IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-75

LOWER TRIBUNAL NO. 97-13379

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

David D. Hendry
Florida Bar No. 0160016
Assistant CCRC-M
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33619-1136
(813) 740-3544

Counsel for Petitioner

Table of Contents

page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

FACTS AND PROCEDURAL BACKGROUND–REPLY 1

GROUND I- REPLY (SEVERE MENTAL ILLNESS) 3

GROUND II–REPLY(JUROR ROBINSON ISSUE/FUNDAMENTAL ERROR ..5

GROUND III–REPLY(FAILURE TO ADVISE*MIRANDA* RIGHTS) 9

CONCLUSION–REPLY 11

CERTIFICATE OF SERVICE 12

CERTIFICATE OF COMPLIANCE 13

TABLE OF AUTHORITIES

Atkins v. Virginia,
536 U.S. 304(2002)……3

Callins v. Collins,
510 U.S. 1141 (1994) 4

Carratelli v. State,
961 So. 2d 312 (Fla. 2007) 7

Graham v. State,
–U.S –, 2010 WL 1946731 (2010) 4

Johnston [David Eugene] v. State,
27 So. 3d 11 (Fla. 2010). 4

Johnston [Ray Lamar] v. State,
841 So. 2d 349 (Fla. 2002) 1,8

Kelly v. The Community Hospital of the Palm Beaches, Inc.,
818 So. 2d 469 (Fla. 2002) 7

Roberts v. Tejada,
814 So. 2d 334 (Fla. 2002) . ……9

Roper v. Simmons,
543 U.S. 551 (2005)……..4

Ross v. State,
–So. 2d –, 2010 WL 2103971 (Fla. 2010).....10

FACTS AND PROCEDURAL BACKGROUND–REPLY

On pages 3-9 of its Response, the State block quotes this Court's direct appeal opinion from *Johnston v. State*, 841 So. 2d 349, 351-355 (Fla. 2002). The Petitioner does not dispute this Court's *2002* 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 an "experienced criminal appellate lawyer." Mr. Johnston would prefer an effective attorney over what the State refers to as an "Eexperienced Criminal Appellant Lawyer." As revealed at the evidentiary hearing, even very experienced defense attorneys make mistakes. Furthermore, a review of the procedural history of the direct appeal on this case reveals that this particular appellate attorney made mistakes, and he was too busy or not prepared to handle the direct appeal in this matter.

A review of the direct appeal in this case, Case Number 00-979, reveals that the appellate attorney made three separate requests for extensions of time to file an initial brief. By Order from this Court dated September 7, 2000, the initial brief was due December 29, 2000. Ten days before the brief was due, on December 19, 2000, appellate counsel informed the Court that "A number of documents. . .are

not included in the record," and he informed that a motion to supplement the record was being filed "concurrently" with his motion for extension of time. Before actually filing the initial brief, two more motions for extension of time were filed. An April 18, 2001 motion for extension of time pled that he was busy working on another difficult case. Two days before his brief was due on June 1, 2001, he filed a motion for extension of time signed May 30, 2001. That motion for extension of time stated that he needed more time to raise matters involving "aspects of ineffective assistance of counsel [issues] intertwined with several of the issues in this case."

On June 18, 2001, the attorney finally filed a 106 page initial brief, and concurrently filed a motion for the enlarged brief to be considered timely-filed and within acceptable page limits. On July 15, 2001, this Court subsequently ordered the attorney to re-file a *100 page* amended brief within 10 days, which he finally did on July 13, 2001. Two motions for extension of time were made prior to serving his reply brief in this case, citing the fact that he was busy with work in other cases, family-related travel, and he was struggling with a "cold and fever."

The Petitioner might not otherwise mention this unique procedural history in the typical case, but because the State here keeps referring to this "experienced criminal appellate attorney," he feels that it necessary to remind the Court of the

procedural history here suggesting that this attorney lacked the competence, skill, and time to handle this direct appeal. This certainly was no smooth sail for the defense attorney on direct appeal. On pages 10-11 of its Response, the State merely block quotes the headings from the issues raised in the amended initial brief filed in 2001. On pages 12-15 of its Response the State simply block quotes and recites the headings of the Petitioner's 3.851 claims that were wrongly denied. On pages 16-17, the State simply reviews the standards of review applicable to ineffective assistance of appellate counsel claims. The Petitioner welcomes these standards and submits that he meets these standards of review for relief.

GROUND I-REPLY
(SEVERE MENTAL ILLNESS)

On page 18 of its Response, the State finally addresses the claim that the Petitioner should not be executed because of his severe mental illness, the 8th Amendment, and the evolving standards of decency. The State should not be able to avail itself of a procedural shield to enable them to violate the dictates of the United States Constitution. The 8th Amendment bars the execution of the Petitioner in light of his severe mental illnesses and neuropsychological deficits. When this case was heard at oral argument in May of 2002, this Court did not have the benefit of the *Atkins* decision,[1] a case decided by the United States Supreme

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

Court in June of 2002. Prior to this death sentence being affirmed in December of 2002, this Court did not have the benefit of the *Roper* decision, a case that was decided in 2005. *Roper v. Simmons*, 543 U.S. 551 (2005).

