IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-780

RAY LAMAR JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS–REPLY

On pages 1-8 of its answer brief, the State simply block quotes portions of this Court's direct appeal opinion in *Johnston v. State*, 841 So. 2d 349, 351-355 (Fla. 2002). The Appellant does not dispute that these are the facts as the Court understood them to be eight years ago. But since that time there have been significant developments in this case, and the factual and procedural landscape of this case has become much more complex in this postconviction posture. The Appellant submits that it is unavailing for the State to simply cut, paste, and bold portions of the direct appeal opinion in the Answer Brief.

At page 10 of the brief in this section, the State claims that the "Appellant's Initial Brief did not include any 'Statement of the Facts.'" The Appellant disputes that claim. The Appellant dedicated the first two pages of his Initial Brief for the "Statement of the Case and of the Facts." It was in that section that the Appellant set forth the relevant facts he felt were important for this Court's understanding of this current postconviction appeal. The Appellant did not simply block quote from this Court's direct appeal opinion as the Appellee did.

SUMMARY OF THE ARGUMENT–REPLY

On page 11, the State claims that "Johnston's attempt to resurrect his substantive claim of Juror Robinson's alleged non-disclosure, held

procedurally-barred on direct appeal, remains procedurally-barred in post-conviction." That bold claim is a blatant attempt by the State to mislead the newer Justices of this Court, or mislead Justices who might not remember, that the majority in *Johnston v. State*, 41 So. 2d 349, 357 (Fla. 2002) stated that this claim "should be addressed in a rule 3.850 motion." Justice Pariente dissented from the majority opinion, feeling that a juror interview should have been granted to see if the jury forewoman was using crack-cocaine at the time she served on this jury. In a final footnote, Justice Pariente wrote as follows concerning Juror Robinson:

> The potential problems with this juror, who was the foreperson, are even more troubling to me given that this is the same juror who failed to disclose in voir dire that she faced criminal charges the previous year, and who was facing arrest and a civil contempt sanction for failure to pay the fine in her criminal case when she served on the jury in Johnston's guilt-phase trial.

Id. at 362

The real danger here is that if our courts fail to address the merits of these important issues, and instead accept the State's knee-jerk urging for a procedural bar, there is a high risk that great injustices will be perpetuated.

The State also claims at page 11 that "defense counsel, as a matter of strategy, wanted to keep juror Robinson on the jury panel because she fit the profile (young/minority) recommended by the defense-retained jury consultant after Johnston's mock trial." This argument fails because the defense was *unaware of*

the non-disclosure, therefore they obviously could not have made an informed strategic decision to keep this juror on the panel. Obviously the jury trial consultant never recommended that the defense should keep non-disclosing jurors on the panel. That would be an absurd, bum recommendation.

Juror Tracy Robinson obviously was not fit to serve on this jury, and for the trial attorneys to adamantly defend her service at the evidentiary hearing merely shows their biased tendencies including rigid refusals to take ownership of their errors. These trial attorneys should logically and simply be saying that they were duped by Juror Robinson. Instead, they would throw reason out the window and deny ineffective assistance of counsel at any and all costs in this case. The trial attorneys were deceived by this juror, and instead of saying, "We were deceived," the trial attorneys are strangely saying, "No, we really wanted her on the jury." In a complex first degree murder case where the verdict came back in 55 minutes with Juror Robinson driving the other jurors as forewoman, one has to wonder if this juror had to deliberate quickly and be done with it so that she could get back to smoking her crack cocaine.

Also at page 11, regarding the *Miranda* claim, the State claims that "Johnston was not 'in custody' when he volunteered his statements." He *was*, in fact, "in custody." No reasonable person in that interrogation room would have felt free to

leave the scene. And the law enforcement agency that sought to question him actually had a warrant for his arrest for grand theft at the time of pre-*Miranda* interview. Though the Appellant was not advised of what may happen if he spoke with them, unconstitutionally the pre-*Miranda* statements he made in the interview room were used against him at trial.

