SUPREME COURT OF FLORIDA

PAUL BEASLEY JOHNSON

Petitioner,

v. CASE NO. SC01-2182

MICHAEL W. MOORE

Secretary,
Florida Department of Corrections
Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, Michael W. Moore, by and through the undersigned counsel and hereby files its response in opposition to the Petition for Writ of Habeas Corpus. Respondent would show unto the Court as follows:

STATEMENT OF THE CASE

Procedural History

In 1981 a jury convicted Johnson of three counts of first-degree murder, two counts of robbery, kidnapping, arson, and two counts of attempted first-degree murder. The trial court sentenced him to death, and this Court affirmed the convictions and sentences. Johnson v. State, 438 So. 2d 774 (Fla.1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984). Johnson petitioned this Court for writ of habeas corpus and was granted a new trial based on his claim of ineffective assistance of

appellate counsel for not challenging the trial court's allowing his jury to separate after it began deliberating his guilt or innocence. Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986), cert. denied, 481 U.S. 1016 (1987). During Johnson's retrial in Polk County in October 1987, the judge granted Johnson's motion for mistrial based on juror misconduct. Johnson's motions to disqualify the trial judge and for a change of venue was granted and the case then proceeded to trial in Alachua County in April 1988 with a retired judge assigned to hear it.

The jury rejected Johnson's insanity defense and found him guilty as charged of three counts of first-degree murder, two counts of armed robbery, kidnapping, arson, and two counts of attempted first-degree murder. After a penalty phase hearing, the jury recommended that he be sentenced to death for each of the murders. The trial court agreed with that recommendation and imposed three death sentences.

Johnson then took an appeal to this Court raising the following claims:

ISSUE I

THE TRIAL COURT ERRED BY STRIKING PROSPECTIVE JURORS DANIELS AND BLAKELY FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO HAVE INDIVIDUAL VOIR DIRE OF PROSPECTIVE JURORS WHO ADMITTED TO HAVING READ

PREJUDICIAL PRETRIAL PUBLICITY.

ISSUE III

APPELLANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S REPEATED INTERJECTIONS AND REBUKES OF DEFENSE COUNSEL BEFORE THE JURY.

ISSUE IV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS WHICH WERE OBTAINED BY JAILHOUSE INFORMANT JAMES LEON SMITH IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

ISSUE V

THE TRIAL COURT ERRED BY ALLOWING STATE WITNESS JAMES SMITH TO TESTIFY ABOUT JOHNSON'S SPECULATION IF AN INSANITY DEFENSE WAS ACCEPTED BY THE JURY.

ISSUE VI

THE TRIAL COURT ERRED BY SUSTAINING THE STATE'S OBJECTION TO APPELLANT'S EXAMINATION OF ROY GALLEMORE IN REGARD TO HIS RECOMMENDATION CONTAINED IN THE PRE-SENTENCE INVESTIGATION OF INFORMANT AND KEY STATE WITNESS JAMES SMITH.

ISSUE VII

THE TRIAL COURT ERRED BY NOT PERMITTING TESTIMONY FROM DEFENSE WITNESS DWIGHT DONAHUE UNLESS APPELLANT WAIVED HIS ATTORNEY-CLIENT PRIVILEGE AND PROVIDED THE STATE WITH DISCOVERY OF PRIVILEGED COMMUNICATIONS.

ISSUE VIII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON THE LIMITED USE OF COLLATERAL CRIME EVIDENCE.

ISSUE IX

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE JOHNSON'S PRIOR CRIMINAL RECORD WHILE CROSS-EXAMINING DEFENSE WITNESSES BECAUSE UNDER THE CIRCUMSTANCES IT HAD NO PROPER RELEVANCE AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR.

ISSUE X

THE TRIAL COURT ERRED BY REFUSING TO ADMIT APPELLANT'S PROFFERED ALLOCUTION INTO EVIDENCE BEFORE THE PENALTY JURY.

ISSUE XI

THE SENTENCING JUDGE ERRONEOUSLY WEIGHED IMPROPER AGGRAVATING CIRCUMSTANCES AND FAILED TO WEIGH ESTABLISHED MITIGATING CIRCUMSTANCES.

ISSUE XII

APPELLANT WAS DENIED HIS RIGHT TO PREPARATION OF THE ENTIRE RECORD OF THE CONVICTION AND SENTENCE FOR REVIEW BY THIS COURT.

This appeal was denied. Johnson v. State, 608 So. 2d 4, 6 (Fla. 1992). A subsequent petition for writ of certiorari was also denied. Johnson v. Florida, 508 U.S. 919 (1993).

Johnson filed a Rule 3.850 motion to vacate on August 1, 1994 in Alachua County. After the case was transferred to Polk County, an evidentiary hearing was held on March 3-5, 1997. Relief was subsequently denied on March 19, 1997 and an appeal was taken to this Court. (PC-R-R.919-935) Relief was denied on July 13, 2000. A motion for rehearing was denied on October 11, 2000.

STATEMENT OF FACTS

A. Trial

In the opinion affirming Johnson's original conviction and sentence, this Court set forth the salient facts as follows:

> The following evidence was presented at the new trial. The evening of January 8, 1981 Johnson and his wife visited their friends Shayne and Ricky Carter. During the evening they all took injections of crystal methedrine and smoked marijuana. Johnson left the Carters' home later in the evening, and Ricky testified that Johnson said he was going to get more drugs and that he might steal something or rob something. Shayne testified that Johnson said that he was going to get money for more drugs and that "if he had to shoot someone, he would have to shoot someone."
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> A taxicab company dispatcher testified that driver William Evans went to pick up a fare at 11:15 p.m. on January 8 and called in to confirm the fare fifteen minutes later. Around 11:55 p.m. a stranger's voice came over the radio. Among other things, the stranger said that Evans had been knocked out. He stayed in touch with the dispatcher off and on until about 2:00 a.m. The dispatcher did not hear Evans after 11:30 p.m., and workers in an orange grove found Evans' body on January 14. Evans had been robbed and shot twice in the face. Searchers found his taxicab, which had been set on fire, in an orange grove about a mile from Evans' body.
>
> When she got off work in the early hours of January 9, 1981, Amy Reid and her friend Ray Beasley went to a restaurant for breakfast. Johnson approached them in the parking lot and asked for a ride, claiming that his car had broken down. Beasley agreed to drive Johnson to a friend's house. During the drive, Johnson asked Beasley to stop the car so that he could urinate. While out of

the car, Johnson asked Beasley to come to the rear of the car. When Reid looked back, she saw Johnson holding a handgun pointed at Beasley. She then locked the car's doors, moved to the driver's seat, and drove away to look for help.

Reid telephoned the sheriff's department from a convenience store, and deputies Clifford Darrington and Samuel Allison responded to her call around 3:45 a.m. The deputies drove Reid back to where she had left Johnson and Beasley, but found no one there. Back in the patrol car they heard a radio call from another deputy, Theron Burnham, advising that he had seen a possible suspect on the road. When they arrived at Burnham's location, they found his patrol car parked with the motor running, the lights on, and a door open, but could not see Burnham. Johnson, however, walked in front of their car, spoke to them, and then began firing at them with a handgun. The deputies returned Johnson's shots, and he ran across a field and disappeared among some trees. Allison then found Burnham's body in a roadside drainage ditch. He had been shot three times, and his service revolver was missing.

Later that day, Beasley's body was found seven-tenths of a mile from where Burnham was killed. He had been shot once in the head, and his body was in a weedy area and could not be seen from the road. Although there were some coins in his pockets, his wallet was gone.

The following afternoon Johnson's wife was still at the Carters' home. They saw a police sketch of the suspect in the night's events in a newspaper and discussed whether it looked like Johnson. Johnson telephoned the Carters' home, and, after speaking with him, his wife became very upset. Ricky Carter asked Johnson if he had done the killings reported in the newspaper, and Johnson replied: "If that's what it says." Carter went to pick up Johnson, taking a shirt that

Johnson changed into. Johnson threw the shirt he had been wearing, which had been described in the newspaper, out the car's window. While driving home, Carter heard Johnson's wife ask, "You killed him, too?" to which Johnson replied, "I guess so." At the Carters' home Johnson told them that he hit the deputy with his handgun when told to place his hands on the patrol car and then struggled with him, during and after which he shot the deputy three times.

The authorities arrested Johnson for the Beasley and Burnham murders on January 10 and charged him with Evans' murder the following week. Reid, Allison, and Darrington identified him, and his fingerprints were found in Evans' taxicab.

