IN THE SUPREME COURT OF FLORIDA

TERRELL M. JOHNSON,

Appellant,

v. CASE NO. SC96,333

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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This brief is typed in Courier New 12 point.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 8

I. SUMMARY DENIAL OF THE MOTION WAS PROPER 9

II. THE JUROR RECORDS CLAIM. 16

III. THE JUROR INTERVIEW CLAIM 18

IV. THE METHOD OF EXECUTION CLAIM 19

V. THE COMPETENCY FOR EXECUTION CLAIM 20

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

CASES

Brady v. Maryland,
373 U.S. 83 (1963) . . . .
9

Brown v State,
565 So.2d 304 (Fla. 1990) 13

Bryan v. State,
25 FLW S159 (February 22, 2000) 19

Buenoano v. State,
708 So.2d 941 (Fla. 1998) 17

Gaskin v. State,
737 So.2d 509 (Fla. 1999) 18

Johnson v. Singletary,
695 So.2d 263 (Fla. 1996) 6, 7

Johnson v. State,
442 So.2d 193 (Fla. 1983) 2, 7, 14

Johnson v. State,
593 So.2d 206 (Fla. 1992). 3, 7, 11, 19

Kearse v. State,
SC90310 (Fla., June 29, 2000) 19

Knight v. Florida,
120 S.Ct. 459 (1999) 20

Knight v. State,
721 So.2d 287 (Fla. 1998) 20

McAllister Hotel, Inc. v. Porte,
123 So.2d 339 (Fla. 1959) . . . .
4

Melendez v. State,
718 So.2d 746 (Fla. 1998) 10, 14

Mitchell v. State,
527 So.2d 179 (Fla.), *cert. denied*, 488 U.S. 960,
109 S.Ct. 404, 102 L.Ed.2d 392 (1988) 4

Provenzano v. State,
751 So.2d 37 (Fla. 1999) 19, 20

Sims v. State,
754 So.2d 657 (Fla. 2000) 19

Songer v. State,
463 So.2d 229 (Fla.), *cert. denied*, 472 U.S. 1012,
105 S.Ct. 2713, 86 L.Ed.2d 728 (1985) 4

State v. DiGuilio,
491 So.2d 1129 (Fla. 1986) 18

Thompson v. State,
2000 WL 373757 (Fla. 2000). 18, 19,
20

MISCELLANEOUS

Fla. R. Crim.P. 3.850 . . . . 7, 9, 16, 17

Fla.R.Crim.P. 3.851(b)(5) . . . .
17

§ 90.404, *Fla. Stat*. . . . .
15

§ 90.607(2)(b), *Fla. Stat.* (1985) . . . .
4

§ 119, *Fla. Stat.* 16, 18

STATEMENT OF THE CASE

The Statement of the Case contained in Johnson's *Initial Brief* is argumentative and is denied. The State relies on the following Statement of the Case and Facts which is taken, in part, from the prior decisions of this Court in the various proceedings brought by Johnson.

On direct appeal from Johnson's conviction and sentence of death, this Court summarized the facts in the following way:

> On December 4, 1979, Terrell Johnson went to Lola's Tavern in Orange County to redeem a pistol he had pawned to James Dodson, the bartender/owner of the tavern. Although Dodson had given Johnson fifty dollars when the gun was pawned, he demanded one hundred dollars to return it. Before paying for the gun, Johnson asked to be allowed to test fire it and took the gun to an open field across the road from the bar where he fired several shots. While returning to the bar, Johnson, irate at what he considered to be Dodson's unreasonable demand, decided to rob the tavern. Johnson told police that he took Dodson and a customer, Charles Himes, into the men's room at the end of the bar, intending to tie them up with electrical cord. The customer lunged at Johnson and he began firing wildly, shooting both men. He then returned to the bar and cleaned out the cash drawer, also taking Dodson's gun, which was kept under the bar. As he was wiping the bar surfaces to remove fingerprints, Johnson heard movement from the back room and returned to find the customer still alive. Johnson shot him again, not, according to Johnson, "to see him dead," but to "stop his suffering."
>
> Several weeks later Johnson was arrested in Oregon for an unrelated crime. He still had Dodson's gun -- he had sold the murder weapon to an acquaintance in Florida -- and thus was linked to the Florida murders based on information from the National Crime

Information Center.

