IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-780

RAY LAMAR JOHNSTON

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____

DIRECT APPEAL FROM A 3.851 DENIAL

_____

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Johnston's postconviction motion filed under Florida Rule of Criminal Procedure 3.851.

The record on appeal is comprised of 62 volumes, initially compiled by the clerk, successively paginated, beginning with page one. References to the record include volume and page number and are of the form, e.g., (Vol. I PCR 123). References to the record on appeal from Mr. Johnston's appeal of his convictions and sentences are of the form, e.g., (Vol. I R 123).

Ray Johnston, the Appellant now before this Court is referred to as such or by his proper name. Mr. Johnston was represented at trial by Joseph Registrato and J. Kenneth Littman. They are sometimes referred to by name or as trial counsel, either separately or together. The phrase "evidentiary hearing" or simply "hearing" refers to the hearing conducted on Mr. Johnston's motion for postconviction relief unless otherwise specified. The use of the term trial court refers to the court in which presided over Mr. Johnston's trial and his postconviction proceedings.

REQUEST FOR ORAL ARGUMENT

Mr. Johnston has been sentenced to death. The resolution of the issues involved in this appeal will determine whether he lives or dies. Oral argument would allow the full development of the issues before this Court. Accordingly, Mr. Johnston requests oral argument.

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STATEMENT OF THE CASE

Ray Lamar Johnston was tried and convicted for the first degree murder of Leanne Coryell in the year 1999 and was sentenced to death. Tracy Neshell Robinson, the jury foreperson who signed the verdict form finding Mr. Johnston guilty (*see* the signed verdict form at Vol. V R 753-754), did not deliberate at the penalty phase for several reasons. First of all, she was arrested on the eve of the penalty phase closing arguments for various drug and weapons charges, including possession of crack cocaine, possession of burning marijuana, possession of a firearm during the commission of a felony, and for an outstanding *capias* related to a prior criminal case issued January 13, 1999 (*see* the *capias* for juror Robinson at Vol. V R 787). Because Tracy Robinson did not disclose *her own* prior criminal case when directly questioned during *voir dire*, and because it was not discovered until *after* her arrest mid-penalty phase that she had an active *capias* for her arrest at the time of *voir dire*, she was permitted to serve on the jury.

Had Ms. Robinson been forthcoming and disclosed her own prior arrest, it most likely would have been revealed that she had an active *capias* related to that prior criminal case, and she more than likely would not have been permitted to serve on the jury. Instead, after concealing material information concerning her own arrest during *voir dir*e, she served on the

jury as the foreperson and signed the guilt phase verdict form. Then she was arrested for drug possession on the eve of the penalty phase closing arguments.

On direct appeal from the murder conviction and death sentence, this Court ruled that the issue of juror nondisclosure had not been specifically raised in the trial court, and stated that "[the] issue should be addressed in a rule 3.850 motion—not on direct appeal." *Johnston v. State*, 841 So. 2d 349, 357 (Fla. 2003). This Court noted that "Appellate counsel concede[d]" that this issue was not specifically raised in the trial court. *Id.* at 357. With that concession, this issue was not addressed by this Court on direct appeal.

The postconviction evidentiary hearing in this matter followed, and was held from January 28 - February 1, 2008, and March 6-7, 2008. The instant appeal follows the Order denying Mr. Johnston's 3.851 Motion to vacate his conviction and death sentence signed February 5, 2009 (*see* the final Order denying relief at Vol. XVI PCR 3102 - Vol. XVII PCR 3238).

The Appellant submits that although the lower court's order indeed is quite detailed, as will be illustrated by this brief, the order is perplexingly detailed with cites to and acknowledgment of evidence which supports the grant of relief.

SUMMARY OF THE ARGUMENTS

ARGUMENT I – A new trial should be awarded for egregious juror misconduct in this case. Trial counsel was ineffective at the trial level for failing to raise the specific issue of juror nondisclosure for foreperson Tracy Robinson's evasive and untruthful responses answers during *voir dire*. At the very least, this case should be remanded for a juror interview to determine if she was influenced by outside influences. A juror interview should be conducted to see if she will admit that she knew there was a *capias* for her arrest during the trial, and to see if she was smoking crack cocaine or marijuana at the time of serving as foreperson of the jury.

ARGUMENT II – Trial counsel was ineffective for failing to file a motion to suppress the *Miranda*-violative statements in this case. The Appellant was in custody at the time he was led into the interrogation room by law enforcement and made statements concerning his relationship with the victim. Law enforcement's advisement of his rights 30 minutes into the interview violated *Miranda v. Arizona* (1966) and *Missouri v. Seibert* (2004).

ARGUMENT III – Trial counsel was ineffective for failing to interview and call witness Diane Busch, a witness who could have testified that Mr. Johnston was not having financial problems at the time this crime was committed, and that he passed on an opportunity to steal $10,000 cash from her while she was in the

hospital. In addition to discrediting financial motive in this case, Ms. Busch could have provided penalty phase testimony that Mr. Johnston provided medical care for her, assisted with family care issues, and actually saved her life. Trial counsel was also ineffective for failing to present the expert testimony of someone like Dr. Simon Cole, discrediting the science of fingerprinting; the lower court erred in failing to accept his expert testimony at the evidentiary hearing. Additionally, trial counsel was ineffective for failing to present available mitigation including the use of prescribed psychotropic medications.

ARGUMENT IV – Trial counsel was ineffective for failing to conduct individual and sequestered *voir dire* of members of the jury panel who were exposed to news reports detailing "Johnston's criminal history and early releases, his purported proclivities for violence against women, and statements from some of Johnston's own family that they believed Johnston was guilty." *Johnston v. State*, 841 So. 2d 349, 358 (Fla. 2003).

ARGUMENT V – The lower court erred in failing to grant an evidentiary hearing on the issue of trial counsel's legally insufficient motion to disqualify the trial judge. The Appellant was denied due process of law and access to the courts in violation of the Constitution.

ARGUMENT VI – The sum of cumulative errors here warrants relief.

STANDARD OF REVIEW

This Court should apply de novo review as per *Stephens v. State*, 748 So.2d 1028, 1032 (Fla. 2000).

ARGUMENT I

THE TRIAL COURT ERRED IN FAILING TO GRANT GUILT PHASE RELIEF BASED ON JUROR MISCONDUCT AND NONDISCLOSURE DURING VOIR DIRE. MR. JOHNSTON DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION WHEN COUNSEL FAILED TO QUESTION JUROR ROBINSON ABOUT HER RESPONSES ON THE JUROR QUESTIONNAIRE AND FAILED TO INCLUDE THE CLAIM OF DELIBERATE FAILURE TO DISCLOSE IN THE POST-TRIAL AMENDED MOTION FOR NEW TRIAL.

The relevant facts underlying this claim were summarized by this Court on direct appeal as follows:

> On June 7, 1999, [juror Tracy] Robinson appeared in court for jury selection in the instant case. On the juror questionnaire, Robinson indicated that either she or somebody close to her was previously accused of a crime. During voir dire, the prosecutor requested that she elaborate on her answer:
>
> MR. PRUNER: "...These jury forms ask very broad questions and, of course, this is where we're getting into that area where I'm not trying to embarrass anyone or intimidate anyone, but it asks, have you or any member of your family or any close friends ever been accused of a crime. That's what I want to go into now. I want to ask who was the person, what relationship was it to you; if it wasn't you, whether you felt that that person, whether it was you or someone else, was treated fairly in the process, and whether you think that incident or experience would prevent you from being a fair and impartial juror..."
> . . .
>
> MR. PRUNER: Ms. Robinson, who was that person?

> MS. ROBINSON: My son's father.
>
> MR. PRUNER: Okay. Did you follow along with that person's involvement in the criminal justice system, keep up with his case?
>
> MS. ROBINSON: Oh, yeah.
>
> MR. PRUNER: Was this in Hillsborough?
>
> MS. ROBINSON: Uh-huh.
>
> MR. PRUNER: Did you have an opinion whether that person was treated fairly or unfairly?
> MS. ROBINSON: It was fair.
>
> MR. PRUNER: Is there anything about your knowledge of his experience that would prevent you from being a fair and impartial juror?
>
> MS. ROBINSON: No.
>
> MR. PRUNER: Thank you.
>
> Defense counsel did not question Robinson any further as to her response to this line of questioning, telling the potential jurors, "Since [the prosecutor has] already asked you many of [the] things I might have asked, I won't ask you to repeat yourself." Robinson never amended her answer and never mentioned that she pled nolo contendere in a criminal proceeding less than a year before signing the questionnaire form. She was selected as one of the jurors and became the forewoman of the jury that convicted Johnston of first-degree murder.

Johnston v. State, 841 So. 2d 349, 355-356 (Fla. 2003).

In the case of *Roberts v. Tejada*, 814 So. 2d 334, 342 (Fla. 2002), this Court vacated a decision from the 3rd DCA reinstating a verdict, wisely reasoning that "Lawyers representing clients in litigation are entitled to ask, and receive truthful and complete responses to, the relevant questions which they pose to

prospective jurors." *Roberts* cites to another case from this Court, *Zequeira v. De La Rosa*, 659 So. 2d 239 (Fla. 1995) and reminds that "a juror's nondisclosure need not be intentional to constitute concealment." *Roberts* at 343. *Roberts* mentions the dissenting opinion from the 3rd DCA's opinion in *Zequiera* that was approved and adopted by the Florida Supreme Court,[1] which opined that even if a juror did not intentionally mislead or conceal, the omission still prevented counsel from having all necessary information to make an informed choice during *voir dire*. In *Roberts*, this Court reversed *Tejada v. Roberts*, 760 So. 2d 960 (Fla. 3rd DCA 2000), a decision by the 3rd DCA that reinstated a jury verdict notwithstanding juror nondisclosure.

Procedurally, in *Roberts*, Ms. Roberts lost at trial in a wrongful death lawsuit against her husband's doctors, but was successful in her motion for new trial in circuit court due to juror nondisclosure of prior litigation history during *voir dire*. The 3rd DCA reversed the trial court's award of a new trial and reinstated the verdict.[2] This Court reversed the 3rd DCA's decision in that case. Though the procedural history of these cases is complex, the law in this area is crystal clear: "It is clear that nondisclosure along with partial or inaccurate

[1]The dissent from *Zequiera v. De La Rosa*, 627 So. 2d 531 (Fla. 3rd DCA 1993) was adopted by the Florida Supreme Court in *De La Rosa v. Zequiera*, 659 So. 2d 239 (Fla. 1995).

[2]*Tejada v. Roberts*, 760 So. 2d 960 (Fla. 3rd DCA 2000).

disclosure is concealment in the voir dire process" (*Roberts, Id.* at 345-346) which warrants a new trial. *Zequiera* was good law for Mr. Johnston at the time of this trial, it is *still* good law, and the case law warrants immediate relief.

Not only did juror Robinson mislead and conceal her arrest record, but she misled and concealed information that could have led to her arrest in the courthouse at the time of serving on the jury. Juror Robinson had an active *capias* that stemmed from her own criminal case, and she failed to reveal this information when questioned directly in *voir dire*. Had all of this information been revealed to the defense, they could have made a fully informed choice concerning whether to strike Ms. Robinson in light of her own criminal case and *capias*.

Presumably, juror Robinson was aware that she had failed to pay court costs on her own criminal case, and that she faced possible arrest.[3] That is really the only possible explanation for her nondisclosure and concealment. Knowing that she would be jeopardizing her own freedom by answering truthfully in response to the State's questions, she gave the false impression that she herself had never been arrested. Had defense counsel simply asked her a direct question (i.e. "Have *you* ever been

[3]Although the record does not contain specific evidence that juror Robinson had personal knowledge of the *capias*, due to the recency of her plea to the Johnston trial and court-ordered financial obligations that followed the plea, Ray Johnston submits that she would have known and did know of the *capias*.

arrested, Ms. Robinson?"; or rather, "Was your answer to the prosecutor's question complete, Ms. Robinson, was anyone else, and I hate to sound meddlesome, but, even yourself, ever accused?"), her history would have been revealed (if she told the truth) and she would have been taken into custody on the *capias* and not allowed to serve as forewoman on the jury. This is the same juror who was arrested for possessing crack cocaine and burning marijuana following the guilt phase portion of the trial. Trial counsel was ineffective for failing to question juror Robinson further in *voir dire*. Additionally, defense counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to raise the specific issue of deliberate failure to disclose at the trial level.

Additionally, appellate counsel was ineffective for failure to cite fundamental error for this issue on direct appeal. As such, this crucial issue was unavailable on direct appeal, and this Court effectively referred the issue for postconviction. This Court stated as follows on direct appeal:

> Johnston next asserts that he is entitled to a new trial because juror Robinson deliberately failed to disclose that she pled nolo contendere to a misdemeanor charge within the past year. Appellate counsel concedes that defense counsel failed to specifically raise this claim with the trial court. As this specific ground for a new trial was not raised with the lower court, it will not be considered on appeal. To the extent that Johnston is claiming his counsel was ineffective, we find that this issue should be addressed in a rule 3.850 motion-not on

direct appeal.

Johnston v. State, 841 So. 2d 349, 357 (Fla. 2003)

Regarding the issue of ineffective *voir dire*, Mr. Registrato could not remember if he was the attorney who followed the prosecutor's inquiry of Ms. Robinson.

> Q: I want to ask you if you remember following Mr. Pruner's inquiry of Ms. Robinson, was it you or Mr. Littman who stepped up next to inquire of the panel?
> A: I don't remember.

Vol. LVIII PCR 1312.

If Mr. Registrato could not remember if he was the attorney questioning Ms. Robinson, obviously he could not remember any strategic reason for not asking follow-up questions of Ms. Robinson. Nevertheless, he attempted to supply a strategic reason for not conducting follow-up questioning of Ms. Robinson after the State had inquired about her response on the questionnaire: "That's not something you would ordinarily do. You don't want – you don't want to irritate them on purpose." [Vol. LVIII PCR 1313]. This type of *post-hoc* rationalization is the type condemned by the United States Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003).

