IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-839

DAVID EUGENE JOHNSTON

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

COUNSEL FOR APPELLEE
KENNETH S. NUNNELLEY
Fla. Bar No. 998818
SENIOR ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
FAX-(386)226-0457

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS

The State relies on the procedural history contained in the memorandum previously filed in this case. Likewise, the State relies on the memorandum summarizing the issues raised in prior proceedings and the memorandum concerning successive motions and procedural bar which have been previously filed with this Court.

Johnston filed this successive motion to vacate, his fifth, on May 6, 2009. The State filed a response to the motion later that same day, and, on May 8, 2009, the circuit court conducted a case management conference. On the afternoon of May 8, 2009, the circuit court entered its order denying Johnston's successive motion, finding that the claims contained in the motion were procedurally barred and, alternatively, meritless. This appeal follows.

THERE IS NO BASIS FOR A STAY OF EXECUTION

To the extent that Johnston's brief can be construed to seek a stay of execution, no stay is necessary. The issues contained in his brief are not complex, and can be decided by this Court prior to the scheduled May 27, 2009, execution. Writing in the context of a last-minute request for a stay of execution, Justice Rehnquist said:

> There must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, when the legal issues in the case have been sufficiently litigated and relitigated that the law must be allowed to run its course. If the

> holdings of our Court in *Proffitt v. Florida*, 428 U.S. 242 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), and *Woodson v. North Carolina*, 428 U.S. 280 (1976), are to be anything but dead letters, capital punishment when imposed pursuant to the standards laid down in those cases is constitutional; and when the standards expounded in those cases and in subsequent decisions of this Court bearing on those procedures have been complied with, the State is entitled to carry out the death sentence. Indeed, just as the rule of law entitles a criminal defendant to be surrounded with all the protections which do surround him under our system prior to conviction and during trial and appellate review, the other side of that coin is that **when the State has taken all the steps required by that rule of law, its will, as represented by the legislature which authorized the imposition of the death sentence, and the state courts which imposed it and upheld it, should be carried out.**

Evans v. Bennett, 440 U.S. 1301, 1303 (1979) (opinion of Rehnquist, as Circuit Justice) (emphasis added). That time has come in this case.

SUMMARY OF THE ARGUMENT

Johnston's motion for post-conviction DNA testing (which was raised for the first time three weeks before his scheduled execution) was properly denied. Johnston's claim is speculative at best, and, in view of the unchallenged evidence from the trial, whatever the result of DNA testing might be, it would not lead to an acquittal or a lesser sentence.

The "newly discovered evidence" claim is based upon a pre-publication executive summary of a National Academy of Sciences report that has never been made available to any court in connection with this case. Johnston's failure to provide the

"newly discovered evidence" results in a claim that is insufficiently pled and should be denied on that basis alone. Moreover, nothing "new" is contained in the report, and the claims are procedurally barred despite Johnston's attempt to avoid application of the settled procedural bar rules.

Johnston's general "testing" motion was properly denied because there is no absolute right to discovery in a post-conviction motion, and, as the circuit court found, because there is no reasonable probability that additional testing would exonerate Johnston.

The "clemency" claim is procedurally barred because it could have been but was not raised in any of Johnston's prior proceedings challenging his conviction and sentence of death. Alternatively, this claim lacks merit.

The "mental illness as a bar to execution" claim is procedurally barred because it could have been but was not raised on direct appeal or in any of Johnston's prior post-conviction motions. Alternatively, this claim is meritless because it has no legal basis.

The "time on death row" as a bar to execution is procedurally barred because it could have been but was not raised in any of Johnston's prior post-conviction motions. Alternatively, this claim is meritless.

The shackling claim is procedurally barred.

ARGUMENT

I. THE MOTION FOR DNA TESTING

On pages 5-12 of his brief, Johnston argues that the trial court should have granted his *Florida Rule of Criminal Procedure* 3.853 motion for "post-conviction DNA testing."[1] In denying Johnston's motion, the trial court held:

> Mr. Johnston alleges the only scientific evidence linking him to the crime was the presence of blood on his clothing and his person, which the State emphasized throughout the trial. He argues the evidence used to convict him was circumstantial; there were no eyewitnesses, confessions, or fingerprints. He insists he is innocent of the murder, pointing out that he was the one who called police and made a full report after finding the body. His position is that if DNA testing revealed that the blood did not belong to the victim, he would be exonerated. Therefore, he seeks testing of his shoes, socks, shorts, fingernail clippings, hair and crime scene debris, evidence that is in the possession of the Orlando Police Department and/or the Orange County Clerk of Court.
>
> To be entitled to DNA testing, Mr. Johnston must be able to demonstrate that the test results would exonerate him or mitigate the sentence he received. *See* Rule 3.853(b)(3) and (4). However, he fails to establish that the testing would exonerate him even if the results showed that the blood did not belong to the victim and the material under the victim's fingernails did not belong to him.

