IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON,

Petitioner,

v.

CASE NO. SC09-2148
L.T. No. CR99-11338
DEATH PENALTY CASE

WALTER A. McNEIL,
Secretary, Department of
Corrections, State of Florida,

Respondents.
_________________________________/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COME NOW the Respondents, WALTER A. McNEIL, Secretary, Department of Corrections, State of Florida, et. al., by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondents respectfully submit that the petition should be denied, and state as grounds therefore:

FACTS AND PROCEDURAL BACKGROUND

Petitioner, Ray Lamar Johnston, was indicted for the first-degree murder of Janice Nugent which occurred on February 6 or 7, 1997 in Tampa, Hillsborough County, Florida. The facts of the case are set out in this Court's opinion at *Johnston v. State*, 863 So. 2d 271 (Fla. 2003):

On either February 6 or 7, 1997, Janice Nugent, a forty-seven-year-old divorced woman, was strangled to death in her Tampa home by Ray Lamar Johnston. Nugent's body was discovered by her son-in law, John McCarthy, at about 11 p.m. on Friday, February 7, 1997. When McCarthy arrived at Nugent's house, he noticed the side door to the house was ajar and keys were still in the door lock. Nugent's car was still in the carport. McCarthy entered the house and discovered Nugent's body, wrapped in a bed comforter and submerged in the bathtub. Nugent was wearing only panties and a brassiere.

The medical examiner, Dr. Julia Martin, testified that the time of Nugent's death was between 1 a.m. on Thursday, February 6, and 1 a.m. on Friday, February 7. Dr. Martin determined that the cause of death was manual strangulation, and that Nugent was murdered before she was submerged in the bathtub. There was extensive bruising to Nugent's neck and shoulder area. Dr. Martin concluded that the strangulation in this case was not by constant, continuous compression, but rather was "more of a manual throttling . . . meaning it was more pressure, release, pressure, release. There was some fighting activity." [FN1] Defensive bruising on Nugent's arms and hands and defensive fingernail injuries on her nose indicated that Nugent struggled with her assailant and attempted to pull the assailant's hands off her face.

> [FN1] Dr. Martin reached this conclusion based on the multiple deep bruising and fingertip contusions to the neck and the lack of petechial hemorrhages in and around the eyes. Petechial hemorrhages are sometimes seen in cases of strangulation where continuous pressure was applied.

Nugent sustained three to five blunt impact "pattern type injuries" on her buttocks and hips. Dr. Martin testified that within a reasonable medical probability, one or more of the patterned injuries on Nugent's buttocks were made by a belt. The other pattern type injuries could have been made by a belt or some other implement, possibly a vacuum cleaner

hose. The belt that caused the injuries was never recovered.

Kelli McCarthy, Nugent's daughter, testified that Nugent retained all of her used answering machine tapes and stored them in a bureau drawer in her bedroom. The answering machine tapes and a portable phone with caller ID were not found. There were no signs of forced entry and no signs of a struggle in any room other than the master bedroom. In the master bedroom a lamp on a bedside table had been broken and partially overturned. Nugent's massage table was open in the living room and jars of cocoa butter and massage oil were found on a nearby piece of furniture. McCarthy testified that Nugent was a massage therapist and would bring the table into the living room to give massages. McCarthy described Nugent as a creature of habit and a "neat freak" and testified that Nugent would mop her kitchen floor every week. It would be very uncharacteristic of her to leave a cup unwashed for three or four weeks. She also testified that Nugent habitually bathed twice a day. There was only one bathtub in the house.

The last person to see Nugent alive, other than Johnston, was Ron Pliego. Pliego arrived at Nugent's house on Wednesday, February 5, 1997, around midnight and left at around 1 a.m. on Thursday morning. Pliego did not eat or drink anything while at Nugent's house and had some form of sexual encounter [FN2] with Nugent. Pliego could not remember whether the massage table was in Nugent's living room when he left. Pliego was eliminated as a suspect in the Nugent murder after he provided police with his fingerprints and DNA.

[FN2] Pliego could not remember whether the encounter involved vaginal or oral intercourse.

Nugent, Johnston, and Frances Aberle, an acquaintance of Nugent who had dated Johnston, were regulars at a bar named "Malio's." A short time before the murder, Aberle told Johnston that she would no longer go to Malio's with him because she was afraid Nugent would retaliate against her for being with Johnston. Several days after the murder, Aberle

and Johnston spoke about the murder and Aberle said, "I just can't understand someone doing that. Why? No matter what somebody did, why somebody would do that." Ray agreed with her and then said, "Well, now there's no reason you can't go to Malio's with me."

Johnston's fingerprints were found on the bottom of a plastic cup under the kitchen table and on the cold water knob of the bathtub, near Nugent's body. Shoe tracks consistent with shoes recovered from a search of Johnston's apartment were found on Nugent's kitchen floor. The State could not prove that the shoe tracks came from the exact shoes owned by Johnston, but did establish that the tracks were consistent with the tracks made by Johnston's shoes. DNA evidence matching Johnston's DNA profile was found on a bed sheet in Nugent's master bedroom. The odds of another person matching Johnston's DNA profile are one in 279 trillion. The mixture stain from which the DNA evidence was found was consistent with blood, saliva, or sweat, but it was not consistent with semen. No evidence of sexual battery was introduced at trial.

Detectives Noblitt and Stanton interviewed Johnston three times before the Nugent trial. In the first interview, Johnston told the detectives that he knew Nugent, and that he met her at Malio's. He had danced with her a few times, and they went out on one dinner date several weeks before Valentine's Day. After the date, they went back to Nugent's house. [FN3] Nugent took him through her kitchen to a locked room at the rear of the house. Nugent began to act strangely and Johnston left the house. Johnston said he never went out with Janice again; he was in the house for no more than half an hour that night; he and Janice did not have sex; and they did not have a fight. Johnston denied killing Nugent.

[FN3] Testimony from other witnesses established that Johnston was in Nugent's house sometime before January 15, 1997.

The second interview took place six days later. By that time, the detectives had received information that Johnston's fingerprint was found on the shower

knob in Nugent's bathroom. Detective Noblitt asked Johnston to go back over the events of his dinner date with Nugent, and Johnston reiterated the story he gave in the first interview. Noblitt then said, "Your fingerprint is in a place very near where Ms. Nugent's body is." Noblitt did not indicate exactly where the fingerprint was found. Johnston said he was only in Nugent's house once and only went in the rooms he had previously mentioned; then Johnston stopped and said "Wait a minute, I may have gone in the computer room." Noblitt countered, "That won't explain the fingerprint," and told Johnston he did not believe he was telling him the truth. Noblitt asked Johnston if he knew where the body was found. At first Johnston said no, then he said, "Oh, I think it was found in the bathroom." Asked how he knew that, Johnston said he had read it in the newspaper. A short time later, Johnston mentioned to the detectives that he has occasional blackouts and seizures. Johnston told the detectives, "Sometimes I get to doing something and doing it and doing it and when it's over I can't remember what I've done." Detective Stanton asked Johnston, "Is that what happened with you and Janice?" and Johnston said, "No, I did not kill Janice."

Detective Noblitt insisted that "[s]omething happened. Your fingerprints are in a place where I know you were there the night she was killed." Johnston stopped for a second and said, "I went to the bathroom." Noblitt took that as meaning that he went in to urinate, and he insisted to Johnston that he did not believe him and the fingerprint did not get there that way. Johnston thought about it for a few minutes and then said, "Okay, I'm going to tell you the truth." He then told the detectives that after he and Nugent returned to her house, they had a conversation about ghosts, which Nugent believed lived in her house. Nugent offered him a massage and Johnston accepted. Johnston took off his clothes and got on the massage table. Nugent heated some massage oil, and when she poured it on him it burned his buttocks and the back of his legs. He jumped up and ran into the shower, washed himself off, and fled Nugent's house in his underwear. Johnston told Noblitt that he was scared and that is why he did not mention these facts during the first interview.