> Johnson was tried in Orange County on an indictment charging two counts of first-degree murder. He admitted the killings but claimed they were provoked by the customer's attack and denied all premeditation. He was convicted of second-degree murder for the death of the customer and of first-degree murder in Dodson's death. On the first-degree conviction the jury recommended and the trial court imposed the death penalty.
>
> The case was first appealed to the Florida Supreme Court in 1980. At that time the transcript of the trial court proceedings was discovered to be virtually incomprehensible because of omissions (including omissions of several bench conferences and the entire voir dire of the venire panel), misspellings, and obvious inaccuracies in either the recording or the transcription of the trial. This Court therefore relinquished jurisdiction to the trial court to attempt to reconstruct the record and to hold an evidentiary hearing on the accuracy of the transcript. The court reporter revisited her stenographic notes and met with the trial judge and trial counsel. The corrected and supplemented transcript was the subject of extensive hearings into its accuracy and reliability. At the close of those hearings, the presiding judge found the corrected transcripts to contain "no significant or material fault ... [nor to show] even one prejudicial omission or error" and issued an order submitting the revised transcript to this Court. It is this transcript upon which we rely in making our review of the record.

Johnson v. State, 442 So.2d 193, 194-95 (Fla. 1983). This Court affirmed Johnson's conviction and sentence of death.

This Court affirmed the denial of Johnson's *Florida Rule of Criminal Procedure* 3.850 motion[1], where Johnson raised the

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[1] Johnson sought Federal habeas corpus relief in May of 1992. The

following claims, as framed by the Court:

> Of the fourteen claims presented in his 3.850 motion, Johnson seeks review of the trial court's rejection of the following twelve: 1) that trial counsel was ineffective for failing to conduct timely investigation and to present compelling mitigation; 2) that the jury was erroneously instructed that a majority vote was required for a life sentence recommendation and that counsel was ineffective for failing to challenge the instruction; 3) that Johnson was denied his right to the independent and competent assistance of a mental health expert; 4) that trial counsel was ineffective for failing to use evidence of voluntary intoxication; 5) that trial counsel was ineffective for failing to depose or impeach the State's ballistics witnesses, for failing to seek independent expert assistance, and for failing to rebut the State's ballistics evidence; 6) that the State violated *Brady* by intentionally withholding evidence of a ballistics test which was subsequently presented to the jury; 7) that statements were obtained from Johnson in violation of *Miranda*; 8) that the court's reconstruction of the record violated Johnson's rights to a full and fair hearing, equal protection, and effective assistance of counsel; 9) that Johnson's sentence was based upon a mistake of fact regarding the jury's sentencing vote; 10) that counsel was ineffective in failing to move for discharge pursuant to the speedy trial rule of the Interstate Agreement on Detainers (IAD); 11) that the trial court impermissibly diminished the jury's role in sentencing contrary to *Caldwell;* and 12) that the trial court erroneously applied the Florida death penalty as if it were mandatory and mercy could not be applied.

Johnson v. State, 593 So.2d 206, 208 (Fla. 1992). (footnotes omitted). This Court denied relief on the *Miranda* claim,

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Federal District Court dismissed the petition for lack of exhaustion of his available state remedies.

pointing out that that claim was "also raised on direct appeal and summarily rejected by this Court because 'we find no support for appellant's other points on appeal and see nothing to be gained by discussing them.'" *Id.* (citation omitted). With respect to the "juror interview" issue, this Court stated:

> Finally, we address claim 2 (error in jury instructions and deficient performance of counsel for failure to litigate this issue). Johnson claims that an error in the court's instructions resulted in an initial jury deadlock of 6-6 on the sentencing recommendation. Such an error in jury instructions is an issue which should properly be raised on direct appeal, and would be procedurally barred if raised for the first time in a 3.850 motion. *Smith,* 445 So.2d at 325. However, Johnson argues that this claim is cognizable because the record at the time of appeal contained no evidence of an alleged jury deadlock. The record reflects that the jury never reported a deadlock to the court and returned a majority recommendation of death after four hours of deliberation. However, based upon trial counsel's affidavit that he recalled "hearing from sources unknown that the jury had deadlocked at 6-6 during the sentencing phase," the circuit judge granted Johnson's motion to interview the jury foreman in 1986. The deposition of the foreman focused upon the jury's deliberations during the penalty phase of the trial. This Court finds that the jury foreman's testimony is not admissible because "[i]t is a well settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations." *Mitchell v. State*, 527 So.2d 179, 181 (Fla.), *cert. denied*, 488 U.S. 960, 109 S.Ct. 404, 102 L.Ed.2d 392 (1988); *accord* Sec. 90.607(2)(b), Fla.Stat. (1985). [footnote omitted]. This rule has also been applied in capital cases. *See Songer v. State*, 463 So.2d 229 (Fla.), *cert. denied,* 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed.2d 728 (1985).
>
> In the instant case, the jury foreman was questioned