[1] In November of **2000**, the Orlando Police Department responded to a public records demand filed on behalf of Johnston by the Innocence Project. *See,* Notice of Production of Records,*etc.*, filed by the Orlando Police Department on April 30, 2009. No mention of DNA testing was made until after the current death warrant was signed. In 2000, Johnston was represented by CCR-North, and had been for some time. *See, Johnston v. State*, 708 So. 2d 590 (Fla. 1998) (listing "Martin J. McClain" as counsel); *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001).

During his January 24, 1984 statement to police, Mr. Johnston admitted holding the victim's body. [FN1] Therefore, it was reasonable to expect her blood to be on his clothing, and the issue at trial was not whose blood it was but how it got there. [FN2] Furthermore, there was other incriminating evidence against Defendant, including scratches on his face,[2] discrepancies in his various statements, the discovery of his bloodstained watch on a bathroom counter in the victim's house, and the fact that a butterfly pendant he was seen wearing was entangled in the victim's hair. Additionally, Mr. Johnston admitted taking personal items from the victim's home, allegedly as a memento of the victim.[3]

Based upon the totality of the evidence presented at trial against Mr. Johnston, this Court therefore concludes that even if the results of DNA testing were to show that the blood on Mr. Johnston's clothes did not belong to the victim and the material under the victim's fingernails did belong to him, there is no reasonable probability this result would exonerate him of the crime.

> [FN1] Q: Was the was the knife there at the time?
>
> A: I seen something like it ah something like a bad looking stick sticking out of her middle chest you know and I went over and bent down and her eyes looked kinda of a yellowish green color and ah her I can't remember if her mouth was open or not but **I remember picking her up and cuddling**

---

[2] The trial evidence established that Johnston had scratches on his face and neck immediately after Ms. Hammond's body was found. (Vol. V, R. 780). Those scratches were not present prior to the murder, and were not caused by the puppy that Johnston bought earlier that evening. (Vol. V, R. 706-7, 750). The witness testimony contradicted Johnston's claim that his puppy had scratched his face. (Vol. 14, R. 2331). Johnston is bound by that "explanation" and cannot change his version of how he came to have scratches on his face without being even less credible than he already is.

[3] Johnston does not challenge any of this evidence in any fashion whatsoever.

> **her into my arms** and started crying over her body and then I noticed her bedroom was all racked up (inaudible), tore up.
>
> (Transcript of 1-25-84 statement at 3) (emphasis added).
>
> [FN2] Investigator Dupuis testified that the stains on Defendant's clothing were not smears, but created by blood that was in motion as it was projected or cast off something else.

Order, at 2. That ruling is correct, is in accord with settled Florida law, and should not be disturbed in any way. In his brief, Johnston seems to suggest that the lower court, and this Court in turn, should in some fashion re-assess the evidence against Johnston, which is uncontroverted. *Initial Brief,* at 9-11. That position ignores the fundamental axiom of appellate review, that the evidence is reviewed in the light most favorable to the prevailing party. *Johnson v. State*, 696 So. 2d 326, 331 (Fla. 1997). When stripped of its pretensions, Johnston's brief argues for a complete review of the sufficiency of the evidence, even though this Court did just that long ago -- there is no legal basis for Johnston's view of the law, which ignores the principles of *res judicata*, collateral estoppel, and procedural bar in favor of repeated review of claims that have long since been either decided or waived. Johnston does not get to re-open claims that either were, or could have been, raised

years ago.[4] The trial testimony, despite the blind eye that Johnston has turned to it, **remains unchallenged.**[5]

To the extent that further discussion of this claim is necessary, the most compelling reason to deny Johnston's motion lies in the speculative nature of his attempt to explain how any possible testing could exonerate him. It is well established that **speculation cannot support the granting of relief under Rule 3.853**. *See Hitchcock v. State*, 866 So. 2d 23, 26 (Fla. 2004). Johnston has not provided an adequate basis to establish a "reasonable probability" that DNA testing could lead to his exoneration. *See* Fla. R. Crim. P. 3.853 (c)(5)(C) (2005). In fact, no such conclusion is legally available on the facts of this case, **since he has never denied that he had his victim's blood on him.**

Under Rule 3.853, Johnston has the burden of demonstrating the probative value of each piece of evidence which he seeks to have tested. *See Robinson v. State*, 865 So. 2d 1259, 1264-65 (Fla.) (noting rule requires defendant to allege with

---

[4] It is somewhat difficult to determine the precise issues underlying the DNA claim. However, there is no authority for the notion that previously-decided issues are re-opened because a DNA claim has been made.

[5] For example, on page 11 of his brief Johnston says that he both "claimed and disclaimed" ownership of the butterfly necklace and the watch. While true that Johnston changed his story, the facts, which Johnston has left out of his brief, are that witnesses confirmed his ownership of those items. Vol. III, R. 572-3 (necklace); Vol. III, R. 529-31 (watch).

specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of an acquittal or a lesser sentence; "It is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence"), *cert. denied*, 540 U.S. 1171 (2004); *see also Cole v. State,* 895 So. 2d 398, 402-03 (Fla. 2004).