The statements included the rejected claims that the victim, a recent acquaintance, lent him her ATM card for repayment of a loan. And the statements included the rejected claims that he jumped into a hot tub with tennis shoes on his feet after he went jogging one August evening in Tampa. The State refuted the Appellant's statements with extensive evidence revealing arguably that Mr. Johnston was having major financial difficulties at the time he made this alleged loan, and presented refuting evidence tending to show that the victim could not have been at Carrabba's with the Appellant at the times he claimed. This evidence included time cards from her place of employment as well as refuting corroborating testimony.

These statements were extremely damaging to the Appellant at trial, and defense counsel should have researched and filed a motion to suppress them, or, at the very least, *considered* that a motion to suppress might be an option. Because this consideration was not even contemplated, the decision to forgo the

filing of a motion was *not* truly strategic.

As far as other issues, Contrary to the State's assertions in this section, Diane Busch's $10,000 cash is not "irrelevant" to this case. The fact that the Appellant initially had access to this large sum of cash refutes the financial motive advanced by the State. On page 12, the State says that "the fact that Johnston 'shook up' people during Ms. Busch's hospitalization [] is hardly mitigating." The "shake up" that the State is referring to is actually Mr. Johnston saving Diane Busch's life. At the evidentiary hearing, Diane Busch actually credited Ray Johnston for saving her life while she was hospitalized. (*See* her testimony at Vol. LX PCR 1557). At a capital murder penalty phase, evidence of saving someone's life is far from "hardly mitigating;" it is *most-undoubtedly* mitigating. It is actually perhaps *the* most powerful type of mitigating evidence that could ever be presented when a defendant asks that his life be spared. In this section at page 12, the State concludes by saying that "Trial counsel, with 20+ years of experience, was not ineffective in failing to conduct individual *voir dire*." It is not really relevant to this claim that trial counsel had experience. It *is* relevant that trial counsel failed to conduct individual *voir dire* in this case, and he could provide no explanation or reason for this omission at the evidentiary hearing. (*See* Vol. LIX PCR 1438).

THE *STRICKLAND* STANDARD AND STANDARD OF REVIEW –REPLY

The Appellant does not dispute the passage cited by the State from *Bradley v. State*, –So. 3d –, 2010 WL 26522 (Fla. 2010) concerning ineffective assistance of counsel claims. The Appellant welcomes this standard, and submits that he has met this standard.

ISSUE I (JUROR TRACY ROBINSON)–REPLY

At page 15, the State again mis-characterizes this claim as procedurally barred and again claims that the decision to keep this juror on the panel was strategic. Nowhere in this record will there be support for the notion that the defense was advised to retain non-disclosing jurors.

Black's Law Dictionary defines *VOIR DIRE* as "TO SPEAK THE TRUTH." Juror Robinson *DID NOT SPEAK THE TRUTH DURING VOIR DIRE*. To allow the State, *now*, to successfully argue that the defense somehow strategically retained this juror, a juror who violated the very purpose of *voir dire*, would be a great injustice. The real issue here is the defense failure to preserve the claim of juror non-disclosure for appeal. This issue should not invite and accept disingenuous *post-hoc* rationalization for why they might have wanted to retain the juror notwithstanding her concealment of personal arrest history. Without the knowledge that Juror Robinson was concealing information during *voir dire*, any decision to

retain her could not have been strategic. Perhaps if the defense fully questioned Juror Robinson about her arrest, it could have been revealed that her arrest was a wake-up call and perhaps she prejudicially glorifies law enforcement and credits them with helping her beat a horrible drug addiction and save her life. This juror was arrested less than a year before the trial, she pled, and was assessed court costs. When asked directly during *voir dire* whether she or a family member had been arrested before, she chose to reveal *only* that another family member had been arrested. A possible and logical reason for her failure to disclose her own arrest could have been that she had knowledge that there was a *capias* connected to that case for her failure to pay court costs.