> about jury pollings during deliberations and the jury's understanding of the court's instructions. This testimony "essentially inheres in the verdict" as it relates what occurred in the jury room during the jury's deliberations. This Court has held that such juror testimony is inadmissible. *E.g., McAllister Hotel, Inc. v. Porte*, 123 So.2d 339 (Fla. 1959). Accordingly, the foreman's deposition cannot be the basis for the relief sought. Furthermore, this Court cautions against permitting jury interviews to support post-conviction relief for allegations such as those made in this case.
>
> Moreover, even if the foreman's testimony were admissible, we find nothing in the deposition which indicates a jury deadlock in this case. The deposition shows only that the jury conducted "different pollings at various junctures in the deliberations."

Id., at 210.

Johnson subsequently sought State habeas corpus relief before this Court. This Court described the claims contained in Johnson's petition, as follows:

> (1) this Court's ruling that his brief on direct appeal could not exceed 70 pages denied effective assistance of counsel because he could not appeal those matters that did not fit within the limited brief; (2) counsel was ineffective for failing to properly raise the issue that Johnson's death sentence resulted from consideration of constitutionally invalid aggravating factors and improper jury instructions as to those factors; (3) counsel was ineffective for failing to properly raise the issue that the jury received an unconstitutional instruction regarding reasonable doubt, compounded by improper prosecutorial comment; (4) counsel was ineffective for failing to properly raise the issue that Johnson was denied his right to the independent and competent assistance of a mental health expert when the judge appointed an employee of the sheriff's office to interrogate him and report what Johnson said to the

judge and the State; (5) counsel was ineffective for failing to properly raise the issue of the State's intentional withholding of the fact that it had conducted a ballistics test and the corresponding exhibits, and that this misleading evidence was improperly presented to the jury at both the guilt and penalty phases; (6) counsel was ineffective for failing to properly raise the issue that Johnson's statements were obtained in violation of his fifth, sixth, eighth, and fourteenth amendment rights, and the State violated due process by concealing the violations; there was a Brady violation because police reports regarding the interrogation were inconsistent with the testimony as transcribed; (7) Johnson was denied a full and fair hearing on the trial court's attempted reconstruction of the record and the procedure used; (8) counsel was ineffective for failing to move to disqualify the reconstruction hearing judge after learning he had received an improper communication from the original (recused) trial judge, and for failing to raise this point on direct appeal; (9) counsel was ineffective for failing to properly raise the issue that Johnson was not allowed to be present at the reconstruction hearings; (10) counsel was ineffective for failing to properly raise the issue of Johnson's absence from critical stages of jury selection at trial and unrecorded bench conferences; (11) the right to an impartial jury was compromised because of unrecorded bench conferences during which jurors were questioned and cause and peremptory challenges were discussed, denying meaningful review and effective assistance of counsel; (12) counsel was ineffective for failing to properly raise the issue on direct appeal that Johnson and counsel were not present when the court communicated with the jury regarding the jury's request to rehear testimony from trial; (13) counsel was ineffective because of the assistant attorney general's improper attacks on the credibility of appellate counsel; (14) counsel was ineffective for failing to properly raise the issue of the judge's and jury's consideration of nonstatutory aggravating factors; (15) counsel was ineffective for failing to properly raise a double jeopardy argument regarding the trial court's use of the death of the other victim -- for which Johnson had been acquitted of first-degree murder -- to support an