Johnston has tried to meet this burden by alleging that "any DNA evidence will fail to incriminate him." Johnston's position is that, should DNA testing fail to establish that the biological material belonged to the victim, he will be legally exonerated. Johnston misunderstands the meaning of exoneration **-- the evidence must affirmatively prove his innocence**, providing a reasonable probability of an acquittal or reduced sentence in the event of a new trial with the DNA evidence. *See Fla. R. Crim. P.* 3.853 (c)(5)(C) (2005). **His motion was insufficient because it did not explain how any DNA testing could affirmatively prove that Johnston was not involved in Hammond's murder or otherwise lead to an acquittal or reduced sentence,** and the trial court properly found to that effect. This case does not present a factual scenario where DNA testing could

provide any benefit.[6] And, under the facts of this case (including the physical evidence and Johnston's multiple, inconsistent statements), whatever any speculative DNA testing might show would not help Johnston. After all, he is limited in the arguments he could make in a retrial because of the multiple statements made to law enforcement -- those statements significantly limit the options available to defense counsel, and render the utility of DNA typing virtually non-existent.

In *Van Poyck v. State*, 908 So. 2d 326 (Fla. 2005), this Court upheld the denial of a request for DNA testing. Van Poyck and his codefendant Valdez had both been sentenced to death for the murder of a corrections officer during an escape attempt. Van Poyck had requested postconviction DNA testing of all of the clothing worn by himself and Valdez, asserting that the DNA evidence would establish that Valdez was the triggerman, thus mitigating Van Poyck's sentence. In denying relief, the Court concluded that identity of the triggerman would not exonerate Van Poyck or mitigate his sentence. *See also Sireci v. State*, 773 So. 2d 34, 43-44 (Fla. 2000) (noting even if DNA on hairs found in motel room belonged to codefendant, Sireci is not exculpated); *Hitchcock, supra.*

[6] No testing was conducted at trial on the "fingernail scrapings" because of the impossibility of obtaining meaningful results. (V. VI, R. 877-9).

The DNA testing that has been requested in this case can only lead to four possible results. If inconclusive, the evidence cannot provide exoneration because it has no probative value. The same is true if the evidence can only be matched to the defendant or the victim. *Compare Ross v. State*, 882 So. 2d 440, 441 (Fla. 1st DCA) (finding blood and hair evidence linked only to the victim did not exclude defendant from having been present at scene and therefore did not exonerate him), *rev. denied*, 892 So. 2d 1014 (Fla. 2004). Finally, DNA could be located which cannot be linked to Johnston or the victim. However, even this possibility does not exonerate Johnston since it is beyond dispute that the victim was bleeding and that Johnston held her. *See, e.g.,* Vol. IV, R. 936-39, 945, 991, 994, 995; Vol. XIV, R. 2332, 2341, 2358, 2371. The presence of DNA which is not linked to either Ms. Hammond or Johnston at the residence/crime scene would be insignificant and does not raise a reasonable question as to Johnston's guilt. *Compare Tompkins v. State*, 872 So. 2d 230, 243 (Fla. 2003) (upholding denial of DNA testing where, even if analysis indicated a source other than victim or defendant, there is no reasonable probability of a different result); *King v. State*, 808 So. 2d 1237, 1247-49 (Fla. 2002) (same). Johnston cannot be exonerated under any scenario.

Although Johnston maintains his innocence, his identity as Hammond's killer cannot be reasonably disputed. It is well established that DNA testing should be denied where it will shed no light on the defendant's guilt or innocence. *See Huffman v. State*, 837 So. 2d 1147, 1149 (Fla. 2nd DCA 2003); *Zollman v. State*, 820 So. 2d 1059, 1063 (Fla. 2nd DCA 2002). This motion was properly denied. When all of the evidence of guilt is considered (as it must be in this context), there is no reasonable probability of a different result.

Finally, Johnston's motion is no more than a blatant and frivolous attempt to delay his execution -- Johnston made no effort to obtain DNA testing until his 2009 death warrant was signed. Such a late-filed request, while technically permissible under Rule 3.853, is nothing more than a last minute attempt to gain a stay by playing chicken with this Court. *See, Bell v. Lynaugh,* 858 F.2d 978, 985-86 (5th Cir. 1988) (Jones, J., concurring). And, given that this issue was not even mentioned in any prior pleading, the conclusion flowing from that omission is that the significance of the now-crucial DNA testing was minimal, at best. *See, Henry v. Wainwright*, 743 F.2d 761, 762 (11th Cir. 1984). In the context of a last-minute next-friend filing, then-Justice Rehnquist, writing as Circuit Justice, made the following comment:

> There may be very good reasons for the delay, but there is also undoubtedly what Mr. Justice Holmes referred to in another context as a "hydraulic pressure" which is brought to bear upon any judge or group of judges and inclines them to grant last-minute stays in matters of this sort just because no mortal can be totally satisfied that within the extremely short period of time allowed by such a late filing he has fully grasped the contentions of the parties and correctly resolved them. To use the technique of a last-minute filing as a sort of insurance to get at least a temporary stay when an adequate application might have been presented earlier, is, in my opinion, a tactic unworthy of our profession.