> When viewed in this light, the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.

Wiggins at 526-527.

Kenn Littman's answer to the question of why no follow-up questioning of juror Robinson was conducted following the State's brief inquiry was more accurate. Kenn Littman stated the following during the evidentiary hearing:

> Q. And my question was at the time of jury selection, taking you back to that very moment, was there any reason while the trial team failed to do any follow-up questioning of juror Robinson on the issue concerning criminal histories?
>
> A. No. I don't -- I would only be speculating since I don't even recall which of us asked the questions. Typically the State wouldn't want someone on the jury who had anyone close to them with a criminal history, whose been prosecuted or had been prosecuted. So that's about all I can tell you. I don't remember.

Vol. LIX PCR 1427.

The record in this case reflects that Kenn Littman followed prosecutor Jay Pruner in *voir dire* examination of the prospective jurors. A recess was taken between Mr. Pruner and Mr. Littman's *voir dire* examination Vol. VII R 166-167. Neither Mr. Littman nor Mr. Registrato testified at the evidentiary hearing that they came to a strategic decision to refrain from asking follow-up questions of Ms. Robinson during the recess or during Mr. Pruner's *voir dire*. Mr. Registrato immediately followed Mr. Littman, with no breaks taken in between *see* Vol. VII R. 209-211. Just as trial counsel was ineffective for their "limited pursuit of mitigating evidence" in *Wiggins*, trial

counsel was ineffective in the case at bar for their limited pursuit of crucial information concerning juror Robinson's arrest record during *voir dire*. There was no strategy involved in failing to ask the necessary follow-up questions of juror Robinson.

But in fairness to trial counsel, it certainly appears that juror Robinson was actively concealing the truth in *voir dire*, and everyone in the courtroom was duped by Ms. Robinson's evasive and incomplete answers. As stated in *Roberts v. Tejada*, 814 So. 2d 334, 342 (Fla. 2002), "Lawyers representing clients in litigation are entitled to ask, and receive truthful and complete responses to, the relevant questions which they pose to prospective jurors." Counsel did not get the benefit of a truthful and complete answer in the case at bar.

Capital attorneys *do* have to ask pertinent and careful questions during *voir dire* to help them gain the knowledge they need to exclude inappropriate jurors. Professor Steven Lubet of Northwestern University School of Law has stated, "[d]uring jury selection, even when it is conducted solely by the court, it is possible to learn directly from the jurors themselves. If this precious opportunity is to be preserved, lawyers must use it wisely and fairly." Steven Lubet, *Modern Trial Advocacy: Analysis and Practice*, (National Institute for Trial Advocacy,

2nd Ed. 1997), 505. "In systems where lawyer participation is permitted, voir dire must be planned as carefully as any other aspect of the trial. [The] areas of inquiry must be designed to obtain the maximum amount of information without overstepping the boundaries set by the court." *Id.* at 511. "[The] first goal, therefore, should be to assure your client a fair trial by identifying those potential jurors who, for whatever reason, cannot be objective about your client's case." *Id.* at 516. "...[I]t is essential to regard *voir dire* as [the] best opportunity to begin to develop a positive relationship with the jury." *Id.* at 524. The trial attorneys in this case did not maximize the amount of information available in *voir dire*. They did not ask the necessary follow-up questions of juror Robinson, allowing a foreperson to sit on the jury who personally assured the State the following during *voir dire* of the following:

> MR. PRUNER: Can you promise me now at this stage that you will not hold us to a higher standard, require us to show you beyond all doubt.
> MS. ROBINSON: Yeah.

Vol. VII R 101.

Given her unique precarious personal legal situation, Ms. Robinson could not have sat on the jury and deliberated objectively. Under active *capias* status, she assured the State she would not hold them to a high burden of proof, and then she sat as foreperson and signed a verdict of guilty within one

hour. Under *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998) and *Reese v. State*, 739 So. 2d 120 (Fla. 3rd DCA 1999), prejudice is "inherent" (*Lowrey, Id.* at 1368, and *Reese, Id.* at 121) when a juror who is under prosecution by the same state attorney's office serves on the jury. To exacerbate the juror misconduct and nondisclosure situation, shortly after the commencement of the penalty phase, juror Robinson was arrested on drug charges.

Several components of counsel's handling of *voir dire* were unreasonable and ineffective. Counsel did no further questioning of juror Robinson apparently because the prosecutor asked "many of [the] things I might have asked." Vol. VII R 170. At the evidentiary hearing, trial counsel could offer no reasonable explanation for failing to follow up on questioning with prospective juror Robinson. At a minimum, counsel clearly should have turned to the three components of the question on the jury form: "have [1] you or [2] any member of your immediate family or [3] any close friend been accused of a crime." Juror Robinson's answer on the form would have allowed clear follow-up by inquiring as to the other and highly significant component of whether she, herself, had ever been accused of a crime.

Although trial counsel was ineffective for failing to follow through with further questions, the information concerning Mr. Robinson's prior arrest record was revealed only after she was arrested on new charges one day into the penalty

phase, after she had signed the guilt phase verdict form as foreperson.

The Motions for new trial failed to cite to juror Tracy Robinson's deliberate non-disclosure

At the evidentiary hearing, three reasons surfaced why the specific issue of juror non-disclosure was not raised at the trial level following the verdict: 1) public defender office turnover, 2) oversight, and 3) ineffective assistance of counsel.

Gerod Hooper, the assistant public defender who prepared, signed and filed the motion and amended motion for new trial, was not present for the actual trial. Regarding his actual involvement in the trial, Mr. Hooper stated the following:

> Okay. I had very little involvement in this case. It was, I believe, Ken Littman on guilt and Joe Registrato on penalty. My only involvement was they had called me on they -- because they were debating -- I believe the guilt was over and they were in the penalty phase. And they were trying to decide whether Mr. Johnston should testify in the penalty phase or not testify. And they just asked me to give them my two cents.

Vol. LVI PCR 1071.

It is not wise for an attorney who had "very little involvement" in a capital case to be responsible for the filing of post-trial motions for new trial. Mr. Hooper was not even at the trial, therefore he would not be privy to the issues which would warrant a new trial, such as deliberate non-disclosure of

juror Robinson's criminal history. And if he indeed had such knowledge, it would be, and it was, ineffective for him to fail to raise that specific issue in his motions. Gerod Hooper responded:

> Q: ...[You] basically weren't involved in the guilt phase at all?
> A. No, I wasn't involved in the penalty phase at all other than just for the question.
> . . . .
> I wasn't there for the guilt phase. I wasn't there for the penalty phase.

Vol. LVI PCR 1072-1073, 1075. The only reason provided by Mr. Hooper for failure to cite deliberate failure to disclose during *voir dire* was unawareness of the issue. Gerod Hooper continued:

> Q. And as I hand this packet here to you, I want to ask you anywhere in that motion or anywhere in that amended motion, did you raise the issue that Tracey Michelle [sic] Robinson deliberately provided false information or deliberately withheld information during voir dire?
> A. Okay. Well, I probably should state that I don't believe I was present during voir dire. I probably filed this because Joe and Ken were not available for some reason. I would have gone off of whatever I was told. What was that? What was the question again?
> Q. You have the motion there, and you have the amended motion. And my question is, did you raise an issue in any of those motions specifically that -- that juror Robinson either deliberately deceived the attorneys during voir dire or that she deliberately withheld information from the attorneys and the Court during voir dire?
> A. Okay. Not in the first motion. Let me take a look at the amended motion. Okay. Now it talks about Tracey Robinson in the amended motion, but not about her deceiving the Court during voir dire. It doesn't say that.
> Q. So in your motions, there was no claim there in your motions a deliberate failure to disclose the

information of her personal arrest?
A. During voir dire, no.
Q. Now, is there any reason why you failed to raise that specific motion in your motion and your -- specific issue. So is there any reason why you failed to raise that specific issue within those two motions?
A. Yes. No. 1, I was -- I didn't conduct voir dire. I wasn't at voir dire. I don't know if the question was even ever asked of her during voir dire, so I don't know if she responded truthly or not. I mean, it's possible that no one even asked her. So I didn't have that information at the time of these motions.
Q. Okay.
A. Like I said, I'm still trying to recall why I filed them as opposed to Mr. Littman unless he had left the office in the interim. I don't know.
Q. At the time that you --at the time that you constructed that motion and that amended motion, did you have with you a copy of the transcript of the trial?
A. I would -- I don't have a specific recollection, but my best guess would be no because these are time-sensitive motions that have to be done within ten days of trial, so I can't imagine how we would have a transcript in that amount of time. So I would say 99 percent no.
Q. Could you have ordered an expedited transcript of the trial prior to constructing these motions?
A. Yeah, I suppose you could if you had some basis to order an expedited transcript. It's not routinely done.
Q. Is there any reason why Ken Littman did not file the motion and the amended motion that we're discussing?
A. That -- that's what I'm trying to recall now. It's driving me nuts. I can't remember how I got stuck writing this motion, not Ken or Joe.
Q. Is it fair to say that you didn't have personal knowledge of what happened during voir dire?
THE COURT: He already said he wasn't there, Counsel, at least three times. How would he have personal knowledge if he was never there?

Vol. LVI PCR 1117-1119

Kenn Littman likewise could offer no explanation for the

failure to raise the issue of deliberate non-disclosure in the motion other than his hasty return to West Palm Beach:

> Q. Did you -- well, strike that. Those documents in front of you right there. Okay. Shifting gears to -- we talked about Mr. Hooper filed those two motions. What are the titles of those motion[s]? Or just the first motion is fine.
> A. Defendant's motion for judgment of acquittal or motion for new trial. And then there's an amended motion.
> Q. Okay. And the dates of those are June of – June 22 of 19 –
> A. June 21st of 1999. And the amended one is July 22, 1999.
> Q. Why -- why is your name not on that?
> A. Because at that time I was working as an assistant public defender in Palm Beach County in the Fifteenth Circuit. And I was brought up here just to try the case. And by the time these were filed, I was back in Palm Beach County.
> Q. Okay. So immediately after Ray Lamar Johnston was -- or the jury recommended death by the vote of twelve to zero, you went back to West Palm Beach?
> A. Well, I can't give you the exact sequence. You asked me why Mr. Hooper wrote the motion out, because that's the reason why.
> Q. Do you remember consulting with Mr. Hooper on those motions?
> A. I don't independently recall that, looking them over. I don't recall that as I sit here now. It's almost nine years later.
> Q. Okay. Would it -- would you agree with me that it would have been more prudent that you prepared that particular motion[]?
> A. No, I wouldn't agree with you.
> Q. Mr. Hooper was not there for the guilt phase of this trial?
> A. I don't recall that either. You're telling me or asking me?
> Q: Asking.
> A. I don't recall.
> Q. If -- if Mr. Hooper stated that his first involvement with the case was prior to the penalty phase in that -- in this case, would you agree with that assessment?

> A. I don’t recall. So if you’re representing that as so, I'll accept that as being accurate.
> Q. Okay. I'm going to ask you if there is any reason why those motions failed to raise the specific issue of deliberate failure to disclose the criminal history by juror Tracey Robinson?
> A. Again --
> Q. Of Tracey Robinson. I'm sorry.
> A. -- you'd have to ask Mr. Hooper that unless you already have. I couldn't -- since I didn't write it, I can't answer that question.
> Q. So you -- you personally can't offer any reason why those motions failed to raise the specific issue of deliberate failure of juror Tracey Robinson to disclose her criminal history?
> A. Correct. As I said, I didn't write these motions.

Vol. LIX PCR 1419-1421.

Mr. Littman could not remember offering any assistance with these motions. He tried the case then went back to Palm Beach County. It is no wonder that the motions fail to raise the specific issue of juror Robinson’s failure to disclose her criminal history. Had counsel been effective, Mr. Littman would have been consulted on the motions, and this crucial issue would have been raised.[4]

The deliberate failure of juror Robinson to disclose her criminal record, if properly presented by trial counsel, was a legal ground that would have earned Mr. Johnston a new trial,

[4]Mr. Registrato could not remember assisting in the motions [Vol. LVIII PCR 1303-1304]. Upon reviewing the motions at the evidentiary hearing, contrary to the ruling of the Florida Supreme Court, Mr. Registrato felt the issue of juror non-disclosure was raised in the motions [Vol. LVIII PCR 1305-1306].

either by the granting of the motion by the trial court or by the Florida Supreme Court on direct appeal by reason of reversible error. *See De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995). *Marshall v. State*, 664 So.2d 302 (Fla. 3d DCA 1995); and *Wilcox v. Dulcom*, 690 So.2d 1365 (Fla. 3d DCA 1997). By filing and arguing a legally incomplete and insufficient motion for new trial, counsel's conduct fell short of the standards for capital defense work, and provided ineffective assistance of counsel.