While Johnson was in jail awaiting trial, inmate James Leon Smith was in a cell near him. At trial Smith testified that Johnson told him that he killed a taxicab driver and set the taxicab on fire to destroy his fingerprints, that he shot Beasley while Beasley was on his knees and stole one hundred dollars from Beasley, and that he shot the deputy.

Johnson's defense was that, at the time of these killings, he was insane because of his drug use. To this end he presented numerous witnesses, including a pharmacologist, who testified about the effects of amphetamines on the human nervous system, and several acquaintances, who testified about his drug use. Thomas McClane, a psychiatrist, examined Johnson in 1987 and testified that, at the time of these crimes, Johnson was so intoxicated by drugs that he was suffering from an amphetamine psychosis which rendered him temporarily insane. Another psychiatrist, Walter Afield, examined Johnson in both 1981 and 1987 and opined that Johnson suffered from a toxic psychosis that made him insane. On cross-examination, however, Afield acknowledged that he relied only on Johnson's statements regarding his

> drug use and that someone can be psychotic but still know right from wrong and still know what he or she is doing.
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> Two psychiatrists testified in rebuttal for the prosecution. In Gary Ainsworth's opinion Johnson was not insane when he committed these crimes. Johnson had been committed to a psychiatric unit because of drug abuse in 1980, and Ainsworth testified that Johnson was not as intoxicated when he committed the instant crimes as he was during the 1980 episode. Robert Coffer's opinion was similar, and he found significant differences between the 1980 incident and these crimes. He testified that, although intoxicated, Johnson did not have a toxic psychosis and was sane while committing these crimes on January 8 and 9, 1981.
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> After hearing all of the evidence, the jury rejected Johnson's insanity defense and found him guilty as charged of three counts of first-degree murder, two counts of armed robbery, kidnapping, arson, and two counts of attempted first-degree murder.
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> In the penalty phase Johnson presented testimony from his aunt and two uncles and from three of the psychiatrists who testified during the guilt phase. The jury recommended that he be sentenced to death for each of the murders. The trial court agreed with that recommendation and imposed three death sentences.
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> Johnson v. State, 608 So. 2d 4, 6-8 (Fla. 1992)

B. Collateral Proceedings

On August 1, 1994 petitioner filed his initial 3.850 in Alachua County. After the case was transferred to Polk County a series of evidentiary hearings were held on petitioner's public records claims: April 15, 1996(Supp.PC-R1:42-54); May 31, 1996

(Supp.PC-R1:74); July 17, 1996(Supp.PC-R2: 152-57, 177, 183); January 9, 1997(Supp.PC-R3: 236)

An evidentiary hearing was held on Johnson's 3.850 Motion on March 3-5, 1997. Johnson's former defense attorney, Robert Norgard testified at the hearing concerning his representation of Johnson in his second and third trials. (PC-R-T8: 10-11) He was not involved in the 1981 trial. He was assisted in the presentation of the case by Attorney Larry Shearer. Shearer was the lead attorney on the case. He and Mr. Shearer divided up responsibilities regarding representation of Johnson. Shearer was the one who was responsible for the preparation of mental health experts. They filed a motion to suppress statements made by Johnson to James Leon Smith as well as to another inmate by the name of Larry Brockelbank. Norgard notes that this issue was dealt with on the 1983 direct appeal, was affirmed and there was no relief granted on this particular issue. evidence. [Johnson v. State, 438 So. 2d 774, 776 (Fla. 1983).] Nevertheless, they renewed the motion when he had been granted a new trial and it was denied. (PC-R-T8: 18)

Accordingly, Smith testified as to statements made by Mr. Johnson regarding the incident involving the cab driver, Mr. Beasley and the trooper. Smith also said that Johnson had told him something to the effect of he was going to act crazy in order to beat the charges. (PC-R-T8: 23) Norgard conceded that as far as he knows Smith's story has been maintained from day one until now that

he was not working as an agent for law enforcement and that the statements were statements he obtained from Mr. Johnson. Smith said that in the 1981 trial, at the suppression hearing before the 1981 trial, at depositions in preparation for the 1981 trial, at the 1987 trial and at the 1988 trial and at the suppression hearings and depositions taken in preparation for the 1987 and 1988 trials. (PC-R-T8: 31-33) The only evidence he had that contradicted Smith was circumstantial evidence which was used to impeach his testimony at trial and was presented to the court in the suppression hearings. (PC-R-T8: 33) In fact, in the 1987 mistrial and the 1988 trial he was able to raise during cross-examination that Smith had gotten some assistance in regard to a custody dispute with his children. (PC-R-T8: 34) He also was able to present evidence that Smith had gotten some benefit that occurred before the 1988 trial in terms of his own sentencing. He conceded that they always looked very closely at the situation involving jailhouse informants and what access they have to information from other sources than the client, so Norgard was aware that he had seen the reports that related at the 1988 trial as well as before then. (PC-R-T8: 35) He also conceded that he has not seen any documents to date that were not provided to him in preparation for the 1988 trial. (PC-R-T8: 36)

Norgard testified that they decided to use an insanity defense in 1987/88 because the reasonable doubt defense used in 1981 was

unsuccessful. As there was evidence that indicated he may have possibly been insane at the time of the offense, they went with the insanity defense, instead. It was supported by earlier examinations of the doctors in preparation for the 1981 trial and was further developed in preparation for the re-trial. They had Dr. Afield, Dr. McClain and Dr. Muther. (PC-R-T8: 37) He had several trials where he had investigated the possibility of using the defense but had actually used it in two trials prior to Johnson. His experience with using the insanity defense is that the jurors just generally do not like the insanity defense. (PC-R-T8: 38-40)

Tactically, they decided that there were going to be negative things coming out from Smith. They felt that regardless of what tactics they took on cross-examination, Smith was going to say things damaging to Johnson's case. Nevertheless, they felt that there were certain items of evidence he could testify to that would have been supportive of the insanity defense. Accordingly, even though they knew that if they got into those statements Johnson's other statements about faking being crazy would be admitted, they knew they had to take the bad with the good in order to get the good in terms of their case. (PC-R-T8: 41)

Norgard deferred to Shearer as to their position on the intoxication defense. (PC-R-T8: 42) His experience with intoxication as a defense is similar to insanity except that it is

even harder for juries to understand when it is based on voluntary drug use versus something such as paranoid schizophrenia or some other mental illness of that nature. (PC-R-T8: 43)

Lawrence Shearer was called as the next witness. (PC-R-T8: 45) He represented Johnson in 1981, 1987 and 1988. There were different attorneys assisting him; in the 1988 period was Assistant Public Defender Robert Norgard, but Shearer was always the lead attorney. (PC-R-T8: 46) Shearer was responsible for the preparation of the mental health experts as well as the family members. (PC-R-T8: 47)

In 1988 he had tried approximately twenty-five first degree murder cases, probably as many as thirty. There were twelve to fifteen penalty phases, so he had considerable experience even at that point in time with phase two preparation. His experience in the 1981 trial had a big impact on the preparations for the 1988 trial. (PC-R-T9: 113) In the 1981 trial guilt-innocence phase the defense presented a defense of reasonable doubt attacking the State's ability to prove that Johnson was the perpetrator in each of the nine charges. The defense was unsuccessful, that was one lesson he learned. The second lesson is that in the penalty phase, five out of the twelve jurors were persuaded by the mental mitigation to vote for a life sentence. That gave them an indication that the jury might appreciate the mental evidence. (PC-R-T9: 114) As a result in 1987 and 1988, they filed a notice of

intent to rely on the defense of insanity which was not done in 1981 and ask the court to appoint a committee of experts to examine Johnson for purposes of the insanity defense. In 1988 he also had the benefit of the appellate rulings from the 1981 proceedings plus additional years' experience. (PC-R-T9: 116)