Evans v. Bennett, 440 U.S. 1301, 1307 (1979). Johnston's last-minute DNA testing motion is no different than the last-minute next-friend filing at issue in *Evans*. DNA evidence has been admissible in this state since 1988 (before Johnston's first post-conviction proceeding), and there is no reason that it could not have been sought long ago if Johnston truly wanted the testing done. *Andrews v. State,* 533 So. 2d 841 (Fla. 5th DCA 1988). In any event, because any possible DNA testing will not exonerate Johnston on the facts of this case, summarily denial of his motion for post-conviction DNA testing was proper. There is no basis for any further delay.

II. THE "NEWLY DISCOVERED EVIDENCE" CLAIM

On pages 12-23 of his brief, Johnston relies on a **pre-publication executive summary** of a report he says will be released by the National Academy of Sciences. The forensic evidence presented at Johnston's trial is discussed at length in

his brief, as are the various challenges that have already been made, **and rejected**, with respect to that evidence. Nothing "new" has been raised, despite Johnston's reference to the unpublished report -- because that is so, these claims are not available to Johnston because they are procedurally barred. The denial of this claim on that basis should be affirmed.

In an effort to avoid the procedural bar, Johnston apparently intends to rely on the report as constituting "newly discovered evidence," even though he does not explain how that is so, either generally or in the context of this case. In any event, the "report" does not amount to the sort of "evidence" that will suffice to remove a procedural bar, as the circuit court found. Specifically, the circuit court held:

> The report does not establish that any particular test, test result, or specific testimony presented at Mr. Johnston's trial was faulty or otherwise subject to challenge. Furthermore, it is merely a new or updated discussion of issues regarding developments in forensic testing. It does not constitute evidence that was not known at trial and could not have been ascertained through the exercise of diligence.

Order, at 10. That result is supported by competent substantial evidence, comports in all respects with settled Florida law, and should not be disturbed.[7]

[7] To the extent that Johnston complains about the qualifications of the blood spatter witness, those claims were raised, and eventually abandoned, in his 1998 post-conviction proceeding. *Johnston v. State*, 708 So. 2d 590, 593 n.6 (Fla. 1998).

To the extent that further discussion is necessary, reports similar in character to this one have not been considered to be newly discovered evidence. *Trepal v. State*, 846 So. 2d 405 (Fla. 2003).[8] **This Court has held that it has never recognized new opinions or new research studies as newly discovered evidence.** *Schwab v. State*, 969 So. 2d 318, 326 (Fla. 2007). In fact, this Court has repeatedly rejected claims that governmental studies, such as the one at issue here, constituted evidence at all, much less newly discovered evidence. *Power v. State*, 992 So. 2d 218, 220-23 (Fla. 2008); *Tompkins v. State*, 994 So. 2d 1072, 1082-83 (Fla. 2008); *Diaz v. State*, 945 So. 2d 1136, 1145-46 (Fla. 2006); *Rolling v. State*, 944 So. 2d 176, 181 (Fla. 2006); *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006). Instead, the Court has characterized such reports as, "a compilation of previously available information . . . and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches." *Rutherford*, 940 So. 2d at 1117. Further, in determining whether information in a report qualifies as "newly discovered evidence," the Court looks to when that information could have been discovered through an exercise of due diligence. *See Diaz*, 945 So. 2d at 1144 (newly published letter not newly discovered evidence when

[8] The report in *Trepal* contained information that actually concerned the case before the Court. *Trepal*, 846 So. 2d at 409. That is certainly not the case here.

information underlying letter available since 1950); *Glock v. State*, 776 So. 2d 243, 251 (Fla. 2001).

Given this body of law, Johnston's claim that the report constitutes newly discovered evidence fails. This is particularly true since Johnston does not cite to a single piece of information underlying the report that is new. The criticisms in the report on which he relies were also made in the ABA report on the death penalty, which was published in 2006 and which is the very report that the Florida Supreme Court has repeatedly held is not newly discovered evidence. Since the report is not newly discovered evidence, Johnston has not met the standard to raise this claim in a successive motion.[9] The circuit court correctly summarily denied this claim.

III. THE GENERAL "TESTING" MOTION

On pages 23-27 of his brief, Johnston argues that the trial court should have granted his motion for "forensic testing" of various items of evidence. **This claim, as framed in the trial court, was not a request for DNA testing pursuant to *Florida Rule of Criminal Procedure* 3.853 -- Johnston made such a request in a separate motion, the State filed a separate response, and**

[9] **This report is nowhere in the record.** Johnston did not attach a copy of the report to his successive motion, nor did he favor this Court with a copy of it, either. As such, the claim is insufficiently pled in addition to the other reasons for denial of relief. *See Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009).

the circuit court denied the motion in a separate order.[10] In denying Johnston's motion, the circuit court held:

> Mr. Johnston is not entitled to test the evidence anew. As this Court concluded in the Order Denying Motion for Postconviction DNA Testing, there is no reasonable probability that the results of additional forensic testing would exonerate Mr. Johnston of the crime.