Relief is warranted here; this claim involving fundamental error should not have been procedurally barred on direct appeal; and the error should be cured by this Court immediately. By analogy, if a Florida Bar applicant concealed his own criminal record and failed to elaborate on his past arrests in the same fashion as juror Tracy Robinson, this Court would surely deny that applicant's admission to practice law in this State. This Court should affirm no lower court's decision allowing this verdict to stand signed by the deceiving juror Robinson. Just as an untruthful Florida Bar applicant might be less than forthcoming in his disclosures to avoid denial of his admission to practice law in this State, the deceptive juror Robinson may have misled the Court during *voir dire* to avoid arrest on the *capias.*

In May of 2007, the Florida Bar Journal published an

article entitled “The Burden of Truth – Have Florida Courts Gone Far Enough Addressing the Problem of Juror Misconduct.” In the article, the authors stated the following:

> It is the duty of a juror to make full and truthful answers to all questions propounded to him touching his qualifications to serve as a juror in any case, since full knowledge of all material relevant matters is essential to the fair and just exercise of the right to challenge, either peremptorily or otherwise. A juror who falsely conceals a material fact relevant to his qualifications is guilty of such misconduct as is prejudicial and obstructive to the fair administration of justice in our courts. If the time ever comes when the court is deprived of the power to make prospective jurors truthfully disclose material facts regarding themselves and their qualifications to serve as fair and impartial jurors, effective administration of justice will be greatly impeded.[]
>
> The Fourth District Court of Appeal recently reached a similar result in *Forbes v. State*, 933 So. 2d 706 (Fla. 4th DCA 2006). In *Forbes*, a 19-year-old prospective juror was found guilty of criminal contempt and sentenced to four months in prison for lying during voir dire in a criminal case regarding his and his family members’ criminal histories. Specifically, the juror denied that “he had any criminal charges pending against him.”[] He also denied that he or any member of his family had ever been arrested.[] Almost immediately thereafter, the state learned that the juror had been arrested for possession of more than 20 grams of marijuana, a felony, and that those charges were pending against him. Upon further inquiry, the trial court also learned that the juror’s father had been arrested twice. The trial court, in turn, ordered him to show cause as to why it should not hold him in direct criminal contempt and after a hearing, “found beyond a reasonable doubt that [the juror] knowingly lied under oath to the court regarding his individual and family arrest history and his [pending] criminal charge.”[] The Fourth District affirmed. In reaching its decision, the court emphasized that [t]ruth and candor during voir dire are critical to a trial judge’s task

> of administering justice and preserving every litigant's right to a fair and impartial jury. In maintaining the integrity and efficacy of the jury selection process, trial judges are dependent upon a prospective juror's honest and candid responses, particularly on matters that bear directly on his or her qualifications and fitness to serve.[]

"The Burden of Truth - Have Florida Courts Gone Far Enough Addressing the Problem of Juror Misconduct," by Donald A. Blackwell and Stephanie Martinez, Florida Bar Journal, Vol. 81, No. 5, May 2007 [footnotes omitted].

The article opines that "if there is any issue regarding a juror's concealment of material information of the falsity of their statements during *voir dire*, the court must, at the very least, permit post trial juror interviews." The authors then cite to *Forbes v. State*, 753 So. 2d 709 (Fla. 1st DCA 2000). In that case, the First DCA concluded that "the lower court erred in denying the motion [for new trial] without affording [the defendant] the opportunity to interview a juror to determine whether the juror failed to disclose knowledge of [the defendant] during voir dire." *Forbes* at 710. In a capital case where Mr. Johnston's life is at stake, at the very least, the courts should permit an interview of juror Robinson. Juror Robinson deliberately withheld information regarding her own arrest record during *voir dire*, she had an active *capias* connected to that arrest record at the time she was directly questioned by the State about her arrest record, she promised

the State in *voir dire* she would not hold them to a higher burden of proof during trial, and she actually served as foreperson during Mr. Johnston's trial. She was arrested shortly thereafter on marijuana, crack cocaine, counterfeit cocaine, and loaded weapons charges, then removed from the jury mid-penalty phase. Accordingly, Mr. Johnston should receive a new trial. In the case of *Massey v. State*, 760 So. 2d 956 (Fla. 2d DCA 2000), the Second District Court of Appeal ruled:

> A juror did not truthfully respond to a direct question on voir dire as to whether she had a personal involvement in the criminal justice system by failing to disclose that, less than four years before the trial, she had been charged with a felony, placed in Pretrial Diversion through the intervention of the State Attorney's Office which was prosecuting the instant case and later had the case dismissed after she successfully completed the program. When these facts became known to the defense after a guilty verdict and conviction, it moved for a new trial on this ground. Although the motion was denied, the prevailing law requires the determination that it should have been granted.

Massey at 956. In the case at bar, juror Robinson actually pled *nolo contendre* to a criminal charge ***just six months*** prior to the Johnston trial; in *Massey*, the juror's ***four year old*** case was dismissed through successful PTI completion; in the case at bar, juror Robinson actually pled, failed to pay her court costs, and subsequently found herself on *capias* status at the time of *voir dire* due to the arrest. Then she was arrested on new drugs and weapons charges one day into the penalty phase. Just like she

deceptively did in *voir dire*, during her arrest, once again, Tracy Robinson blamed her son's father as the culprit, even though her son's father was in jail at the same time a marijuana cigarette burned in her ashtray. The juror misconduct and concealment in the case at bar is much more egregious than in *Massey*, and warrants a new trial, or at the very least, a juror interview. *See also Kelly v. The Community Hospital of the Palm Beaches, Inc.,* 818 So.2d 469 (Fla. 2002)

THE LOWER COURT ERRED IN FAILING TO PERMIT A JUROR INTERVIEW

The lower court denied the Appellant's postconviction Motion for Juror Interview filed under the relatively new rule of Fla. R. Crim. Proc. 3.575 (*see* Motion at Vol. III PCR 504-506). The lower court did so verbally without a written court order. (*see* transcript at Vol. XXXXVIII PCR 387-391). The lower court stated during the hearing on that Motion, "You don't have to ask [juror Tracy Robinson] any questions regarding that. The sole question is what her answers were, what the reality is from the conviction and why didn't defense counsel address that to the Court in his motion. All right. Based on the Supreme Court decision and what transpired at the trial level, I'm going to deny the motion to interview." Vol. XXXVIII PCR 387-388. In response, counsel for the Appellant stated:

> Just for the record, []as far as Mr. Johnston's due process rights are concerned, it's our position that those issues with regards to whether this juror

> deliberately failed to disclose this—this arrest, this conviction, we cannot effectively pursue this claim, that issue, unless we have a juror [] interview and other states allow juror interviews. And number two, whether this woman was on drugs or whether she was in her right mind to be the foreperson of this jury and sit [and] deliberate the guilt[] of Ray Lamar Johnston. We cannot know whether she was on drugs [without a juror interview].

Vol. XXXVIII PCR 388-399.

The Appellant urges this Court to revisit this issue, consider the position of the Florida Bar Journal article cited above, and adopt the position taken by Justice Pariente in her dissent in this case. *See Johnston v. State*, 841 So. 2d 349, 361 (2003), wherein the following dissent was made by Justice Pariente:

> I would . . . remand this case for the trial court to conduct a juror interview to determine whether juror Robinson was using drugs during the guilt-phase portion of the trial. Juror Robinson was the *forewoman of the jury*. Robinson was arrested for possession of crack cocaine, marijuana and a loaded firearm on the evening of the first day of the penalty phase. . . .[T]he proximity in time and nature of the arrest in relation to the guilt phase amount to more than mere speculation or conjecture as to whether Robinson abused drugs during trial.
> . . . .[U]se of crack cocaine by a juror during trial would be an overt act subject to judicial inquiry[.]
>
> . . . .It is troubling that we are affirming this death case without obtaining an answer to the question of whether the forewoman of the jury used crack cocaine during the trial and in deliberations. . . .I would remand for a jury interview . . . .the circumstances of this case demand this action at a minimum.

Johnston, Id. at 361.

The Appellant submits that it is unfair and unreasonable to deny a juror interview here. The majority stated on direct appeal: "Johnston is not entitled to relief because his request for an interview is based on mere speculation." *Johnston, Id.* at 357. Without a juror interview, all that is really available to the Appellant at this point is speculation. To deny this claim and motion in this fashion is analogous to denying a defendant relief for failure to present any evidence of ineffective assistance of counsel, while at the same time denying the opportunity to present such evidence at an evidentiary hearing.

There *is* record evidence here that juror Robinson was arrested mid-trial for drugs and weapons charges. It would be reasonable to assume that she was using drugs at the time of trial. There is also evidence that she had a *capias* for her arrest on an unrelated charge at the time. And there is evidence that she failed to disclose that arrest during *voir dire*. At the very least, a juror interview is warranted under these circumstances in this death penalty case.

The Lower Court's Order

The lower court was wrong to deny this claim citing "Defendant[']s] fail[ure] to present any evidence that he advised anyone on the defense trial team that he did not want Ms. Robinson on the jury." (*See* lower court's final Order at Vol.

XVI PCR 3110). Ray Lamar Johnston should not be blamed for allowing Tracy Robinson to wrongly serve on the jury. Juror Robinson deceived everyone in her responses during *voir dire*. The biggest victim of this deceit was Ray Lamar Johnston. To blame Mr. Johnston for his failure to voice objection to this untruthful juror is to victimize him once again. Just as everyone in the courtroom was duped into believing that Ms. Robinson was free from any criminal accusations, so duped was Mr. Johnston. And to engage in *post-hoc* rationalization for the defense's retention of this juror as the lower court justifies at Vol. XVI PCR 3110, and to cite a lack of "prejudice" here is just wrong. "*Voir Dire*" translated literally to English means "to tell the truth." Juror Tracy Robinson *failed* to tell the truth, and that is no fault of the Appellant's.

The case of *Roberts v. Tejada*, 814 So. 2d 334, 342 (Fla. 2002) tells us that "Lawyers representing clients in litigation are entitled to ask, and receive truthful and complete responses to, the relevant questions which they pose to prospective jurors." Capital defendants whose literal lives and liberties are placed in the hands of these people should be afforded jurors who provide truthful and complete answers during the *voir dire* process. When there is a breakdown in this process like what occurred here at trial, the trial process lacks reliability and due process. Trial counsel inexplicably continues to fail

to understand this concept. To deny this claim as the lower court did in this fashion is to abandon simple, fair and constitutional notions of fairness and due process. This Court should grant relief.

This Court stated the following on first direct appeal regarding this claim: "To the extent that Johnston is claiming his counsel was ineffective [for failure to raise the issue that the juror failed to 'disclose that she pled nolo contendre to a misdemeanor charge within the past year'], we find that this issue should be addressed in a rule 3.850 motion - - not on direct appeal." *Johnston, Id.* at 357. The lower court wrongly denied this claim based on the following flawed reasoning: "The Court further finds Defendant failed to present any evidence that he advised anyone on the defense trial team that he wanted to request a new trial based on juror Robinson's deliberate failure to disclose that she pled nolo contendre to a misdemeanor charge within the past year." (*See* Order at Vol. XVI PCR 3114).

Mr. Johnston did not represent himself *pro se* at trial. He was represented by attorneys who should have raised this issue, if they were exercising due care in their legal representation of Mr. Johnston. The lead trial attorney should have included this specific claim in the motion for new trial rather than quickly returning to Palm Beach County and leaving the task to

Gerod Hooper, an attorney who did not even observe the trial or have the benefit of the trial transcripts. To deny this claim as the lower court did, to blame the Appellant for some failure to advise his attorneys that he wanted this issue raised in the motion for new trial, is tantamount and analogous to denying a litigant's medical malpractice claim based on his failure to instruct the doctors how to properly and precisely perform a certain surgical procedure that was botched.

The lower court states in its Order at Vol. XVI PCR 3114-3115: "The Court finds Ms. Robinson did not deliberately lie about the existence of the prior misdemeanor, but failed to disclose such information." This Court's jurisprudence does not require the Appellant to establish a "deliberate lie" as the lower court suggests. *Roberts, Id.* cites to *Zequeira, Id.* and reminds that "a juror's nondisclosure need not be intentional to constitute concealment." *Roberts* at 343. *Roberts* continues: "It is clear that nondisclosure along with partial or inaccurate disclosure is concealment in the voir dire process" (*Roberts, Id.* at 345-346) which warrants a new trial. The lower court here failed to follow the law and applied flawed reasoning in denying this claim.

The lower court in its Order denying relief finds at Vol. XVI PCR 3115 that the information concerning juror Robinson's criminal history was "not material to the extent of warranting a

new trial." Quite the contrary, the information *was* material, especially considering the active *capias* stemming from her undisclosed criminal history, and this Court's jurisprudence concerning prospective jurors who are under active prosecution at the time of trial. The lower court concludes at Vol. XVI PCR 3115 that the "Defendant failed to demonstrate how he was prejudiced by counsel's failure to include in the motions juror Robinson's alleged deliberate failure to disclose."

The prejudice here is clear. Mr. Johnston should have been afforded a new trial based on this issue. But because of trial counsel's failures and omissions, the issue was not raised at trial and was not preserved for direct appeal. Now that it has been shown in postconviction that an attorney who was not even present for the *voir dire* or the trial prepared grossly inadequate motions for a new trial, and not surprisingly missed this vital issue, this Court should grant relief.

ARGUMENT II

THE TRIAL COURT ERRED IN FAILING TO GRANT GUILT PHASE RELIEF BASED ON MIDSTREAM RECITATION OF MIRANDA WARNINGS. WHEN MIRANDA WARNINGS ARE GIVEN ONLY AFTER THE INTERROGATION BEGINS, THIS FAILS TO COMPLY WITH MIRANDA'S CONSTITUTIONAL REQUIREMENT AND ALL STATEMENTS MADE UNDER THESE CIRCUMSTANCES ARE INADMISSIBLE - - COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS STATEMENTS.

> "At the outset, if a person in custody is to be subjected to interrogation, he must be informed in clear and unequivocal terms that he has a right to remain silent. . . .such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."

Miranda v. Arizona, 384 U.S. 436, 467-468 (1966)

> "Custody for purposes of Miranda encompasses not only formal arrest, but any restraint on freedom of movement to the degree associated with formal arrest."

Ramirez v. State, 739 So. 2d 568, 573 (Fla. 1999)

> "An 'interrogation' comprises 'not only [] express questioning, but also any words or actions on the part of police that the police know are reasonably likely to elicit an incriminating response from the subject.'"

U.S. v. Pacheco-Lopez, 531 F. 3rd 420, 423 (6th Cir. 2008) citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

Trial counsel was ineffective for failing to file a motion to suppress the *Miranda*-violative statements Ray Lamar Johnston made to detectives in the police station's interrogation room

following the murder of Leanne Coryell. These statements came on the heels of extensive media coverage reporting on Mr. Johnston's criminal record, including the broadcasting of dramatic videotape of Mr. Johnston using the deceased's ATM card following the discovery of the victim's body.

