IN THE SUPREME COURT OF FLORIDA

DAVID EUGENE JOHNSTON,

Petitioner,

v. **CASE NO. SC00-1024**

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax (904) 226-0457

COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT

This brief is typed in Courier New 12 point.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

RESPONSE TO PRELIMINARY STATEMENT

To the extent that the "preliminary statement" includes an averment of constitutional error, such claim is denied.

RESPONSE TO INTRODUCTION

The "introduction" to the petition sets out the basis for its dismissal. By Johnston's own admission, the petition seeks an inappropriate and unauthorized "re-examination" of an earlier appeal from the denial of relief under *Florida Rule of Criminal Procedure* 3.850. That claim, in turn, is based upon the claim, which this Court has squarely rejected, that *Stephens v. State*, 748 So.2d 1028 (Fla. 2000) supplies a basis for re-opening cases that were decided long ago.

RESPONSE TO PROCEDURAL HISTORY

The most recent appellate decision issued in this case was written by the Eleventh Circuit Court of Appeals, and was released on December 8, 1998. That Court summarized the procedural history of this case in the following way:

> We briefly summarize the facts underlying Johnston's conviction for capital murder: On November 5, 1983, at approximately 3:30 a.m., Johnston called the police department in Orlando, Florida, identified himself as Martin White, and advised a police officer that someone had killed his grandmother. Johnston also informed the police of the location where the murder had occurred. The police subsequently went to the address supplied by Johnston and found the dead body of eighty-four year old Mary Hammond. The body revealed evidence of multiple stab wounds and manual strangulation. The police arrested Johnston for Hammond's murder after noticing that his clothes were blood-stained, his face was scratched, and his statements

to the police were inconsistent. Other evidence presented at trial also linked Johnston to Hammond's murder: (a) Johnston worked at a demolition site nearby Hammond's home, and the police discovered several of Hammond's household belongings in a pillowcase of [sic] a front-end loader parked at the demolition area; (b) a watch that Johnston wore shortly before the murder was found covered with blood in Hammond's home and a pin that Johnston wore on the morning of the murder was found entangled in Hammond's hair; and (c) the police discovered a print matching Johnston's shoe outside the kitchen window of Hammond's house.

A jury convicted Johnston of Hammond's murder and recommended a death sentence. The trial court imposed a sentence of death after finding as aggravating factors that Johnston previously had been convicted of a violent felony; that this offense had been committed in the course of committing a burglary; and that the murder was especially heinous, atrocious, or cruel. The Florida Supreme Court affirmed the conviction and sentence, *Johnston v. State*, 497 So.2d 863 (Fla. 1986), and denied Johnston's subsequent state petitions for habeas corpus and for post-conviction relief under Florida Rule of Criminal Procedure 3.850. *Johnston v. Dugger*, 583 So.2d 657 (Fla.1991)[1].

Johnston next filed a petition for habeas corpus in federal district court. Johnston raised twenty issues in the petition; the district court denied the writ as to eighteen of these issues and ordered that the writ conditionally issue as to two remaining, related claims. Specifically, the court determined that, pursuant to the Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the trial court's instruction to the jury on the "heinous, atrocious, and cruel" aggravating factor was unconstitutionally vague and had been improperly considered by the jury. The court further found that, in addressing this claim in Johnston's state petitions for post-conviction relief, the Florida Supreme Court had failed explicitly to (1) articulate an independent and adequate state procedural ground for rejecting the claim, (2) apply a limiting construction and concomitant reweighing of the invalid jury instruction, or (3) perform a harmless error analysis with respect to the

---

[1] According to Johnston, this decision of this Court is the only one at issue in the current habeas petition. *Petition*, at 3.

jury's improper consideration of this factor. Noting that "only Florida courts can determine the proper approach to Petitioner's sentencing," R3-42 at 28, the court ordered that the writ conditionally issue

> 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.

Id.