Order, at 1. That result is correct, is not an abuse of discretion, and should not be disturbed.[11]

To the extent that further discussion is necessary, **this motion is merely a request for discovery in a post-conviction proceeding**, albeit a request that was not made until three weeks prior to Johnston's scheduled execution. A post-conviction petitioner has no absolute right to engage in discovery. *State v. Lewis*, 656 So. 2d 1248, 1249 (Fla. 1994); *Overton v. State*, 976 So. 2d 536, 548-549 (Fla. 2007) ("A trial court's determination with regard to a discovery request is reviewed under an abuse of discretion standard. *See Reaves v. State,* 942 So. 2d 874, 881 (Fla. 2006) (**"The abuse of discretion standard of review also applies to the denial of a motion for discovery**

[10] To some extent, the orders on the Rule 3.853 motion and the general discovery motion overlap. Johnston's brief does, also.

[11] To the extent that Johnston refers to *Osborne v. District Attorney's Office*, 521 F.3d 1118 (9th Cir. 2008) and the pending review of that case in the United States Supreme Court, the Ninth Circuit referred to "the unique and specific facts of this case" in reaching its result. That case does not help Johnston, and makes no difference at all to the disposition of this claim, which is not a DNA claim, anyway.

in a postconviction case." (*citing State v. Lewis,* 656 So. 2d 1248, 1250 (Fla. 1994))).

Johnston's motion referred to blood testing evidence, fingerprints, and footwear impression evidence. All of these items of evidence were referenced in the motion with citation to the **trial record**, and there is no claim that this evidence was not known to all parties at all relevant times throughout the 26-year history of this case. **Johnston has had multiple post-conviction relief proceedings, but never sought such testing until three weeks prior to his scheduled execution.**[12]

In any event, it was never disputed that Ms. Hammond's blood was on Johnston's clothing (because he "cradled her head" when he "found the body"), nor was it ever disputed that Johnston had been inside the victim's home. *See, e.g.,* Vol. IV, R. 936-39, 945, 991, 994, 995; Vol. XIV, R. 2332, 2341, 2358, 2371. Because the issue is not whether it was Ms. Hammond's blood on Johnston's clothing, **but how that blood came to be there**, whatever forensic testing Johnston might wish to undertake has no relevance to any issue. Johnston has never denied having the victim's blood on him, having made multiple

[12] Johnston was represented from 2003 to 2006 by Edwin Mills. On September 19, 2006, Ismael Solis was appointed to represent Johnston -- on February 23, 2007, Mr. Solis moved to withdraw after reviewing the files and records and finding no issue on which to seek review.

statements to that effect shortly after the murder. *See*, Vol. XIV, R. 2332, 2341, 2358, 2371.[13] Because that is so, the requested "testing" would have served no purpose, and the motion was properly denied.

IV. THE "CLEMENCY" CLAIM

On pages 27-35 of his brief, Johnston argues that there is some global defect in the process by which clemency determinations are made and death warrants are issued. Given that that process has remained essentially unchanged in the post-*Furman* era, it stands reason on its head to suggest that this claim could not have been raised at the time of direct appeal, as well as at the time of the prior post-conviction motions. The fact that this claim is raised for the first time in the face of an execution demonstrates its lack of merit, and establishes the procedural bar to its review. The circuit court correctly denied relief on procedural bar grounds, finding an abuse of the post-conviction procedure. *Order*, at 10. Moreover, this Court rejected this precise claim in *Marek v. State*, SC09-765 (Fla., May 8, 2009), ms. op. at 12-13. The circuit court's denial of relief should not be disturbed.

[13] Johnston made several statements "explaining" how the blood got on his clothing and in closing argument the issue was not whose blood was on Johnston but, rather, how that blood got there. *See, e.g.*, Vol. IV, R. 936-39, 945, 991, 994, 995; Vol. XIV, R. 2332, 2341, 2358, 2371.

To the extent that any further discussion is necessary, Johnston's clemency proceeding was conducted on December 3, 1987, before the Florida Executive Clemency Board, following a comprehensive investigation, detailed application prepared by counsel and interviews, with counsel present, by a three member panel of the Florida Parole Commission. See Rule 15, *Rules of Executive Clemency*. Johnston's clemency application was denied when, on October 28, 1988, his first death warrant issued, signaling no clemency was approved by the Executive Clemency Board. Johnston was represented in the state clemency proceedings by attorney David F. Allen of Orlando. Johnston was neither abandoned by counsel nor left alone to navigate the clemency process from his jail cell. *see Harbison v. Bell*, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009). With the issuance of the second warrant on April 20, 2009, the Governor again declined to grant executive clemency in Johnston's case.[14]

In light of the fact that the state clemency process has already taken place, commencing in 1987 and culminating on April 20, 2009, when Johnston's second death warrant was signed, there is no basis for current post-conviction counsel to suggest the

[14] In Florida, the votes of the Governor and two members of the Executive Clemency Board are required to grant executive clemency; the Governor however is a necessary affirmative vote, or, put another way, if the Governor votes not to grant clemency, clemency cannot be granted.

underpinnings of *Harbison* have not been met. Johnston has not had to "navigate the clemency process from his jail cell." He has had full review of his case, and clemency was, quite rightly, denied. On page 32 of his brief, Johnston says that "collateral counsel was precluded from seeking clemency" until *Harbison* was decided. That argument makes no sense for two reasons. First, Johnston has already had a clemency proceeding in which he was represented by counsel. Second, the claim raised in the circuit court was not whether Johnston's **post-conviction counsel** could represent him in a clemency proceeding. Johnston made no mention of any issue related to Chapter 27 of the *Florida Statutes* in his successive motion, and cannot raise such a claim for the first time on appeal from the denial of relief. If that is the claim now advanced on appeal, that claim is raised for the first time here, and is procedurally barred. *Harbison* has no impact on this case.