> aggravating factor as to Johnson's conviction of first-degree murder for the victim in the instant case; (16) the death sentence was unfair and unreliable because of the prosecutor's inflammatory argument to the jury at sentencing; (17) counsel was ineffective for failing to properly raise the sentencing court's refusal to find mitigating circumstances clearly set out in the record; (18) counsel was ineffective for failing to properly raise the issue that improper penalty-phase jury instructions shifted the burden to Johnson to prove death was inappropriate and an improper standard was employed in sentencing; (19) counsel was ineffective for failing to properly raise the impropriety of arguments and instructions to the sentencing jury which diluted their sense of responsibility for sentencing; (20) review on direct appeal was inadequate because the trial court's sentencing order failed to provide a reasoned judgment regarding the penalty; (21) the death sentence is invalid because the trial judge applied Florida's capital sentencing statute as if it required a mandatory death sentence; (22) the combination of excessive procedural and substantive errors at the trial and appellate proceedings cannot be harmless when viewed as a whole; and (23) counsel was ineffective for failing to properly raise the trial court's improper instruction of the jury as to the elements of robbery, which was the underlying felony supporting the felony murder charge.

Johnson v. Singletary, 695 So.2d 263, 264-65 (Fla. 1996). This Court held:

> All of Johnson's twenty-three claims are either procedurally barred -- because they were either already examined on the merits by this Court on direct appeal or in Johnson's 3.850 proceeding, or because they could have been but were not raised in any earlier proceeding -- or meritless. We therefore deny his petition.
>
> Claims 5 (ballistics), 6 (improper statements), and 21 (mandatory application of death penalty) were

> specifically considered by this Court on direct appeal and in the 3.850 motion appeal; thus those claims are procedurally barred even if couched in ineffective assistance language. (FN1)
>
> > FN1. Claim 5 (ballistics) was point 2 on direct appeal and claim 5 in the 3.850 proceeding. *Johnson v. State*, 442 So.2d at 195; *Johnson v. State*, 593 So.2d at 210. Claim 6 (improper statements) was point 5 on direct appeal and claim 7 in the 3.850 proceeding. Brief for Appellant at 48, *Johnson v. State*, 442 So.2d 193 (Fla. 1984); *Johnson v. State*, 593 So.2d at 208. Claim 21 (mandatory application of death penalty) was point 7 on direct appeal and claim 12 in the 3.850 proceeding. Brief for Appellant at 59, *Johnson v. State* 442 So.2d 193 (Fla.1984); *Johnson v. State*, 593 So.2d at 208.

Johnson v. Singletary, 695 So.2d at 264-65

Subsequently, Johnson filed a successive *Florida Rule of Criminal Procedure* 3.850 motion in February of 1997. The Circuit Court ultimately issued an order denying relief on June 16, 1999. In pertinent part, that order found that the motion was "both untimely and successive". (R283). The collateral proceeding trial court denied relief on the motion, and entered specific findings with respect to the various claims and sub-claims contained therein. Those specific findings are discussed herein as they relate to the trial court's denial of relief on Johnson's Rule 3.850 motion.

Notice of appeal was given on August 10, 1999, and the record was certified as complete and transmitted on December 17,

1999. A supplemental record was received on May 4, 2000. Johnson filed his *Initial Brief* on April 17, 2000.

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court properly denied relief without an evidentiary hearing on this successive, untimely motion. None of the claims contained in Johnson's brief provide a basis for relief as a matter of law, and, because that is true, there is no necessity for an evidentiary hearing. The issues about which Johnson complains are not only procedurally barred, but also meritless on their face. Summary denial was proper.

Johnson's request for "juror records" was properly denied as untimely and successive. Alternatively, because any substantive claim based on such records would be time-barred and procedurally barred under settled law, any error was, at most, harmless.

Johnson's claim of error based upon the trial court's refusal to allow him to interview the jurors who heard his case in 1980 is not only procedurally barred, but also foreclosed as a matter of law by binding precedent.

The "method of execution" claim contained in Johnson's brief is foreclosed by binding precedent, and is not a basis for relief.

The competency for execution claim is not ripe for consideration. Moreover, the "claim" contained in Johnson's brief is devoid of any allegation of fact which could supply a colorable basis for this claim.

<u>ARGUMENT</u>

I. SUMMARY DENIAL OF THE MOTION WAS PROPER

On pages 6-45 of his *Initial Brief*, Johnson argues that he was entitled to an evidentiary hearing on the claims contained in his successive and untimely *Florida Rule of Criminal Procedure* 3.850 motion. Despite the hyperbole of Johnson's brief, there is no basis for reversal because the collateral proceeding trial court properly denied relief without an evidentiary hearing on this untimely, successive motion. Johnson's specific claims are addressed below.