Regarding the early-morning interrogation, Sergeant Iverson responded as follows at the evidentiary hearing:

> Q. Okay, what time did you begin speaking with Ray Lamar Johnson?
> A. Around 2:20.
> Q. And why do you say 2:20 a.m.?
> A. Because that's what I had in mind about the time we started talking to him.
> Q. And what did you talk to Ray Lamar Johnston about?
> A. First of all, introduced ourselves to him and had a little small talk about who we were and what we were doing, what we were investigating. And asked Mr. Johnston why he had come down to the office. And that's when he began -- he told us that he wanted to straighten out the incident about the credit card.
> Q. Okay. And then tell me about how the conversation progressed.
> A. Well, at that point we allowed him to talk. He was willing to talk to us and we allowed him to talk. He told us the whole lengthy story about how he had met the victim and known her for a few weeks, had made her a loan. She had given him the credit card to re-pay the loan.
> Q. And what else did he tell you?
> A. Basically that they had met at Malio's. That they had been together that evening. He gave us some time frames when they had been together up until -- at Malio's at 6:30 and went out to dinner at Carrabba's at roughly 7:30. And put themselves together -- he put themselves together during that time frame.
> Q. Okay. And what did he tell you about the ATM card?
> A. That he had used the ATM card with her permission. That she had given it to him to repay a loan that he had given her. He had given her $1,200 allegedly to pay some bills that she had.

> Q. So Ray Lamar Johnston told you that he did, in fact, use that ATM card?
> A. Yes.
> Q. Okay. And when he admitted using the ATM card is that when he was under arrest?
> A. Yes.
> Q And what time was that?
> A. That was about 2:45, 2:47. 2:47 is when I had him sign the consent to be interviewed form. I advised him of his Miranda warnings and then we talked to him more specifically about the death of Mrs. Coryell.
> THE COURT: So I'm clear, you already had an arrest warrant for him at that time, right?
> THE WITNESS: That's correct, sir.
> BY MR. HENDRY:
> Q. Could he have left?
> A. Up until the point where he actually admitted to it, I probably would have let him leave, when he admitted to using the card he was not free to go at that point. Even though I had a warrant in hand I could have, you know, fixed that the next day. If he had had a plausible explanation of why he was using the card.
> THE COURT: Why did you think that was not as plausible explanation as the one he just gave you?
> THE WITNESS: The time frames did not match. I had information from her coworkers that they had worked together during the same time frame that Mr. Johnston claims to have been with her.

Vol. LV PCR 1033-1035.

There is no question in this case that Mr. Johnston was subjected to custodial interrogation at the Criminal Investigations Division of the Hillsborough County Sheriff's Office and was not initially informed of his *Miranda* rights.

> "There is no question in this case that Ramirez was subjected to interrogation and was not initially informed of his Miranda rights."

Ramirez, Id. at 573. Mr. Ramirez received relief from this Court from his conviction and sentence of death due to *Miranda*

violations, and so should Mr. Johnston.

Trial counsel failed to research and consider a viable motion to suppress statements made to law enforcement in this case. As such, trial counsel was ineffective and Mr. Johnston should receive a new trial free from the taint of the unconstitutionally-obtained statements regarding his relationship with Leanne Coryell and his whereabouts on the night of Leanne Coryell's disappearance and murder. Though the State has argued that the statements made were not facially incriminating, that is irrelevant to this analysis. *See Davis v. State*, 698 So. 2d 1182, 1187 (Fla. 1997).[5] *See also Mansfield v. Secretary, Department of Corrections*, 601 F. Supp. 2d 1267 (M.D. Fla. 2009), disagreeing with this Court's analysis regarding the harmless error analysis of the defendant's statements, finding that "At numerous points on the videotape, Mansfield makes statements that suggest he is lying to the police," *Id.* at 1307, and, the tape "show[ed] Mansfield being evasive and contradicting himself. . . . making statements that

[5] *Davis* held: "[T]he trial court found that whether a *Miranda* violation had occurred was moot because Davis had not made any incriminating statements during that interview. However, *Miranda* prohibits the use of *all* statements made by an accused during custodial interrogation if the accused has not been warned against the right against self-incrimination and right to counsel. Thus statements obtained in violation of *Miranda* are inadmissible, regardless of whether they are inculpatory or exculpatory." *Id.* at 1187. In any event, the State utilized Mr. Johnston's statements against him at trial, arguing that they were incredulous and inculpatory.

were contradicted by other (apparently trustworthy) witnesses who testified at trial." *Id.* at 1311.

The *Mansfield* Court concluded:

> More than 40 years ago, the United States Supreme Court recognized that custodial police interrogations are inherently coercive . . . . *Miranda* has been the law of the land for more than 40 years. The warnings it requires are well-known to schoolchildren-let alone commissioned police officers. . . . Its violation here was blatant and obviously prejudicial to the Petitioner.

Mansfield at 1311. In the case at bar, the *Miranda* violation was equally blatant and prejudicial.

Members of the Hillsborough County Sheriff's Office violated Mr. Johnston's Fifth Amendment right to remain silent when they led him into their lair and intentionally failed to comply with the constitutionally-required prophylactic *Miranda* admonishments. Mr. Johnston's defense team then violated his Sixth Amendment right to effective counsel when they failed to consider a legally viable motion to suppress the illegally-obtained statements.

Subjectively, *and* objectively, Mr. Johnston knew he was not free to leave the scene when he arrived at the police station. He testified to this extensively during the evidentiary hearing, describing his experience at the police station. (*see* Vol. LVII PCR 1243-1288). Mr. Johnston was subjected to an interrogation at the police station initially

without the benefit of *Miranda* until he admitted using the victim's ATM card, then he was arrested for grand theft. As *Pirzadeh v. State*, 854 So. 2d 740 (Fla. 5th DCA 2003) explains, "an interrogation can be either the direct asking of questions or its 'functional equivalent.'" *Id.* at 742. Law enforcement obviously was not seeking to talk to Ray Lamar Johnston about his golf game or the Brandon Chamber of Commerce. This "invitation" to the police station was no social call. Mr. Johnston was at least in the functional equivalent of custody when he walked through the secured doors of the Hillsborough County Sheriff's Office that early morning. Law enforcement was seeking to elicit a confession from Ray Lamar Johnston, and they should have provided *Miranda* warnings up front. The statements at the police station were the product of custodial "interrogation," thus triggering *Miranda* requirements. Ray Lamar Johnston testified as follows:

> Q. How is the only way they're going to let you leave that police station?
> A. The only way is if they let you leave. When they -- you know, when detectives bring a suspect in and I'm -- I've seen this, you know. I've been around it so many years, when a detective brings a suspect in, they take your things from you, you're not going anywhere. You know, that's just -- that's just the way the law works. And you're not going anywhere. You're going to be arrested. That's just the way they work. That's just the way the law works and there's nothing wrong with that.
> Q. Mr. Johnston, that first door with the buzzer, who had control of that buzzer? Did you have control of that buzzer?

> A. No, it was the person that was in the -- in the front behind the glass. I don't know if it's a cubicle or a room, but whoever it was there. I think it was a woman officer, but it might have been a male.

Vol. LVII PCR 1277-1278. As *Davis, Id.* explains, the standard to judge whether a person is in custody is "how a reasonable person in the suspect's position would have perceived the situation." *Id.* at 1188. There was clearly a restriction on Mr. Johnston's freedom of movement at the police station once he entered the door with the security buzzer and was escorted to the intake desk and interrogation room. As the news broadcasts explained, law enforcement wanted to talk to Mr. Johnston. They were "looking for him." They even had an arrest warrant for him. Mr. Johnston was not free to leave the scene. Any reasonable person in his position would have known that their freedom to walk out of the station house was restricted by the authority of armed law enforcement officers. Law enforcement controlled Mr. Johnston's movements, and controlled the situation once he entered the station house. What began as a voluntary entry into the station house quickly transformed into a custodial situation requiring the constitutional protections of *Miranda* once they sought to elicit statements from him.

Mr. Johnston stated that upon entering the building the officers asked if they could search his car, and they took his car keys. Vol. LVII PCR 1251. He did not feel free to leave

the scene when he was lead into the interrogation room. He stated that in order to leave the interrogation room, he would have to go around the table and get around Detectives Iverson and Walters. Vol. LVII PCR 1254. Regarding his feelings of leaving the station house a free man that early morning, Mr. Johnston stated, “And then the way that they put the stories on the news, you know, I mean, with my background, too, there was -- I knew that there was just no way I was going to walk out of there.” Vol. LVII PCR 1255. He testified that once inside the interrogation room, the detectives mentioned the videos and photographs related to Ms. Coryell’s ATM card. They asked him about his relationship with Ms. Coryell, and he admitted using her ATM card. Vol. LVII PCR 1256. Immediately thereafter he was officially arrested. Vol. LVII PCR 1256. Ray Johnston subjectively felt no more free to leave the police station before being excused by law enforcement than a pupil might feel free to leave the principal’s office before being dismissed. A reasonable person in Mr. Johnston’s shoes would not feel free to leave the police station once he entered the police station. Ray Johnston informed the Court that he relayed these circumstances to his appointed attorney Deb Goins and her investigator, yet a motion to suppress was never filed. Vol. LVII PCR 1279.

No reasonable person in this situation would feel free to

leave the scene at the police station. Ray Lamar Johnston did not subjectively feel free to leave the police station once he stepped inside. *Davis, supra,* is distinguishable in certain aspects from the instant case because the Court reasoned in *Davis*, "At least once [Davis] had gone to the police station voluntarily for questioning and was permitted to leave." *Supra* at 1188. Mr. Johnston had *never before been permitted* to leave the police station in this case after questioning. This was custodial interrogation, and *Miranda* should have been provided to Mr. Johnston up front, not just midstream. *Miranda* addresses the "interrogation practices...likely...to disable an individual from making a free and rational choice about speaking" and held that a suspect must be "adequately and effectively" advised of the choice the constitution guarantees. *Miranda v. Arizona*, 384 U.S. 436 (1966) at 464-465. *Miranda* warnings that do not include an advisement of the right to have attorney present during questioning are inadequate to fully inform defendant of his constitutional rights. The State suggested through cross-examination of Mr. Johnston at the evidentiary hearing that because Mr. Johnston had been arrested before, he knew he had a right to remain silent. The United States Supreme Court has stated otherwise:

> No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is

> there ascertainable assurance that the accused was aware of this right.

Miranda v. Arizona, 384 U.S. 436 (1966) at 471-472. *Roberts v. State*, 874 So. 2d 1225 (4th DCA 2004); *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999), *Holland v. State,* 813 So. 2d 1007 (4th DCA 2002).

Because custodial interrogations are inherently coercive, law enforcement *must* advise persons of their constitutional rights *before* subjecting them to custodial interrogation. *Reichmann v. State*, 581 So. 2d 133 (Fla. 1991); *Franklin v. State*, 876 So. 2d 607, 608 (Fla. 4th DCA 2004); *West v. State*, 876 So. 2d 614, 616 (Fla. 4th DCA 2004).

Mr. Johnston submits that any statements detectives said he made to law enforcement must be suppressed because once he entered the police station, the doors were locked and he was not free to leave at any time. An individual is "seized" for purposes of the 4th Amendment when he comes under official control either by physical force or by submission to control of authority. Deputy Caimano testified at the evidentiary hearing that at the police station, Mr. Johnston rang the buzzer, he and Detective Shepard let him in, and they patted him down and escorted him into the squad area. Vol. LXI PCR 1632-1633. At that point, no reasonable person would have felt free to leave the station until told by law enforcement that was permitted.

Curiously, Deputies Caimano and Shepard did not recall that there was a signed arrest warrant for Mr. Johnston upon his arrival at CID, even though they fielded the call from Mr. Johnston early in the evening and they knew they would be responsible for receiving Mr. Johnston at the station house following his telephone call. *See* Vol. LXI PCR 1632 (Caimano, did not recollect an arrest warrant); Vol. LXI PCR 1685 (Shepard, did not recollect an arrest warrant).

At the station house, Mr. Johnston was never told that he was free to leave. Vol. LXI PCR 1635. Caimano stated that law enforcement officers were constantly by Mr. Johnston's side, and if Mr. Johnston needed to use the restroom, an officer would have "accompanied" him to the restroom. Vol. LXI PCR 1636. The news spots on TV showing a photograph of Mr. Johnston and news that he was wanted for questioning for this murder support the detectives' intentions to arrest him. They actually had a signed arrest warrant. Therefore, when Mr. Johnston entered the detectives' office building and the door was locked, a "seizure" had in fact occurred. *Ripley v. State*, 898 So. 2d 1078 (Fla. 4th DCA 2005). At the very least, Mr. Johnston was in custody for purposes of Miranda when he was escorted into the interrogation room. *See Ramirez v. State*, 739 So. 2d 568 (Fla. 1999).

Failure to give *Miranda* warnings and obtain a waiver of rights before custodial questioning requires exclusion of any

statements obtained. Mr. Johnston did not feel reasonably free to leave the scene once he entered the station house. Law enforcement, with signed arrest warrant in their possession, clearly intended to arrest Mr. Johnston for at least grand theft at the time for using the victim's ATM card. They should have read Mr. Johnston his *Miranda* rights prior to any questioning. They had a signed arrest warrant at the time of this interrogation. The circumstances were such that Mr. Johnston was not free to leave the police station once he entered the police station and encountered the interrogating detectives. Mr. Johnston was not in control of his movements in the police station. He was not in control of his freedom. The detectives were in complete control and the doors were locked upon entry. Mr. Johnston was not free to use the restroom without the escort of a detective in that building. The lawful and constitutional practice would have been to read *Miranda* prior to *any* questioning. What may have started as a voluntary encounter quickly escalated into a seizure because no reasonable person would have felt free to leave the scene on their own power once they entered the buzzer-controlled door and were "greeted" by law enforcement officers with a frisk, and ordered to sit. Ray Lamar Johnston's entry into the police station for questioning was motivated by fear, not by a voluntary choice, just as no elementary pupil enters the principal's office truly voluntarily

when so instructed by a teacher.

Law enforcement searched Mr. Johnston's briefcase and car up front, and the interrogation began without the benefit of *Miranda*. As the United States Supreme Court has stated, "when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Missouri v. Siebert*, 542 U.S. 600, 613-614 (2004) citing *Moran v. Burbine*, 475 U.S. 412, 424 (1986).