The only explanation for the reason why the juror non-disclosure issue was not addressed on direct appeal is that trial counsel was ineffective for failing to specifically preserve the issue at trial. Attorney Gerod Hooper, the man who was delegated the responsibility for including the Juror Robinson claim in a motion for new trial, stated that he did not recall why he "got stuck writing the motion." (*see* Vol. LVI PCR 1119). He stated as follows:

> 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. There is simply for the failure to present and preserve the juror non-disclosure issue.

In the similar case of *Davis v. State*, 341 F. 3d 1310 (11th Cir. 2003), the 11th Circuit Court of Appeals stated:

> To now require Davis to show an effect on his trial is to require the impossible . . . Accordingly, when a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved . . . Davis established a primae facie case of racial discrimination with respect to the black juror's removal from the jury panel, and the state failed altogether to rebut the inference thereby raised. Thus, the record shows a violation of the Equal Protection Clause . . .We believe there is a reasonable probability that the Florida courts would have found the *Batson* violation to warrant automatic reversal . . . On several occasions [] the [United States Supreme] Court has reversed convictions without pausing to determine whether the improper exclusion of jurors made any difference to the trial's outcome.

Davis, Id. at 1315-1316

What makes these cases similar is that both cases deal with *voir dire* issues. In *Davis*, the specific issue was a *Batson* challenge. In the case at bar, the specific

issue is juror non-disclosure. But both cases involve a failure to preserve a *voir dire* issue. It is clear from this Court's direct appeal opinion in this case that the specific issue of juror non-disclosure was not raised at the trial level. So the question becomes: Is there a reasonable probability of a more favorable outcome on appeal had this issue been preserved? And the answer should be a resounding "yes." Juror Robinson failed to disclose material information about her recent arrest during *voir dire*, and as such, the Appellant is entitled to a new trial.

The Third District Court of Appeal granted relief in the exact same circumstances in the case of *Massey v. State*, 760 So. 2d 956 (Fla. 3d DCA 2000):

> 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, *Id.* at 956. The only difference is that the case at bar involves more egregious non-disclosure. The conclusion here is inescapable. The Appellant should be afforded a new trial for juror non-disclosure. The defense was ineffective for failing to preserve this clearly meritorious issue. The Third District Court of Appeal based its decision in *Massey* on this Court's prior holdings in *De La Rosa v.*

Zequiera, 659 So. 2d 239 (Fla. 1995) and *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998). For Massey to get relief, and Johnston *not* to get relief, would be to endorse freakishly wanton and inconsistent appellate results. That should not happen, *especially* in a death penalty case.

It must be noted that on rehearing in *Massey*, the State argued that the decision granting relief should be reversed because the defense was not diligent in their duty to discover the juror concealment under *De La Rosa v. Zequiera*, 659 So. 2d 239 (Fla. 1995). Responding to that argument on rehearing, Chief Justice Schwartz specifically responded in part that the "juror's concealment was so serious and material that the interests of justice seem instead to require a new trial under the circumstances." *Massey, Id.* at 957.

The juror's non-disclosed arrest in *Massey* occurred *four years prior* to *voir dire*. Juror Robinson's arrest occurred *less than a year prior* to *voir dire*. In *Massey*, the juror *successfully completed a pre-trial diversion program* and the case was *dismissed*. Juror Robinson *pled no contest* to the criminal charge and was *ordered a to pay court costs*. When she failed to pay those court costs, a *capias* was issued. She was later arrested, not on the *capias* connected to the concealed arrest, but rather, in connection with new brand new *drugs and weapons charges*. Juror Robinson *picked up those new drugs and weapons charges one day into the penalty*

phase. Justice requires a new trial free from the taint of this troublesome juror, especially in a death case.