Shearer explained his concerns regarding Smith's testimony and the challenges they made to Smith's credibility. (PC-R-T9: 52) He added that in 1981, the State's information was the same as what Smith was reporting at deposition, to wit that Smith had a coincidental contact with Johnson in jail during which time Johnson allegedly made some incriminating responses. He remembered that the evidence showed that Smith had made contact with a Sheriff's detective that he knew by the name of Ben Wilkerson to report this information and that Det. Wilkerson thereupon informed him to collect any such additional information that Johnson might report to him during their contact and that this was all done from that point on with the Sheriff's Department becoming informed as far as what information was obtained. As far as the State Attorney was concerned, there was no purposeful movement of Smith to the cell next to Johnson. The State only had information which was what Smith and the Sheriff's Department were reporting to the effect that it was coincidental that Sheriff jail personnel placed Smith in an adjacent cell to Johnson. (PC-R-T9: 53) The State reported as far as any promises or rewards, that none had been made in the

early stages to Smith; subsequently the only thing that had been told to Smith is that it would be made known to the Court and Probation and Parole authorities the fact of his cooperation but that no definitive promises of any specific gains or rewards were made to him other than that. (PC-R-T9: 54) Assistant State Attorney Hardy Pickard sent him a letter in 1981 stating that the only promises to Smith for the favorable information was "I have told him his cooperation would be made known to Parole Commission." (PC-R-T9: 55) With regard to Johnson's claim that he was ineffective for opening the door to Smith testifying about Johnson saying he would act crazy, Shearer testified that although Judge McDonald had ruled that it would not necessarily be admissible unless the defense opened the door, they had a strategic reason for opening the door. (PC-R-T9: 63) He said that they opened the door in order to obtain all the portions of Smith's account of Johnson's testimony about the killing. (PC-R-T9: 64) Further, they were able to cross-examine Smith about the access he had to Johnson's legal papers. Shearer testified that Johnson denied ever making those statements to Smith and said that James Leon Smith was a liar. Johnson told Shearer that he had given Smith access to legal papers, police reports, etc. and asked him to help him read them. (PC-R-T9: 111) Shearer noted that Smith admitted during his deposition that Johnson had shown him the papers. (PC-R-T9: 66) Smith denied using Johnson's legal papers as a source for his

report. They did not have any information that the State was supplying this information.(PC-R-T9: 67) He had no other evidence to support a belief or theory that he had used these notes for the purpose of fabricating information. The motions to suppress filed in 1981 and 1988 were both denied and he was unable to develop any facts to support his suspicions as to what may have happened. (PC-R-T9: 112)

Shearer's recollection of the preparation for the penalty phase is that he called two or three family members. There was an aunt and an uncle and there was a third individual by the name of Ward. (PC-R-T9: 73) Shearer denied Johnson's position that there was no effort to locate people other than the three who testified. (PC-R-T9: 104) He did not call Johnson's mother, Jane Cormier, to testify because he couldn't find her. (PC-R-T9: 73) He made a request of the investigators to try to develop information on her location. They asked Johnson what information he had, but they were unable to find her. (PC-R-T9: 74) He remembers time to time asking the investigators if they had any luck locating Johnson's mother or father. What additional efforts were made he couldn't say, but he knows that other efforts were requested. There would have been no reason for not pursuing trying to develop information from Johnson's mother. (PC-R-T9: 76) He did not believe they ever attempted to get Johnson's father's mental health history, but they were able to present Johnson's father's alcoholism and abusiveness

through other witnesses. However, at least one of the relatives downplayed that Ommer was a violent person (PC-R-T9: 106) (PC-R-T9: 80) In short, he was simply unable to track down any other people and went with what he had. (PC-R-T9: 105) The evidence they produced at trial showed that Johnson had been abandoned at an early age by his father and his mother and basically, they were no parents to him at all. Shearer noted that any bad acts committed by Johnson's parents after they had abandoned Johnson, would not have been relevant except in a genetic way. (PC-R-T9: 108) Accordingly, they presented evidence about the custodial grandparent's alcoholism. (PC-R-T9: 109)

Shearer recalled that during the guilt-innocence phase of the trial the defense called Dr. Thomas McClain, a psychiatrist, Dr. Walter Afield, a psychiatrist, Dr. Thomas Muther, a professor of toxicology. During the penalty phase the defense call Dr. McClain and Dr. Afield as expert witnesses in psychiatry. In the penalty phase, they also called Dr. Ainsworth, a psychiatrist who testified for the prosecution during the guilt-innocence phase (PC-R-T9: 87)

With regard to Johnson's assertion that counsel should have presented an intoxication defense, Shearer testified that he did not recall the specific reasons for not pursuing the defense, but they had considered that possibility during trial preparation. (PC-R-T9: 89) One of the considerations he had was although an insanity defense can be presented without having the defendant

testify, the defendant usually needs to testify to carry out the voluntary intoxication defense and they had decided not to put Mr. Johnson on the stand. (PC-R-T9: 101) Shearer further reasoned that an intoxication defense is more difficult to pull off in front of the jury than the insanity defense because intoxication and insanity actually look at different issues of the mental state, and even though it may have been founded upon the same factual basis as an intoxication causing mental state, intoxication deals with a person's capacity to make a specific intent. (PC-R-T9: 102)

As for the failure to make certain objections during the closing arguments, Shearer testified that generally there are always strategic or tactical decisions to be made somewhere along the line and depending on the egregiousness of the improper prosecutorial argument, he may have decided that he should not object. (PC-R-T9: 92, 100)

As far as his motion to record all proceedings, it was granted. Further, since he was not the appellate lawyer, he never read the whole transcript and, therefore, he is probably not in the best position to say if there was something omitted. (PC-R-T9: 100)

The next witness presented by Johnson was Joan Carol Soileau. She is a nurse who lived with Paul Beasley Johnson in California in 1978. At that time he was a hard worker. They moved in together after dating for three months. He was neat, he cooked steaks, loved to barbeque, listen to music and never had any problems, kept

a low profile. He helped out people in the complex. She had a four and one-half year old son who got along great with Paul. He was great with her little boy. (PC-R-T9: 124-128) During that time Paul did not use drugs and only drank socially. (PC-R-T9: 129) He left to go back to Florida to get a divorce, so he could come back and marry her. When he got to Florida he called her and told her he was not coming back because he met his son, little Paul. He told her it tore him up to see little Paul because, "He is the spitting image of me, I can't leave him", and she understood because she was a mother. (PC-R-T9: 131) He said he was going to be there for his boy, that his dad wasn't there for them and that he was going to be there for his boy. She told him "I love you but I understand, be a dad, do what you have to do," and he never came back to California. She wrote to some relatives and kept in touch with his family over the years. She was living in Connecticut in 1988 when Paul went to trial (PC-R-T9: 132) She was in contact with Paul's brother, Steve. She also had the address for his mother and his aunt, Joyce. (PC-R-T9: 133) In 1983 she moved to Massapequa, New York. She lived there for less than a year, then moved to New London, Connecticut and stayed there until 1991. (PC-R-T9: 135) She was in touch with Steve, who was in California, Idaho and Colorado. He kept moving around but he always called and kept in touch. However, she was not in touch with the defendant after 1978. (PC-R-T9: 136) On cross she admitted that the

defendant was in fact married at the time they were cohabitating and at the time there was no hint of drug use, drug dependency or alcohol dependency. (PC-R-T9: 138)

Johnson's mother, Jane Cormier, testified that Johnson was one of three children. She recounts being abused by Paul's father while she was pregnant with Paul. She notes that they had no money and the father drank all the time. When she was pregnant with Paul she moved to Alabama. (PC-R-T9: 139-146) She had her sister, Joyce Kihs, come stay with her. They had no running water, indoor plumbing or electricity. (PC-R-T9: 147) She did not want to be pregnant because she was being abused. She drank to ease her pain. She had no pre-natal care. (PC-R-T9: 148) Her house was searched many times for moonshine. She was not a healthy pregnant woman, she was sickly. (PC-R-T9: 149) Paul was delivered by a midwife and a doctor named Dr. Beasley. When Paul was born, his head was out of shape and they tried for months to shape his head. (PC-R-T9: 150) He was a sick child when she got pregnant with Paul's brother Steve, so she decided to leave Paul with his grandparents. (R. 152) She felt bad about abandoning him because she loved him dearly. It wasn't a choice she made easily but it was a choice she thought might keep him alive because they could take better care of him and she had to leave him with a babysitter and try to work. The grandparents weren't rich, they were poor people but were better able financially to take care of Paul. (PC-R-T9: 153) Cormier

testified that when she remarried and moved to Japan she did not take Paul with her because he had been with his grandmother and it would have broken Mrs. Johnson's heart to give up the baby. (PC-R-T9: 156) When she came back from Japan she moved to California. She tried hard to get hold of Paul but she could never reach him. (PC-R-T9: 157) She saw Paul again in 1976. He was living in Florida with his wife, Cheryl (PC-R-T9: 158) She got Paul, his wife and the baby to fly out to California. Cheryl was unhappy out there so she came back and Paul stayed for awhile until he went back to see his baby. (PC-R-T9: 159) He was a loving and wonderful son. He didn't cause any problems in California. (PC-R-T9: 161) He showed no indication of any drug use while he was in California. He was a healthy, strong person. (PC-R-T9: 164)

In 1988, she was living in the same town where Paul lived with her in California which would have been Oxnard. She had the same phone she'd had for thirty-two years. (PC-R-T9: 164) She was in contact with Steve and Joyce. (PC-R-T9: 165) She would have been willing to come here in 1988. She would have loved it.