On pages 18-20 of the Response, the State simply block quotes this Court's opinion from *David Eugene Johnston v. State*, 27 So. 3d 11 (Fla. 2010). The Petitioner asks that this Court reconsider these very similar issues and grant relief based on the Petitioner's current and past mental status in light of the evolving standards of decency. The law and society's tolerance for the execution of certain classes of citizens in this nation is continually evolving. Just recently, the United States Supreme Court granted relief from a *life sentence* imposed on a 16-year-old who was sentenced to life without the possibility of parole for a non-homicidal offense. *Graham v. State*, –U.S –, 2010 WL 1946731 (2010). To permit the State the use of the procedural bar to defeat the Petitioner's claim is to defeat Justice Blackmun's fleeting and dissenting hope that "Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme." *Callins v. Collins*, 510 U.S. 1141, 1159 (1994). Due in part to the severe mental illnesses and neuropsychological deficits that he is laboring under, the Petitioner is not one of the least mitigated of the mitigated human beings housed on Florida's death row.

GROUND II–REPLY

(JUROR ROBINSON ISSUE/FUNDAMENTAL ERROR)

On page 21, the State addresses Ground II, appellate counsel's failure to raise the juror Tracy Robinson issue as fundamental error. The State here at page 21 upgrades the appellate attorney in this case to the status of "very experienced criminal appellate attorney." On page 9 he was classified by the State as simply as an "experienced criminal appellate attorney." Then the State cites to a case that this attorney won in 1989 to bolster his "experience" The Petitioner will not cite to the numerous cases that this attorney lost over the years, but he will point out that just because an attorney won a case in 1989 does not mean that he provided effective representation to the Petitioner during the years 2000-2002.

On page 22, the State says that "the Juror Robinson claims, including the *unpreserved* concealment/failure to disclose subclaim, were raised on direct appeal and steadfastly pursued at oral argument by Johnston's experienced appellate counsel." Conspicuously absent from that claim by the State is any justification for the appellate attorney's failure to raise this important issue as fundamental error in the amended initial brief. The transcript from the oral argument held May 7, 2002 proceeded as follows:

> **THE COURT**--WHAT WAS IN THE MOTION FOR NEW TRIAL, ABOUT HER NOT DISCLOSING BEING ACCUSED OF CRIMINAL ACTS?

THE APPELLATE ATTORNEY--NOTHING.

THE COURT--WHAT WAS IN THE MOTION FOR NEW TRIAL?

THE APPELLATE ATTORNEY--NOTHING WAS IN THE MOTION FOR NEW TRIAL ON THAT.

THE COURT--SO THIS ISSUE WASN'T RAISED IN THE MOTION FOR NEW TRIAL?

THE APPELLATE ATTORNEY--THIS, AS FAR AS I CAN TELL, NOBODY EVER PICKED UP ON THAT PARTICULAR ASPECT OF THE PROBLEM. OKAY. MOST OF WHAT IS GOING ON HERE IS VERY STRONGLY BEING ARGUED BY COUNSEL FOR BOTH SIDES BY THE JUDGE. THE MATTERS ABOUT THE DRUG USE, POSSESSION, AND TO INTERVIEW THE JUROR. THE MATTERS ABOUT THE CAPIAS AND THE REECE/LOWRY ISSUE. THE JUDGE HAD THE WRONG IDEA THAT THE REECE LOWRY ISSUE TURNED ON THE KNOWLEDGE OF HER CAPIAS, WHICH I WILL GET TO IN A MINUTE, BUT AS FAR AS HER NONDISCLOSURE, APPARENTLY NOBODY PICKED UP ON THE FACT THAT –

THE COURT--HOW DO WE GET TO THAT ISSUE?

THE APPELLATE ATTORNEY--I THINK YOU YOU GET TO THAT ISSUE BY--ISSUE, BY THE FACT THAT IT IS INTERTWINED WITH OTHER ISSUES. THERE ARE A LOT OF INTERTWINED ISSUES, AND THAT ONE PARTICULAR ASPECT OF IT, LACK OF KNOWLEDGE, I THINK, IS WELL-PRESERVED. THE DEFENSE COUNSEL DIDN'T HAVE THE LUXURY OF TRANSFER[SIC] AT JURY SELECTION. I DON'T THINK HE PICKED UP ON THE FACT AND ONCE IT CAME OUT THAT SHE HAD THIS PRIOR CONVICTION AND MAYBE SOME OTHERS BECAUSE THE WRONG PAPERWORK WAS INTRODUCED BY THE STATE.