The third interview with Johnston took place on September 2, 1997. By that time, the detectives had received DNA test results indicating that Johnston's bodily fluid was found on a sheet in Nugent's master bedroom. The detectives advised Johnston of his constitutional rights, as they had done in the previous interviews, and told him they wanted to talk more about Nugent's homicide. Noblitt testified:

> I told him that we executed our search warrant; told him we had only taken a few things; that most of his property was still there, and had some small talk about who was going to pick up whatever remaining property he had. And Mr. Johnston sat there and looked at myself and Detective Stanton and said, "I think I have a problem."

Johnston then told the detectives that he had another person named Dwight living inside of him. Johnston said that Dwight was "very mean" and "I got to be cautious." Noblitt testified that Johnston "sat and put his fists together and clinched his fists real tight with his knuckles almost turning white and leaned back in his chair and kind of closed his eyes ... and he said 'You've got to see him man.'" During the same interview Johnston denied that "Dwight" killed Nugent.

The State filed a motion to rely upon *Williams* [FN4] rule evidence of Johnston's prior first-degree murder conviction. After two hearings on the subject, the trial court granted the State's motion to rely upon *Williams* rule evidence and issued a ten-page order detailing the analysis the court conducted in reviewing the motion. The State presented evidence that on March 13, 2000, Johnston was convicted of the first-degree murder of Leanne Coryell. Coryell was murdered on August 19, 1997, six months after the Nugent murder. Johnston confessed to the Coryell murder during the penalty phase of the Coryell trial, after the jury had convicted him of the murder.

[FN4] Williams v. State, 110 So.2d 654 (Fla.1959); § 90.404, Fla. Stat. (Supp.1996).

Coryell was a thirty-year-old, physically fit, blond-haired, attractive woman. She was forcibly abducted from her apartment by Johnston and taken to a nearby park. Her body was found nude and partially submerged in a pond. Coryell's clothing was scattered on the ground in the vicinity of the pond, and her car was found nearby in a church parking lot. The cause of her death was strangulation, most likely manual strangulation. However, the possibility that a ligature was used could not be ruled out by the medical examiner. Coryell was most likely already dead when her body was dragged and placed into the water. There was evidence of a sexual battery.

Johnston and Coryell resided in different buildings of the same apartment complex. Certain property, including an ATM card, was taken from Coryell, and money was later withdrawn from her bank account using that card. There were pattern injuries on Coryell's buttocks that were consistent with Coryell having been beaten with a belt. The pattern injuries matched the pattern of Coryell's belt found at the scene.

During the Nugent trial, the State read into the record parts of Johnston's confession to the Coryell murder. In this confession, Johnston admitted killing Coryell, but said he did not rape or sexually assault her. Johnston said that after she was already dead he attempted to cover himself by making it appear as if Coryell had been assaulted. In furtherance of this objective, he removed Coryell's clothes and scattered them, kicked her in the crotch area, struck her with her belt, and dragged her into the pond. Johnston admitted that he knew chlorinated water, and even water itself, would remove trace evidence, and acknowledged that he took steps to cover up what he had done.

During his confession to the Coryell murder, Johnston referred to "Dwight," the entity which purportedly lived inside him. A psychologist had testified earlier in the Coryell penalty phase that Johnston expressed a fear that another personality within him named "Dwight" had possibly committed the Coryell murder. However, Johnston admitted in his

confession that "Dwight" was not responsible for the Coryell murder.

The trial court in the Nugent case noted that the *Williams* rule evidence of the Coryell murder was presented for sixty-two minutes at trial.

On October 6, 2000, the jury found Johnston guilty of the first-degree murder of Janice Nugent. The trial court conducted the penalty phase of Johnston's trial, during which both the State and Johnston presented evidence. The jury recommended by a seven-to-five vote that Johnston be sentenced to death. Johnston presented a motion for mistrial as to the penalty phase, and the trial court granted this motion. A new penalty phase was conducted.

The jury in the second penalty phase recommended by an eleven-to-one vote that Johnston be sentenced to death. The trial court followed the jury's recommendation and imposed a death sentence, finding and weighing two aggravating factors, [FN5] one statutory mitigating factor, [FN6] and twenty-six nonstatutory mitigating factors. [FN7] On direct appeal, Johnston raises five issues.

> [FN5] The aggravating factors were: (1) defendant was previously convicted of a felony involving the use or threat of violence to the person, § 921.141(5)(b), Fla. Stat. (Supp.1996), and (2) the capital felony was especially heinous, atrocious, or cruel (HAC). § 921.141(5)(h), Fla. Stat.
>
> [FN6] The only statutory mitigating factor was that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. § 921.141(6)(f), Fla. Stat.
>
> [FN7] The nonstatutory mitigating factors were: (1) defendant has a long history of mental illness; (2) defendant suffers from a dissociative disorder; (3) defendant suffers from seizure disorder and blackouts; (4)

> defendant did not plan to commit the offense in advance; (5) defendant's acts are closer to that of a man-child than that of a hard-blooded killer; (6) defendant is haunted by poor impulse control; (7) defendant is capable of strong, loving relationships; (8) defendant excels in a prison environment; (9) defendant could work and contribute while in prison; (10) defendant has extraordinary musical skills; (11) defendant obtained additional education while he was in prison; (12) defendant served in the U.S. Air Force and was honorably discharged; (13) defendant received a certificate of recognition from the Secretary of Defense for services rendered; (14) defendant excelled and was recommended for early termination while on parole; (15) defendant was a productive member of society after his release from prison; (16) defendant turned himself in to the police; (17) defendant demonstrated appropriate courtroom behavior during trial; (18) defendant has tried to conform his behavior to normal time after time; (19) defendant has a special bond with children; (20) defendant has the support of his mother, brother, and sister; (21) defendant has been a good son, brother, and uncle; (22) defendant has a mother, sister, three brothers, three nieces, and two nephews who love him very much; (23) defendant maintained a Florida driver's license; (24) defendant maintained credit cards and a bank account; (25) defendant can be sentenced to multiple consecutive life sentences and will die in prison; (26) the totality of the circumstances does not set this murder apart from the norm of other murders.

Johnston, 863 So. 2d at 274-278.

Johnston appealed his convictions and sentences, raising the following five issues in a 100-page amended initial brief:

> ISSUE I: THE TRIAL COURT COMMITTED HARMFUL ERROR IN ALLOWING THE PROSECUTION TO INTRODUCE BEFORE THE JURY A SERIES OF STATEMENTS MADE BY APPELLANT DURING CUSTODIAL INTERROGATION CONCERNING "DWIGHT."

ISSUE II: THE TRIAL COURT COMMITTED HARMFUL ERROR IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE PERTAINING TO THE DISSIMILAR MURDER OF LEANNE CORYELL.

ISSUE III: THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO PROVE IDENTITY.

ISSUE IV: THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE STATE IS INSUFFICIENT TO PROVE PREMEDITATION.

ISSUE V: FLORIDA'S DEATH PENALTY STATUTE, AND THE PROCDURE BY WHICH APPELLANT WAS SENTENCED TO DEATH, ARE CONSTITUTIONALLY INVALID.

Amended Initial Brief of Appellant, FSC Case No. SC01-1914.

Johnston's experienced appellate counsel, Steven Bolotin, also filed a 27-page reply brief. *Reply Brief of Appellant, FSC Case No. SC01-1914.*

On October 16, 2003, this Court affirmed Johnston's convictions and sentences on direct appeal. *Johnston v. State*, 863 So. 2d 271 (Fla. 2003). Thereafter, Johnston's appellate counsel, Mr. Bolotin, then filed a petition for writ of certiorari in the U. S. Supreme Court, based on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). On March 22, 2004, the United States Supreme Court denied certiorari. *Johnston v. State*, 541 U. S. 946, 124 S. Ct. 1676 (2004).