In alternatively denying relief on the merits, the circuit court held:

> In *Bundy v. State,* 497 So. 2d 1209 (Fla. 1986), the Florida Supreme Court rejected Bundy's assertion that he was entitled to time to prepare and present an application of clemency before execution, explaining:
>
> > [I]t is not our prerogative to second-guess the application of this exclusive executive function. First, the principle of separation of powers requires the judiciary to adopt an extremely cautious approach in analyzing questions involving this admitted

> matter of executive grace. As noted in *In re Advisory Opinion of the Governor*, 334 So.2d 561, 562-63 (Fla. 1976), "[t]his Court has always viewed the pardon powers expressed in the Constitution as being peculiarly within the domain of the executive branch of government."
>
> *Id.* at 1211 (some citations omitted). *See Marek v. State*, SC09-765 (Fla. May 8, 2009).
>
> Mr. Johnston has not presented any reason that this Court should depart from this precedent. Accordingly, this claim is denied.

Order, at 11. This claim is meritless in addition to being procedurally barred -- relief was properly denied on both grounds, which are independently adequate grounds for the denial of relief. The circuit court's ruling should not be disturbed.

V. THE "MENTAL ILLNESS" CLAIM

On pages 35-46 of his brief, Johnston claims that he is "exempt from execution" because he suffers from "severe mental illness." **Johnston does not claim that he meets the *Ford v. Wainwright* standard of incompetence for execution, as the circuit court found**. *Order*, at 4-5. (In other words, this is not a *Ford* claim at all). Johnston's claim is a freestanding claim that his self-described "severe mental illness" is a bar to execution on equal constitutional footing with mental retardation or age. The circuit court summarily denied relief, and that ruling, which is supported by competent substantial

evidence, should not be disturbed. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998).

This claim is procedurally barred because it could have been but was not raised on direct appeal or in any of Johnston's prior state post-conviction relief motions. That is a procedural bar under settled Florida law, and the circuit court correctly denied relief on that basis. Rule 3.850(f), *Fla. R. Crim. P. Order,* at 3. That result is correct, and should not be disturbed.[15]

Moreover, this claim is untimely because it is based, **by Johnston's own admission**, on matters that have been known and available since prior to trial. *See, Motion*, at 5, para. 3.[16] Because that is so, this claim is untimely, and should be denied on that basis as well. Rule 3.851(d), *Fla. R. Crim. P.*

Alternatively, this claim lacks merit, as the circuit court found. *Order*, at 3-4.[17] This Court has upheld summary denial of this claim, stating:

> **Indeed, his allegations refer to testimony regarding his mental illness presented at the 2001**

---

[15] Johnston's brief does not acknowledge the procedural bars or explain how the circuit court was wrong in applying them.

[16] As support for this claim, Johnston relies on mental state testimony that was presented at his 1989 evidentiary hearing. Nothing from the most recent mental examination is any more than a re-packaging of the testimony produced years ago. That establishes the untimeliness of this claim.

[17] The circuit court relied on *Power*. *Order,* at 4-5.

evidentiary hearing for his initial postconviction motion. We hold, therefore, that the circuit court did not err in summarily denying this claim as untimely.

In an abundance of caution, we also note that we have previously determined that Power's claim has no merit. In *Diaz*, the defendant cited ABA Resolution 122A, arguing that his personality disorders were sufficiently akin to being mentally retarded so as to exempt him from execution. 945 So. 2d at 1151. We held:

> [N]either this Court nor the Supreme Court has recognized mental illness as a *per se* bar to execution. Instead, mental illness can be considered as either a statutory mental mitigating circumstance if it meets that definition (*i.e.*, the crime was committed while the defendant "was under the influence of extreme mental or emotional disturbance") or a nonstatutory mitigating circumstance. *See* § 921.141(6), Fla. Stat. (2006). Such mental mitigation is one of the factors to be considered and weighed by the court in imposing a sentence.
>
> *Id.*

Although Diaz was not able to show that he suffered from mental illness, we held that "even if he could, this would not automatically exempt him from execution as there is currently no *per se* 'mental illness' bar to execution." *Id.* at 1152; *see also Connor v. State*, 979 So. 2d 852, 867 (Fla. 2007) ("To 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." (*citing Diaz*, 945 So. 2d at 1151)). We reaffirm our previous declaration in *Diaz* and hold that the existence of mental illness standing alone does not automatically exempt Power from execution. [FN4]

> [FN4] To the extent that Power alleges that his mental illness renders him incompetent to be executed, this claim is not yet ripe, as he was told in his initial

> postconviction appeal. *Power II*, 886 So. 2d at 958; *see also Barnhill v. State*, 971 So. 2d 106, 118 (Fla. 2007); *Coney*, 845 So. 2d at 137 n.19; *Jones v. State,* 845 So. 2d 55, 74 (Fla. 2003); *Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001).