During the two years he was in California, she did not see anything that he did that was out of the ordinary. What she saw was exactly what people would think was perfectly normal. He was perfectly normal, he didn't get violent, he wasn't assaultive, he didn't have any sort of habits that would compel him to go out and try to rob anybody. He didn't rob anybody. (PC-R-T9: 170) When he

returned to Florida she gave him her telephone number, she had his telephone number. She stayed in the same part of town. She moved several times in the Oxnard area but he never contacted her after he left the area. She was not in contact with anybody from the Johnson side of the family during those years. (PC-R-T9: 173)

Johnson's aunt, Joyce Kihs testified that she lived with Paul Beasley Johnson when he was a baby. (PC-R-T9: 175) They lived in a shack; she was about fifteen or sixteen years old. (PC-R-T9: 176) Johnson's father was mean, vicious and violent. (PC-R-T9: 177) She was afraid of him. He sold moonshine and they had little money for food. (PC-R-T9: 179) Jane drank while she was pregnant with Paul. He knocked her around. Kihs kept the kids in the room because she did not want them hurt. (PC-R-T9: 180)

She remembers the delivery. There was a black lady, a midwife. (PC-R-T9: 181) Ommer came home, he was drunk. She told him "you better get your wife a doctor." He went and got a doctor. Jane was in labor for a long time. (PC-R-T9: 182) When Paul was born he was red and blue. He had a funny shaped head. (PC-R-T9: 183) When she took Paul to his grandparents', Ommer was probably in jail. (PC-R-T9: 186) Paul came out to California in 1976 with his wife and his baby. They got tickets for them. (PC-R-T9: 188) When Paul was in California he was good, he was loving. (PC-R-T9: 189) He seemed happy, she never saw him using drugs, he was not arrested. (PC-R-T9: 190) He was never violent (PC-R-T9: 196) He

was consistently able to work, function well in his family unit. He was a healthy looking person, engaged in normal relationships. (PC-R-T9: 197) She did not know that some two-and-a-half years later he had committed three murders. She would have never seen it coming from the way he acted because he was "healthy as a buck." (PC-R-T9: 198)

Johnson's brother, Steven Lee Johnson testified that he was sixteen or seventeen years old before he found out he had a brother. (PC-R-T9: 199) Paul acted fine when he was in California. (PC-R-T9: 204) He didn't use drugs. He drank beer, but not to excess. He worked, he was in the labor union, steadily employed, had a steady girlfriend. (PC-R-T9: 205) He never tried to get in touch with him after he left. He would ask his mother a couple of times if she knew and she said I haven't heard anything from him. (PC-R-T9: 207) He was living in Idaho in 1988, had a phone, was in contact with his mother. Nobody contacted him. (PC-R-T9: 208) He did not see any predilection towards substance abuse. (PC-R-T9: 209) As far as a substance abuse problem, he has not had a problem with it other than "a weekend warrior sort of thing." He has never been treated for substance abuse, never been arrested for it. (PC-R-T9: 210)

Forensic psychologist, Brad Fisher, did an extensive developmental and neurological history including the Halstead Battery, the Wechsler Adult Intelligence Scale, the Bender Visual

Motor Gestalt Test, the House Tree Person, some cards from Thematic Apperception Test, the Neurological History questionnaire. There was no evidence of malingering. (PC-R-T10: 228-32, 240) Dr. McClain had done a mental status. Psychologists do not usually do the Bender Gestalt Test. He believes that Johnson was suffering at the time of the crime from toxic psychosis and neurological damage. (PC-R-T10: 241) There is a strong likelihood that the defendant's sniffing glue and inhalants as a teenager would produce brain damage later. (PC-R-T10: 243)

The Wechsler Adult Intelligence Scale shows indications of significant intermediate and perhaps long-term problems. Some sort of organic brain damage is not inconsistent with a person who has toxic psychosis. (PC-R-T10: 246) He hypothesizes that there were no problems while Johnson was in California because Johnson may have been in remission. (PC-R-T10: 247) Even though when he was in California and demonstrating non-destructive behavior, at some level there was still brain damage. (PC-R-T10: 249) Fisher finds the two statutory mitigating factors of extreme mental or emotional disturbance and capacity to conform in conduct substantially impaired. (PC-R-T10: 251)

On cross-examination Dr. Fisher admits that he has no disagreement with the experts on the bottom line. (PC-R-T10: 252) His only supplement would be the suggestion of organic brain damage. (PC-R-T10: 252) He says that despite a fifteen or so year

history of huffing and sniffing, Johnson was capable of abstaining from that kind of abuse for two years. (PC-R-T10: 254) The doctor says that Johnson is capable of abstaining from abusing drugs or alcohol by choice. Therefore, in 1981 he would have also been capable of making the decision not to abuse amphetamines and other narcotics. (PC-R-T10: 255-56)

James Leon Smith testified against Johnson in 1981, 1987 and 1988 and also gave depositions before each of these trials. (PC-R-T9: 220) Smith testified at the evidentiary hearing that when he testified that Johnson had made certain incriminating statements, the testimony was true. He claimed, however, that he was told specifically what to ask by Detective Wilkerson and that he was intentionally placed in the cell next to Johnson in order to ask him questions. (PC-R-T10: 261) Smith claimed that periodically Wilkerson would tell him questions to ask Johnson.

Smith also testified that Johnson never told him that he would just act crazy to beat the charges or anything about the individual offenses. Smith testified that his testimony was based on what Mr. Wilkerson would instruct me to ask and what he was able to gleam from Johnson's legal papers. (PC-R-T10: 261) He also said that he was instructed that he wasn't to say that they asked him to say anything. In exchange Smith claimed that they were going to help him in court with the custody of his three kids and at a later time, when he went to court, they were going to speak on his behalf

to the sentencing judge. (PC-R-T10: 263-269) He explained that after Johnson's trial he wrote to ASA Pickard, who told him that he would have to file a motion for mitigation before Pickard could do anything for him. (PC-R-T10: 272) After he filed the motion for mitigation, they had a hearing before Judge Bentley on December 17, 1981. (PC-R-T10: 273)

When it came time for his retrial in 1987 or 1988 he did not want anything to do with the trial, so told them he did not want to testify. Smith claimed the ASA Atkinson told him, "You're going to testify. We're going to writ you or whatever back and you're going to testify whether you want to or not." Smith claimed that he was testifying now because he does not want to carry this inside of him for the rest of his life and he doesn't want to have any part of somebody dying on his behalf. (PC-R-T10: 276)

On cross-examination Smith was impeached with his prior trial testimony from 1988 and 1987. He admitted that at the trial in 1988 he testified that "it was something that had to be done and that's why he was testifying." When he was confronted with his testimony from 1987, which said, "Really what it boils down to is I came forward because at first I didn't want to come forward because I didn't want anything to do with the State Attorney's Office or the Public Defender's Office. I guess that maybe part of it is because I still got things I live by in my heart." (PC-R-T10: 278-279) Smith claimed that he made this statement after his

conversation with the Assistant State Attorney, Pickard or Lee Atkinson in a room right "before I went into trial and I think I was versed pretty good before I went in there. Before I went in the courtroom, the State Attorney talked to me by myself out there and he told me to carry on with the trial like I was supposed to and I did. I don't remember exactly what it's been. It's been years, but I did a lot of drugs since then. I don't remember exactly, not that many years ago."

Smith could not remember exactly who or what was said to him. He didn't think he was threatened, although he may have said some things out of the way. "Like I say, I don't remember the exact conversation that took place, it's been a few years." He also was not sure if he was intimidated. He didn't think the prosecutor came out and told him to lie.