Johnston's interrogation was continual with no breaks. It took place in the same place with the same two detectives, who did not advise Johnston that his statements made prior to being given *Miranda*, could not be used against him. These circumstances challenge the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes could not have understood them to convey a message that he retained a choice about continuing to talk.

Detectives Walters and Iverson relied on Johnston's pre-warning statements to obtain the post-warning ones used at trial which shows the temptations for abuse inherent in the two-step technique. As a result any statements made by Mr. Johnston were inadmissible. This midstream recitation of warnings after interrogation and unwarned statements could not effectively

comply with *Miranda*'s constitutional requirement, and any statements made pre or post *Miranda* are inadmissible. Law enforcement readily admits in this case that the *Miranda* warnings were not provided until *after* Mr. Johnston had made several statements concerning his relationship with Ms. Coryell and his use of her ATM card. Trial counsel should have filed a motion to suppress statements on this basis.

A motion to suppress statements was not filed at the trial level. As a result, the Appellant was barred from raising this issue on direct appeal. As such, trial counsel was ineffective under *Strickland v. Washington,* 466 U.S. 668 (1984) for failing to investigate, research, and file a motion to suppress. Had a motion to suppress been filed and granted by the trial court, incriminating statements would not have been introduced and used against Mr. Johnston, and the jury would have acquitted.

The Lower Court's Order

Regarding this issue, the lower court's order makes unreasonable factual findings and conclusions, and makes erroneous legal conclusions as well. The lower court correctly acknowledges that prior to the Appellant's arrival at the "Criminal Investigations Division," or "CID," (*see* Vol. LV PCR 1039) Detective Iverson "prepared a search warrant for Defendant's residence and a criminal report affidavit for a grand theft warrant, both of which were subsequently signed by a

judge." Order at Vol. XVII PCR 3211. That acknowledged, when the Appellant finally arrived at the offices of law enforcement, his apartment had already been searched, his personal items had been taken by law enforcement, the news was reporting that he was wanted for questioning in connection with this murder, and they actually had a warrant for his arrest for grand theft for use of the victim's ATM card. Notwithstanding all of that, the lower court somehow finds law enforcement's "testimony to be credible" that their "contact with Defendant [at "CID"] was in no way different than that of a citizen not involved in this case who had appeared at 1:30 in the morning," and that the Appellant was "treated as a normal citizen unrelated to the Coryell case would have been treated." Order at Vol. XVII PCR 3236. Those dubious representations were made by law enforcement at the evidentiary hearing to support their failure to initially advise the Appellant of his *Miranda* rights, and were erroneously accepted by the lower court. It is naïve, unreasonable, and just plain wrong to believe and factually find that Ray Lamar Johnston was no more a suspect that evening than any other citizen reporting to the station house with information, and was treated no differently than a random person would have been treated.

Regarding the arrest warrant for the Appellant held by law enforcement at the time of his arrival at the "CID" office, and

whether the Appellant was "free to leave the scene" at the time of his arrival, Sergeant Iverson testified that "if [the Appellant] had given [him] something that was plausible, it wasn't necessary to make an arrest at that time." Order at Vol. XVII PCR 3213. Though the lower court in its order found "the testimony of Detective Iverson to be credible," [Order at Vol. XVII PCR 3232] the lower court made the following comments at the time it heard this dubious testimony:

> THE COURT: [TO MR. PRUNER] [] I'm going also going to be directing you to do some research over night.
> MR. PRUNER: That will be done, but as the testimony will indicate it will not be required.
> THE COURT: I'm sorry.
> MR. PRUNER: As things unfold your initial concerns will be allayed.
> THE COURT: I appreciate that. I can't wait.
> MR. DRISCOLL: What were your initial concerns?
> THE COURT: What are my initial concerns?
> MR. DRISCOLL: Yes.
> THE COURT: One, he's holding an arrest warrant issued by a judicial officer. And he's saying the man could walk away. There is case law right on point, if I remember correctly, but not in Florida. If you—
> MR. PRUNER: Judge, it's inappropriate for me to commit [sic, "comment"] with the witness on the stand.
> THE COURT: No, that's what I'm saying. I mean, it's real obvious—I would think it's real obvious what my concerning [sic, "concerns"] are at this moment. []
> . . . .
> MR. PRUNER: Would Your Honor instruct the witness as to the limitations of the attorney contact—
> THE COURT: He is not to discuss his testimony with anybody, anybody.

Vol. LV PCR 1042-1043.

Due to concerns that the Appellant's statements might otherwise be suppressed, law enforcement would have the courts

and the public believe that when the Appellant arrived at the criminal investigations division and was buzzed into the secured door, at that time he had the right to walk away from the station house notwithstanding a signed and valid arrest warrant for grand theft connected to this murder. Such blatant misrepresentations should surely shake one's confidence in the criminal justice system. Detective Iverson's testimony was not credible, and law enforcement's deceptive and posturing two-step tactics to obtain unconstitutionally-obtained statements should not be tolerated by this Court. Regarding the *Miranda*-violative statements obtained by law enforcement in this case, the Appellant would direct the Court's attention to the following testimony:

> Q: So there's about a 25 to 27 minute period between the point in time when Ray Lamar Johnston starts talking to you and he's read Miranda?
> A: That's correct.
> Q: And at this point in time you did have an arrest warrant?
> A: Yes.
> Q: And that arrest warrant was signed by a judge?
> A: Yes.
> Q: If I could ask you, he had basically [] told you in that 25 to 27 minute period of time, he had told you a lot of his interactions with Leanne Coryell on the evening that she was murdered?
> A: That's correct.
> Q: Told you he was with the victim and that she handed him her ATM card?
> A: That's correct.
> Q: And that statement was made to you prior to you administering Miranda rights?
> A: Yes.. . . .
> Q: And he made a statement that she gave him the ATM

card because he was re-paying a loan to him.
A: That's correct.
Q: And he made statements to you and those were all pre-Miranda?
A: Pre and after Miranda.
Q: He also made statements to you pre-Miranda that they met at Malio's and that they went to dinner and Carrabba's?
A: That's correct.
Q: I'm going to ask you why, why did you wait until hearing that story to read him his Miranda rights?
A: He came down voluntary on his own to meet what [sic] us and we didn't go out and search him, search for him and call him down to the office. So wanted to see what he had to say.
Q: Was he free to leave the scene?
A: Like I explained earlier, I think if he had given me something that was plausible, it wasn't necessary to make an arrest at that point in time.
. . . .
Q: Tell me about the room where he was interrogated.
A: It was an interview room at the Criminal Investigations Division. Probably ten by ten room with a table and chairs.
. . . .
Q: And how many doors to that room?
A: One.

Vol. LV PCR 1037-1039.

Law enforcement was surely not seeking a "plausible explanation" for Mr. Johnston's repeated use of the recently-deceased's ATM card. And law enforcement surely had no intention to "let him leave" at this point of the investigation, armed with a valid arrest warrant, and reportedly wanting to speak with him about his suspicious, repeated use of the recently deceased's ATM card. The unrecorded interrogation in the ten foot by ten foot room with only one door behind the detectives' backs was absolutely custodial in nature. Custodial

interrogation is inherently coercive and therefore requires *Miranda* advisories up front. *See Miranda*, *Id.* at 467-468. The Appellant's freedom of liberty and unrestricted movement was obviously transformed into closely-monitored police custody when he came into the secured confines of Hillsborough County Sheriff's Office CID.

Just because Ray Lamar Johnston was not placed in handcuffs and leg irons at Criminal Investigations Division did not make this interview and interrogation non-custodial in nature. On this particular morning following the discovery of Ms. Coryell's dead body and the video footage of Mr. Johnston using her ATM card, following the search of Mr. Johnston's apartment and the securing of a warrant for his arrest for grand theft in connection with this crime, there were undoubtedly trained and skillful questions posed, unsophisticated and uncounseled responsive answers provided, and restrictions of liberty placed upon the Appellant at the station house. The State fortified their case against the Appellant with testimony and evidence from the dental office contradicting Mr. Johnston's version of events leading up to Ms. Coryell's death, as well as reliable bank account evidence and information making the Appellant's story that he was able to provide the victim a "loan" most implausible.

Pointing out the inconsistencies in his statements to law

enforcement, this Court stated the following on direct appeal: "The detective confronted Johnston with the fact that Coryell did not leave work until 8:38;" and continues, "In response to Johnston's contention that he loaned Coryell money, the State introduced several witnesses who testified that Johnston near the time of the murder did not have the financial ability to make a $1200 loan." *Johnston, Id.* at 352, 353. The statements to law enforcement were obviously very damaging, and trial counsel's failure to move to suppress them was quite prejudicial. The lower court was wrong to deny this claim simply because the Appellant "never incriminated himself in Mrs. Coryell's death." Order at Vol. XVII PCR 3223.

As acknowledged by the lower court, "Mr. Littman admitted that he would want to exclude any evidence which could show Defendant had made a false statement." Order at Vol. XVII PCR 3224. Yet, no motion was made. And when asked what research he conducted on this issue, Mr. Littman evasively and curtly responded, "having done criminal law for 30 years, I would tell you there is no basis." (*see* testimony cited in Order at Vol. XVI PCR 3224. Even criminal defense attorneys with 30 years of experience obviously make mistakes and omissions as illustrated by this claim. Mr. Littman failed to research and apply the well-known and clearly-established precedent of *Miranda* in this case. *Miranda* developed further into constitutional case law

that resulted in relief under similar circumstances to this case in *Missouri v. Seibert*, 542 U.S. 600 (2004).

In its Order, the lower court unreasonably finds that "Defendant's freedom of movement was not restrained in any way as Defendant could have exited the side door by merely pushing the push bar and it would have opened." Order at Vol. XVII PCR 3232-3233. Had such an exit been attempted, Mr. Johnston may have been charged with obstructing or opposing an officer without violence in addition to grand theft. With regard to a restriction on freedom of movement, at the very least in this case, even as acknowledged by the lower court at Vol. XVII PCR 3233, there was a "buzz[] in," a "pat[] down," a "search [of] briefcase," a "search for weapons," and an "escort[] to a room where they shut the door." No reasonable person under those circumstances would feel free to leave the interrogation room. *Miranda* should have been administered up front, not administered later as some mere technical aside. Law enforcement violated the United States Constitution here in a calculated fashion in an attempt to obtain a full confession. Although their attempt was unsuccessful in this regard, damage was still done as statements were obtained and utilized against the Appellant at trial.

The lower court's analysis of this claim is extremely misguided. For example, at Vol. XVII PCR 3233, the Order reads:

"[T]he Court finds when [Detective Walters] met with the Defendant, Defendant voluntarily went with him into the interview room and did not indicate to him that he did [sic, "not"] want to speak with him or that he wanted an attorney present." First of all, there appears to be a significant typographical omission in this finding; the lower court's order appears to fail to include the word "not" before "want to speak" in the passage above. But more importantly, the issue here is law enforcement's *failure to advise* the Appellant of his right to remain silent and his right to an attorney. The lower court turns *Miranda* on its head in this case and seems to impose a duty on the suspect to invoke constitutional rights that are not even advised. The Appellant cannot be faulted here for failure to invoke rights that were not even provided by law enforcement. As far as the subsequent *Miranda* advisory, the proverbial cat, spotted with readily-disproven statements, was already out of the bag.

When Detectives Walters and Iverson escorted Mr. Johnston into the interview room at the CID building, this was clearly police custody requiring the prophylactic *Miranda* advisories. The lower court wrongly denied relief on this claim because "Defendant made those statements [with discrepancies] before he was arrested." Order at Vol. XVII PCR 3234-3235. Whether the Appellant was under formal arrest is inapposite here. The issue

here is whether he reasonably felt free to leave the scene at the time he was questioned. Clearly, at the very least point in time at CID, once he was escorted into the interview room, Mr. Johnston did not feel free to leave the scene, just like any reasonable person in Mr. Johnston's position would not feel free to leave the scene.

The lower court finds at Vol. XVII PCR 3236 that "Defendant was free to leave the Sheriff's Office after he entered the Sheriff's Office, and if Defendant asked [Agent Caimano] to leave, he would have conferred with on-scene supervisors and called the detectives saying that Defendant wanted to leave." The Appellant was obviously not free to leave the sheriff's office. The sheriff's office held a signed arrest warrant for grand theft. There would be no simple conference amongst the detectives and deputies if the Appellant would have attempted to leave the CID building; obviously, there would have been an arrest. The lower court's factual finding here that "Defendant was free to leave" is yet another example of clearly erroneous and unreasonable factual findings reached in this case.

The *Miranda*-violative statements in the case at bar should be suppressed. This Court should reverse the lower court's ruling on this issue.

ARGUMENT III

THE TRIAL COURT ERRED IN FAILING TO GRANT RELIEF FOR A COMBINATION OF INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES. THESE ERRORS DEPRIVED MR. JOHNSTON OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

This claim was originally pled in the Appellant's 3.851 Motion as "Claim IX" with various subparts. Through counsel, the Appellant here will present the subclaims in an order that reflects the importance and relief-worthiness of each claim.

A. Failure to Call Witness Diane Bush

Ms. Diane Busch, a crucial witness known to both the prosecution and the defense at trial, was an available witness who could have been called by the defense in both the guilt and penalty phases of trial. Ms. Busch refuted the State's motive in this case. Through her evidentiary hearing testimony, she refuted the notion that Mr. Johnston was in desperate need of money at the time of Ms. Coryell's murder, and she provided powerful mitigation as she described her hospitalization and subsequent medical care that was assisted and provided by Mr. Johnston. Diane Busch credits Ray Johnston for caring for her while hospitalized, and credits him for actually "sav[ing] [her]

life." (*See* her testimony at Vol. LX PCR 1557). In a death penalty case, there can perhaps be no more powerful mitigation than a witness who testifies that the defendant saved her life. This type of testimony can certainly be enough to tip the scales of justice and persuasion in favor of a life recommendation.