The correct and competent answer to the last question was fundamental error. One need only look as far back as this Court's opinion in *Kelly v. The Community Hospital of the Palm Beaches, Inc.*, 818 So. 2d 469, 476 (Fla. 2002) to see that this claim rises to the level of fundamental error. In that opinion, this Court stated: "The parties have a **fundamental right** to a proper jury, and juror misconduct invokes issues of fairness and due process." (**emphasis added**). The appellate attorney in the case at bar was ineffective for 1) failing to raise this issue as fundamental error, 2) failing to argue fundamental error at oral argument, and for 3) failing to cite *Kelly, Id.* as supplemental authority on the issue. It must be noted that *Kelly, Id.* was released just 11 days after appellate counsel "conceded" the issue at oral argument in the case at bar.[2]

On page 25, the State cites to *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007) to advance the argument that the Juror Robinson issue is not fundamental error. *Caratelli, Id.* is inapplicable here. *Caratelli* involves the simple failure to raise a cause challenge of a juror. In the case at bar, the issue involves a juror who was dishonest during *voir dire* by concealing material information about her arrest record. This is not an "unauthorized re-argument" as mis-characterized by the

[2] "This Court reasoned on direct appeal: "Appellate counsel concedes that defense counsel failed to specifically raise this claim with the trial court." *Johnston v. State*, 841 So. 2d 349, 357 (Fla. 2003).

State. This is a valid claim that appellate counsel failed to raise the Juror Robinson concealment issue as fundamental error in the amended initial brief, and further, counsel ineffectively conceded lack of preservation of the issue at oral argument without a qualifying argument that the error at issue was fundamental in nature.

At page 26 the State suggests that this claim has no place in a habeas petition. The State claims, "Johnston's blatant attempts to resurrect his direct appeal complaints , submitted under the guise of habeas, conspicuously rely on the *SAME* cases which were previously cited [] on Johnston's direct appeal." The cases *ARE* the same. The law has not changed, and the law is clear. The Petitioner should be afforded relief now on this issue, and he should have been afforded relief at the direct appeal level. He was not afforded relief on direct appeal because of appellate counsel's omission and concession. The Petitioner now submits that appellate counsel presented this claim ineffectively on direct appeal, and this claim is entirely proper for consideration in this habeas petition. The claim of fundamental error was conspicuously absent from the direct appeal briefs, and the appellate attorney's concession of lack of preservation without qualifying argument was conspicuously present at oral argument.

At pages 26-27, the State suggests that the Petitioner has to show that Juror Robinson was actually biased. This is not the law. The Petitioner need only show

concealment of material information, and he has done so. *See Roberts v. Tejada*, 814 So. 2d 334, 342 (Fla. 2002) ("The record here reflects that the trial court struggled with the issue of materiality, but confused the analysis with 'prejudice,' which is not a part of the *De La Rosa* test.").

GROUND III-REPLY
(FAILURE TO ADVISE*MIRANDA* RIGHTS)

On page 30 the State improperly mis-characterizes and headlines this claim as the "The Procedurally-Barred *Miranda* Claim." It is not procedurally barred, and it should not be ruled procedurally barred. The State claims at length in a footnote at page 31 that the Petitioner was not "in custody." He was certainly in custody! According to the TV news reports that were aired while he was sitting as a customer and free man at Malio's restaurant, he was obviously the primary suspect in a very high-profile first degree murder investigation. The bartender told him so. The TV news bits informed that law enforcement wanted to speak with the man caught on video withdrawing money from the victim's bank account. The bartender basically told him, "Ray, I think they want to speak with you." That is why Ray called law enforcement. The Petitioner knew that he was wanted. Just because the Petitioner voluntarily drove to the police station, that did not magically transform the ensuing custodial interrogation into a non-custodial

interrogation. Once he went to the police station, law enforcement controlled his freedom.

This interrogation happened at the police station in a small room designed for custodial interrogations. Like the room described by this Court recently in *Ross v. State*, –So. 2d –, 2010 WL 2103971, (Fla. 2010), this was a "[v]ery small room at the station with at least two officers in the room." *Ross, Id.* at 9. The Petitioner was "confronted with evidence of his guilt," *Ross, Id.* at 10, including the use of the victim's ATM card, and he "was never informed he was free to leave." *Ross, Id.* at 10. The facts of this interrogation are simply such that no reasonable man would feel free to leave the scene. Especially the reasonable man whose face was repeatedly shown on TV news reports withdrawing funds from the victim's bank account. *Miranda* should have been read to the Petitioner up front. Instead, law enforcement, in a calculated manner, chose to question the Petitioner at length without reading him *Miranda*.

At pages 32-37, the State block quotes the lower court's order denying this claim, and makes a conclusory statement that this claim should not be raised in the habeas petition. This claim *is* proper for habeas consideration and relief.

CONCLUSION–REPLY

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 HABEAS REPLY has been furnished by FedEx to Katherine Blano, Assistant Attorney General and by U.S. Mail to Ray Johnston on this 25th day of June 2010.

_____

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive,
Suite 210
Tampa, Florida 33619-1136
813-740-3544

Copies furnished to:

Katherine Blanco
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, FL 33607-7910

Ray Lamar Johnston
DOC# 927442
Florida State Prison
7819 NW 228th Street
Raiford, Florida 32026

CERTIFICATE OF COMPLIANCE

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

_____

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive,
Suite 210
Tampa, Florida 33619-1136
813-740-3544