He said that the State Attorney brought in a copy of the transcript from the prior trial and went over it with him and told him that he was supposed to testify accordingly. He did not tell the State Attorney that the testimony was not the truth. (PC-R-T10: 284) He doesn't think he was under any sort of prosecution at the time of the last trial in 1988. (PC-R-T10: 286) Despite the fact that he had already received his mitigation and any other help he claimed to have been promised and despite the fact that Hardy Pickard had nothing to do with the retrial, Smith claimed Pickard told him that he had to testify to things he had already testified

to and that legally he couldn't say that he was promised anything. (PC-R-T10: 288) After Cervone gives him a copy of his deposition to refresh his recollection (PC-R-T10: 293), he admits that he did get some stuff from Johnson. He does not recollect if Johnson admitted committing the crime. (PC-R-T10: 294) Johnson may have admitted any of the killings, he doesn't recall. He may have admitted specific things like having any of the victims on their knees. (PC-R-T10: 295) He did not recall if Johnson said anything about an exchange of gunfire. (PC-R-T10: 296) He admitted that he told the State Attorney back then as a result of him testifying against Johnson he was shot at, knocked off his motorcycle and some other things and he suffered consequences while he was in prison. Nevertheless, he claimed that he was just trying to do the right thing now by changing the story so he no longer faced that rather than protecting himself. (PC-R-T10: 297)

Dr. Roswell Lee Evans, Jr., a pharmacotherapy specialist in psychiatry, testified that after reviewing the data on Johnson, he determined that Johnson is a lifelong substance abuser and that he had significant brain damage as a result of some of his substance abuse disorders. (PC-R-T10: 309-315) It indicates that Johnson was acutely intoxicated at the time of the crimes, to the point of drug-induced psychosis and that his intoxication had an effect on his ability to coolly reflect on his actions. (PC-R-T10: 315) He stated that Johnson's I.Q. is 82. (PC-R-T10: 322) In his opinion

Johnson was under extreme mental and emotional disturbance and he could not conform his conduct to the requirements of the law. (PC-R-T10: 323)

On cross-examination he admitted that he is in agreement with the previous experts concerning Johnson's toxic psychosis. (PC-R-T10: 324) He also agrees with their decisions as to intoxication and that Johnson's focus was on getting his hands on more drugs. He agreed that what he did was purposeful in terms of acquiring substances and that he knew that he was going out to acquire more drugs. He also agreed that Johnson was capable of purposely committing a robbery to get drugs, but claimed that he was capable of purposely committing a murder. (PC-R-T10: 325) He was aware that the two cases involved bullets to the head. He wouldn't say that Johnson didn't intend or didn't mean to kill somebody but his primary intent was to obtain drugs. He also admitted that it was a purposeful act when he put the gun to their heads and that he meant to kill them. (PC-R-T10: 326) He explained that in his opinion, the fact that it's purposeful behavior is something that is not necessarily cognizantly controlled. (PC-R-T10: 327)

At the close of the defense's case, Judge Bentley inquired of Johnson as to whether he wanted to testify. He says he wants to consult with his lawyers about it. After having consulted with his lawyers he tells the court that it's his decision not to testify today. (PC-R-T10: 329-330)

The State's first witness was former Assistant State Attorney Lee Atkinson. Atkinson was the prosecutor on the instant case. (PC-R-T10: 333) He testified that there were no significant differences between the testimony presented in 1987/1988 from the 1981 trial including the pre-trial suppression hearings.

Atkinson testified that he was a lecturer for both the National College of District Attorneys, the Justice Department, several State prosecutor associations, on trials in capital cases and one of the great concerns is the use of jailhouse informants because of the tendency those witnesses have five to ten years later to say something different than they did at trial. (PC-R-T10: 334) So in this case, the first thing he did was read the opinions of the Florida Supreme Court on Johnson's appeals from the 1981 convictions. Atkinson then got the record and went through the transcript. Before he met and spoke with Smith, he provided Smith with copies of his former testimony. He had met with the lead investigator and those other police officers who he had reason to believe might know about the question of what Smith's involvement was and how it came about. Everything that was said to him was consistent with the evidence that had come out in the suppression hearing. He did not give Smith any direction as to what to do. (PC-R-T10: 335) There had originally been two jailhouse sources. He had already rejected using the other witness, Larry Brockelbank. Based on what he learned from the file even if

Brockelbank had convinced him that he was telling the truth, he wouldn't have used him because he felt he would have been a detriment to the trial, that he had no credibility. When Atkinson met with Smith, he made the decision to put him on the stand at Johnson's trial. (PC-R-T10: 336) Atkinson testified that he had a practice which he engaged in with every witness he used and that he used it with Smith. "The first thing is that they tell the truth, the whole truth and nothing but the truth. If they don't know something, they are to say so. If they don't remember something, they are to say so and if they are not sure about their answers, not to give an answer they are uncertain of, to stick with what they know is truth. Second I tell them the most important thing a witness can do is listen carefully, make sure he understands the questions." (PC-R-T10: 337) Additionally he tells them if there is any kind of deal for cooperation he wants to be the one to disclose it to the court rather than wait for the defense to do it and that if any kind of deal is entered into, it will be kept. (PC-R-T10: 338) He testified that he warned Smith that on Friday morning before the start of the trial that he "was not going to pick up the phone and call me and tell me you want something in return for the testimony you now think I need to try this case." He explained to Smith that he would not be blackmailed by him and that even though he could use his testimony at trial, he could convict Johnson without it. (PC-R-T10: 339) Then he gave

Smith a copy of his transcript and asked him if the testimony he had given was true. He said it was. Atkinson specifically went over with Smith the issues the defense is now raising. He specifically questioned him concerning the allegation that Smith had been planted and told what he should try and find out from Johnson. He also questioned him as to whether what he was saying Johnson had told him was suggested by the police. He made it clear to Smith that if anything had happened that he needed to know it and he needed to know it before the trial started. He told Smith that if it had happened and he lied about it, he could tell Atkinson the truth now and he would not suffer any consequences for telling the truth. (PC-R-T10: 340-342) He also told him that if he did lie and he showed up ten years later and testified that he had lied, that if it was within his power, he would prosecute him for perjury. (PC-R-T10: 352) Smith assured him that everything he had said before was truthful, that in fact there was no subterfuge or plan by the Sheriff's Department, that the things he claimed Johnson told him, Johnson had told him and they were not suggested to him by the police. (PC-R-T10: 340-342)

Atkinson further denied going over his questions and answers with Smith. He explained that particularly with witnesses who had testified before, he finds it useful to make sure they have the opportunity to review police reports but his way of preparing a witness was to sit down and ask them to tell him what they know

about the case. (PC-R-T10: 340-342) He never expressed any change in his testimony. (PC-R-T10: 342) He didn't have any hesitation at that point in using Smith as a witness, but he was not essential to the case because basically there were a couple of friends of Johnson's who could provide critical evidence that suggested he was the one that committed the murders. Additionally, he noted that there were three eyewitness to the murders as well as substantial circumstantial evidence, including Johnson's own conduct after the murders. He felt that the case could be tried tomorrow without Smith's testimony and the result would be the same. (PC-R-T10: 343-344)

Atkinson also testified concerning Smith's letter expressing his reluctance to testify. The concerns in the letter were the general concerns of someone who was currently incarcerated about being known by other prisoners to in fact have been a witness against somebody, particularly in a capital case, a concern many people have in that situation and some concern about just having to go through the ordeal again of being cross-examined and having his credibility questioned. (PC-R-T10: 354) While he may have expressed some unwillingness to testify previously, at no time did Smith express to Atkinson any unwillingness to testify on the grounds that what he had to say would not be true. (PC-R-T10: 351)

With regard to the penalty phase, if there were additional testimony that had been presented from the mother to the effect of

his having good behavior during the two year period in California, it probably would have helped his case that there was nothing wrong with Johnson because it would have contradicted some of the very basic information that the experts for the defense were relying on in forming their opinions. (PC-R-T10: 344) It was the same regarding the brother's testimony. (PC-R-T10: 345) With regard to the evidence of some brain disorder from drug abuse, it would have had no impact. In his experience, the key to the insanity defense and defending against it is to look at the facts of the crimes themselves, then look at the behavior of the defendant and the opinions of the psychiatrists and you can almost always demonstrate that the actual behavior is inconsistent with the defense psychiatrist's opinion. (PC-R-T10: 346)

The last witness was Hardy Pickard, Assistant State Attorney for Polk County, who prosecuted Paul Beasley Johnson in 1981. He is familiar with James Leon Smith. (PC-R-T10: 356) There were no other agreements other than his cooperation would be made known to the Parole Commission. Pickard vaguely remembers that Smith filed a motion of mitigation. There was a hearing on it but he has almost no recollection of it. He thinks it would have been after Johnson's trial was all over. He can recall no agreements by him or law enforcement that were not disclosed to the defense. (PC-R-T10: 357) The only thing he told Smith is that he would be required to testify truthfully. (PC-R-T10: 358)