When the pretensions of Johnson's brief are stripped away, what remains is an argument that he should have been given an evidentiary hearing on his claims of ineffective assistance of counsel, newly discovered evidence, and alleged violations of *Brady v. Maryland*. *Initial Brief*, at 8. However, the collateral proceeding trial court dealt with each of those claims, and set out in its order why an evidentiary hearing was not required as to those claims.

The first of Johnson's claims is a "newly discovered

evidence" claim which relates to his waiver of his *Miranda* rights. The trial court denied relief on this claim, stating:

> Defendant's claim must be denied for two reasons demonstrating that this evidence is not newly discovered. First, it is clear that Defendant himself was present when he refused to sign the *Miranda* card. Evidence is only newly discovered if it was "unknown by the trial court, **by the party**, or by counsel at the time of trial." *Melendez v. State,* 718 So.2d 746, 747 (Fla. 1998) (quoting *Blanco v. State*, 702 So.2d 1250, 1251 (Fla. 1997). Thus, it is impossible to validly characterize this evidence as "newly discovered" when Defendant was personally aware of his initial refusal and all circumstances attendant to his interrogation.
>
> Second, the State again shows that this evidence was supplied to the defense during the normal course of discovery and that, even if was not provided, Defendant could have obtained it through a simple public records request using due diligence. In support, the State again submits the Hinshelwood letter which specifically refers to "*Miranda* card" as one of the items turned over to the defense during discovery and also attaches a copy of a *Miranda* card apparently signed by officer Peterson and indicating that Defendant refused to sign. (See attached Letter and Card).

(R 286-287. Those findings by the collateral proceeding trial court establish that Johnson's claim based upon the "*Miranda* Card" simply has no basis in fact. Not only was the evidence at issue demonstrated to have been turned over to Johnson's trial counsel, but it was also demonstrated that the "evidence" was not "newly discovered" within the meaning of *Jones* and the cases based upon it. There is no issue that is appropriate for evidentiary development because Johnson is not entitled to

relief as a matter of law. Because that is so, summary denial was proper, and the trial court's decision should not be disturbed.

Moreover, as the collateral proceeding trial court discussed at length, the record from Johnson's trial establishes that there was no violation of *Miranda*.[2] (R287-289). When all of the hyperbole is stripped away, Johnson's brief contains nothing more than his complaints about the trial court which, despite Johnson's best efforts to present them in an incorrect light, correctly disposed of issues that are procedurally barred and, alternatively, without merit.

Johnson's claim that the State withheld exculpatory evidence is addressed at pages 5-6 of the trial court's order denying relief. (R285-6). The trial court found as follows:

> Defendant first contends that never before seen police notes have been provided which contain eyewitness reports that two white males left the scene of the crime in a truck resembling the one owned by Defendant. He alleges the reports were "never before seen" because when first provided by the Orange County Sheriff's Department, the copy was illegible.
>
> The State claims that this information, irrespective of the Orange County Sheriff's failure to provided [sic] legible copies, was provided to the defense long ago by the prosecution during the normal course of

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[2] The *Miranda* claim, or at least a version of it, was rejected on appeal and in the prior Rule 3.850 proceeding. *Johnson v. State*, 593 So.2d at 208.

> discovery. In support of its claim, the State submits a Complaint Report of the crime showing that "Two W/M" (two white males) were suspected of committing the murders. (See attached Complaint Report). The State then submits a letter dated June 3, 1980 from Assistant State Attorney Bruce Hinshelwood to Assistant Public Defender Gerald W. Jones ("Hinshelwood Letter") in which Hinshelwood specifically states that the Complaint Report was included in various documents then supplied to the defense during the normal course of discovery. (See attached letter). Accordingly, the Court finds that these documents conclusively refute Defendant's claim in that they demonstrate, at the very least, that Defendant was notified pretrial that two white males were, at some point, suspected of committing the crime.
>
> Further, it is clear that Defendant has failed to show prejudice or materiality in regard to this claim. Even assuming counsel was unaware of this information, the mere fact that law enforcement may at one time have investigated a co-suspect falls well short of establishing a reasonable probability that the outcome of Defendant's case would have been different.

(R285-6).