Johnston filed an Amended Motion to Vacate Judgment Conviction and Sentence on July 12, 2005. On May 3, 2006, Johnston filed an amendment to Claim Two and the State filed its

Responses on September 8, 2005, and June 27, 2006, respectively. Johnston raised 19 claims in his post-conviction motion:

> CLAIM I: MR. JOHNSTON IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. JOHNSTON'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT. AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.220. MR. JOHNSTON CANNOT PREPARE AN ADEQUATE 3.851 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.
>
> CLAIM II: (as amended) MR. JOHNSTON WAS DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND FELL VICTIM TO A *GIGLIO* AND/OR *BRADY* VIOLATION, BECAUSE THE STATE KNOWINGLY MISREPRESENTED FACTS TO THE COURT TO OBTAIN A FAVORABLE RULING ON THEIR *WILLIAMS* RULE APPLICATION.
>
> CLAIM III: MR. JOHNSTON'S CONVICTIONS AND SENTENCES ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO ERRONEOUS JURY INSTRUCTIONS AND FAILURE TO ENSURE JURY INSTRUCTIONS ON AVAILABLE STATUTORY MITIGATION IN VIOLATION OF MR. JOHNSTON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.
>
> CLAIM IV: MR. JOHNSTON WAS DENIED HIS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND MENTAL HEALTH EXPERTS DURING THE GUILT AND SENTENCING PHASES OF HIS CAPITAL CASE, WHEN CRITICAL INFORMATION REGARDING MR. JOHNSTON'S MENTAL STATE AND BACKGROUND WAS NOT PROVIDED TO THE JURY AND JUDGE, ALL IN VIOLATION OF MR. JOHNSTON'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

CLAIM V: MR. JOHNSTON'S CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR PROVIDING ILL-ADVICE TO THE DEFENDANT CONCERNING THE NEED TO CONFESS TO THE CORYELL MURDER. THIS CONFESSION PREJUDICED THE DEFENDANT IN THE NUGENT CASE WHEN IT WAS INTRODUCED AS *WILLIAMS* RULE EVIDENCE IN VIOLATION OF MR. JOHNSTON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VI: MR. JOHNSTON'S CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT PROPER VOIR DIRE, FAILURE TO QUESTION AND CHALLENGE BIASED JURORS BASED ON PREJUDICIAL PRE-TRIAL PUBLICITY, AND FAILING TO FILE A MOTION FOR CHANGE OF VENUE IN VIOLATION OF MR. JOHNSTON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VII: MR. JOHNSTON'S CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR MAKING LIGHT OF MITIGATION, BELITTLING THE DEFENDANT AND HIS CASE, MISMANAGING THE MENTAL HEALTH EXPERTS AND LAY WITNESSES, AND ENGAGING IN A CONFLICT OF INTEREST BY TAKING AN ADVERSARIAL ROLE AGAINST HIS CLIENT.

CLAIM VIII: MR. JOHNSTON'S SENTENCE IS MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE STATE VIOLATED THE GOLDEN RULE DOCTRINE, AND FOR FAILING TO OBJECT TO THE STATE'S BURDEN-SHIFTING PENALTY PHASE CLOSING ARGUMENT IN VIOLATION OF MR. JOHNSTON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM IX: MR. JOHNSTON'S CONVICTIONS AND SENTENCES ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE THAT RELEVANT SCIENTIFIC TESTIMONY WAS READ BACK TO THE JURY DURING THEIR DELIBERATIONS IN RESPONSE TO THEIR QUESTIONS IN VIOLATION OF MR. JOHNSTON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM X: MR. JOHNSTON'S CONVICTIONS ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO DEFENSE COUNSEL'S FAILURE TO CONSULT AND UTILIZE

NECESSARY EXPERT WITNESSES TO SCIENTIFICALLY REBUT THE STATE'S THEORY OF THE CASE, TO OTHERWISE OBJECT AND CHALLENGE THE STATE'S EXPERTS, AND FOR PROSECUTORIAL MISCONDUCT ON THE PART OF THE STATE CONCERNING FORENSIC EVIDENCE.

CLAIM XI: MR. JOHNSTON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. JOHNSTON TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. JOHNSTON. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

CLAIM XII: MR. JOHNSTON'S DEATH SENTENCE IS FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE STATE'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENTS UPON NON-STATUTORY AGGRAVATING FACTORS. DEFENSE COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE.

CLAIM XIII: THE JUDGMENTS AND SENTENCES OF DEATH IN THIS CASE MUST BE VACATED IN LIGHT OF *RING V. ARIZONA*.

CLAIM XIV: MR. JOHNSTON IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

CLAIM XV: COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST AN INSTRUCTION PURSUANT TO *SIMMONS v. SOUTH CAROLINA*, AND/OR INVESTIGATE AND PRESENT MITIGATING EVIDENCE OF PRACTICAL PAROLE INELIGIBILITY, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

CLAIM XVI: MR JOHNSTON'S CONVICTIONS AND SENTENCES ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM THE JURY DURING THE CORYELL AND NUGENT CASES THAT THE DEFENDANT WAS HEAVILY MEDICATED AND SEDATED. SPECIFICALLY, THIS

INFORMATION SHOULD HAVE BEEN MENTIONED AT THE VERY LEAST DURING HIS CONFESSION IN THE PENALTY PHASE OF THE CORYELL TRIAL. THIS OMISSION VIOLATED MR. JOHNSTON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XVII: INTERROGATION BY DETECTIVES NOBLITT AND STANTON AFTER JOHNSTON INVOKED HIS RIGHTS WAS UNCONSTITUTIONAL, AND COUNSEL WAS INEFFECTIVE IN FAILING TO SUPPRESS THE STATEMENTS.

CLAIM XVIII: TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE IN ADVISING THE DEFENDANT NOT TO TESTIFY, THREATENING TO WITHDRAW, FAILING TO INVESTIGATE, FAILING TO CALL WITNESSES, AND FAILING TO CHALLENGE THE STATE WITNESSES.

CLAIM XX: (Misnumbered – Actually Claim 19) MR. JOHNSTON'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(Claims as stated by Petitioner/Defendant)

The trial court held evidentiary hearings on December 1, 2006; June 14-15, 2007; and July 12-13, 2007 on eight of Johnston's post-conviction claims. Post-conviction relief was denied in the trial court's order of December 31, 2008. The appeal from the denial of post-conviction relief is currently pending before this Court in *Johnston v. State*, SC09-496.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Preliminary Legal Principles and Standards of Review

The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the two-part *Strickland v. Washington*, 466 U.S. 668 (1984) standard for claims of trial counsel ineffectiveness. *Valle v. Moore*, 837 So. 2d 905 (Fla. 2002). To prevail on a claim of ineffective assistance of appellate counsel in a habeas petition, a criminal defendant must show (1) specific errors or omissions by appellate counsel that "constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance," and (2) that the "deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Dufour v. State*, 905 So. 2d 42, 70 (Fla. 2005) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)); See also, *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000). Moreover, the appellate court must presume that counsel's performance falls within the wide range of reasonable professional assistance.

The failure to raise a meritless issue on direct appeal will not render counsel's performance ineffective, and this is also true regarding new arguments that would have been found to be procedurally barred had they been raised on direct appeal.

See, *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) (emphasizing that appellate counsel cannot be deemed ineffective for failing to raise a claim which "would in all probability" have been without merit or would have been procedurally barred on direct appeal); *Spencer v. State*, 842 So. 2d 52, 74 (Fla. 2003) ("[A]ppellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success"). In sum, appellate counsel cannot be ineffective for failing to raise an issue that has not been preserved for appeal, that is not fundamental error, and that would not be supported by the record. See, *Medina v. Dugger*, 586 So. 2d 317, 318 (Fla. 1991). Finally, habeas corpus "is not a second appeal and cannot be used to litigate or relitigate issues which could have been . . . or were raised on direct appeal." See, *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992).