Ms. Busch was known at the time of trial, and she was available at the time of trial to testify. Mr. Johnston actually asked his attorneys to interview her, yet they failed to do so.

Diane Busch testified at the evidentiary hearing that she met Ray Johnston at church in approximately June of 1997. Vol. LX PCR 1534. She described their relationship as follows:

> After we met, we communicated on the telephone establishing a friendship. Met one time behind Gaither High School, went rollerblading and he went jogging around the track. Another encounter, he had called and asked if he could bring sandwiches over for my children and I for lunch, which he did so. Another time, I went to his apartment and met some of his friends. And we proceeded to go out, and he sang karaoke and we had snacks. And another time after that, we went out to dinner and dancing at Malio's. And those were the encounters that I recall.
> Q. Okay. How was the karaoke?
> A. Actually quite good.
> Q. Okay. Can you tell us how Ray Lamar Johnston treated you while you were dating?
> A. Like a perfect lady.
> Q. And how did Mr. Johnston act towards your children while you were dating?
> A. A gentleman.
> Q. Was he polite?
> A. Very.
> Q. And so approximately how many times did you and your children spend time with Mr. Johnston?

A. All of us, once. And Mr. Johnston took my children out to dinner one time without me.
Q. Okay. Did Mr. Johnston pay for activities that he I shared with you and your children?
A. Yes.
Q. Did Mr. Johnston ever ask you for money or ask you to pay for anything?
A. No.
Q. Did Mr. Johnston ever inform you that he was having financial problems?
A. No.
Q. Did you ever see Mr. Johnston use cash during your dates?
A. (Witness nods head.) Yes.
Q. And did he seem to have plenty of money as far as you could tell?
A. He was able to take care of the things we were doing.
Q. Did Mr. Johnston ever say I can't afford to do that?
A. No

Vol. LX PCR 1535-1536.

The above testimony refutes the notion that Ray Lamar Johnston was desperate for money in 1997, and it shows that he was a caring individual. While Ms. Busch was hospitalized for four months with a severe respiratory problem, Ms. Busch reflected, "He managed all of my medical care. His role was nothing short of a caring, loving individual wanting the best possible care for the success of recovery." Vol. LX PCR 1549.

Diane Busch explained in detail the different functions that Ray Johnston served while she was in the hospital:

A. I had gone into respiratory arrest in front of all four of my children. Upon arriving at the hospital and being situated in a room and starting to relax a little bit, I asked Mr. Johnston if he would go and get my four children and bring them to the

hospital so they could see that I was all right; and he did that for me.
Q. Did you ask Mr. Johnston -- did you request any favors of him with regards to some cash that you had in your home?
A. Yes, I did.
Q. Okay. Describe that.
A. It was possibly the second day I was in the hospital. I know I was still on Dale Mabry University Community Hospital. I had been estranged from my husband for approximately a year-and-a-half and had some cash in the house. I asked Mr. Johnston if he would go and get that with my girlfriend. And -- and they counted it out. And I asked him if he would give that to her and she would deposit it into her bank account and that was carried out.
Q. Okay. Where was this -- where was this cash?
A. Under the mattress in the master bedroom.
Q. Okay. And what purpose did -- did Mr. Johnston, was he serving some type of -- as security, meaning not financial, but -- well, why did you want Mr. Johnston to go with your friend there to your house to get this cash?
A. I had been estranged from my husband, and I was concerned that he would have access to the home and would have access to that.
Q. Okay. So in case there were any -- in case there was any interference in obtaining that cash from your -- from your estranged husband, you wanted Mr. Johnston there just in case?
A. Yes.
Q. And why did you have so much cash in your home, at the time?
A. I'm a mother of four and I always believe in having emergency funds available.
Q. So you trusted Mr. Johnston to carry out that request
A. Absolutely.
Q. And did Mr. Johnston, in fact, do what you asked him to do?
A. Yes, he did.
Q. Ray -- Mr. Johnston had the ability to knock your friend out and take this cash?
A. They were alone in the house, to my knowledge, yes.
Q. And he did not do that?
A. No.

Q. Did Mr. Johnston have access to your personal effects while you were hospitalized?
A. Yes, he did.
Q. Did Mr. Johnston have access to your car?
A. Yes, he did.
Q. Did Mr. Johnston have access to your credit cards?
A. Yes.
Q. And did Mr. Johnston have the capability to take that $10,000 cash and use it for his own personal use?. . . .
A. Yes.
Q. And did Mr. Johnston have the capability to take that $10,000 cash and use it for his own personal use?
THE WITNESS: I wanted to -- when you said did he have access to my credit cards, he had them in his presence, the credit cards and my purse and everything.
BY MR. HENDRY:
Q. Okay. What about the $10,000 cash?
A. Could you repeat the question?
Q. I think you've already -- I think we've already covered that. Did Mr. Johnston ever steal anything from you?
A. No.
Q. Did Mr. Johnston ever ask to borrow any of that $10,000 cash?
A. No.

Vol. LX PCR 1553-1556.

The above testimony would have created reasonable doubt in the guilt phase and caused the jury to acquit. The failure to call a witness can constitute ineffective assistance of counsel if the witness may have been able to cast doubt on the defendant's guilt. "[T]he failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant's guilt, and the defendant states in his motion the witnesses' names and the substance of their testimony, and explains how the omission

prejudiced the outcome of the trial." *Ford v. State*, 825 So. 2d 358, 360-361 (Fla. 2002). *See also Jackson v. State*, 711 So.2d 1371 (Fla. 4th DCA 1998). In the unlikely event that Mr. Johnston would have been convicted even with Ms. Busch's testimony, the jury would have recommended life over death at the penalty phase because Diane Busch informed, "I felt that he had saved my life." [Vol. LX PCR 1557]. Ms. Busch credits Ray Johnston with saving her life because:

> A. [N]obody in the hospital would listen to the pain I was in. Nobody was doing anything, by the minute I was failing. And Mr. Johnston was very, very concerned and protective and listened to everything that I said, and he was the only one that shook people up and gave attention to my needs. And my needs were the fact my organs were shutting down and he got me to another hospital and orchestrated the doctors to coordinate what is going on, and just complete management. Without him, I would have died that fourth day.

Vol. LX PCR 1557.

As far as penalty phase testimony and valuable non-statutory mitigation, it does not get much more powerful than the above testimony. Trial counsel was ineffective for failing to present Ms. Busch's testimony to the jury. Ms. Busch testified that no one from the public defender's office ever contacted her, and she would have been willing to testify for Ray Lamar Johnston. [Vol. LX PCR 1559]. As such, trial counsel was ineffective and Mr. Johnston's sentence of death should be vacated because there is a reasonable probability under

Strickland that the jurors and or the Court could have been persuaded to spare Mr. Johnston's life in light of Ms. Busch's compelling testimony.

No one from the defense team claimed to have interviewed Ms. Busch. No one from the defense team claimed to have strategically decided that she was not a good witness. The failure to call Ms. Busch to trial was *not* a strategic choice; it was an omission, a big mistake, a huge oversight. There is documented evidence that public defender's office was aware of Ms. Busch, and that Mr. Johnston described his relationship with her. (*see* EH exhibit 13, attorney Deborah Goins' jail interview notes at Vol. XXIX PCR 5434, wherein Ms. Goins writes: "Diane Busch – D says he had been around Diane when she was ill – he helped her out", *see* Mr. Johnston's notes to trial counsel admitted at the evidentiary hearing as EH exhibit 14; specifically, *see* Vol. XXIX PCR 5439-5440, wherein Ray Johnston actually urged his attorneys, "Diane Busch needs to be interviewed by herself with no one in the room. . .[I] saved her life 3 times.", *and see* by Mr. Johnston's testimony cited in the lower court's order at Vol. XVI PCR 3161). An interview of Ms. Busch would have provided a wealth of information vital to both guilt and penalty phase issues. Diane Busch's testimony refutes the State's theory that Mr. Johnston was in financial shambles near the time of the Coryell murder, refutes the notion that the

motive for this murder might be money, and as an added bonus, her testimony includes powerful mitigating evidence that the Appellant saved her life. The Appellant even provided his trial team with Ms. Busch's telephone number (*see* Vol. XXIX PCR 5439). Diane Busch should have been contacted, she should have been interviewed, and she should have testified for the Appellant at trial.

The Lower Court's Order

The lower court's order continues to cite and acknowledge testimony that supports relief, yet fails to grant relief. For example, the lower court acknowledges at Vol. XVI PCR 3157 that trial attorneys Kenn Littman and Joe Registrato could not recall an individual by the name of Diane Busch. As such, there obviously was no strategy involved in failing to present her vital testimony.

Had Diane Busch's testimony been presented at the guilt phase, Ray Johnston could very well have been acquitted. Had *her* testimony been presented at the penalty phase, that testimony could have diminished any desire of the trial team to present the Appellant's testimony and confession at the penalty phase, and could have persuaded the jury to recommend life over death.

In a case where the State is advancing the theory that Ray Johnston killed the victim to obtain her money, it would

obviously be very important to cast doubt on that alleged motive. The lower court acknowledges in its order at Vol. XVI PCR 3158 that the "Defendant never asked [Ms. Busch] for money or asked her to pay for anything," that "he never informed her [of] financial problems," and that "he used cash during their dates, he was able to pay for things, and he never said, I can't afford to do that." With regards to penalty phase issues, the lower court acknowledges at Vol. XVI PCR 3158 that "she became ill and Defendant drove her car behind the ambulance at the hospital," and "while she was in the hospital, she asked Defendant to pick up her four children and bring them to the hospital and he did." The lower court acknowledges at Vol. XVI PCR 3159 that Ray Johnston was entrusted to assist her friend in counting out $10,000 cash in her home, and he in fact assisted in having it deposited in her friend's account. Somehow notwithstanding the acknowledgement of this powerful evidence presented at the evidentiary hearing, the lower court inexplicably denied relief.

In a case where the State is seeking the death penalty, it is important for defense attorneys to investigate, appreciate, and present this type of game-changing testimony and evidence at the penalty phase. This omission and error at the penalty phase was not harmless in nature. *See Porter v. McCollum*, 130 S. Ct. 447 (2009). In *Porter*, apparently without the need for full

briefing and oral argument, in a unanimous *per curiam* decision, our United States Supreme Court ruled that "the decision not to investigate [mitigating evidence of the defendant's military service and background] did not reflect reasonable professional judgment." *Id.* at 453. In the case at bar, the decision to not interview Diane Busch and present her testimony at both phases did not reflect reasonable professional judgment. As reporter David Savage from the Chicago Tribune poignantly commented the day after the *Porter* decision on December 1, 2009, "The Court's opinion put defense attorneys on notice that they have a duty to look into their client's background and tell jurors about any mitigating evidence that would call for leniency." The Appellant submits that defense attorneys were put on notice of this duty long ago by the case of *Strickland*.

Regarding available evidence from Ms. Busch discrediting the Appellant's alleged financial motive, the lower court actually acknowledges in its order, "the Defendant had access to her personal effects, her car, and her credit cards, but [he] did not ever steal anything from her or ask to borrow any of the ten thousand dollars cash," and further acknowledges, "[he] had access to her home and could have stayed there if he wanted to and used her credit cards that were in her purse, but he did not." Vol. XVI PCR 3159. The lower court also acknowledges at Vol. XVI PCR 3159, "although she was available in June of 1999

to testify and would have testified[] nobody contacted her to testify."

The lower court's rationale for the denial of this claim is confusing at best. At Vol. XVI PCR 3160, the lower court cites to Mr. Registrato's "[lack of] specific recollection [] of any discussion with [] the trial team regarding Ms. Busch [], [or] whether or not to call Ms. Busch either at guilt phase or penalty phase." Then, strangely, the court "finds Mr. Registrato's testimony to be more credible than that of Defendant," and finds "Defendant did not request that Mr. Registrato interview and call Ms. Busch to testify." Vol. XVI PCR 3162. This finding makes no sense, and completely ignores Appellant's EH exhibits 13 and 14, the Deb Goins jail interview notes, and Ray Johnston's written comments to his trial team concerning Diane Busch. Furthermore, it must be noted that Ms. Busch was listed in the discovery materials provided by the State prior to trial, including a Hillsborough County Sheriff's Office supplemental police report describing Mr. Johnston's relationship with Diane Busch (*see* State's EH exhibit 28 at Vol. XXIX PCR 5448-5449). Elementary trial preparation dictates that the ***trial attorneys*** have the duty to interview and investigate witnesses listed in the state's discovery materials.

The failure to interview Ms. Busch is ***no fault of the Appellant's***, rather, it is the fault of the trial team. Trial

attorneys are charged with the duty to investigate the state's case. Woefully ill-prepared would be the trial attorney who awaits instruction from his untrained, incarcerated client before he investigates the state's case. The lower court's decision blaming the defendant for "not request[ing] that Mr. Registrato interview and call Ms. Busch to testify" (Vol. XVI PCR 3162) is factually erroneous, and unreasonably contrary to *Rompilla v. Beard*, 545 U.S. 374 (2005). *Rompilla, Id.* at 377 holds that "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available," there is still a duty to investigate. In the case at bar, Diane Busch was listed in the discovery materials, the Appellant informed his trial that he saved her life and she should therefore be interviewed "*alone*," and there was *still* a failure to investigate.

If the trial court truly finds trial counsel Joe Registrato and Kenneth Littman credible in their testimony regarding Ms. Busch, then the court should be finding that trial counsel could not remember any strategy involved in the failure to interview or call Ms. Busch (*see* the lower court's citation to trial counsel's testimony regarding Diane Busch at Vol. XVI PCR 3160). Instead, the lower court finds that the Appellant did not make a request for Diane Busch to be interviewed. This finding flies in the face of the Appellant's written request to his trial

attorneys at Vol. XXIX PCR 5439-5440. When important witnesses are listed in police reports, there is no duty on the client to request that counsel interview those individuals. This is reminiscent of the court's prior finding that the Appellant made no request that his attorneys raise the specific issue of juror Robinson's deliberate failure to disclose her criminal history. The lower court is wrong to make legal and findings of ineffective assistance of the client where the actual duty to investigate rests with trial counsel, not the client.