This non-disclosing, troubled woman with an active *capias* seated herself as jury forewoman on this capital case, and she drove the jury deliberations at a dangerous and furious pace. She signed a verdict form indicating guilty as charged in less than one hour of commencement of the deliberations in a first degree murder case that included accompanying complex and serious felony charges of kidnaping, robbery, sexual battery, and burglary of a conveyance with assault. Going into the deliberations, she was obviously aware death was a possible penalty. Then she was herself arrested mid-penalty phase on drugs and weapons charges. Juror misconduct in a criminal case cannot get much worse than this. Relief should be afforded.

Attempted Justification for the Failure to Preserve the Juror Non-Disclosure Issue

The State claims at page 17 that because of Ken Littman's testimony, relief is not warranted. The State claims: "the fact that Ms. Robinson had pled *nolo contendre* within a year before the trial to [][a] misdemeanor charge [] was not something the defense would have raised in the motions because she was a young, African-American female who fit the young, minority juror profile recommended by [the jury trial consultant]." There are problems with this argument for several

reasons, and on several levels. First of all, this is obvious *post-hoc* rationalization from an attorney who apparently fled the jurisdiction shortly after trial, and failed to personally file the motion for new trial. The defense *did* in fact raise the issue that Juror Robinson was "under prosecution" at the time of the trial based on her *capias*, and therefore she was disqualified from jury service. And the defense *did* in fact raise the issue that a juror interview was appropriate to determine if she was high on crack cocaine at the time of trial. Accordingly, this begs the question: "Why would the defense raise *some* appellate issues concerning this juror in the motion for new trial, but not *other* available issues?" The answer is "ineffective assistance of counsel." The question is not: "Would you have stricken this juror?" The relevant question is: "*Why* was the issue of juror non-disclosure not raised at the trial level?" Ken Littman's attempted justification for the failure to preserve this issue makes no sense.

In the American Bar Association's "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" (also known as the "ABA Guidelines"), Guideline 10.8 explains the "DUTY TO ASSERT LEGAL CLAIMS." That guideline states that counsel should "consider all legal claims." Trial counsel failed in this regard. The guideline also states that each claim should be "thoroughly investigate[d]" before the attorney "reach[es] a conclusion" as to

"whether it should be asserted." The juror non-disclosure issue should have been raised in the motion for new trial. Trial counsel apparently failed to "evaluate [this] potential claim in light of [] the near certainty that all available avenues of postconviction relief will be pursued". The ABA guidelines warn of "later contentions by the government that the claim has been waived, not exhausted, defaulted, not exhausted, or otherwise forfeited." Counsel obviously failed to "present this claim as forcefully as possible" as recommended by the ABA Guidelines. He failed to present the claim at all. Even in the face of obvious failures to follow these ABA Guidelines and pursue meritorious claims, Ken Littman would have this Court excuse his ineffective representation for some alleged illogical and conveniently-tailored strategic reason. In order for the failure to raise the juror non-disclosure issue to be a valid strategy, Ken Littman would have had to discuss the pros and cons of raising such a claim with Gerod Hooper. Then the attorneys would have to come up with a valid reason why the claim should not be raised. And that is not what happened here. It certainly was not in the Appellant's best interest to fail to preserve the issue. That actually caused the claim to be held procedurally barred on direct appeal. There was nothing preventing trial counsel from presenting and preserving this claim.

On pages 16-26 of the State's Answer, the State merely block quotes the lower

court's order denying relief on this claim. The Appellant will not repeat here the reasons why the lower court's decision was wrong. Those reasons were already discussed in the initial brief. The State's periodic bolding of the text of the lower court's order does nothing to answer the Appellant's specific claims in his initial brief.

On page 26 of the Answer, the State continues with its tired refrain and says, "Again, to the extent Johnston attempts to resurrect his direct appeal claim of juror non-disclosure/misconduct, this claim is procedurally barred." In reality, this case is all about the resurrection of this claim. This Court forecasted in the direct appeal opinion that this claim would be addressed again in postconviction. One cannot discuss this claim in this context without discussing the substantive merits of the underlying claim. As much as the State would like for the Court to pass on this issue once again and continue to hold it procedurally barred, the claim is now fully ripe and it is proper to grant relief in this procedural posture.