GROUND I

MENTAL ILLNESS AS *PER SE* BAR TO EXECUTION

In this first habeas claim, CCRC argues that Petitioner/Defendant, Ray Lamar Johnston, is mentally ill and his execution is barred under the 8th and 14th Amendments. This habeas claim is procedurally barred - it was not raised at trial – on direct appeal – or in Johnston's post-conviction motion and

appeal. It is also without merit, as this Court held in [David Eugene] *Johnston v. State*, 2010 WL 183984, 12-14 (Fla. 2010):

> **Claim of Mental Illness as a Bar to Execution**
>
> Johnston argues, as he did in the postconviction court, that he is exempt from execution under the Eighth Amendment to the United States Constitution because his severe mental illness places him in the same category as those whose executions are barred because they were under the age of eighteen at the time of the murder or are mentally retarded. **The court below denied relief, finding Johnston's claim was procedurally barred for not having been raised on direct appeal or in prior postconviction proceedings and because, under this Court's precedents, mental illness is not a per se bar to execution. We agree with both these conclusions.**
>
> Relying on the reasoning behind the United States Supreme Court's rulings in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding the death penalty unconstitutional for defendants under age eighteen at the time of the crime) and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding the death penalty unconstitutional for mentally retarded defendants), Johnston argues that it similarly constitutes cruel and unusual punishment to execute a defendant who is severely mentally ill. [FN7] He contends that his mental illness and neurological impairments, which have been documented in various proceedings in the record, cause him to experience the same deficits in reasoning, understanding and processing information, learning from experience, exercising good judgment, and controlling impulses as those experienced by mentally retarded individuals and by those who commit murder while under the age of eighteen. **However, we agree with the postconviction court that the claim is procedurally barred because it could have been, but was not, raised on direct appeal or in any of the numerous prior postconviction motions.** [FN8]
>
> > [FN7] Johnston has already raised an *Atkins* claim in a prior proceeding. The postconviction court in that case denied the

> claim after an evidentiary hearing, concluding that Johnston is not mentally retarded. We affirmed in *Johnston v. State*, 960 So. 2d 757 (Fla. 2006).
>
> [FN8] We distinguish the claim Johnston makes here from a claim of insanity as a bar to execution. In order for insanity to bar execution, the defendant must lack the capacity to understand the nature of the death penalty and why it was imposed. See § 922.07(3), Fla. Stat. (2009); *Provenzano v. State,* 760 So.2d 137, 140 (Fla.2000). Florida Rule of Criminal Procedure 3.811 provides the procedure for asserting that a prisoner is insane, as that term is defined, and provides that the claim may not be made until a death warrant is signed.

Even if the claim were not procedurally barred, we would conclude that it is without merit. The same claim Johnston makes has been repeatedly rejected by the Court. In *Nixon v. State*, 2 So. 3d 137 (Fla. 2009), the Court held:

> Lastly, Nixon asserts that the trial court erroneously denied him a hearing on his claim that mental illness bars his execution. We rejected this argument in *Lawrence v. State*, 969 So.2d 294 (Fla.2007), and *Connor v. State*, 979 So.2d 852 (Fla.2007). **In *Lawrence*, we rejected the defendant's argument that the Equal Protection Clause requires this Court to extend *Atkins* to the mentally ill**. See 969 So.2d at 300 n. 9. In *Connor*, we noted that "[t]o the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position." ***Connor,* 979 So.2d at 867 (citing *Diaz v. State*, 945 So.2d 1136, 1151 (Fla.) cert. denied, 549 U.S. 1103, 127 S.Ct. 850, 166 L.Ed.2d 679 (2006) (indicating that neither the United States Supreme Court nor this Court has recognized mental illness as a per se bar to**

> **execution)).** Accordingly, Nixon is not entitled to relief on this claim.
>
> Id. at 146. **In *Lawrence v. State*, 969 So.2d 294 (Fla. 2007), we also rejected the claim Johnston makes here - that defendants with mental illness must be treated similarly to those with mental retardation because both conditions result in reduced culpability. Id. at 300 n.9. We find no reason to depart from these precedents. For all these reasons, relief is denied on Johnston's claim that his mental illness is a bar to execution.**
>
> *Johnston*, 2010 WL 183984, 12-14; 16 (e.s.).

In this case, as in the above-cited cases – *Nixon*, *Lawrence*, *Conner*, *Diaz* and [David Eugene] *Johnston* - CCRC'S habeas claim - that alleged mental illness is a *per se* bar to execution - is procedurally barred and also without merit.

GROUND II

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL (FAILURE TO RAISE UNOBJECTED-TO VERBAL INSTRUCTION AS ALLEGED "FUNDAMENTAL ERROR")

On direct appeal, Johnston was represented by an experienced criminal defense lawyer, Steven Bolotin. See e.g., *Brown v. State*, 538 So. 2d 833, 834 (Fla. 1989) (reversing conviction and death sentence in 1989 in case where the appellant, James Richard Brown, was represented by Assistant Public Defender Steven Bolotin). The "strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel." *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000)

(en banc) (quoting *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998)). For the following reasons, Johnston's claim of ineffective assistance of appellate counsel must fail.

First, Johnston complains, primarily, about the trial court's summary denial of his related claim of ineffective assistance of *trial* counsel. (Habeas Petition at page 9). Any challenge to the trial court's summary denial of post-conviction relief is not cognizable via habeas and is procedurally barred. Notably, Johnston's habeas petition (Ground II, at pages 9 – 14) essentially repeats the same arguments which are set forth in Johnston's initial brief (Initial Brief of Appellant, Claim VII, sub-claim (b) at pages 82 – 86), and then adds a two-sentence perfunctory claim that appellate counsel was ineffective. (Habeas petition at page 14-15). "As this Court has repeatedly stated, habeas corpus petitions cannot be used as a means to seek a second appeal or to litigate issues that could have been or were raised in a post-conviction appeal." *McDonald v. State,* 952 So. 2d 484, 498 (Fla. 2006), citing *Knight v. State*, 923 So. 2d 387, 395 (Fla. 2005) (citing *Baker v. State*, 878 So. 2d 1236, 1241 (Fla. 2004); *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989)).

Second, as the trial court found below, any substantive challenge to the trial court's verbal instruction is

procedurally barred in post-conviction. *See Thompson v. State*, 759 So. 2d 650, 665 (Fla. 2000) (emphasizing that substantive challenges to jury instructions are procedurally barred in post-conviction because the claims can and, therefore, should be raised on direct appeal). Furthermore, ("[C]laims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel." See, *Heath v. State*, 3 So. 3d 1017, 1033, fn. 11 (Fla. 2009), citing *Pooler v. State,* 980 So. 2d 460, 470 (Fla. 2008).

Third, CCRC admits that defense counsel did not object to the trial court's single remark. (Habeas Petition at 9). Jury instructions "are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred." *Garzon v. State*, 980 So. 2d 1038, 1042 (Fla.2008) (quoting *State v. Delva*, 575 So. 2d 643, 644 (Fla.1991)); *Heath v. State,* 3 So. 3d 1017, 1035 (Fla. 2009). Appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved for appeal. See, *Israel v. State*, 985 So. 2d 510, 520-521 (Fla. 2008).

Fourth, 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. According to the transcript, the trial court

stated, "A mitigating circumstances *may* [*sic* - *need*] not be proved beyond a reasonable doubt by the defendant." (DA XXI/2461). This discrepancy appears to be a scrivener's error,[1] particularly in light of the absence of any contemporaneous objection or correction, *sua sponte*, and especially in light of the fact that the simultaneous written penalty phase instructions correctly stated, "[A] mitigating circumstance *need* not be proved beyond a reasonable doubt by the defendant." (DA IV/571).

Fifth, although a claim of ineffective assistance of appellate counsel is properly raised in a petition for writ of habeas corpus, *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000), "appellate counsel cannot be considered ineffective . . . for failing to raise issues that were not properly raised during the trial court proceedings and do not present a question of fundamental error." *Peterka v. State*, 890 So. 2d 219, 242 (Fla. 2004). As this Court emphasized in *Peterka*, 890 So. 2d at 242:

In *Valle*, we explained that

> **appellate counsel cannot be considered ineffective under this standard for failing to raise issues that were not properly raised during the trial court proceedings and do not present a question of fundamental error.** See *Rutherford*, 774 So. 2d at 643.