The lower court was misguided to find that "Defendant never had use or possession of the [$10,000], nor did [Diane Busch] have any reason to believe Defendant had access to it while it was in her girlfriend's account." Vol. XVI PCR 3162. This finding flies in the face of Ms. Busch's testimony at Vol. LX 1555-1556 wherein Ms. Busch testified that Mr. Johnston had access to all of her personal effects, including her cash and credit cards, and he could have taken them for his own use if he so chose. The point here is not actual "use or possession" of the money, nor is it Ms. Busch's belief in the Appellant's access after the bank deposit was made in her friend's account. The point here is the Appellant's *actual* access to these things of great financial value while Ms. Busch was in the hospital in critical condition. Ray Lamar Johnston *had* actual access to the $10,000 cash. Mr. Johnston had the actual ability to overcome

Ms. Busch's friend by force and access and take the $10,000 cash. The lower court here unreasonably ignores the exculpatory value of Ms. Busch's evidentiary hearing testimony. The lower court blindly finds the following: "by Defendant's own admission, he did not have access to the ten thousand dollars at the time of Ms. Coryell's murder because it remained in Ms. Busch's girlfriend's account." Vol. XVI PCR 3162. Again, the point is, rather than taking the $10,000 when he had the easy opportunity before the deposit was made, he assisted in the financial transaction that allowed the money to be deposited into Ms. Busch's friend's account rather than taking the money for his own use.The court already acknowledged "access" at Vol. XVI PCR 359.

Contrary to the lower court's findings, Ms. Busch's testimony absolutely would have "refuted the State's theory that Defendant murdered Ms. Coryell for pecuniary gain." (*see* order at Vol. XVI PCR 3162). At the very least here, there should be a consideration of the *value* of this exculpatory evidence. The lower court outrageously fails to assign any exculpatory value at all to Ms. Busch's testimony! This would be like a trial court failing to acknowledge at all the age mitigator of an 18 year old capital defendant, obviously contrary to *Roper v. Simmons*, 543 U.S. 551 (2005), and contrary to common sense.

This case should be remanded to the circuit court for a

determination of the appropriate exculpatory weight to be afforded to Ms. Busch's testimony. Quite justifiably, this Court should remand this case to the circuit court for a whole new guilt phase or penalty phase which includes the testimony of Ms. Diane Busch.

The failure to call Diane Busch to trial was not a case of reasonable trial strategy. The lower court's order even acknowledges that "[Joe Registrato] testified he did not know if an investigator from the Public Defender's Office talked with Ms. Busch," he "did not" recall requesting that an investigator speak with her, and he did not "weigh[] [] the pros and cons of prospective testimony from Ms. Busch because he did not know there was any Ms. Busch who would have helped them." Vol. XVI PCR 3169. Available evidence and witnesses left uninvestigated by defense attorneys cannot be deemed strategically abandoned. The lower court turns *Strickland* on its head by finding the following:

> Defendant did not request that Mr. Registrato interview and call Ms. Busch to testify as a nonstatutory mitigation witness during the penalty phase. Moreover, the Court finds, by Ms. Busch's own admission, she never contacted anyone about testifying on Defendant's behalf. Consequently, Defendant failed to demonstrate how counsel acted deficiently in failing to call Ms. Busch when Defendant did not make such a request.

Vol. XVI PCR 3169.

Although inapposite to a *Strickland* analysis, the Appellant

did make such a request (*see* Mr. Johnston's notes to trial counsel admitted at the evidentiary hearing as exhibit 14 (specifically, *see* Vol. XXIX PCR 5439-5440, wherein Ray Johnston urged his attorneys, "Diane Busch needs to be interviewed by herself with no one in the room. . . .[I] saved her life 3 times.")). Furthermore, to fault Ms. Busch because she "never contacted anyone about testifying on Defendant's behalf" is wrong. "Ineffective assistance of witness" is not recognized under *Strickland*, and should not be cited to justify the failures and omissions of trial counsel. The lower court was wrong to accept the *post hoc* rationalization by trial counsel attempting to excuse their simple failure to investigate and develop Diane Busch as a witness.

Finally, it must be noted that Diane Busch did not contact CCRC-M in postconviction; CCRC-M reviewed the case materials and contacted Diane Busch. If they were providing the effective assistance of counsel including reasonable representation and due diligence, trial counsel would have contacted Diane Busch after reviewing the discovery materials in this case. This Court should reverse.

B. Failure to Inform the Jury of the Appellant's Prescribed Psychotropic Medications

Trial counsel was ineffective for failing to inform the jury that the Appellant was using prescribed psychotropic medications at the time of his trial. Clinical and forensic Pharmacologist Dr. James O'Donnell reviewed the inmate medication dispersing logs from the Hillsborough County Jail and testified that Mr. Johnston was given high doses of psychotropic medication three (3) times daily. This went on for more than two (2) years while Mr. Johnston awaited trial.

Dr. James O'Donnell testified at the evidentiary hearing that Mr. Johnston was impaired at the time of trial due to the medications he was ingesting:

> Q. Did you form any opinions in this matter regarding the effects of psychotropic medication on Ray Lamar Johnston at the time of trial?
> A. Yes, I did.
> Q. Are those the same opinions that you expressed in your reports which have been filed by the Court?
> A. Yes.
> Q. And what are your opinions?
> A. In my opinion Mr. Ray Lamar Johnston was impaired by psychotropic medications and Flexeril that were administered to him during the time of trial and sentencing hearing. Those impairments could effect [sic, affect] his ability to think and act, to make decisions, to control his emotions. The impairments have the effect of confusion, disorientation, attitude. And in my opinion, based on what we know the drugs do and based on my reports based on my interview of Mr. Johnston, he was impaired during the time of

the trial and the sentencing hearing.
Q. Is it your opinion that such impairments would have impeded Mr. Johnston's ability to think rationally and adversely affected his ability to reason and make sound judgments during his confinement and trial?
MR. PRUNER: Objection, this is outside of his expertise. Sound judgments, legal judgments?
MR. HENDRY: Dr. O'Donnell --
The COURT: Rephrase the question.
BY MR. HENDRY:
Q. Do you feel that such impairments would have impeded Mr. Johnston's ability to think rationally and adversely affected his ability to reason and make sound judgments during his trial?
A. Yes, I hold that opinion.

Vol. LV PCR 989-990.

Regarding the specific side effects of the psychotropic medications Ray Lamar Johnston was taking at the time of trial, Dr. O'Donnell informed:

A. Dilantin is a central nervous system depressant in that it depresses the state of weightiness of the brain. A depressant is a tricky term, I don't want to suggest that it causes emotional depression or that someone is depressed, but rather it's like -- it's a central nervous system depressant, indeed, all four medications are classed as central nervous system depressants because of that classification that it carries a general generic description of a downer-type effect on the patient. That can cause clouding and disorientation, somnolence, fatigue. Dilantin -- those are very common effects from Dilantin.
Q. I'm going to ask you if you would agree with this description that the most common manifestations encountered with this drug --
THE COURT: Which drug are we talking about?
MR. HENDRY: Dilantin.
BY MR. HENDRY:
Q. -- include slurred speech, decreased coordination and mental confusion.
A. Yes, I agree with that description.
Q. Dizziness, insomnia, transient nervousness, motor twitchings and headache.

A. Yes. Those are common side effects, neurological toxicities of Dilantin.
Q. And with regard to the drug Tegretol, is this a depressant?
A. Yes, Tegretol is also a central nervous system depressant.
Q. And would you agree with me that the adverse effects include dizziness, drowsiness, disturbances of coordination, confusion, headache, fatigue, blurred vision, visual hallucinations?
A. Yes, those are all recorded neurological toxicities associated with Tegretol.
Q. Speech disturbances, abnormal and voluntary movements?
A. Less frequent occurrence, yes.
Q. Depression with agitation?
A. Yes.
Q. Talkativeness?
A. That is reported, yes.
Q. With regard to the drug xanax, is this a sedative, hypnotic, schedule 4 controlled substance?
A. Yes.
Q. Is this a depressant?
A. Criminal nervous system depressant by definition, yes. As a sedative hypnotic, yes.
Q. Does the side effect include depression and impaired performance?
A. Yes.
Q. And patients receiving Xanax should be cautioned against engaging in hazardous occupations or activities requiring complete mental alertness?
A. Yes.
Q. With regards to the drug Flexeril, would you agree that this is a muscle relaxant and depressant?
A. Yes. And I would like to be clear that Flexeril is not considered to be a psychotropic drug, but I listed it in here because it does carry central nervous system depressant. And the central nervous system depressant effects of the Flexeril would be at least additive to the similar effects of the other — of the psychotropic drugs that were also administered.
Q. Adverse side effects of Flexeril, would you agree that it could cause disorientation, insomnia, depressed mood, abnormal sensation, anxiety, agitation, psychosis, abnormal thinking and dreaming, hallucinations, excitement?
A. Yes, those are reported to be associated with

Flexeril in clinical doses.

Vol. LV PCR 986-989.

At the very least, Mr. Johnston should have had a competency evaluation performed prior to his testimony. Regarding Mr. Johnston testifying and the medication issues, trial attorney Gerod Hopper testified that no attorney on the defense team advised against Mr. Johnston testifying, and Mr. Hooper was not made aware that Mr. Johnston was taking psychotropic medications when he provided advice to the team. The jury should have been informed that Ray Lamar Johnston was taking psychotropic medications from the time he was arrested through his penalty phase testimony.

The Lower Court's Order

The lower court's order places too much emphasis on the simple outward appearances of Mr. Johnston at the trial, citing simply to the "evaluations of Dr. Maher and the eyewitness observations of [] the defense team." *See* order at Vol. XVI PCR 3047. One cannot truly know what was happening internally inside of Mr. Johnston at the time he testified. The jury should have been informed of the prescribed psychotropic medications the Appellant was taking, at the very least, to support his mental health mitigation, and as evidence of additional non-statutory mitigation.

C.Ineffective Assistance of Counsel for Providing the

Appellant with Ill-considered and Improper Advice about the Need to Testify at the Penalty Phase of the Trial, Failure to Present Available Mitigation

Ray Lamar Johnston should not have testified during his penalty phase. Trial counsel provided Mr. Johnston with very poor and ineffective advice concerning the need to testify and admit to the murder in Coryell. The Hillsborough County Public Defender's Office represented Mr. Johnston in the Coryell murder first, then in the Nugent murder. The attorneys' ultimate unusual advice in Coryell urging him to testify and admit the murder during the penalty phase was woefully ineffective, and caused prejudice on several levels. First of all, his impaired testimony derailed the positive effects of the mitigating mental health testimony in the penalty phase, causing the jury to ignore the powerful available mitigation and vote 12-0 for death. Secondly, the Coryell penalty phase confession carried with it the added detriment and devastation of being utilized against him the in Nugent guilt phase as *Williams* Rule evidence.

The *instant* prejudice was realized in the Coryell trial as Mr. Johnston, through his trial testimony, immediately diminished the powerful available mitigation, and sealed his case for death. Regarding Mr. Johnston's trial testimony, clinical and forensic psychologist Dr. Cunningham opined as follows at the evidentiary hearing:

Q. Dr. Cunningham, in all the material that you

> reviewed in preparation for your testimony here today, did you see any indication within those records that there was any discussions between trial counsel and Mr. Ray Lamar Johnston concerning his medications and the effect they may have had on his testimony?
> A. No, sir.
> Q. On that slide there, you list there how his medication may have an impact on judgment, may have a blunting affect, could you describe what you're talking about there with those, under those subheads?
> A. Yes, sir, to the extent that Mr. Johnston was experiencing confusion or sedation from those medications. Those would impact on judgment in the same way that were your airline pilot taking the same medications he would not be allowed to operate the aircraft, whether he looked like he was good to go coming down the ramp or not. The fact that he was on those medications would disqualify him from that role because of the potential that those have for affecting reaction time and judgment in a critical arena, as well as the underlying disorders that they would reflect. The blunting of affect is that the impact of these is to reduce the normal spontaneity, the normal reactions that someone might have to bring that into a more narrow range, particularly as those drugs are take in combination with each other, the effect of that maybe to make the person much less reactive, which can be regarded as being in passive cold blooded, stoney in a court setting. And that's the concern then with providing information to a jury that somebody is on medication, so that you reduce the likelihood of that kind of misinterpretation being made.

Vol. LII PCR 655-657.

Dr. Cunningham felt that the Appellant's penalty phase testimony "could be viewed [by the jury] as not containing remorse." Vol. LII PCR 667. Trial counsel's plan to place Mr. Johnston up on the stand and exhibit remorse backfired. He was not able to show remorse, and he negated the statutory and non-statutory mental health mitigation that was previously

presented. Dr. Cunningham testified that because Ray Johnston could be seen as a "smooth talker" on the stand, there was a risk that his verbal functioning would interfere with the jury's appreciation of Mr. Johnston's brain function and related mitigation.

Dr. Cunningham noted several other areas of concern in the defense penalty phase presentation. The decision to place Mr. Johnston on the stand was not the only thing that caused Dr. Cunningham concern. Dr. Cunningham noted the following in his review of the background materials in the Johnston case:

> 1) Failure of the defense to articulate a coherent theory of mitigation.
>
> 2) Failure of the defense to elicit testimony regarding both historical and contemporaneous evidence supportive of the presence of neurological disorder and brain functioning impairment.
>
> 3) Failure of the defense to elicit adequate testimony regarding the nexus of Mr. Johnston's brain impairments and criminal conduct.
>
> 4) Failure of the defense to offer evidence of Mr. Johnston's broader aggressive reactivity.
>
> 5) Failure of the defense to offer crime-specific evidence of both reactive impulsivity and poor judgment.
>
> 6) Failure of the defense to elicit testimony regarding evidence of affective and anxiety disorders in Mr. Johnston.
>
> 7) Failure of the defense to elicit testimony regarding dysfunctional factors in Mr. Johnston's family of origin.

