could not and did not stand up to habeas scrutiny. For these reasons and the reasons explained in Mr. Johnston's Initial Brief, Mr. Johnston's Motion to Vacate was timely filed and he is entitled to a remand of his case for full consideration of the merits of the Claims raised.

Argument II

The State attempts to convince this Court that previous collateral counsel's comments below are a basis for this Court to refuse to guarantee Mr. Johnston access to the public records to which he is entitled. They are not and the State's position should fail for a number of reasons. First, previous collateral counsel's exact words should be noted:

> MR. SHIPPY: All right, your honor. The first claim that the court needs to address,

> your honor, is claim one, which is a claim - or a statement making a claim for certain outstanding public records. And I can inform the court here on the record today that that is not a basis for -- I'm not using that as a basis today for not moving forward in the proceedings. There do remain some outstanding requests but what I would propose to the Court is that I will follow those up in the course of manner that I need to and if any additional information that's relevant to these proceedings comes out of it, then I will take the appropriate course of action.

(T. 3-4). Further, counsel stated:

> I'm simply telling the court that I am prepared to rely upon the allegations as pled. That doesn't mean that I'm waiving my right to pursue additional -- obtain these records to see whatever they may have and determine at that point in time whether you're staying proceedings but I'm simply relying upon the allegations as pled, whether or not it is 119.

(T. 55). The court below was incorrect, as is the State in its brief--there was no waiver of the right to chapter 119 materials. Whether or not the issue was addressed in rehearing has no bearing on whether or not it was preserved for this court.

As to the State Attorney files, this Court needs to remand for an evidentiary hearing. Representatives of the State Attorney's office provided Mr. Johnston with greatly conflicting reports of whether they had requested files. On the one hand, on May of 1995, one Assistant State Attorney offers to allow their file from this case to be inspected. A month later another Assistant State Attorney informs Mr. Johnston's attorney that that file has been destroyed. The only materials ever provided

by the State Attorney were a few postconviction pleadings. Under Ventura a remand for an evidentiary hearing is required.

Moreover, it should be noted that since the issuance of the lower court's order denying relief in this case, during the course of the under-warrant litigation in State v. Medina, it was again proven that the Orange County law enforcement agencies had failed in the past to comply with chapter 119. It was also shown that the State had mislead courts regarding compliance by the Orange County Sheriff:

> It is undisputed at this point that the State possessed evidence that implicated Joseph Daniels in the murder and failed to disclose this evidence to the defendant. In fact, and incredible as it now appears, the record actually demonstrates that the State represented on the record in earlier postconviction proceedings that absolutely everything in its files was furnished to the defendant. That "everything" was actually packaged together and placed in the record. However, recently, and to the State's credit, it has acknowledged that not "everything" was furnished at that time. Among the newly furnished materials recently provided by the State is evidence of Joseph Daniels' involvement in this murder. The record reflects, of course, that even before this time the victim's former boyfriend, Billy Andrews, was a serious suspect. The involvement of Andrews was a major part of the defense at trial.

The State also argues that this Court's decision in Correll v. State, 698 So. 2d 522 (Fla. 1997) "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 fact." Answer Brief at 10.

Remaining Claims

The State argues that the remaining claims are untimely. Mr. Johnston relies on his Brief and the arguments presented in this Reply and his Reply to State's Response. The State argues that several of Mr. Johnston's claims are successive. These arguments fail for the same reasons the State's arguments that the claims are untimely fail.

As to Mr. Johnston's allegations of new evidence of his mental condition, the State argues that the information was "obviously available at the time of trial as well as at the time of the first Rule 3.850 motion." Answer Brief at 12. This argument is faulty. Mr. Johnston is a schizophrenic whose delusions change over time. As they change, they themselves are new evidence of his mental state. To the extent this information is based on Mr. Johnston's delusions, this information could not have been known at the time of trial.

Mr. Johnston's claims that his penalty phase counsel was ineffective include the allegation that counsel's failure to object to Eighth Amendment error was prejudicially defective. Those arguments could not have been raised before 1994 when this Court found the Eighth Amendment claim to be procedurally barred.

As to the issue raised by Mr. Johnston based on newly discovered evidence concerning Judith Bunker, again the State improperly relies on the outcome of litigation in another case: State v. Correll. Presumably here the State is arguing that Mr. Johnston is estopped by the doctrine of collateral estoppel or

res judicata. It is not. Under no preclusion doctrine can the resolution of the issue in State v. Cornell be solely determinative of Mr. Johnston's claims. As authority, this Court's decision in Cornell is relevant perhaps, but not dispositive.

The State's assertion that Mr. Johnston's competency claim is not cognizable in postconviction must fail. As this Court has repeatedly made clear, competency claims are cognizable in postconviction. See Mason v. State, 489 So. 2d 734 (Fla. 1986); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990).

As to the State's remaining arguments, Mr. Johnston relies on his Initial Brief.

CONCLUSION

For the reasons stated herein and in Mr. Johnston's initial brief, Mr. Johnston urges the Court to reverse the Lower court and grant him the relief he seeks.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 13, 1997.

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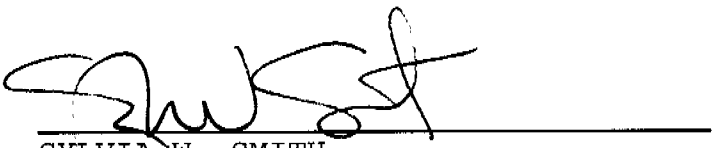

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