---

[1]As this Court noted in Cole v. State, 841 So. 2d 409, 429 (Fla. 2003), "In context of the trial court's entire discussion in the order, it is clear that the reference [to nonstatutory aggravating circumstances] was merely a scrivener's error . . ."

> The same is true for claims without merit because appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal. See *id*. In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue. See *Jones v. Barnes*, 463 U.S. 745, 751-53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (appellate counsel not required to argue all nonfrivolous issues, even at request of client); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990) (noting that "it is well established that counsel need not raise every nonfrivolous issue revealed by the record"). Finally, a claim that has been resolved in a previous review of the case is barred as "the law of the case." See *Mills v. State*, 603 So. 2d 482, 486 (Fla. 1992).
>
> 837 So.2d at 907-08 (parallel citations omitted).

Peterka, 890 So. 2d at 242 (e.s.).

Sixth, in this case, as in *Israel v. State*, 985 So. 2d 510 (Fla. 2008), Johnston has not met his burden under *Strickland* and CCRC has not established fundamental error based on a brief misstatement. As this Court emphasized in *Israel*:

> **Finally, to the extent that Israel asserts ineffective assistance of appellate counsel for not litigating these claims of instructional error on direct appeal, he has not met his burden.** See *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) (explaining that the standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland* standard for trial counsel ineffectiveness, i.e., deficient performance and prejudice from the deficiency). **Jury instructions "are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred."** ***State v. Delva*****, 575 So. 2d 643, 644 (Fla. 1991). Israel has not asserted that trial counsel objected to any of these instructions.**

> **Nor has Israel shown that the alleged instructional error was fundamental error that could be raised on appeal even though not preserved at trial. Thus, appellate counsel cannot be deemed ineffective for not raising an unpreserved claim on appeal. See Rodriguez, 919 So. 2d at 1281**; *Medina v. Dugger*, 586 So. 2d 317, 318 (Fla. 1991).
>
> *Israel,* 985 So. 2d at 520 (e.s.)

Lastly, in denying Johnston's claim of ineffective assistance of trial counsel (based on the failure to object to the trial court's verbal instruction), the post-conviction court found that the defense failed to demonstrate any prejudice under *Strickland where* the jury was provided with the correct standard in the written instructions.[2] See *Peterka v. State*, 890 So. 2d 219, 240 (Fla. 2004). As the trial court cogently explained:

> **Moreover, assuming that counsel's conduct in not objecting to the erroneous jury instruction constitutes deficient performance, Defendant has failed to allege or establish how he was prejudiced by this omission. In determining prejudice with regard to alleged penalty phase errors, the test "is whether there is a reasonable probability that, absent the errors, the sentence would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."** *Strickland*, 466 U.S. at 695;

[2]In *Phillips v. State*, 972 So. 2d 233 (Fla. 4th DCA 2007), the Court emphasized, **"[w]hether an erroneous jury instruction constitutes fundamental error cannot be made in a vacuum; it must be based upon the totality of the circumstances of each individual case.** As this court has previously stated: "[T]he determination of whether fundamental error occurred **requires that the ... instructions be examined in the context of the other jury instructions, the attorneys' arguments, and the evidence in the case...**" *Id.* at 236 (e.s.), citing *Garzon v. State*, 939 So. 2d 278, 283 (Fla. 4th DCA 2006), *review granted*, 956 So. 2d 455 (Fla. 2007).

> see also *Ponticelli v. State*, 941 So. 2d 1073, 1094-95 (Fla. 2006).
>
> In this case, the court instructed the jury in the second penalty phase that "a mitigating circumstance may not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." (See April 12, 2001, transcript, p. 2461) (emphasis added). **The written instructions provided to the jury correctly stated that "a mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established**." (See Penalty Proceedings – Capital Cases, written jury instructions filed April 21, 2001, attached) (emphasis added). **Considering the court's alleged misstatement in context, and in light of the fact that the written instructions provided to the jury contained the correct standard, the Court finds Defendant's assertion that the jury was misled to believe that mitigating circumstances must be proved beyond a reasonable doubt and that Defendant may not have met this erroneous high standard of proof is without merit. In addition, even if counsel's failure to object to the alleged misstatement can be considered deficient performance, the Court finds that Defendant is unable to establish prejudice because the jury was provided with the correct standard in the written instructions**. See *Peterka v. State*, 890 So. 2d 219, 240 (Fla. 2004) (assuming *arguendo* that counsel's failure to clarify the definitions of aggravating and mitigating circumstances could be considered deficient performance, the Court found the defendant could not "establish prejudice because the jury was properly instructed during the penalty phase"). **Accordingly, this sub claim of Claim III is denied.**
>
> (PCR V8/1555-1556) (e.s.)

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.

GROUND III

THE UNOBJECTED-TO ADMISSION OF JOHNSTON'S VOLUNTARY STATEMENTS TO LAW ENFORCEMENT

In this habeas ground, CCRC argues that (1) the trial court was "wrong" to deny this claim in post-conviction and (2) Johnston's statements allegedly were obtained in violation of his 5th, 6th, 8th, and 14th Amendment rights. (Habeas petition at pages 15 - 19). Any challenge to Johnston's statements to law enforcement involves an issue that was cognizable at trial and on direct appeal and is procedurally barred. See, *Green v. State*, 975 So. 2d 1090, 1115 (Fla. 2008).

Johnston's habeas petition (Habeas Ground III, at pages 15-19) essentially duplicates the same arguments which were rejected in post-conviction and which are repeated in Johnston's initial brief on post-conviction appeal (Initial Brief of Appellant, Claim V, at pages 67-70). As this Court has repeatedly stated, habeas corpus petitions cannot be used as a means to seek a second direct appeal or to litigate issues that could have been or were raised in a post-conviction motion and collateral appeal. See, *McDonald v. State,* 952 So. 2d 484, 498 (Fla. 2006); *Knight v. State*, 923 So. 2d 387, 395 (Fla. 2005). Therefore, this claim is procedurally barred.

Furthermore, CCRC's attempt to utilize the extraordinary writ of habeas corpus in an attempt to resurrect a procedurally-

barred challenge to Johnston's statements to law enforcement is both improper and without merit. In denying this claim below (Post-conviction Claim XVII), the trial court ruled:

> INTERROGATION BY DETECTIVES NOBLITT AND STANTON AFTER JOHNSTON INVOKED HIS RIGHTS WAS UNCONSTITUTIONAL, AND COUNSEL WAS INEFFECTIVE IN FAILING TO SUPPRESS THE STATEMENTS.
>
> In Claim XVII, Defendant alleges trial counsel was ineffective for failing to ensure that certain statements Defendant made to detectives in violation of his Fifth Amendment rights were suppressed. Defendant contends Detectives Noblitt and Stanton violated his rights by questioning him without a lawyer present after Defendant signed a written notice of invocation of constitutional rights on August 22, 1997. Without providing a date this alleged improper interrogation occurred or identifying with any degree of specificity which statements trial counsel should have ensured were suppressed, Defendant contends he "clearly did not initiate the interrogation" and the detectives "were prohibited from approaching [Defendant] in the first place." (See Defendant's amended motion, p. 58).
>
> The State responds that any post conviction challenge to the admissibility of Defendant's statements is procedurally barred. Providing specific record citations, the State also responds that the investigating detectives advised Defendant of his constitutional rights and obtained his waiver of those rights prior to interviewing Defendant on each occasion he was interviewed. Citing *Ault v. State*, 866 So. 2d 674 (Fla. 2003); *Hess v. State*, 794 So. 2d 1249 (Fla. 2001); and *Thomas v. State*, 748 So. 2d 970 (Fla. 1999), the State contends that Defendant's attempt to prospectively invoke his right to counsel through the written notice mentioned above is of no legal consequence and did not warrant suppression of his statements to detectives. Therefore, the State asserts, trial counsel's failure to obtain a legal remedy not authorized by law does not amount to deficient representation.