Once the Appellant is convicted and sentenced to death, *EVERY AVAILABLE APPELLATE ISSUE* in connection with this particular juror *must be raised*. The failure to do so constitutes ineffective assistance of counsel. A competent defense attorney would not refrain from raising a meritorious juror non-disclosure issue simply because, *in theory*, she might make a good juror. Juror Robinson *did not*

make a good juror. She rushed her fellow jury members to convict in less than one hour. After she voted to convict the Appellant, it was trial counsel's duty to raise every available issue citing the problems with her jury service. For trial counsel to now come up with reasons why he might want to keep her on the jury in efforts to dodge responsibility for missing an appellate issue is just plain wrong. This situation actually borders on a conflict of interest. Trial counsel *still* works for the Office of the Public Defender, not the Office of the State Attorney. Trial counsel should now be acknowledging the obvious error here, not denying the error.

As Justice Pariente pointed out at the oral argument on direct appeal:

> THIS IS A JUROR WHO, TEN MONTHS BEFORE THIS PARTICULAR JURY SELECTION, WAS ARRESTED, CHARGED, AND CONVICTED OF OBSTRUCTING A POLICE OFFICER WITHOUT VIOLENCE, WAS SUPPOSED TO PAY A FINE, DOESN'T PAY THE FINE, IS, KNOWS THAT SHE IS GOING TO BE ARRESTED, AND THEN ON TOP OF THIS, DOES NOT DISCLOSE IT TO THE JUDGE OR TO THE DEFENSE LAWYER OR TO THE PROSECUTOR, AND THEN ON TOP OF IT, IS ELECTED JURY FOREPERSON, AND THEN ON TOP OF IT, THE DAY AFTER THE -- AND THEN ON TOP OF IT, THE DAY AFT PENALTY PHASE BEGINS, SHE ARRESTED ON -- ON THE DAY AFTER THE PENALTY PHASE BEGINS, SHE IS ARRESTED ON TWO DRUG CHARGES AND THEN ANOTHER. AS FAR AS WE ARE HERE, NOW, IN THE FIRST DIRECT APPEAL, WHY ISN'T IT BETTER, GIVEN THESE, THE COMPILATION OF THESE KINDS OF THINGS, WITH A PERSON BEING A JURY FOREPERSON, TO HAVE A NEW TRIAL AND A CLEAN TRIAL, AS OPPOSED TO SPENDING THE NEXT TEN TO 15 YEARS FIGURING OUT WHETHER DEFENSE COUNSEL WAS INEFFECTIVE IN NOT INDIVIDUALLY VOIR

> DIRING THESE JURORS WHEN THERE WAS PUBLICITY THE DAY BEFORE, WHETHER AS INEFFECTIVE BECAUSE HE SHOULD HAVE FOLLOWED UP ON THE QUESTIONING. WHY ISN'T THAT BETTER?

Oral Argument at approximately 58:47-1:00:33 of 1:05:08, May 7, 2002. It is better that relief be given now in this case than to wait yet another 8 years for this case to work its way through the federal system, and eventually have a federal court find trial counsel's after-the-conviction reasons for the adversarial breakdown in this case to be clearly disingenuous.

At page 27, the State claims that "Johnston's IAC claim is based, in part, on speculation regarding Ms. Robinson's *assumed* knowledge of a capias in her misdemeanor case. Such speculation is insufficient to support Johnston's IAC/guilt phase claim." That argument comes from a party who has repeatedly objected to juror interviews. Without the grant of a juror interview, Mr. Johnston is *forced* to speculate about her knowledge of the *capias* and the extent of her drug use. But the Appellant submits that there *is* circumstantial evidence here in the record to support active concealment and knowledge of the *capias*. If this were an application for admission to the Florida Bar rather than *voir dire* questions, there would certainly be a finding of active concealment. Just as a dishonest candidate should be denied admission to the Florida Bar on these facts without some showing of major rehabilitation, Juror Robinson's verdict form should likewise be denied affirmation,

and the Appellant should not be executed based on that verdict form.