8) Failure of the defense to sponsor testimony regarding Attention Deficit Hyperactivity Disorder.

Nowhere in the penalty phase did the defense bring up the available evidence of family dysfunction. To the contrary, the jury was misled to believe that the Johnston family had little problems. Dr. Cunningham described the marital infidelity and domestic violence that permeated the Johnson home. Dr. Cunningham described how Mrs. Johnston broke a beer bottle over Mr. Johnston's head, and informed that:

> [A] presidential task force, [] the American Psychological Association, whose findings were published in 1996, [] found that it seems to do as much psychological damage to a child to observe the violence in the family as to be directly hit themselves.

Vol. LIII PCR 780.

Dr. Cunningham said that there a definite correlation between violence in the family and violence in the community. Vol. LIII PCR 780-781. On the issue of family dysfunction, Dr. Cunningham concluded:

> In the absence of this discussion about the dysfunction in the family and the outcomes of [brother] Butch [Johnston] as well, the jury may well be left with an impression that Ray grew up like "Leave it to Beaver" and had every advantage and that this was a stable household and that he just willfully became bad out of his own volition. So this is pretty classic mitigation, that is, this is a dysfunctional family that he's grown up in with a number of risk factors that are part of it that are formative in nature.

Vol. LIII PCR 784.

Dr. Cunningham noted a failure of the defense to inform the jury that Ray Johnston has Attention Deficit Hyperactivity Disorder, or ADHD. He described the symptoms and possible causes for ADHD:

> ADHD is a disorder that's comprised of a triad of symptoms, inattention and distractibility, impulsivity and excessive motor activity or being hyper. In terms of causes there seem to be a number of different things that can cause this disorder. It can be something that arises out of fetal alcohol exposure, in other words, that mama was drinking during her pregnancy and, in fact, Sara reported that she drank socially during her pregnancy with Ray. In terms of descriptions that would support a conclusion that he had Attention Deficit/Hyperactivity Disorder, Sara reported, in my interview with her, that he was hyper and his motor was racing all the time, that unlike his siblings he could not sit and play with one toy, but instead would move from one thing to the other, that he couldn't tolerate sitting in her lap to have a story read to him. Those are typical descriptions in early childhood, children in early childhood who have Attention Deficit/Hyperactivity Disorder. And then when he got to school there were routine complaints from teachers from the early grades in school of being disruptive, not staying in his seat, not finishing his work and not staying on task. In terms of records that were available, Sara reported to the Alabama State Board of Pardons and Parole in 1976, quote, He, describing Ray, was a very active child almost to the extent of being hyperactive, end of quote. So there's some record support for that as well.
> Q And did you see any indication in the records that the trial attorneys or Dr. Maher considered ADHD?
> A. No, sir.
> Q. Did you see any testimony in the trial transcript about the ADHD?
> A. No, sir.

Vol. LIII PCR 784-786.

Had trial counsel engaged in enough meaningful discussions

with their mental health expert, and provided the expert with necessary background information, this diagnosis of ADHD would have been reached and this very weighty mitigating factor could have been presented to the jury.

The Lower Court's Order

The lower court's order was wrong to deny this claim and refer to this wealth of available mitigating evidence not presented at trial as "CCRC's alleged post-conviction 'mitigation.'" (*see* Vol. XVI PCR 3037). The jury failed to hear Dr. Cunningham's important diagnosis of ADHD which lends tremendous support to the mental health mitigation available in this case.

As Dr. Cunningham pointed out at the evidentiary hearing, and the lower court apparently rejected because "[the lower court] could not conceive of a lawyer pointing out [a certain childhood incident] [] and saying, oh doctor, by the way, this comment that she believes the child might have been hyperactive, does that give rise to any potential diagnosis," Dr. Cunningham explained, "ADHD is a disorder that doesn't simply go away in most cases but continues on across the teen years. It's a broad risk factor for increased likelihood of misconduct [] even into adulthood, and is one of the factors that's identified as a risk factor for delinquency and criminality by the U.S. Department of Justice in a study they published in 1995." Vol. LIII PCR 792.

By failing to accept the ADHD diagnosis and other mitigation presented at the evidentiary hearing, the lower court violates capital sentencing law. As the United States Supreme Court has explained the law:

> [i]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (internal quotation marks and citation omitted). The lower court obviously fails to appreciate the notion of an individualized assessment of the Appellant's character, history, and personality it relates to his deserved, reduced moral culpability. This Court should reverse.

D.Ineffective Assistance of Counsel for Failure to Challenge the Fingerprint Evidence

The lower court's denial of this claim is found at Vol. XVI PCR 3045-3046. The lower court was wrong to "procedurally bar[]" this claim as it is proper for postconviction presentation and consideration. The lower court cites to *State v. Armstrong*, 920 So. 2d 769 (Fla. 3rd DCA 2007) and this Court's denial of review of that decision found at *Armstrong v. State*, 945 So. 2d 1289 (Fla. 2006) to support the denial of this claim.

The lower court refused to consider Dr. Simon Cole's evidentiary hearing testimony regarding the fallibility of fingerprint science and evidence. The Appellant here relies on the extensive evidentiary hearing proffer of Dr. Simon Cole located at Vol. XLIX PCR 445-518 to support the claim that trial counsel was ineffective in the case at bar for failure to consult an expert such as Dr. Simon Cole to rebut the State's forensic fingerprint evidence in this case. The Appellant submits that Dr. Cole's testimony stands on its own, and supports its own admissibility under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) as it has a general acceptance in the scientific community.

The Appellant asks this Court at the very least to remand this case back to the lower court for consideration of Dr. Simon Cole's testimony regarding fingerprint science and trial counsel's omissions in this regard.

Prior to this Court's denial of jurisdiction in the *Armstrong* case regarding the admissibility of Dr. Simon Cole's testimony, there was a complex federal case that addressed issues of the admissibility of the science of fingerprinting and surrounding issues of Dr. Simon Cole's proposed testimony. *See U.S. v. Mitchell*, 365 F. 3rd 215 (3rd Cir. 2004). In that particular case, Mitchell challenged the admissibility of fingerprint evidence under *Daubert v. Merrell Dow*

Pharmaceuticals, 509 U.S. 579 (1993) using the testimony of Dr. Cole and other experts in the field; once the pre-trial challenge to the fingerprint evidence was denied, Mitchell sought to have Dr. Cole testify at trial about the unreliability of fingerprint evidence. The trial court ruled that Dr. Cole would not be permitted to specifically testify that fingerprinting was not a "science." The defense in *Mitchell* argued that in effect, the trial court improperly excluded the testimony of Dr. Cole. The 3rd District Court of Appeal ruled that there was a failure to preserve the issue at trial:

> Mitchell could have asked the Court whether Prof. Starrs and Dr. Cole would be permitted to testify as to the reliability of fingerprint identification, provided that they did not opine on the irrelevant issue of whether it was science. Instead, he accepted their exclusion. Mitchell could have proffered the subject matter of testimony he would like to present. Instead, he proffered the witnesses he would like to call. Mitchell could have attempted to put his witnesses on the stand to preserve his objections. Instead, they never appeared at trial.

Mitchell at 251. Implicit in the 3rd Circuit Court of Appeal's ruling is the notion that Dr. Cole *would* be permitted to testify about the unreliability of fingerprint evidence. His testimony could aid the trier of fact, and it is relevant. But, the defense in *Mitchell* failed to request that he be permitted to testify on the issue of fingerprint unreliability. So in effect, the issue was not preserved for appeal regarding the admissibility of Dr. Cole's general testimony. In the case at

bar, Dr. Simon *did* testify as a proffer at Vol. XLIX PCR 445-518. As his testimony shows, Dr. Cole is well-qualified, and his testimony is relevant to the issue of reliability of fingerprint evidence. His testimony would certainly meet the requirements of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) as it has a general acceptance in the scientific community

E.Ineffective Assistance of Counsel for Failure to Challenge the Shoe Tread Evidence

Trial counsel was ineffective for failing to present the most accurate, highest, and most defense friendly statistic for the number of shoes that could have made the treadwear impressions at the crime scene. Rather than a mere 588,054 pairs of shoes manufactured by Reebok that could have made the treadwear impressions at the Coryell murder scene, trial counsel should have presented the higher figure of "millions" of shoes, supported by EH defense exhibit number 8 (the "Stacey Moord/Reebok Memorandum"). *See* Vol. XXVIII PCR 5390-5410. Trial counsel received an inadequate affidavit from Reebok, and at the very least, counsel should have requested an amended affidavit from the company prior to presenting the inadequate affidavit at trial. *See* EH defense exhibit number 7 (the "Rodd Patten/Reebok Affidavit" at Vol. XXVIII PCR 5312-5314). No such request was made, and counsel was therefore ineffective. Had the jury heard the higher figure, they would have fully

discounted the treadwear evidence and acquitted Mr. Johnston.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. JOHNSTON'S CLAIM THAT HE DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION, WHEN COUNSEL FAILED TO INDIVIDUALLY VOIR DIRE MEMBERS OF THE JURY VENIRE ABOUT PRE-TRIAL PUBLICITY.

There can be no greater prejudice to a criminal defendant than a juror hearing extensive pretrial publicity about his extensive criminal arrest record prior to trial. That is exactly what happened in the instant case. Just as trial counsel was ineffective in failing to ask the necessary follow-up questions of juror Robinson, trial counsel was ineffective for failing to conduct individual and sequestered *voir dire* of members of the venire who were exposed to the pre-trial publicity in this case.

This Court stated as follows on direct appeal regarding this issue:

> The record reveals that both the television media and newspapers closely followed the progress of the murder investigation and criminal proceedings in the case. Media reports included numerous inadmissible details of Johnston's criminal history and early releases, his purported proclivities for violence against women, and statements from some of Johnston's own family that they believed Johnston was guilty. [] Johnston recognizes that defense counsel "dropped the ball" by not requesting individual voir dire for these jurors.

Johnston, Id. at 358. The Appellant was vilified in the media. Defense counsel *did* drop the ball. As such, the Appellant should receive a new trial.

Attorney Kenn Littman could offer no explanation why he failed to individually *voir dire* the members of the venire who had been exposed to the media.

> Q. My -- my question really is, at the time was there any reason why you didn't separate those people out and have them questioned thoroughly about their exposure to the media?
> A. I don't recall it at all. At all.

Vol. LIX PCR 1438

This Court should grant relief on this claim because it is clear that trial counsel "dropped the ball" here. The test for prejudice is "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial]." *Strickland* at 686-687. There can be no confidence in the outcome of this case where at least two of the sitting jurors were exposed to the completely prejudicial news media in this case. The common thread in all the media reports was *not* the lack of evidence and the circumstantial nature of the evidence against Mr. Johnston. The common thread was that Ray Lamar Johnston was a career criminal who repeatedly engaged

in violent crimes against women, and who was repeatedly released early from prison for his crimes. Front page newspaper articles and television news broadcasts highlighted Mr. Johnston's criminal past in sensationalist fashion. There can be no confidence in the outcome of the verdict and jury's 12-0 death recommendation in this case due to the variable of the extent to which the jury knew of Mr. Johnston's criminal past.

The Lower Court's Order

The lower court was wrong to rule that "any" claim of this nature "is procedurally-barred in postconviction." *See* order at Vol. XV PCR 3019. *This* Court specifically stated on direct appeal, "[W]e deny this claim without prejudice because it should be raised in a postconviction motion, as opposed to direct appeal." At Vol. XV PCR 3019-3020, the lower court cites to *Spencer v. State*, 842 So. 2d 52, 68 (Fla. 2003) and suggests that this claim "w[as] cognizable on direct appeal and therefore, procedurally-barred in postconviction." *Spencer* does not control this issue, *Johnston* controls this issue. And the lower court was clearly wrong in finding this claim procedurally barred.

As the lower court continues to "put this procedurally barred claim in perspective," its analysis is misguided and unfair. Once again, Ray Lamar Johnston is blamed by the lower court for trial counsel's failure to privately *voir dire* certain

jurors on extremely prejudicial media exposure. The lower court unfairly notes: "In post-conviction, attorney Littman agreed that Johnston personally contributed to the pretrial publicity by giving a telephone interview from jail to a news reporter." *See* footnote one of order at Vol. XV PCR 3021. Contrary to the lower court's order, the jury panel's memory and lasting impressions from the prejudicial media reports of Mr. Johnston's criminal past did not fade like Mr. Littman's memory of his alleged speculative reasons for "dropp[ing] the ball" here. This Court should grant relief, or remand for further inquiry.

ARGUMENT V

THE LOWER COURT ERRED IN REFUSING TO GRANT AN EVIDENTIARY HEARING ON A CLAIM THAT REQUIRED A FACTUAL DETERMINATION. REMAINING UNCURED ARE VIOLATIONS OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHICH DENIED MR. JOHNSTON'S RIGHT TO DUE PROCESS, HABEAS CORPUS AND ACCESS THE COURTS UNDER FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Mr. Johnston asks this Court to remand Mr. Johnston's case for the evidentiary hearing that he deserves so that he may obtain the remedy to which he is entitled under Fla. R. Crim. Proc. 3.851.

MR. JOHNSTON WAS ENTITLED TO A HEARING ON ALL CLAIMS DESIGNATED AS REQUIRING A FACTUAL DETERMINATION UNDER RULE 3.851.

LOWER COURT CLAIM I – THE FILING OF A LEGALLY INSUFFICIENT MOTION TO DISQUALIFY JUDGE (IAC)

This claim requires a factual determination. The lower court was wrong to deny an evidentiary hearing.

ARGUMENT VI

CUMULATIVE ERROR

Due to the errors that occurred individually and cumulatively in the lower court, this Court should grant relief from this unconstitutional conviction and death sentence, and/or remand for further postconviction proceedings.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Johnston respectfully urges this Honorable Court to reverse the circuit court's order denying a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by hand delivery to all counsel of record this 19th day of January, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief was generated in a courier new 12 point font, pursuant to Fla. R. App. P. 9.210.

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