In an abundance of caution, this Court granted an evidentiary hearing on this claim. Defendant testified at the hearing that he was arrested in the Coryell case on August 21, 1997, and he signed the invocation of constitutional rights form in first appearance court on the morning of August 22, 1997. (See July 12, 2007, transcript pp. 832, 844). He was first interrogated by Detectives Noblitt and Stanton regarding the Nugent case on the afternoon of August 22, 1997. (See July 12, 2007, transcript p. 846). Defendant testified that he did not contact the detectives; rather, they requested to speak with him. July 12, 2007, transcript p. 846). He further testified that Detectives Noblitt and Stanton contacted Defendant to discuss the Nugent homicide two more times and that Defendant never requested that they come and interview him. (See July 12, 2007, transcript pp. 846-47).

During the direct examination of Mr. Littman at the evidentiary hearing, the Court asked post conviction counsel to specify which statements should have been suppressed as alleged in Claim XVII. Post conviction counsel responded that it was Defendant's statements to law enforcement, which were referenced in the State's closing argument, that he used the victim's shower to rinse off after being burned with massage oil. (See June 14, 2007, transcript pp. 386-87). **Mr. Littman testified he felt these statements were exculpatory in nature and explained his rationale for not seeking their suppression as follows:**

> Littman: Well, we attributed them to mean that there was an explanation for [Defendant's] fingerprints being on the bathtub water faucet, that he was telling them that he took a shower. And we couldn't put [Defendant] on the stand, so there we were offering explanation through the State's own evidence what [he] . . . had told Detective Noblitt without having to put him on the stand and subject him to cross-examination. So I consider that to be an exculpatory. I know he never made any incriminating statement. He always denied it that he had anything to do with this woman.

Hendry: Okay. So as far as investigating a motion to suppress these statements, based on that Invocation of Rights Form, are you saying you never pursued that option?

Littman: I'm saying the Invocation of Rights Form has nothing whatsoever, legally, to do with the issue. The law is very clear on this point. He would have to invoke the rights at the time interrogation has begun. He was not in custody, nor was there a Nugent case pending at the time he made those statements.

In fact, if my recollection serves me, he initiated contact with the police on his own, despite our telling him not to do so, to talk about the Nugent case. And he was giving this explanation, which was always exculpatory, always self-serving. It wouldn't be covered by that form. The law says he has to invoke it at the time interrogation begins. He never did that.

Court: What I'm gathering, you wanted the statement in anyway?

Littman: I wanted the statement in. We had to explain, Your Honor, why those fingerprints were on that faucet. That's (sic), apart from the *William's* Rule of course, was the most damaging piece of physical evidence in the case, because a body was found in that bathtub. And as I recall, the victim Ms. Nugent' s daughter I think said that her mother was a very good housekeeper and that she always cleaned the bathroom. There would have been — there would have been no explanation for why latent prints would have been on there unless they were put there at the time of Janice Nugent's murder. That's my recollection of what the State's witness said.

(See June 14, 2007, transcript pp. 387-89).

On cross-examination, Mr. Littman indicated that he did not object to the introduction of Defendant's exculpatory statements for strategic reasons and that even if he had wanted to move to suppress Defendant's statements he did not believe there was a legal basis for filing such a motion. (See June 14, 2007, transcript pp. 421-22). **Mr. Littman further testified that despite being advised not to talk to the police, Defendant initiated contact with them on more than one occasion to speak about the Nugent case, and at least one of those occasions was to Detective Noblitt.** (See June 14, 2007, transcript pp. 422-23). Mr. Littman testified that he filed a motion in limine seeking suppression of those statements of Defendant that Mr. Littman did not feel strategically benefited the case. (See June 14, 2007, transcript p. 423). The record reflects that on August 17, 2000, Mr. Littman filed a motion in limine on behalf of Defendant requesting that the Court instruct the prosecutor and any and all State witnesses to refrain from referencing in any manner the matters outlined in the motion, which included statements Defendant made to Detectives Noblitt and Stanton other than those concerning Defendant using the victim's shower after being burned by massage oil. (See Defendant's Motion in Limine filed August 17, 2000, attached).

At trial, Detective Noblitt testified that he and Detective Stanton interviewed Defendant about the Nugent homicide three times. (See October 4, 2000, transcript, p. 806). At the beginning of each interview, the detectives gave Miranda warnings, advised Defendant of his constitutional rights, and obtained Defendant's written consent to be interviewed. (See October 4, 2000, pp. 806-08, 813-14, 821-23). Detective Noblitt further testified that Defendant indicated a willingness to talk to the detectives and did not ask for an attorney to be present before he would talk. (See October 4, 2000, transcript pp. 813-14). On cross-examination, Mr. Littman elicited that the detectives' interviews with Defendant took place more than six months after the victim's body was found and it was public knowledge to anyone who read the newspaper that the victim was found in her bathtub. (See October 4, 2000, transcript pp. 837-38).

“The presence of both a custodial setting and official interrogation is required to trigger the Miranda prophylactic. . . . Absent one or the other, *Miranda* is not implicated.” *Sapp v. State*, 690 So. 2d 581, 585 (Fla. 1997) (quoting *Alston v. Redman*, 34 F. 3d 1237, 1243 (3d Cir. 1994)). In *Sapp*, the defendant was arrested on an unrelated charge and signed a claim of rights form shortly before attending first appearance court. Sapp, 690 So. 2d at 583. A week later, while Sapp was still in custody, police initiated an interrogation concerning the facts of the case at bar. Id. Prior to questioning, Sapp was advised of his Miranda rights in writing and waived those rights in writing. Id. Sapp did not request an attorney and, after speaking about the facts of the case, he signed a written statement. Id. The Court concluded the claim of rights form executed before custodial interrogation had begun or was imminent was ineffective to invoke the Fifth Amendment *Miranda* right to counsel. Id. at 585-86.

In this case, Defendant testified that he signed the invocation of constitutional rights form at first appearance court for the Coryell case on the morning of August 22, 1997. He also testified that he was first interrogated by Detectives Noblitt and Stanton regarding the Nugent case in the afternoon of that same day. This testimony was uncontroverted. **There was no evidence presented that at the time Defendant executed the invocation of rights form at first appearance court, a custodial interrogation regarding the Nugent case had begun or was imminent. Under *Sapp,* the invocation of rights form was ineffective to invoke Defendant’s Fifth Amendment Miranda right to counsel.** Although Defendant testified that he did not initiate contact with Detectives Noblitt and Stanton to discuss the facts of the present case, he did not testify, and no other evidence was presented, that Defendant attempted to invoke his right to counsel once the interrogation had begun or was imminent. **Indeed, it appears the invocation of rights form is the only evidence upon which Defendant bases his claim that he effectively invoked his Fifth Amendment right to counsel and his *Miranda* rights were thereafter violated. Moreover, Detective Noblitt’s trial testimony established that prior to each of the three**

> **interviews, Defendant was informed of his *Miranda* rights in writing and he waived those rights in writing. There was no evidence presented at the evidentiary hearing to refute this testimony. Accordingly, there was no *Miranda* violation and no legal basis for trial counsel to have sought suppression of Defendant's statements to detectives based on a Miranda violation. *Hess v. State*, 794 So. 2d 1249, 1258-59 (Fla. 2001).**
>
> Additionally, Mr. Littman specifically testified at the evidentiary hearing that he felt Defendant's statements that he used the victim's shower to rinse off after being burned with massage oil provided an innocent explanation for why Defendant's fingerprints were found on the bathtub faucet near where the victim's body was found. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). **The Court finds Mr. Littman's testimony credible and his decision to not seek suppression of the above statements was based on sound trial strategy that was well within the norms of professional conduct. This finding is further supported by the fact that Mr. Littman filed a motion in limine seeking to exclude reference to other statements of Defendant that Mr. Littman testified he felt would not strategically benefit the case. Accordingly, Defendant has failed to show that Mr. Littman provided ineffective assistance of counsel as alleged. Claim XVII is denied.**

(PCR V9/1645-1651) (e.s.)