Power v. State, 992 So. 2d 218, 222 (Fla. 2008). (emphasis added).[18] The circuit court properly applied settled Florida law and denied relief on the alternative grounds of lack of merit. That alternate basis for denial of relief is likewise correct. This claim was properly denied on procedural bar and untimeliness grounds, and, alternatively and secondarily, the alternate merits ruling is also correct under settled law. This claim is not a basis for relief.

VI. THE "TIME ON DEATH ROW" CLAIM

On pages 46-55 of his brief, Johnston claims that he should be exempted from execution because of the time that he has spent incarcerated. This claim could have been but was not raised in any of his prior post-conviction relief motions, and is procedurally barred for that reason.[19] Summary denial of this claim was appropriate.

---

[18] Johnston has not made such a claim under *Ford.*

[19] Under settled law, this claim is subject to procedural bars, just like any other claim. *See, Elledge v. State*, 911 So. 2d 57, 77 (Fla. 2005) ("Elledge's contention that his now thirty-one-year stay on death row violates international law is procedurally barred as it could have but was not raised on direct appeal and is also meritless. *See Knight*, 746 So. 2d at 437 (summarily denying the claim that Florida had forfeited its

Alternatively and secondarily, summary denial of this claim was proper under controlling Florida law. As this Court has held:

> Tompkins's next claim is that Governor Bush's failure to reset his execution in 2004 resulted in Tompkins remaining on death row for such a prolonged period of time, twenty-three years, that it constitutes cruel and unusual punishment in violation of the Eighth Amendment. **We reject this claim as we have repeatedly done in the past**. In *Booker v. State,* 969 So. 2d 186 (Fla. 2007), this Court recognized that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay." *Id.* at 200; *see also Gore v. State,* 964 So. 2d 1257, 1276 (Fla. 2007) (holding that twenty-three years served on death row is not cruel and unusual punishment), *cert. denied*, 128 S. Ct. 1250, 170 L. Ed. 2d 89 (2008); *Elledge v. State,* 911 So. 2d 57, 76 (Fla. 2005) (finding no merit in constitutional claim predicated on the cruel and unusual nature of prolonged stay on death row); *Lucas v. State*, 841 So. 2d 380, 389 (Fla. 2003) (concluding that twenty-five years on death row does not constitute cruel and unusual punishment); *Foster v. State,* 810 So. 2d 910, 916 (Fla. 2002) (holding that twenty-three years on death row is not cruel and unusual punishment).
>
> Further, Tompkins contributed to the delay of his execution by filing five postconviction motions. **He cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction and sentence.** As explained by this Court in *Lucas*:
>
> > In the twenty-five years since he was first found guilty of the murder of Jill

---

right to execute Knight under binding norms of international law).") Johnston ignores the procedural bar, and does not attempt to explain why it was not properly found by the lower court.

> Piper, Lucas has exercised his constitutional rights in challenging both the finding of guilt and his death sentence. The finding of guilt was upheld in his first direct appeal in 1979 and was not challenged in any of the subsequent appeals. Lucas is clearly guilty of the murder of Jill Piper, and it has been determined that the proper sentence is death. Lucas's exercise of his constitutional rights has prevented his sentence from being carried out. Lucas may not now claim that his punishment has been cruel and unusual as a result of his own actions in challenging his death sentence. Lucas's claim that he was entitled to an evidentiary hearing on this issue is without merit and is denied.
>
> 841 So. 2d at 389.

> Accordingly, in light of this Court's precedent, we conclude that the trial court did not err in summarily denying Tompkins's claim that his twenty-three years on death row constitutes cruel and unusual punishment.

Tompkins v. State, 994 So. 2d 1072, 1085 (Fla. 2008) (emphasis added). Likewise:

> Gore argues that his twenty-three years served on death row is cruel and unusual punishment, and violates both the Eighth and Fourteenth Amendments of the United States Constitution. This Court has consistently rejected the argument that serving time on death row is cruel and unusual punishment, regardless of the time served. *See Lucas v. State*, 841 So. 2d 380, 389 (Fla. 2003) (holding that over twenty-five years on death row is not cruel and unusual punishment); *Foster v. State*, 810 So. 2d 910, 916 (Fla. 2002) (holding that twenty-three years on death row is not cruel and unusual punishment). **Gore's exercise of his constitutional rights through the appeal and postconviction process has prevented his death sentence from being executed, so he may not claim a constitutional violation due to his length of time on death row.** *See Knight v. State*, 746 So. 2d

> 423, 437 (Fla. 1998) **("[N]o federal or state courts have accepted [the] argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay.**"). Therefore, Gore's claim is without merit.