To the extent that further discussion of the first claim contained in Johnson's brief is necessary, the trial court's findings about the sequence and timing of the *Miranda* warnings is dispositive of Johnson's claims because it establishes that there is no basis for the claims contained in Johnson's brief. The collateral proceeding trial court found:

> Additionally, the result in his case would have been no different had defense counsel been aware of the evidence because the record conclusively refutes Defendant's contention that his *Miranda* rights were violated. The transcript of the hearing held on

Defendant's motions to suppress shows that Defendant was arrested by Oregon law enforcement at approximately 10:00 P.M. on January 5, 1980 regarding a holdup at a filling station and a shooting of a police officer. Testimony was had from Chief of Police Richard Montee that Defendant was advised of his *Miranda* rights from a card at approximately 3:55 P.M. on January 6, 1980. Defendant signed that card. The following day, at 1:30 P.M., Defendant was again read his *Miranda* rights from a card that Defendant signed. After making an inculpatory statement, law enforcement made an audiotape of the statement including an oral advisement of Defendant's *Miranda* rights.

The record plainly shows that, irrespective of the 12:05 a.m. refusal, Defendant was advised of his *Miranda* rights and acknowledged them prior to making any inculpatory statements regarding the Orlando crime to Police Chief Montee. Thus, even assuming Defendant's allegations are true, failure to turn the refusal card over to the defense made no difference in the outcome of Defendant's trial because his statements to Montee would have been admissible in any event. In sum, no interrogation was made nor were any inculpatory statements obtained regarding the Orlando murder before Defendant received his *Miranda* warnings, signed a card indicating that he understood his rights, and waived those rights by offering a voluntary statement to Montee.

Defendant also made an inculpatory statement on February 7, 1980 to Officer Robert Peterson while Defendant was being transported for a psychiatric examination. Unrebutted testimony regarding this statement showed that it was made long after he had received and waived his *Miranda* rights, was volunteered spontaneously, and not upon interrogation. (Mot. To Suppress Hrg. at 71-76). Again, Defendant's initial refusal to sign the *Miranda* card on January 6, 1980 has no bearing whatsoever on this statement. Absent an express showing that Defendant's statements obtained by law enforcement would have been rendered inadmissible for failure to give *Miranda* warnings, Defendant cannot begin to show t hat this evidence, had it been known to counsel, would have produced a

> different result.
>
> Finally, Defendant's allegation also rests heavily on his assertion that he was never expressly informed that he could stop questioning at any time. "The right to cut off questioning is implicit in the litany of rights which *Miranda* requires to be given to a person being questioned. It is not, however, among those that must be specifically communicated to such a person." *Brown v State,* 565 So.2d 304, 306 (Fla. 1990). Thus Defendant's rights were in no way compromised by the failure to give this particular warning.

(R287-9).

Johnson also argues that the lower court erroneously found that the "statement" of the girlfriend of one of his victims that the victim would have resisted a robbery attempt was neither exculpatory nor "newly discovered evidence". The trial court found as follows:

> Defendant next claims that the sheriff's office has recently obtained evidence that the bar customer's girlfriend stated that the customer was the type of person who would have resisted a robbery attempt. Defendant claims that had this information been revealed, it would have supported Defendant's theory of exculpation at trial. While this evidence may have supported Defendant's theory of defense, it does not constitute "newly discovered evidence" under rule 3.850. The type of newly discovered evidence contemplated by rule 3.850 is that which would probably result in acquittal upon retrial. *See Melendez v. State,* 718 So.2d 746 (Fla. 1998). The victim's girlfriend's lay opinion, even assuming it would have been admissible, can hardly be deemed exculpatory to the extent that it would produce acquittal on retrial.

(R6). Those findings are consistent with the facts found by this

Court on direct appeal, when this Court stated:

> On December 4, 1979, Terrell Johnson went to Lola's Tavern in Orange County to redeem a pistol he had pawned to James Dodson, the bartender/owner of the tavern. Although Dodson had given Johnson fifty dollars when the gun was pawned, he demanded one hundred dollars to return it. Before paying for the gun, Johnson asked to be allowed to test fire it and took the gun to an open field across the road from the bar where he fired several shots. While returning to the bar, Johnson, irate at what he considered to be Dodson's unreasonable demand, decided to rob the tavern. Johnson told police that he took Dodson and a customer, Charles Himes, into the men's room at the end of the bar, intending to tie them up with electrical cord. **The customer lunged at Johnson and he began firing wildly, shooting both men.** He then returned to the bar and cleaned out the cash drawer, also taking Dodson's gun, which was kept under the bar. As he was wiping the bar surfaces to remove fingerprints, Johnson heard movement from the back room and returned to find the customer still alive. Johnson shot him again, not, according to Johnson, "to see him dead," but to "stop his suffering."

Johnson v. State, 442 So.2d at 194-95. (Emphasis added). Because this Court accepted the defendant's version of the events that occurred during the robbery, it makes no sense to allege that the testimony of Himes' girlfriend would have resulted in acquittal, especially in light of the fact that Johnson was convicted of second-degree murder for Himes' death. *Id.*

Moreover, Johnson has not explained how this testimony would be admissible evidence in the first place[3]. Section 90.404(1)(b)

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[3] Johnson describes Himes' reputation as one of "aggressive behavior" on page 42 of his *Initial Brief.* Even if that

provides narrow exceptions, none of which apply to this case, to the rule that evidence of a trait of character is not admissible to prove that the victim acted in conformity with such character trait. Even if the opinion of Himes' girlfriend that he would have resisted a robbery attempt is character evidence, it is not admissible under § 90.404 of the *Florida Statutes.*[4]

Johnson also argues that the 3.850 trial court should have considered his behavior on death row since his incarceration as "*Skipper* evidence". *Initial Brief*, at 43-45. Johnson does not explain, because he cannot, why evidence that by definition did not exist when he was sentenced to death should be considered as "one of a cumulative set of factors requiring an evidentiary hearing and relief from his death sentence." *Initial Brief*, at 44. While *Skipper* evidence would be admissible should Johnson ever receive a resentencing proceeding, it has nothing whatsoever to do with whether he is entitled to an evidentiary hearing or relief under Rule 3.850. To adopt the "theory"

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description is accurate, it has nothing to do with the facts of this case. Resisting an armed robbery is hardly inappropriate behavior, however ill-advised it may be.

[4] This evidence is nothing more than speculation -- while this Court accepted Johnson's version of the events, what he has labeled as newly discovered evidence is in fact no more than an inadmissible opinion about how a person might have acted in a particular situation.

advanced in Johnson's brief would be to adopt a rule that requires continual reopening of cases and endless review of sentences based upon any perceived behavioral manifestation exhibited by the defendant. Such a theory flies in the face of any notion of finality of cases, and, as advanced here, stands reason on its head. The rule 3.850 court should be affirmed in all respects.

II. THE JUROR RECORDS CLAIM

On pages 46-48 of his brief, Johnson argues that he is entitled to relief because the rule 3.850 trial court did not afford him an evidentiary hearing on his claim of a violation of Chapter 119 of the *Florida Statutes* with respect to his supplemental request for certain records relating to the jurors who tried his case in 1980. Because of the uniquely fact-driven nature of this claim, the trial court's ruling is set out below -- it should be affirmed in all respects.[5]

In denying relief on this claim, the Rule 3.850 trial court stated:

Defendant generally claims that he has been denied

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The over-arching basis for the trial court's denial of relief was that the motion was untimely under *Florida Rule of Criminal Procedure* 3.850 (b), and because the motion is successive under Rules 3.851(b)(5) and 3.850(f). Because the motion was properly denied on procedural grounds, the alternative grounds for denial are of diminished significance.

access to public records regarding jurors. Defendant's request or this information was filed on December 31, 1998, three days after a status hearing was held at which defense counsel expressly represented to the Court that there would be no more public records requests and after both parties agreed to the date a *Huff* hearing on Defendant's motion would be held. (See attached Tr. of 12/28/1998 Hrg.). It is therefore somewhat disingenuous for Defendant to claim his access to this information has been frustrated when his own late-filed request is much to blame.

It is equally apparent that a 3.850 motion is an improper vehicle for Defendant's complaint. The State correctly notes in its response that allowing such an allegation in a rule 3.850 motion would preclude ever reaching the merits of the motion because public records are normally a threshold matter. Defendant's allegations should have been brought by a motion to compel, motion to continue, or similar document in order to promote the resolution of public records <u>before</u> his motion was due.