Once again, CCRC improperly seeks to use the extraordinary writ of habeas corpus as a vehicle to assert claims which are not cognizable in habeas and which are procedurally barred. This claim must be denied.

GROUND IV

THE *WILLIAMS* RULE CLAIM

In this ground, CCRC argues that *Williams* Rule evidence was erroneously admitted at trial. CCRC's renewed claim, asserted under the guise of habeas corpus, is not cognizable via habeas corpus and is procedurally barred. See, *McDonald v. State,* 952 So. 2d 484, 498 (Fla. 2006); *Knight v. State*, 923 So. 2d 387, 395 (Fla. 2005).

On direct appeal, *Johnston v. State*, 863 So. 2d 271, 281-83 (Fla.2003), this Court squarely addressed, and rejected, Johnston's *Williams'* rule claim and stated, in pertinent part:

> B. APPLICATION OF LAW
>
> The question before this Court is whether there are identifiable points of similarity which pervade the factual situations in the Coryell and Nugent murders. If identifiable points of similarity are evident, this Court must then determine whether the dissimilarities between the factual situations are insubstantial. See *Gore v. State*, 599 So.2d 978, 983-84 (Fla.1992).
>
> After a hearing on the State's pretrial motion to rely upon *Williams* rule evidence, the trial court prepared a detailed, written pretrial order on the issue. In its order, the trial court found the following similarities between the Coryell murder and the Nugent murder:
>
>> a. Both bodies were submerged in shallow water after death . . . Coryell was dumped in a pond, face down, while Nugent was dumped in a bathtub of running water.... However, during the penalty phase of the Coryell murder case [Johnston] testified.

> [Johnston] testified that he originally wanted to take [Coryell's] body up to the victim's apartment, but was scared that she had some type of alarm system. Additionally, [Johnston] testified that he submerged [Coryell's] body in the pond because he thought the water would destroy evidence....[T]he use of water in both instances ... with the ... stated belief that water would destroy evidence makes the similarities between the two cases profound....
>
> b. Both victims were single white females with blonde hair and medium build.
>
> c. The location of the residences of both victims were known to [Johnston].
>
> d. [Johnston] knew both victims prior to the murders. [Johnston] dated and/or had a social acquaintance with Nugent. But [Johnston] only lived in the same complex as Coryell and had only greeted Coryell.
>
> e. Both victims were strangled to death in a violent manner and with the use of great force which left multiple areas of dark, widespread contusions on the victims' neck.
>
> f. Both victims were left with distinct patterned bruises on their buttocks. In the Coryell case the medical examiner identified the cause of the bruising as [the victim's] belt. In the Nugent case the medical examiner will testify that the bruises were consistent with the use of a belt.
>
> g. Both victims had multiple blows from a fist to the head and upper body.

As the trial court noted in its order admitting the *Williams* rule evidence, there are a number of similarities between the Coryell and Nugent murders. In addition to the similarities set forth above, evidence in each case established that both victims

were already dead when they were submerged in the water, and both victims were, at least partially, strangled from behind.

The similar belt pattern injuries on the buttocks of both victims are possibly the most unique similarities between the Nugent and Coryell murders. Johnston alleges that the State failed to show that these injuries were similar. However, Dr. Martin, the medical examiner in the Nugent case, testified that within a reasonable medical probability, one or more of the patterned injuries on Nugent's buttocks came from a belt. Likewise, the medical examiner in the Coryell case testified that Coryell was beaten on the buttocks with a belt. During the penalty phase of the Coryell case, Johnston confessed to beating Coryell's buttocks with a belt.

The trial court noted the following dissimilarities between the two murders:

> 1. Johnston only knew Coryell by sight as a neighbor who he greeted on occasion, while he actually socialized with Nugent.
>
> 2. Coryell was kidnapped and apparently abducted in her own automobile from her apartment complex and then sexually battered in a wooded area adjacent to a church. Nugent was found dead in her own home and there was no evidence of kidnapping or sexual battery, nor were there any signs of forced entry into the home.
>
> 3. Coryell was thirty years of age; Nugent was forty-seven.
>
> 4. Nugent was found in bra and panties, while Coryell was found nude.

The first dissimilarity is insubstantial and likely the result of a difference in the opportunity with which Johnston was presented, rather than a difference in modus operandi. See *Gore*, 599 So.2d at 984 (citing *Chandler v. State*, 442 So.2d 171, 173 (Fla.1983)). The second and fourth dissimilarities

> are explained by Johnston in his confession during the Coryell penalty phase. Johnston testified that he would have taken Coryell's body to her apartment but was afraid she had an alarm system. Johnston further testified that he did not sexually assault Coryell but wanted to make it appear as if she had been sexually assaulted. Johnston claims to have removed Coryell's clothing in furtherance of this objective. The third dissimilarity is insubstantial in light of the fact that testimony established that both victims were blond, physically fit, attractive women. As this Court stated in *Chandler*, "We recognize that the crimes are not exactly the same. However, that fact alone does not preclude admission of collateral crime evidence and, indeed, would erect an almost impossible standard of admissibility." *Chandler*, 702 So.2d at 194.
>
> In this case, there are unusual and pervasive similarities between the Coryell and Nugent murders. The dissimilarities between the two murders are insubstantial and are partially explained by Johnston's own confession in the Coryell case. Because there are pervasive similarities and insubstantial dissimilarities between the Coryell and Nugent murders, we hold that the trial court did not abuse its discretion by finding that the Coryell murder was admissible as Williams rule evidence.
>
> *Johnston*, 863 So.2d at 281-283.

Habeas may not be used as a vehicle to re-address an issue that has already been considered and resolved on direct appeal. *Diaz v. State*, 945 So. 2d 1136, 1152 (Fla. 2006), citing *Patton v. State*, 878 So. 2d 368, 377 (Fla. 2004). As reiterated in *Damren v. State*, 838 So. 2d 512, 520 (Fla. 2003), "it is improper to argue in a habeas petition a variant to a claim previously decided." *Porter v. Crosby*, 840 So. 2d 981, 984 (Fla. 2003); See also, *Thompson v. State*, 759 So. 2d 650, 657 n.

6 (Fla. 2000) (declining the petitioner's "invitation to utilize the writ of habeas as a vehicle for the reargument of issues which have been raised and ruled on by this Court"); *Rodriguez v. State*, 919 So. 2d 1252, 1287 (Fla. 2005) (same). Moreover, Johnston's habeas petition concedes that this habeas claim essentially is a repetition of Claim III in Johnston's contemporaneous initial post-conviction brief. Accordingly, once again, it is procedurally barred.

<u>GROUND V</u>

THE FINGERPRINT EVIDENCE CLAIM

This final habeas claim attempts to challenge the admission of fingerprint evidence at trial. Again, CCRC alleges "the trial court was wrong" [to deny post-conviction relief]; and, in an apparent attempt to circumvent the page limitations for initial briefs, CCRC uses the habeas petition as a means to elaborate on a perfunctory claim presented in Johnston's initial post-conviction brief. (Compare Habeas Petition at 24-31 and Initial Brief of Appellant, at page 91, sub-claim (g), entitled "LOWER COURT'S CLAIM X (SUBCLAIM 7)-INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ARGUE BREAK IN THE CHAIN OF CUSTODY OF FINGERPRINT EVIDENCE" and stating "This claim requires a factual determination. The court was wrong to deny an evidentiary hearing." (Initial Brief of Appellant at 91). In other words,

CCRC again seeks to challenge the trial court's post-conviction ruling under the guise of habeas. This complaint is not cognizable in habeas and is procedurally barred. See, *McDonald v. State,* 952 So. 2d 484, 498 (Fla. 2006); *Knight v. State*, 923 So. 2d 387, 395 (Fla. 2005).