PRELIMINARY STATEMENT

Johnson raised the following claims in his amended rule 3.850 motion: (1) records in the possession of state agencies were withheld in violation of chapter 119, Florida Statutes, and the United States and Florida Constitutions; (2) Johnson was denied a proper appeal due to omissions in the record; (3) the trial court erroneously instructed the jury as to the cold, calculated, and premeditated aggravator; (4) the trial court erroneously instructed the jury as to the aggravator of a previous conviction of a violent felony; (5) sentencing was unreliable because the judge refused to find mitigation established by the record; (6) the sentencing jury was misled by an argument that unconstitutionally diluted its sense of responsibility for sentencing; (7) the court erroneously instructed the jury that one single act supported two separate aggravators; (8) Johnson received ineffective assistance of counsel in that counsel was rendered ineffective by the State's withholding of material and exculpatory evidence; (9) penalty phase jury instructions improperly shifted the burden to Johnson to prove that death was inappropriate, and failure to object rendered counsel ineffective; (10) Johnson was unconstitutionally denied his rights to an adequate mental health evaluation; (11) Johnson received ineffective assistance of counsel at the penalty phase because

counsel failed to adequately investigate and prepare additional mitigating evidence and failed to object to the trial judge's prejudicial comments; (12) newly discovered evidence establishes that Johnson's conviction and sentence are constitutionally unreliable; (13) ineffective assistance of counsel and the prosecutor's improper argument and comment rendered the conviction and sentence fundamentally unfair and unreliable; (14) Johnson received ineffective assistance of counsel during voir dire in that trial counsel was rendered ineffective by the trial court's interference when it repeatedly interrupted trial counsel during jury selection; (15) Johnson received ineffective assistance of counsel in that the jury was allowed to rely upon improperly admitted evidence and trial counsel failed to adequately investigate and prepare a defense or challenge the State's case; (16) Johnson received ineffective assistance of counsel during voir dire in that counsel was rendered ineffective by the trial court's refusal to grant in camera voir dire and its refusal to grant additional peremptory challenges; (17) Florida's capital sentencing statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty and violates due process and the prohibition against cruel and unusual punishment; (18) an unconstitutional automatic aggravator (underlying felony) was applied; (19) Johnson's constitutional

rights were violated when the prosecutor impermissibly suggested to the jury that the law required that it recommend a sentence of death; (20) the avoid arrest aggravating factor was improperly applied; (21) the State unconstitutionally used a jailhouse informant to obtain statements from Johnson; (22) Johnson is innocent of the death sentence; (23) the instruction relating to flight after commission of robbery, kidnapping, or arson is unconstitutionally vague and overbroad; (24) rules prohibiting defense counsel from interviewing jurors to evaluate whether juror misconduct existed are unconstitutional; (25) juror misconduct occurred in the guilt and penalty phases of Johnson's trial in violation of his constitutional rights; (26) Johnson received ineffective assistance of counsel by trial counsel's failure to adequately investigate, develop, and present evidence in support of a voluntary intoxication defense; and (27) cumulative errors were not harmless.

On appeal from the denial of his Rule 3.850 Motion to Vacate, Johnson raised eight claims:"(I) the circuit court erred in denying Johnson an evidentiary hearing or additional discovery concerning his public records request; (II) the circuit court erred in denying Johnson's motion to disqualify Judge Bentley; (III) the circuit court erred in denying Johnson's claim that the State withheld material exculpatory evidence rendering counsel

ineffective at the guilt phase; (IV) the circuit court erred in denying Johnson's claim that counsel was ineffective at the penalty phase of Johnson's trial; (V) the circuit court erred in denying Johnson's claim that his constitutional rights were violated by counsel's failure to obtain an adequate mental health evaluation and failure to provide necessary background information to the mental health consultants; (VI) the circuit court erred in summarily denying Johnson's claims;[1] (VII) the circuit court erred in ruling that venue was appropriate in Polk County for hearing Johnson's rule 3.850 motion; and (VIII) the circuit court erred in refusing to consider Johnson's cumulative error claim." Johnson v. State, 769 So. 2d 990, 994 (Fla. 2000).

Petitioner now raises ten claims in the instant petition, most under the umbrella of ineffective assistance of appellate counsel claims. The issues raised in the instant petition are:

> Claim One: Failure to ensure that the record on appeal was complete.
> Claim Two: Failure to raise claim that

[1] Johnson's assertion of error based on the trial court's summary denial of certain claims included: 1 (public records), 2 (appellate record), 3 and 4 (jury instructions), 6 (misleading jury), 7 (improper doubling of aggravators), 9 (jury instructions improperly shifted the burden), 12(newly discovered evidence), 14(trial court comments to counsel), 16(denial of additional peremptory challenges), 17 (death penalty procedure unconstitutional, 18 (death penalty procedure is unconstitutional), 19(improper comments), 21(jailhouse informants), 23(flight instruction), 24(juror interviews),25(jury misconduct) and 26 (voluntary drug intoxication).

> Johnson was absent from critical stages of proceedings.
> Claim Three: Failure to argue that the jury considered invalid and vague aggravating factors.
> Claim Four: Failure of trial court to find mitigating factors.
> Claim Five: Failure to argue that the sentencing jury was misled by instructions which diluted their sense of responsibility.
> Claim Six: Failure to argue that the jury instructions shifted burden to Johnson,
> Claim Seven: Failure to assert improper prosecutorial comments on appeal.
> Claim Eight: Failure to assert error in denial of cause and use of peremptory challenges to prospective jurors.
> Claim Nine: Failure to raise claim that sentence rests on an automatic aggravating factor.
> Claim Ten: Failure to challenge constitutionality of Death Penalty Statute.

A review of the foregoing claims makes it clear that the instant petition for writ of habeas corpus is, as was the petition filed in Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987), "almost entirely a repetition of the issues raised in the Rule 3.850 proceeding." By including these types of claims within his petition for writ of habeas corpus, "collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. Wainwright, 507 So. 2d at 1384. Accord, Demps v. Dugger, 714 So. 2d 365, 368 (Fla. 1998). As these identical claims were considered and rejected upon review of the denial of the 3.850, this Honorable Court need not and should not "replough this ground once again." Ibid.

With respect to each of the issues raised in this habeas petition, petitioner gratuitously asserts that appellate counsel was ineffective for failing to raise the issues on direct appeal. In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000), this Court held that "claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion." Id. at 774 So. 2d 643. Thus, to the extent that petitioner is attempting to use habeas review as a means of second appeal, this Court should deny relief.

Moreover, most of the claims asserted by Johnson were not the basis of an objection at trial and therefore, would have been procedurally barred on direct appeal. Respondent urges this Court to continue to enforce its procedural default policy; otherwise, appeal will follow appeal and there will be no finality in capital litigation. cf. Johnson v. State, 536 So. 2d 1009 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality). In Harris v. Reed, 489 U.S. 255 (1989), the United States Supreme Court held that where a state court was ambiguous in its ruling denying relief on both procedural and substantive grounds, the federal habeas courts should reach the merits:

> Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state

> court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.
>
> The court added in footnote 12:
> . . . Additionally, the dissent's fear, post, p.11-12 and n.6, that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line pro forma order can easily write that "relief is denied for reasons of procedural default."

Accordingly, although the following will establish that no relief is warranted on any of the claims raised, the state urges this Court to expressly find procedural bars where the claim has not been properly presented.

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE THAT THE RECORD ON APPEAL WAS COMPLETE. ACCORDINGLY, MR. JOHNSON WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND SENTENCES IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC 3 (b)(1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES ANNOTATED, SEC. 921.141(4), DUE TO OMISSIONS IN THE RECORD. (As stated by petitioner.)

Johnson's first claim is that appellate counsel was ineffective for failing to ensure that the record on appeal was complete. It is the state's position that this claim is procedurally barred and meritless. Relief should be denied.

This claim was asserted to this Court both in a Motion to Supplement, as an issue on direct appeal, Johnson, 608 So. 2d 4 (Fla. 1992), in the motion to vacate and on appeal from the denial of same. This Court has repeatedly held that "'[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.' Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989)." Atwater v. State, 2001 WL 617915, 26 Fla. L. Weekly S395 (Fla. 2001).

Having failed to establish that trial counsel was ineffective, Johnson now attempts to have this claim reviewed yet again by

asserting ineffective assistance of appellate counsel. As appellate counsel actively sought to include those items in the direct appeal record, Johnson has failed to establish deficient performance. Johnson has also failed to establish how he was prejudiced by this alleged failure. Beyond Johnson's speculation that something may have happened during any non-transcribed bench conference, there was no showing that any relevant and material information was not included in the record. A similar claim was rejected by this Court in Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000):

> We have previously rejected a similar claim that appellate counsel was ineffective for failing to have transcribed portions of the record, including parts of voir dire, the charge conference, and a discussion of whether the defendant would testify. See Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993). We reasoned that "[h]ad appellate counsel asserted error which went uncorrected because of the missing record, or had [the defendant] pointed to errors in this petition, this claim may have had merit." Id. However, *because the defendant "point[ed] to no specific error which occurred" during the portions of the record that remained untranscribed, we concluded that appellate counsel was not ineffective.* Id.; see also Turner v. Dugger, 614 So. 2d 1075, 1079-80 (Fla. 1992) (finding defendant had not been prejudiced by failure of counsel to have charge conference transcribed). As with the defendant in Ferguson, Thompson has not pointed to any errors that occurred during the untranscribed portions of the proceedings. Therefore, these habeas claims are without merit.
>
> Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000)(emphasis added)

This claim should be denied.

CLAIM II

MR. JOHNSON WAS ABSENT FROM CRITICAL STAGES OF THE TRIAL IN VIOLATION OF HIS RIGHTS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW. (As stated by petitioner.)

Johnson next claims that counsel was ineffective for failing to assert on appeal that Johnson was absent during critical stages of the proceedings, to wit: certain voir dire challenges and bench conferences concerning challenges. To the extent that Johnson attempts to raise the substantive issue that his right to be present was violated, this claim is procedurally barred as it was not raised below. Muhammad v. State, 2001 WL 40365, 26 Fla. L. Weekly S156, (Fla. 2001) (claims of absence during bench conference must be preserved for appellate review through a specific objection); Rutherford v. Moore, 774 So. 2d 637, 647 (Fla. 2000)(claim is procedurally barred where not asserted at trial); Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994)(where defendant failed to raise issue at trial or on direct appeal, claim is procedurally barred and does not constitute fundamental error or ineffectiveness of counsel).

Additionally, as the constitutional right to be present does

not extend to bench conferences involving purely legal matters, this claim would not have constituted error, much less fundamental error, Johnson has failed to show either deficient performance or prejudice sufficient to establish ineffective assistance of counsel. Rutherford v. Moore, 774 So. 2d 637, 647 (Fla. 2000 Hardwick v. Dugger, 648 So. 2d at 105.

Relief should be denied.

CLAIM III

MR. JOHNSON'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE. (As stated by petitioner.)

At trial, the sentencing judge found the following aggravating factors for each of the three murders for which Johnson was convicted: *Evans* 1) previous conviction of violent felony; 2) committed while engaged in robbery, kidnapping, and arson; 3) committed for financial gain; and 4) committed in a cold, calculated, and premeditated manner; *Beasley* 1) previous conviction of violent felony; 2) committed during a robbery; 3) committed for financial gain; and 4) committed in a cold,

calculated, and premeditated manner; and *Burnham* 1) previous conviction of a violent felony; 2) committed while fleeing after committing a robbery; 3) committed to avoid or prevent a lawful arrest; and 4) committed in a cold, calculated, and premeditated manner. The trial court considered the statutory mitigators that Johnson had not waived and the nonstatutory mitigators that he asked the court to consider, i.e., whether he was under the influence of drugs when he committed these crimes, whether he suffered a drug dependency that contributed to these crimes, and whether he suffered emotional abuse or handicap during childhood. The court found that none of the mitigators had been established by the evidence.

Johnson now asserts that appellate counsel failed to argue that his jury considered invalid and vague aggravating factors, including 1) heinous, atrocious or cruel (HAC), 2) cold, calculated and premeditated (CCP), 3)avoid arrest, 4) pecuniary gain, and that said consideration cannot be harmless.[2]

First, appellate counsel did assert as error the court's

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[2] On direct appeal, this Court reviewed Johnson's challenge to the cold, calculated and premeditated and pecuniary gain aggravating factors. This Court rejected the pecuniary gain factor as the lower court had also found the during the course of a robbery factor but agreed that the evidence supported the trial court's finding that all three murders were committed in a cold, calculated, and premeditated manner. Johnson v. State, 608 So. 2d 4, 11 (Fla. 1992).

finding of the pecuniary gain aggravator for Beasley's murder and the cold, calculated, and premeditated aggravator for all three murders. Johnson v. State, 608 So. 2d 4, 11 (Fla. 1992). This Court upheld the CCP factor and struck the pecuniary gain finding, but concluded that it was harmless.

Appellate counsel also challenged the heinous, atrocious or cruel instruction. With regard to that claim, this Court stated:

> During our consideration of this case, the United States Supreme Court decided Espinosa v. Florida, --- U.S. ----, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and held our former instruction on the heinous, atrocious, or cruel aggravator insufficient. Although the trial court gave Johnson's jury the instruction struck down in Espinosa, we hold the error to have been harmless. Both the state and the defense requested an expanded instruction on this aggravator, but the court decided to give the standard instruction. In closing argument the state listed the aggravators, but did not dwell on this one or mention it again. The defense explained the aggravator, telling the jury, among other things, that it was meant "to separate those crimes of torture, of excessive wickedness, vileness of the person wanting to inflict not just death, but inflict pain" and that the facts did not support finding it. In addition to this argument the court instructed the jury that its recommended sentence "must be based on the facts as you find them from the evidence." During its consideration of the sentence, the court specifically found the evidence insufficient to support this aggravator. As stated by the Supreme Court, a jury is "likely to disregard an option simply unsupported by evidence." Sochor v. Florida, --- U.S. ----, ----, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992). We see no way that the instruction abrogated in Espinosa could have

> affected the jury's consideration as to what sentence it would recommend. Therefore, reading that instruction to the jury was, beyond doubt, harmless error.
>
> Johnson v. State, 608 So. 2d 4, 13 (Fla. 1992)

Thus, this claim should be denied. Mann v. Moore, 2001 WL 776293, 26 Fla. L. Weekly S490 (Fla., Jul 12, 2001) (Habeas corpus petitioner was procedurally barred from asserting claim where same claim was rejected on merits on direct appeal and was found to be procedurally barred on motion for postconviction relief.)

Johnson also challenges the instruction given on the cold, calculated and premeditated aggravating factor and asserts that appellate counsel was ineffective for failing to challenge the instruction on appeal. This Court has consistently held that appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal. Lambrix v. Singletary, 641 So. 2d 847, 848-49 (Fla. 1994). At the time of this trial, Jackson v. State, 648 So. 2d 85 (Fla. 1994) which struck the standard CCP then existing instruction had not been decided. Moreover, the record shows that the instruction given was an expanded version and was substantially (T.R. 3411-13) as requested by defense counsel.[3] Johnson has not only failed to establish that

[3] The standard instruction at the time mirrored Florida Statute 921.141 (5)(i) "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense

this instruction was challenged and, therefore, preserved for appeal, but, also, that the failure to raise the claim constituted deficient performance.

Johnson's claim that the avoid arrest instruction was unconstitutionally vague is also barred. Moreover, as Johnson acknowledges, the instruction has not been altered by this Court or found to be vague. Accordingly, he has failed to establish deficient performance or prejudice.

The instruction on pecuniary gain was agreed upon by trial counsel and no reversible error has been established. (T.R. 3404-05).

As Johnson has failed to establish either deficient performance or prejudice, this claim should be denied.

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of moral or legal justification." The instruction actually given to the jury was, "Six, the crimes for which the defendant is to be sentenced were committed in cold, calculated and premeditated manner, without any pretense of moral or legal justification. To establish this aggravating circumstance, there must be more than just premeditation shown. There must be proof of a heightened degree of calculated premeditation or methodical intent." (T.R. 3609)

CLAIM IV

THIS COURT SHOULD REVISIT THE ISSUE THAT MR. JOHNSON WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED AND FAILED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW. (As stated by petitioner.)

This Court has repeatedly held that, "habeas corpus petitions are not to be used for additional appeals on questions which could have been ... or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989). When analyzing claims that "merely express dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner," this Court will decline a "petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court." Routly v. Wainwright, 502 So. 2d 901, 903 (Fla. 1987); Steinhorst v. Wainwright, 477 So. 2d 537, 540 (Fla. 1985). "Under these precedents, if an issue was actually raised on direct appeal, th[is] Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal." Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000)

This claim was raised on direct appeal and rejected by this Court. After reviewing the extensive sentencing order this Court found that the trial court fully considered and discussed the mitigators that Johnson argued applied to his committing these murders. Johnson v. State, 608 So. 2d 4, 12 (Fla. 1992).

CLAIM V

MR. JOHNSON'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. (As stated by petitioner.)

Again, Johnson has not established that this claim was preserved for appeal. Therefore, it should be denied as procedurally barred. Moreover, this Court has repeatedly stated "that trial counsel's failure to object to standard jury instructions that have not been invalidated by this Court does not render counsel's performance deficient." Downs v. State, 740 So. 2d 506, 518 (Fla. 1999) (Finding claim that counsel failed to object to instructions that allegedly shifted the burden of proving that death is not an appropriate penalty to the defendant to be without merit as a matter of law). As there is no merit to the underlying claim, counsel cannot be deemed ineffective for failing to raise this issue on direct appeal. Thompson v. State, 759 So. 2d 650, 665 (Fla. 2000); Demps v. Dugger, 714 So. 2d 365, 368 & n. 8 (Fla. 1998) (noting that the Court had rejected this claim many times).

CLAIM VI

MR. JOHNSON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS AND COMMENTS BY THE COURT AND STATE SHIFTED THE BURDEN TO MR. JOHNSON TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. JOHNSON TO DEATH. (As stated by petitioner.)

This claim is also procedurally barred and without merit. As this Court stated in Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999):

> In claim 19 Teffeteller asserts that counsel should have objected that the jury instructions and the prosecutor's closing argument shifted the burden to him to prove that the mitigating circumstances outweighed the aggravating circumstances. Counsel was not ineffective in this regard. When viewed as a whole, the instructions given by the court did not shift the burden of proof to the defendant. See Preston v. State, 531 So. 2d 154, 160 (Fla. 1988); Arango v. State, 411 So. 2d 172, 174 (Fla. 1982).
>
> Id. at 1024.

Upon rejecting this claim, this Court also noted in Teffeteller that: "[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been ... or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989). Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999).

This claim was asserted in the rule 3.850 motion and was summarily denied as procedurally barred. Accordingly, relief should be denied.

CLAIM VII

IMPROPER PROSECUTORIAL ARGUMENT AND THE PRESENTATION AND CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES RENDERED MR. JOHNSON'S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL. (As stated by petitioner.)

Johnson challenges a number of comments made by the prosecutor during cross-examination and closing argument in the instant case. Johnson concedes that no objection was asserted below to the comments made during closing. As this Court has repeatedly stated, "appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue on appeal." Downs v. Dugger, 2001 WL 1130695, *8 (Fla.), citing, Rutherford, 774 So. 2d 637, 643 (Fla. 2000).

Moreover, this claim was rejected by this Court upon the denial of the rule 3.850 appeal as follows. This Court stated: "As to the third sub-claim, the circuit court correctly found, after reviewing the closing argument, that while there were several objectionable comments during closing arguments, the argument as a whole was proper. Our review of the record demonstrates that

Johnson has failed to demonstrate that counsel was ineffective at the penalty phase of Johnson's trial." Johnson v. State, 769 So. 2d at 1004. As habeas corpus is not to be used as a second appeal for claims that were raised and rejected, relief should be denied.

Trial counsel did object to the questions during cross-examination concerning anti-social personality disorder, drug use studies and Johnson's prior criminal history as improperly introducing non-statutory aggravation to the jury. (T.R. 3462, 3465, 3468) However, as these questions were proper and did not constitute error, Johnson has failed to show either prejudice or deficient performance of appellate counsel. Therefore, relief should be denied. Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999).

CLAIM VIII

THE TRIAL COURT UNCONSTITUTIONALLY ABRIDGED MR. JOHNSON'S ABILITY TO EXERCISE HIS RIGHT TO PEREMPTORY CHALLENGES BY ITS RULINGS AND REFUSAL TO GRANT ADDITIONAL PEREMPTORY CHALLENGES. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL AND FOR FAILING TO RAISE THE CLAIM THAT THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENSE CHALLENGES FOR CAUSE AS TO JURORS SUGGS, WOLFE AND TOWNS. (As stated by petitioner.)

Johnson now seeks another review of his claim that the trial court abridged his ability to exercise his right to peremptory

challenges by its rulings and refusal to grant additional peremptory challenges. He also gratuitously asserts that appellate counsel was ineffective for failing to raise this claim on direct appeal and for failing to raise the claim that the trial court erred in refusing to grant defense challenges for cause as to jurors Suggs, Wolfe and Towns. "'[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.' Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989)." Atwater v. State, 2001 WL 617915, 26 Fla. L. Weekly S395 (Fla. 2001).

This claim *was* raised on direct appeal and rejected by this Court: "We also find no merit to Johnson's other arguments regarding voir dire. The trial judge has great discretion in deciding if prospective jurors must be questioned individually about publicity the case may have received. [cites omitted] Johnson has demonstrated no abuse of discretion in his trial judge's refusal to allow individual questioning of the prospective jurors." Johnson v. State, 608 So. 2d 4, 9 (Fla. 1992). This issue was also presented in Johnson's Rule 3.850 motion to vacate and was denied as procedurally barred. When analyzing claims that "merely express dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner," this

Court will decline a "petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court." Routly v. Wainwright, 502 So. 2d 901, 903 (Fla. 1987); Steinhorst v. Wainwright, 477 So. 2d 537, 540 (Fla. 1985). "Under these precedents, if an issue was actually raised on direct appeal, th[is] Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal." Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000).

In Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998), this Court addressed this same claim and held:

> Kokal argues that the trial court failed to excuse for cause three jurors who were death-biased, thus requiring him to expend peremptory challenges to strike the jurors. He claims appellate counsel was ineffective for failing to raise this issue. We disagree. The record shows that none of the three jurors actually served on the jury, and Kokal points to no objectionable juror who did serve. See Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990) ("Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause of attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted."). Appellate counsel cannot be faulted for failing to raise a non-meritorious claim. Chandler v. State, 634 So. 2d 1066 (Fla. 1994).

Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998)

Like Kokal, none of the jurors Johnson challenges actually served on Johnson's jury, and he points to no objectionable juror who did serve. Thus, this Court correctly denied this claim on appeal and no ineffective assistance of appellate counsel has been established. No relief is warranted on this claim.

CLAIM IX

MR. JOHNSON'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE. (As stated by petitioner.)

This claim was asserted in the rule 3.850 appeal and found to be procedurally barred. Johnson v. State, 769 So. 2d 990 (Fla. 2000). As "habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial," relief should be denied. Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989).

Moreover, the substance of the claim has repeatedly been rejected by this Court. Atwater v. State, 26 Fla. L. Weekly S395

(Fla. 2001); Hudson v. State, 708 So. 2d 256 (Fla. 1998), and Blanco v. State, 706 So. 2d 7 (Fla. 1997). As appellate counsel cannot be deemed ineffective for failing to raise a non-meritorious claim, relief should be denied.

CLAIM X

THE TRIAL COURT ERRED IN DENYING MR. JOHNSON'S MOTION TO DECLARE FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND VIOLATES THE CONSTITUTIONAL PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL. (As stated by petitioner.)

This issue was summarily denied as procedurally barred in Johnson's Rule 3.850 motion to vacate and rejected on appeal. Johnson v. State, 769 So. 2d 990 (Fla. 2000). Under the guise of ineffective assistance of counsel, Johnson now seeks another review of this claim. Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel, but claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a post-conviction motion. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

Moreover, as this claim is wholly without merit, counsel's failure to raise the issue on appeal does not constitute deficient performance. Waterhouse v. State, 2001 WL 578413, 26 Fla. L. Weekly

S375 (Fla. 2001)(rejecting claim that Florida's death penalty statute is unconstitutional); Knight v. State, 746 So. 2d 423, 429 (1998)(same); Fotopoulos v. State, 608 So. 2d 784, 794 n. 7 (Fla. 1992) (same). Relief should be denied.

CONCLUSION

Based on the foregoing reasons, this Honorable Court should deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Michael P. Reiter, Capital Collateral Regional Counsel - Northern Region and Heidi E. Brewer, Assistant Capital Collateral Regional Counsel, 1533 S. Monroe Street, Tallahassee, Florida 32301.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

_____
COUNSEL FOR RESPONDENT