Johnston moved to alter or amend the judgment with respect to those claims on which the district court had denied habeas relief; the court denied the motion and both Johnston and the state appealed the district court's judgment. We granted Johnston's application for a certificate of probable cause to appeal and, at the same time, granted respondent-Singletary's motion to hold the appeal in abeyance pending the Florida Supreme Court's disposition of the issues raised by the district court's conditional issuance of federal habeas relief. See R3-56. The Florida Supreme Court "reopened" the case based on the district court's directive and decided that (1) Johnston's challenge to the "heinous, atrocious, or cruel" jury instruction was procedurally barred and (2) even if the issue were not procedurally barred, the erroneous instruction would not have affected the jury's recommendation or the trial court's sentence. *Johnston v. Singletary*, 640 So.2d 1102, 1104 (Fla. 1994), (*Johnston I*), *cert. denied*, 513 U.S. 1195, 115 S.Ct. 1262, 131 L.Ed.2d 141 (1995). The district court subsequently evaluated the Florida Supreme Court's decision and denied federal habeas relief as to all claims. Johnston's appeal to this court proceeded and Singletary's appeal was dismissed. In the meantime, Johnston had filed in state court another motion for post-conviction relief as well as a petition for habeas corpus; the Florida Supreme Court denied both the motion and the petition. *Johnston v. Singletary*, 708 So.2d 590 (Fla. 1998) (*Johnston II*). (FN2) Johnston's only remaining claims for collateral relief, therefore, are contained in the instant federal habeas petition. (FN3)

FN2. We note that the procedural history in this case

> is somewhat more complex than our brief overview indicates; in the interest of clarity, however, we have summarized only those portions of the procedural background that remain relevant to Johnston's appeal.
>
> FN3. The following claims for relief are without merit and do not warrant further discussion: (1) Lack of exhaustion of state remedies; (2) unconstitutional reliance on the "heinous, atrocious, or cruel" instruction as a permissible aggravating circumstance; (3) Johnston's waiver of his *Miranda* rights was unknowing and involuntary; (4) trial counsel was ineffective for stipulating to Johnston's identity with respect to a prior offense; and (5) improper admission into evidence of prior convictions for making a terroristic threat and committing battery on a police officer.

Johnston v. Singletary, 162 F.3d 630, 632-34 (11th Cir. 1998). Johnston's petition for rehearing was denied on May 26, 1999. *Johnston v. Singletary*, 182 F.3d 938 (11th Cir. 1999). The United States Supreme Court denied Johnston's petition for writ of certiorari on October 4, 1999. *Johnston v. Singletary,* 513 U.S. 1195, 115 S.Ct. 1262, 131 L.Ed.2d 141 (1995).

When the claims contained in the instant petition were last before this Court, all relief was denied in an opinion that stated:

> Johnston makes other claims of ineffectiveness of trial counsel. He asserts that counsel failed to investigate his alcohol and drug abuse and his abnormal mental condition which rendered him incapable of forming the requisite specific intent. He maintains that their failure to pursue insanity, voluntary intoxication, or diminished capacity defenses was ineffective. According to the hearing testimony, counsel felt that the defense of reasonable doubt/identity was more plausible than the defenses of insanity, voluntary intoxication, or diminished capacity. The evidence substantially contradicted the latter three defenses. Items stolen from the victim's apartment were

secreted on a nearby construction site where defendant had worked. Defendant reported the finding of the victim's body. He made statements to the police and sent a bogus confession from another person in an attempt to focus police investigation on some other unidentified suspect. Johnston consistently maintained that someone else committed the crime. Additionally, counsel was faced with the findings of two court-appointed experts who determined that Johnston was competent. Johnston refused to cooperate with a third expert or to allow the presentation of an insanity defense because he feared placement in a mental hospital. He thought he would be acquitted. Furthermore, in order to present these defenses, evidence would have had to be presented in the defendant's case, and counsel felt that the tactical advantage of having opening and closing arguments would be more beneficial. We agree with the court below that the decision not to pursue those defenses was reasonable trial strategy and not ineffective. *See Thompson v. Wainwright*, 784 F.2d 1103 (11th Cir. 1986) (counsel not ineffective regarding investigation of insanity defense where counsel arranged for two psychiatric evaluations of defendant, one psychiatrist found defendant competent, and defendant failed to cooperate with the other).