Moreover, although the IAC/fingerprint evidence claim was initially summarily denied, testimony was presented at the evidentiary hearing on this issue; and, therefore, the trial court made additional findings, which are unchallenged and dispositive. As the trial court cogently explained,

> **Sub Claim 7**
>
> In sub claim seven, Defendant claims trial counsel heard testimony that crime scene technician Joan McIlwaine left fingerprints she collected from the victim's house in her vehicle for three days and the vehicle was left unattended and out of her sight for long periods of time. Defendant further alleges this alone indicates probable tampering that requires the State to establish a proper chain of custody of the latent fingerprint evidence. However, **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.** See *Floyd v. State*, 850 So. 2d 383 (Fla. 2002); *Taplis v. State*, 703 So. 2d 453 (Fla. 1997).
>
> **To the extent that Defendant is alleging ineffective assistance of counsel for failing to object to the admission of fingerprint evidence based on a possible break in the chain of custody, Defendant has failed to make out a facially sufficient claim.** Defendant fails to allege that but for trial counsel's failure to object, the result of the proceeding would have been different. *See Blackwood v. State*, 946 So. 2d 960, 970-71 (Fla. 2006). "Relevant physical

evidence is admissible unless there is an indication of probable tampering." *Peek v. State*, 395 So. 2d 492, 495 (Fla. 1980). **Defendant's bare allegation of a break in the chain of custody is insufficient to render relevant physical evidence inadmissible. Floyd, 850 So. 2d at 399.**

The Court notes that in denying Defendant's request for an evidentiary hearing on this claim, this Court relied on Ms. McIlwaine's testimony on cross-examination explaining why there might be a three day gap between the date she lifted prints and the date she placed them into property. (See November 22, 2006, Order pp. 14-15, attached). However, upon further review of the trial transcript, the prints to which trial counsel and Ms. McIlwaine were referring were actually the shoe prints she had lifted from the victim's kitchen floor. (See October 3, 2000, transcript pp. 546-48). Specifically, defense counsel cross-examined Ms. McIlwaine regarding this shoe print evidence as follows:

Littman: So your testimony is, as you sit here today, that you photographed them and lifted them on February 8th, but it wasn't until three days later that you placed them into property?
McIlwaine: Yes, sir.

Littman: Why would there be a three-day gap?

McIlwaine: Because we have a lot of evidence and we continue to process while we're still doing it. All the evidence I collected, there were things to be processed and packaged. It takes a little bit of time. So we lock them up in our property room.

(See October 3, 2000, transcript pp. 546-47). Thus, as to any allegation that Ms. McIlwaine stored shoe print lifts in her car for three days, her trial testimony refutes this. Defendant has not alleged or identified specific facts to refute her trial testimony that the shoe prints were locked in the property room during the three day period between when they were lifted and placed into property. As such, any claim with regard to shoe print evidence is without merit.

As to the latent fingerprints, there is no evidence to support the claim that Ms. McIlwaine stored any latent fingerprints in her car for three days. At trial, she testified that she puts latent lifts on a card, writes the appropriate information on them, puts them in an envelope, and passes them on to the latent examiners. (See October 3, 2000, transcript pp. 538-39). She clarified on cross-examination that the envelope containing the latent lift cards goes into a sealed box. (See October 3, 2000, transcript pp. 547-48). **Considering Ms. McIlwaine's trial testimony, there is no indication that a break in the chain of custody occurred, much less that the evidence was probably tampered with.** *Overton v. State*, 976 So. 2d 536, 552 (Fla. 2007) (noting "it is not necessary that evidence be immediately catalogued with a property receipt at the police station for an intact chain of custody to exist"). As such, it cannot be said that counsel's failure to move to suppress all the evidence in Ms. McIlwaine's possession fell outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690; see also *Taylor v. State*, 855 So. 2d 1, 26-27 (Fla. 2003) (finding the trial court did not abuse its discretion in admitting certain physical evidence because although FDLE picked up the evidence two weeks after the booking officer collected it, the evidence had been stored in a locked cabinet under the booking desk during that time).

Although this claim was denied an evidentiary hearing, the Court notes that testimony was presented at the hearing on this issue. As such, and in an abundance of caution, the Court makes the following further findings. When post conviction counsel asked Ms. McIlwaine about the process she followed when lifting fingerprints from the victim's home, she responded as follows:

McIlwaine: It's a white card, a little bit bigger than an index card. On one side we write our information, where we collected it from, and the other side is where the tape goes. They go into a manila envelope, the same size. It gets put in the lock box and the latent print technicians take care of it.

Hendry: You say it gets placed in a --

McIlwaine: A lock box. Yes, right next to their office. It's in our security area.

(See December 1, 2006, transcript, pp. 105-06). When questioned regarding her supplement report and the latent fingerprints, Ms. McIlwaine further explained:

McIlwaine: We don't write on our supplement where we take them, because that's -- there's no other place for them to go. We're not allowed to take them anywhere. They have to stay in our office. They have to go into that box.

Hendry: So, there's no record in that supplemental report that you placed the latent fingerprints in the box?

McIlwaine: No, sir. It just says items, just tells you where I have lifted them.

Hendry: There's no evidence in that report that shows that you secured those prints in any way?

McIlwaine: We don't have to write that we secured them, because our office is secured.

(See December 1, 2006, transcript, pp. 116-17).

Further, post conviction counsel specifically asked Ms. McIlwaine whether she ever keeps any evidence in her car, and she responded:

McIlwaine: No, sir. May I ask a question? Overnight, is that what you are asking me?

Hendry: Any evidence whatsoever in this particular case, any items that you might have recovered from the crime scene, did you put any of that in a car?

McIlwaine: It does stay in the car with us when we're driving back. It will get locked in our crime lab. We have a lot of evidence we're processing. We're going in, taking it back and forth, yes. If I'm

going in to get evidence and bring it back out, it does get locked and then I go back and get more. We do do that.

Hendry: Did you ever leave any evidence in your car overnight?

McIlwaine: No, sir.

(See December 1, 2006, transcript, pp. 128-29).

On redirect examination, Ms. McIlwaine clarified her trial testimony that the latent lift cards are placed into an envelope and then passed on to the latent examiners. The State asked, "[w]hen you say pass it, did you mean to indicate to the jury that you handed it to the latent examiners?" Ms. McIlwaine responded, "[nb, sir. It was a figure of speech. It goes to their box then it goes to them." (See December 1, 2006, transcript, pp. 134-35). **The Court finds Ms. McIlwaine's evidentiary hearing testimony is credible and consistent with her trial testimony. There is no indication that shoe print lifts or latent fingerprints were stored in her car for three days, and Ms. McIlwaine specifically testified that she never left any evidence in her car overnight. As such, Defendant's claim that Ms. Mclwaine stored the fingerprint evidence in her vehicle for three days, unattended at times, thereby constituting a break in the chain of custody evidencing probable tampering is without merit.** This portion of Defendant's Claim X is denied.

Defendant also cites a study conducted by the International Association for Identification, presumably in support of the proposition that inaccurate print readings by latent print examiners leaves suspects vulnerable to bias or even malfeasanse by the police. However, **Defendant has failed to allege the reading of the fingerprints in this case was inaccurate and there is no indication that Defendant has an expert who can show that the reading of the prints was inaccurate. Therefore, this claim is facially insufficient and must be denied.**

(PCR V9/1621-1625) (e.s.)

As with all of the preceding claims raised in Johnston's habeas petition, this issue is both procedurally barred in habeas and also without merit. Habeas relief must be denied.

CONCLUSION

Respondents respectfully request that this Honorable Court DENY the instant petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF LAW has been furnished by U.S. mail to David D. Hendry, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 19th day of February, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. DA-R App. P. 9.100(*l*).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_/s/ Katherine V. Blanco___________
KATHERINE VICKERS BLANCO
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0327832
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
katherine.blanco@myfloridalegal.com

COUNSEL FOR RESPONDENTS