Further, the State's citation to *Buenoano v. State,* 708 So.2d 941 (Fla. 1998) is most telling. There the Florida Supreme Court held that:

> [Defendant] has not alleged that through the exercise of due diligence she could not have made these requests within the time limits of rule 3.850. Accordingly, she is precluded from asserting that the trial court should have addressed her public records request prior to denying her third rule 3.850 motion.

Id. At 943. Similarly, there is nothing in Defendant's motion or in the record that indicates that Defendant could not have, through exercise of due diligence, requested the juror information before filing his first rule 3.850 motion. This is especially apparent in light of the fact that Defendant alleges no specific juror misconduct that has been disclosed since the denial of his first rule

> 3.850 motion. Thus, to the extent that Defendant seeks general juror information, that information could have been requested before his first motion was filed and may not now be heard.

(R283-4).

Those findings are correct, and should be affirmed in all respects.

As the trial court pointed out, there is no reason alleged that any claim of juror misconduct could not have been timely raised in Johnson's first Rule 3.850 motion. The substantive juror interview claim is not available to Johnson because it is not only time-barred but also procedurally barred because it was not raised in his first rule 3.850 motion, as the trial court found. (R293). *See, Thompson v. State,* 2000 WL 373757 (Fla. 2000); *Gaskin v. State,* 737 So.2d 509, 520 n. 6 (Fla. 1999). Because that is true, the Chapter 119 claim is, at most, a claim of harmless error that is not a basis for relief. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986). Johnson has demonstrated no basis for relief, and the trial court should be affirmed.

III. THE JUROR INTERVIEW CLAIM

On pages 49-52 of his brief, Johnson argues that he should be entitled to conduct interviews of the jurors who tried his case in 1980. The trial court denied relief on this claim, finding that it was untimely and procedurally barred because it

could have been raised, at the latest, in Johnson's 1986 Rule 3.850 motion. (R293). The trial court pointed out that Johnson has alleged no misconduct, and has not alleged why this claim was not raised in the prior Rule 3.850 proceeding. Moreover, the trial court found this claim foreclosed by settled law that was announced by this Court in its affirmance of the denial of the prior Rule 3.850 motion. *Johnson v. State*, 593 So.2d 206, 210 (Fla. 1992).[6] To the extent that further discussion of this claim is necessary, Johnson's claim is foreclosed by the decisions of this Court. *Kearse v. State*, SC90310 (Fla., June 29, 2000); *Thompson, supra; Gaskin, supra*. The trial court's denial of relief should be affirmed.

IV. THE METHOD OF EXECUTION CLAIM

On pages 52-54 of his brief, Johnson complains that Florida's change in method of execution in some way creates a basis for him to challenge that statutory change at a later date. This claim is foreclosed by binding precedent -- this Court has upheld the change in method of execution from electrocution to lethal injection, and has also decided a challenge to the competency of the State to carry out an

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[6] The circuit court had allowed Johnson to take the deposition of the foreman of his trial jury -- this Court held such testimony inadmissible. *Johnson v. State*, 592 So.2d at 210.

execution by lethal injection adversely to the defendant. *Sims v. State,* 754 So.2d 657 (Fla. 2000); *Bryan v. State,* 25 FLW S159 (February 22, 2000); *Provenzano v. State,* 25 FLW S408 (May 25, 2000). This claim has no legal basis.

To the extent that Johnson has included a "length of incarceration" claim on page 54 of his brief, that claim has been squarely rejected. *Knight v. Florida,* 120 S.Ct. 459 (1999); *Knight v. State,* 721 So.2d 287, 300 (Fla. 1998). There is no basis for relief, and the trial court should be affirmed in all respects.

V. THE COMPETENCY FOR EXECUTION CLAIM

On pages 54-55 of his brief, Johnson alleges that he is "insane to be executed". Johnson alleges no facts to support this claim, and, moreover, this claim is not ripe for consideration at this time. *See, Provenzano v. State,* 751 So.2d 37 (Fla. 1999); *see also, Thompson v. State, supra,* at n. 12. However, the State suggests that, if Johnson has evidence to support his claim of "insanity for execution" it should have been disclosed in his brief rather than being kept hidden for use at some later, more advantageous, time. This claim is not a basis for relief.

CONCLUSION

Based upon the foregoing arguments and authorities, the

State respectfully requests that this Court affirm the trial court's denial of relief in all respects.

Respectfully submitted,

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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 William M. Hennis, III, Assistant CCRC-South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, on this ______ day of July, 2000.

Of Counsel