Gore v. State, 964 So. 2d 1257, 1276 (Fla. 2007) (emphasis added). This claim is meritless in addition to being procedurally barred, and the circuit court properly denied relief on those grounds. *Order*, at 7-8.[20]

Finally, as the circuit court noted, Johnston's case has been in virtually constant litigation since the direct appeal was concluded in 1986.[21] This is Johnston's second death warrant and his sixth post-conviction proceeding. As the Florida Supreme Court said in Tompkins: "Tompkins contributed to the delay of his execution by filing five postconviction motions. **He cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction and**

[20] To the extent that Johnston raises an "international law" component, that claim is meritless, too, in addition to the procedural bar which forecloses review. *Knight v. State*, 746 So. 2d 423, 437 (Fla. 1998) ("We similarly reject Knight's claim under international law.")

[21] The circuit court pointed out that Johnston has filed five prior post-conviction motions in addition to various federal proceedings, and said, "[w]hile it is his absolute right to file such challenges, the Court is obliged to conclude that the delay in carrying out the sentence is attributable in large part to the continuous litigation." *Order*, at 8.

sentence." *Tompkins v. State*, 994 So. 2d at 1085. The circuit court's denial of relief is supported by competent substantial evidence and should not be disturbed.[22]

VII. THE "SHACKLING" CLAIM

On pages 55-59 of his brief, Johnston claims that he is entitled to relief because he was "shackled" in violation of *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 2009 (2005). This claim is procedurally barred because it was raised and rejected on direct appeal. *Johnston v. State*, 497 So. 2d 863, 965-66 (Fla. 1986); *Order*, at 6. Moreover, this claim is procedurally barred because it was not raised in any of Johnston's prior post-conviction relief motions.[23]

---

[22] *See, Thompson v. Sec'y for the Dep't of Corr.*, 517 F.3d 1279, 1284 (11th Cir. Fla. 2008)(""Numerous other federal and state courts have rejected *Lackey* claims. *Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 1140, 546 U.S. 1136, 163 L. Ed. 2d 944 (2006) (citing cases); *see, e.g., Chambers v. Bowersox*, 157 F.3d 560, 568, 570 (8th Cir. 1998) (noting that death row delays do not constitute cruel and unusual punishment because delay results from the "desire of our courts, state and federal, to get it right, to explore . . . any argument that might save someone's life"); *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996) ("The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. . . . White has benefitted from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights.").

[23] On page 59 of his brief, Johnston says that the circuit court "ignores the fact that [he] was denied the opportunity to prove

Further, *Deck* was released in May of 2005, and could have been raised at the time of Johnston's prior proceedings. And, as the circuit court pointed out, this claim is not one of "newly discovered evidence" since it was litigated on direct appeal. *Order,* at 6. As the circuit court also found, this claim is insufficiently pleaded because Johnston does not allege that he was actually seen in restraints by one or more jurors, **only that he might have been.** That is insufficient to plead a claim of any sort, and is an additional basis for summary denial of relief. *Order*, at 6.

In any event, *Deck* is not retroactively available to Johnston,[24] and does not amount to "fundamental error" such that the procedural bars can be ignored. *England v. State* 940 So. 2d 389, 404 (Fla. 2006); *Gore v. State*, 846 So. 2d 461, 471 (Fla. 2003). This claim should be denied as procedurally barred under settled Florida law:

> Hill next claims that his constitutional rights were violated when he and his codefendant, Clifford Jackson, were shackled during the penalty phase. The trial court properly denied this claim as procedurally barred. First, there is absolutely no evidence in the record that Hill was ever shackled during the penalty phase. Second, this claim is certainly not based upon

---

his claim." In fact, it is Johnston who has ignored the multiple layer of procedural bar that forecloses review of this claim.

[24] For federal habeas purposes, *Deck* is not retroactively applicable to final cases like this one. *Marquard v. Sec'y for the Dep't of Corr.*, 429 F.3d 1278, 1311 (11th Cir. 2005). There is no reason for Florida retroactivity law to be different.

> newly discovered evidence. Even assuming that Hill was shackled during the penalty phase in 1986, he knew it, and the law of Florida has long provided a basis for the relief he now seeks. Since at least 1987, the law in Florida has been that shackling a defendant during the penalty phase without ensuring that his due process rights are protected is a sufficient ground for reversing a death sentence. *See Elledge v. Dugger*, 823 F.2d 1439, 1450-51 (11th Cir. 1987). Therefore, Hill's assertion that he could not have brought this claim until after the United States Supreme Court decision in *Deck v. Missouri*, 544 U.S. 622, 161 L. Ed. 2d 953, 125 S. Ct. 2007 (2005), is without merit. **We affirm the trial court's denial of this claim under Florida Rule of Criminal Procedure 3.851(e)(2)(B).**

Hill v. State, 921 So. 2d 579, 585 (Fla. 2006) (emphasis added). Summary denial on alternate procedural bar and lack of merit grounds was correct, and the circuit court's ruling should not be disturbed.

CONCLUSION

WHEREFORE, based upon the arguments and authorities set out herein, the State submits that the circuit court's denial of Johnston's successive post-conviction motion should be affirmed in all respects.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(386) 238-4990

Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail and U.S. Mail to: **Todd D. Doss,** 725 SE Baya Dr. Suite 102, Lake City, Florida 32025-6092 on this ____ day of May, 2009.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL