IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2148

LOWER TRIBUNAL NO. 99-11338

RAY LAMAR JOHNSTON,
Petitioner,
v.
WALTER MCNEIL,

Secretary,
Florida Department of Corrections,
Respondent,
and
BILL MCCOLLUM,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS–REPLY TO THE STATE

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FACTS AND PROCEDURAL BACKGROUND–REPLY

On pages 2-9 of its Response, the State block quotes this Court's direct appeal opinion from *Johnston v. State*, 863 So. 2d 271, 274-278 (Fla. 2003). The Petitioner does not dispute this Court's *2003* understanding of the facts of this case. But, there have been significant postconviction factual developments in the past eight years in this case, and the factual landscape has changed significantly. On page 10 of its Response, the State specifically refers to the Petitioner's direct appeal attorney as "experienced." But, as revealed at the evidentiary hearing, even very experienced defense attorneys make mistakes. A review of the procedural history of the direct appeal in this case reveals that the direct appeal attorney made mistakes, and he was not prepared to handle the direct appeal.

On January 17, 2002, this Court issued a briefing schedule, mandating that the Appellant had until May 16, 2002 to serve his initial brief. The briefing schedule stated that "further motions for extension of time will be granted only due to a medical emergency," it stated that the "brief shall not exceed 100 pages," and it made clear that "[m]otions to file enlarged briefs w[ould] not be entertained by the Court." The Appellant's attorney, suffering no medical ailments, failed to meet the May 16 deadline, he eventually exceeded 100 pages in length, and he later sought to have this Court accept his untimely-filed 103 page brief.

Seven days before the initial brief was due, the Petitioner's attorney filed a "Motion for Extension of Time to Serve Initial Brief." He cited to the voluminous record on appeal and he questioned his own ability to provide "effective assistance of counsel."[1] This Court graciously granted him an extension until July 15, 2002 to file his brief, *and he missed that deadline as well*. On June 28, 2002, that attorney again filed a "Motion for 25 Day Extension of Time to Serve Initial Brief." Again, he cited to no medical emergency, and he promised as follows: "This is the appellant's second–and it will be his last–request for an extension of time." He was clearly struggling with the appeal.[2] On August 19, 2002 he filed a "Motion to Accept 103 Page Brief," which was denied on September 6, 2002. He was ordered to "immediately file an amended initial brief [] which does not exceed 100 pages in length." Finally, on February 18, 2003, this "experienced" attorney filed a "Motion for 15-Day Extension of Time for Serving Appellant's Reply Brief." In his motion, again he cited to *no* medical

[1]He stated in his motion filed May 9, 2002, "In order to provide appellant with effective assistance of counsel, counsel needs an extension of time of sixty (60) days to July 15, 2002, to serve the Initial Brief."

[2]He stated in his motion filed June 28, 2002, "Due to the length of the record (over 3400 pages in the Nugent trial, and much more than that if the Court agrees to take judicial notice of the relevant portions of the Coryell trial), and the factual complexity of the issues, an extension of time of twenty-five days will be necessary and sufficient to allow the undersigned to effectively complete appellant's initial brief."

situation which might have been hindering his ability to timely file a reply brief. But interestingly, he did cite to his "caseload" as a reason why he needed more time.

On pages 11-14 of its Response, the State merely block quotes the 19 claim headings that the Petitioner pursued in circuit court on his 3.851 Motion. The Petitioner does not dispute that he raised those claims at the circuit court level.

Ground I–Reply

Regarding Ground I, the Petitioner urges here that his severe, major mental illnesses and brain damage should act to bar the imposition of the death penalty by authority of the 8th and 14th Amendments. The State claims on page 16 of their Response that this claim should be procedurally barred because it was not raised at trial or on direct appeal. As mentioned already in this Reply brief, the Petitioner's direct appeal was decided by this Court in 2003. *Atkins v. Virginia*, 536 U.S. 307 (2002) had just been I issued less than a year prior, and a few years later *Atkins* was followed by *Roper v. Simmons*, 543 U.S. 551 (2005). Death penalty jurisprudence in this country has seen dramatic changes in this early 21st Century. There is now a ban on the execution of juveniles and on the mentally retarded because of our nation's evolving standards of decency. No procedural bar should be allowed to stunt the growth of our evolving standards of decency. This Court should grant habeas relief.

The Petitioner's claim here is that appellate counsel was ineffective for failing to raise this claim on direct appeal following the *Atkins* decision. This claim is now ripe for consideration, especially in light of the evolving standards of decency referenced in the *Atkins* and *Roper* cases. The State says on page 16 that this claim was not raised on direct appeal. That is true, but it *should have been* raised on direct appeal, and that is why the Petitioner raises it here in his habeas petition as ineffective assistance of appellate counsel.

The Petitioner submits that his severe mental illness *should* be a bar to execution based on reduced moral culpability, the 8th and 14th Amendments, and the evolving standards of decency.

Ground II–Reply

In Ground II, the Petitioner submits that appellate counsel was ineffective for failing to raise as fundamental error the fact that the penalty phase jury received an incorrect instruction regarding the burden of proof for mitigation. On page 21 of the Answer, the State claims "although there is a discrepancy between a ***single*** word in the transcript and the written penalty phase instructions, the State submits that this is likely a scrivener's error." The "***single***" word could have been the difference between life and death for the Petitioner. When a jury is mistakenly instructed that mitigation "may not" be proven beyond a reasonable doubt rather than "need not" be proven beyond a

reasonable doubt, that penalty phase becomes fundamentally flawed. This claim should have been raised by appellate counsel on direct appeal as fundamental error even though trial counsel failed to object to the faulty jury instruction. Although the written instructions in this case contain the correct standard and burden for mitigation, the trial transcripts reveal that the jury was instructed otherwise.

The State claims on page 25 of their Answer, "CCRC cannot establish any prejudice from trial counsel's failure to object and, likewise, cannot establish any prejudice arising from appellate counsel's failure to raise this claim." The prejudice is clear. Trial counsel's failure to object to the erroneous jury instruction contributed to appellate counsel not realizing this grave error. When appellate counsel failed to raise this issue as fundamental error on direct appeal, he failed to get the Petitioner relief from his unconstitutional sentence of death. The failure to raise this claim as fundamental error on direct appeal led to the death sentence being affirmed.

As our United States Supreme Court reasoned while evaluating whether a lesser-included instruction should be given in a capital case, and they feared the *risk* of an unwarranted conviction in the absence of the jury instruction: "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). In the case at bar, there certainly is, at the very least, a *risk* that the jurors who recommended death did so with the mis-guidance of an erroneous jury

instruction. The particular jury instruction at issue governs the standard of proof for mitigation. Because it was incorrect, the jury could have completely misapprehended the Constitutional bedrock of the law of capital sentencing. As such, relief is proper, and a new penalty phase should be granted due to the erroneous penalty phase jury instruction.

Ground III–Reply

This claim involves the admission of incriminating statements to law enforcement introduced against the Petitioner at trial. The Petitioner made these statements while housed in a Hillsborough County Jail. At pages 27-32, the State in its Response block quotes the lower court's Order on this issue.

At page 29 of the State's Response, testimony from the evidentiary hearing is mentioned in the lower court's Order and is repeated in this section. Regarding this unreliable testimony relied upon by the lower court in its denial of relief, during the hearing Mr. Littman testified that Ray Johnston "was not in custody" when he made the statements. This is clearly erroneous testimony. At the time that Mr. Johnston made statements in connection with the Nugent case, *he was in jail*. He had been arrested on the Coryell case, and he was obviously in custody on that charge. Mr. Littman testified that Mr. Johnston "initiated contact with the police on his own." This is also erroneous. Mr. Littman was not involved in this case in August of 1997. Mr. Littman apparently

was not privy to the fact that law enforcement contacted Mr. Johnston. Hours after the arrest on the Coryell case, and after a rights form was signed, the detectives went to the jail, summoned him, and encouraged him to speak about his relationship with Ms. Nugent.

Indeed, Kenn Littman testified as follows, "The law says he has to invoke [*Miranda*] at the time interrogation begins. He never did that." But in reality, *Sapp v. State*, 690 So. 2d 581 (Fla. 1997) says that is if questioning regarding a separate offense is "imminent," when a suspect signs an invocation of rights form in one offense, those rights will protect against the imminent interrogation on another offense." [A]t least three federal courts of appeal agree in the wake of McNeil that the Supreme Court, presented with the issue, would not permit an individual to invoke the Miranda right to counsel before custodial interrogation has begun or is imminent. [citations omitted]. We agree with this interpretation of McNeil." In the case at bar, the morning that Ray Johnston signed the invocation of rights for the Coryell murder, the police wanted to speak with him about the Nugent murder. And they did in fact question him that very same day. As such, trial counsel *should have* filed a motion to suppress, and the statements *should have* been suppressed.

As the lower court's order is repeated by the State at page 31, the lower court analyzed *Sapp, Id.* as follows, "The Court concluded the claim of rights form executed

before custodial interrogation had begun or was imminent was ineffective to invoke Fifth Amendment Miranda right to counsel." Because it is obvious here that interrogation in the Nugent case was imminent, the accompanying constitutional protections should have been afforded with the Petitioner's signed invocation of rights form.

A similar situation arose in the case of *State v. Thompson*, 987 So. 2d 163 (Fla. 3rd DCA 2008). In that case, a DUI suspect invoked his right to counsel during a DUI investigation. Then the next morning, he was contacted by detectives regarding an unrelated robbery, he waived his rights, and he confessed to a robbery. The lower court's order suppressing the confession was upheld based on the following reasoning:

> When Thompson invoked his right to counsel several times in the DUI intake room, he could no longer be questioned, as the trial court found, "on any matter." We can only assume that Thompson's unwillingness to answer police questions continued during his twelve-hour stay in jail. The fact that police reinitiated contact, and not Thompson, creates a presumption of coercion in Thompson's subsequent waiver, and this presumption does not dissipate with a later reading of *Miranda*. We therefore find that the trial court was correct in suppressing Thompson's confession.

Thompson, Id. at 166.

> Miranda rights are not investigation-specific; once invoked, they apply to subsequent custodial interrogations even if those interrogations are unrelated to the offense for which the suspect is in custody. *See Arizona v. Roberson,* 486 U.S. 675 (2008) (holding that a suspect's request for counsel indicates an unwillingness to answer without an attorney present any questions police may pose, and this unwillingness is not

> investigation-specific). Finally, prolonged police custody of a suspect after that suspect requests counsel creates a presumption that any subsequent waiver of *Miranda* rights is the result of police coercion.

Thompson, *Id.* at 165.

In the case at bar, the Petitioner's Invocation of Rights form (see Defense Exhibit 11 at PC ROA Vol. X, 1950) signed August 22, 1997 should act to invalidate any waiver that might have been attempted by Detectives Stanton and Noblitt on the Nugent case. The first interrogation on the Nugent case actually took place the very same afternoon of first appearance court, August 22, 1997. It must be noted again that Kenn Littman was not even Ray Johnston's attorney at the time these interrogations were taking place, therefore he should not be attempting as he did at the evidentiary hearing to suggest that Mr. Johnston was making contact with law enforcement in the first place. (See Coryell Dir. Appeal ROA Vol I, 80-83, *attorney Deb Goins* filed the "Motion for Protective Order" with accompanying 9/4/97 letter to Stanton and Noblitt admonishing them that she represents him, she is aware they "have been to the jail to see [him]," and that "he does not wish to talk to any law enforcement personnel concerning any matter."

The fact that Assistant State Attorneys Nick Cox and Shirley Williams were contacted by the detectives and asked about interrogating the Appellant on the Nugent murder further shows that the Nugent interrogation was imminent at the time the

Appellant signed the form on Coryell. The lower court was wrong to find as recited on page 31 of the State's Answer: "There was no evidence presented that at the time the Defendant executed the invocation of rights form at first appearance court, a custodial interrogation regarding the Nugent case had begun or was imminent." The timing of the signing of the form and timing of the interrogation, mere hours lapsing in between those two events, is enough supporting evidence to show that the Nugent interrogation was imminent.

Ground IV–Reply

Regarding this claim, at page 33 of its Answer, the State says that habeas relief is not cognizable on this "renewed" claim. The State then block quotes this Court's direct appeal opinion on pages 33-36. Again, the Petitioner does not dispute that this was the Court's understanding of this claim back in 2003. The situation is that new evidence has surfaced in postconviction revealing and documenting that Dr. Martin changed her true opinions to afford the State the benefit of *Williams* Rule evidence of the Coryell murder.[3]

[3]See EH Defense Exhibit 4, PC ROA Vol. X, 1822-1838, Dr. Julia Martin's "Telephone and Contact Log," wherein at an entry dated 8/27/00 she clearly opines that instruments other than a belt were used to beat the victim. She later changes that opinion at trial to suit the State's *Williams* Rule evidence.

Ground V–Reply

Regarding this claim concerning the admission of fingerprint evidence, the Respondent simply states that this claim is not proper for habeas corpus relief, and they block quote the lower court's order regarding this claim at pages 38-42 of their Response. This claim is proper for habeas corpus relief, and the lower court was wrong to deny relief. The fingerprint evidence was unreliable and should not have been admitted at trial against the Petitioner.

The error in the lower court's analysis is found at page 38 of the State's Response where the lower court found, "Defendant's claim that there was a break in the chain of custody is procedurally barred, as it should have been raised on direct appeal." The defense failed to object to the chain of custody break at trial, therefore the issue was not preserved for appeal, and therefore it was not ripe for appeal. It is ripe now in postconviction, and the Petitioner urges that this Court grant relief.

CONCLUSION

This Court should grant all relief requested in the Petition, and grant any other relief that allows this Court to do justice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY has been furnished by United States mail to all counsel of record on this ____ day of April 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing REPLY of the Petitioner was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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