Johnston also contends that counsel failed to investigate and present mitigating evidence of his mental health problems and his abused childhood in the penalty phase of trial. This claim is without merit. At the outset, it should be noted that Johnston's trial attorney testified at the rule 3.850 hearing that Johnston's family was unwilling to assist Johnston at the time of the trial. Notwithstanding, Johnston's stepmother testified during the penalty phase about Johnston's history of mental problems and his low intellectual functioning and that he was the product of a broken home; that his mother neglected, rejected, and abused him; and that his father physically abused him. She also testified that his father's death when Johnston was eighteen greatly affected him. In addition, Ken Cotter, Johnston's former attorney, testified that Johnston had tremendous mood swings, would say things that did not make sense, and received a social security disability check which Cotter distributed to him from an escrow account because Johnston was unable to administer the money. The court charged the jury on the two statutory mental health mitigating factors and trial counsel argued them to the jury. Defense counsel obtained the appointment of a third mental health expert, whom they hoped to use in the penalty phase, but Johnston refused to cooperate with

> the expert. Counsel did not introduce Johnston's Louisiana hospital records in the penalty phase. However, we find that decision to be reasonable trial strategy given the negative aspect of the records. They contain numerous references to Johnston's arrests and convictions; his suicidal, homicidal, and abnormal sexual tendencies; his combative, threatening, and antisocial acts; past drug and alcohol abuse; and his dangerousness. Given these facts, counsel's performance was reasonable and not ineffective.

Johnston v. Dugger, 583 So.2d 657, 661-62 (Fla. 1991). Those findings of fact and conclusions of law by this Court are inconsistent with Johnston's claim that this Court "improperly reviewed" his ineffective assistance of counsel claims. There was no error, and, hence, there is no basis for relief.

RESPONSE TO STATEMENT OF JURISDICTION

While this Court has jurisdiction over original petitions for writs of habeas corpus in capital cases, this petition is not properly brought, and should be dismissed with prejudice.

RESPONSE TO GROUNDS FOR RELIEF

On pages 3-50 of the habeas petition, Johnston argues that he received ineffective assistance of counsel at the penalty phase of his capital trial, and that this Court did not "adequately" review that claim in his 1991 *Florida Rule of Criminal Procedure* 3.850 appeal.[2] For the reasons set out below, Johnston's petition for habeas corpus relief should be denied in all respects.

The fundamental reason that this Court should deny the

[2] This claim purports to be based upon this Court's decision in *Stephens v. State,* 748 So.2d 1028 (Fla. 2000).

petition is that *Stephens v. State* does not stand for the proposition that this Court is somehow compelled to reopen this case. The true facts are to the contrary -- this Court has decided the claim advanced by Johnston adversely to him, and there has been no attempt to suggest why those decisions should be reconsidered. *See, Sims v. State*, 754 So.2d 657 (Fla. 2000) (rejecting claim identical to the one raised by Johnston); *Bryan v. State*, 753 So.2d 1244 (Fla. 2000) (same).[3] There is no basis for re-opening a case that was decided nine years ago, and the petition should be dismissed.[4]

In addition to having no legal basis, Johnston's habeas petition is procedurally barred because the claim of ineffective assistance of penalty phase counsel has already been rejected by this Court in the previous appeals from denial of Rule 3.850 relief. That is a procedural bar under settled law. *See, Johnson v. State*, 695 So.2d 263, 265 (Fla. 1996); *see also, Thompson v. State* 2000 WL 373757 (Fla. 2000); *State v. Riechmann,* 25

---

[3] *Sims* and *Bryan* were both decided well before Johnston filed this habeas petition. Neither case is acknowledged therein, even though they are direct authority against Johnston's position.

[4] Johnston's reference to *Williams v. Taylor*, 120 S.Ct. 1495 (2000)(for which he never provides a citation to the reported opinion) is misleading. That case was concerned with the interpretation of a provision of the Anti-terrorism and Effective Death Penalty Act which has no application at all to this case, or, for that matter, to this Court.

Fla.L.Weekly S163 (Fla. 2000); *Teffeteller v. Dugger* 24 Fla.L.Weekly S110 (Fla. 1999); *Parker v. Dugger,* 550 So.2d 459, 460 (Fla. 1989).

Moreover, this petition represents an improper attempt to reopen a Rule 3.850 appeal that was decided long ago by this Court through the guise of a petition for habeas corpus. There is no authority for such a procedure, and, in the context of this case, there is no justification for creating it. This petition is no more than an attempt to obtain a second bite at the apple -- habeas does not serve that function. In any event, a review of this Court's disposition of the ineffective assistance of counsel claims demonstrates that there was no error. *See,* pages 4-6, above.

Finally, Johnston has omitted the fact that the Eleventh Circuit Court of Appeals has also reviewed Johnston's claims of ineffectiveness of penalty phase counsel, and decided the issue adversely to him. *Johnston v. Singletary,* 162 F.3d at 639-643. There is no basis for habeas relief, and the petition should be denied in all respects.[5]

To the extent that further discussion of any of the claims and averments contained in Johnston's petition is necessary, and without waiving the various procedural bar defenses, the linchpin

[5] To the extent that the petition may include ineffective assistance of counsel claims that have never been presented to the Court, such claims are procedurally barred.

of Johnston’s argument, or, in his words, the “gravest error” of the trial court, is based in Johnston’s effort to confuse “nonstatutory aggravation” with the strategic decisions of trial counsel not to place unfavorable (damaging) information before the penalty phase jury. See pages 4-6, above. Under Johnsotn’s theory, any evidence of mitigation **must** be placed before the jury regardless of whether **unfavorable** information is contained within the same evidence. Because a jury is presumed to follow its instructions, or so the argument goes, such evidence must be presented or, otherwise, counsel is constitutionally ineffective.

The shortcoming in Johnston’s argument is that it is contrary to well-settled law, as well as being contrary to common sense. Decisions as to matters of trial strategy are the most fundamental example of decisions that should not be second-guessed years after the fact:

> Writing for this Court more than a decade ago, Judge Vance observed that in regard to strategy decisions, trial counsel's "position in reaching these conclusions is strikingly more advantageous than that of a federal habeas court in speculating post hoc about his conclusions." *Stanley v. Zant*, 697 F.2d 955, 970 (11th Cir. 1983), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984). He explained that counsel's knowledge of local attitudes, and "evaluation of the particular jury, his sense of the 'chemistry' of the courtroom are just a few of the elusive, intangible factors that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions." *Id.* Judge Vance's reasoning was vindicated when the Supreme Court, one year later, instructed us: that "counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment,"

> *Strickland v. Washington,* 466 U.S. at 690, 104 S.Ct. at 2066; that only acts or omissions "outside the wide range of professionally competent assistance" are deficient for ineffective assistance purposes, *id.*; that our scrutiny of counsel's performance should be "highly deferential," *id.* at 689, 104 S.Ct. at 2065; and, that counsel's strategic choices are "virtually unchallengeable," *id.* at 690, 104 S.Ct. at 2066. All of those directions warrant a holding that use of the "spare him for science" argument in this case did not constitute deficient performance.

Waters v. Thomas, 46 F.3d 1506, 1521-22 (11th Cir. 1995). The courts have long declined to establish a "checklist of required mitigating evidence", for the obvious reason that such would be squarely contrary to *Strickland v. Washington*. *See, Evans v. Cabana,* 821 F.2d 1065, 0171 (5th Cir. 1987); *Chandler v. United States,* 2000 WL 1010248 (11th Cir., July 21, 2000). The ultimate question in an ineffective assistance of counsel claim is whether "some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial...". *Waters v. Thomas, supra,* at 1512. When that standard is applied to the facts of this case, Johnston is not entitled to any relief on the ineffective assistance of counsel claim that he has attempted to resurrect in this habeas petition. All relief should be denied.

CONCLUSION

Johnston's petition for habeas relief is based on an invalid legal premise and should be dismissed for that reason. *Stephens* does not supply a basis for reopening the rule 3.850 appeal that was decided by this Court in 1991, especially when the result of

that proceeding was upheld by the Eleventh Circuit Court of Appeals on review of the denial of federal habeas relief. The petition represents an improper use of the writ of habeas corpus.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax (904) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Bret B. Strand, Assistant CCRC-Northern Region, Office of Capital Collateral, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, on this _____ day of August, 2000.

Of Counsel