To deny a juror interview, *at the very least in this case*, is to deny the opportunity to seek further evidence to prove this claim. Such a denial equates to a denial of due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The State argues at page 28 that "Even after Juror Robinson was arrested (between the guilt and penalty phases), the defense opposed her removal from the jury. Thus, as a matter of trial strategy, the defense team still wanted to keep Tracy Robinson on the jury panel." Again, the real issue here is whether this juror failed to disclose material information during *voir dire* sufficient to give trial counsel and the Appellant the information needed to make an *informed* decision on whether to retain or strike this juror. The fact that the defense sought to retain this juror after her arrest merely indicates their failure to appreciate the fact that a juror is ineligible to serve if they are under active prosecution. Mr. Littman's *post-hoc* rationalization for why they may have wanted to retain this juror, including his racially-assisted profiling, should not exclude the defense's failure to preserve the juror non-disclosure issue for appeal.

The biggest problem with the lower court's order is that it faults the Appellant for failing to ask his trial attorneys to strike Juror Robinson. The Appellant, like the

trial attorneys, were duped into believing that Juror Robinson had no arrest record. Not only did she have an arrest record, she had a *capias* that was connected to that arrest. Without knowledge of the full circumstances concerning the arrest and criminal court case, neither the Appellant not the trial attorneys could make an informed decision during *voir dire*.

At page 29, the State again references the "experience" of the trial attorney. No matter how experienced this lead trial attorney was, the fact remains that *he was not even there to file the Motion for New Trial*. Given the post-verdict circumstances involving Juror Robinson, the lead trial attorney should have *at least been available* to ensure that every appellate issue was raised and preserved for appeal in the motion for new trial. Instead, another attorney who was not even present for trial was "stuck with" the responsibility to raise and preserve the appellate issues.

The State suggests on page 31 that the Appellant has to prove that Juror Robinson was actually biased. Quite the contrary, the Appellant *need not* prove bias. He need only show that there was a failure on that juror's part to disclose material information. *Carratelli v. State,* 961 So. 2d 312 (Fla. 2007) is inapplicable here. *Davis v. State*, 341 F. 3d 1310 (11th Cir. 2003) is the applicable case under these particular circumstances. *Caratelli, Id.* is not a juror non-disclosure case.

Massey, *Id.* is the applicable case here, not *Carratelli*.

Also on page 31, the State claims that the "undisclosed information was not material in this case and the defense did not exercise due diligence in attempting to discover the information." If this is a concession by the State that trial counsel was not diligent in discovering this information during *voir dire*, the Appellant will accept this concession. But, the Appellant maintains that the information was so material that its disclosure would have led to the discovery that there was a *capias* connected to the arrest at issue. Juror non-disclosure cannot get much more material than that in a criminal case.

The Appellant will also accept the State's concession at page 32 that "counsel d[id] not inquire further to clarify any ambiguity sought" with regards to this juror's arrest record. Under law, the Appellant need not prove the impossible here, as claimed by the State: "that any juror was actually biased and that the unanimous verdict would have been different." That is not what is required under law. The Appellant need only prove that trial counsel was deficient for failing to preserve the juror non-disclosure issue, and had the issue been preserved, there is a reasonable probability of a different result on direct appeal.

ISSUE II (THE *MIRANDA* CLAIM)–REPLY

Regarding Claim II, the State claims at page 37 that "Johnston's *Miranda*

claim is one which could have been raised at trial and on direct appeal; therefore it is procedurally-barred in post-conviction." The Appellant has now raised the issue in postconviction that trial counsel was ineffective for failing to file a motion to suppress statements. Because a motion to suppress statements was not filed by trial counsel, the issue was not preserved for direct appeal. It is unclear why the State continually attempts to assert an inapplicable procedural bar in its answer brief.

Trial counsel clearly should have moved to suppress the statements made by the Appellant to law enforcement because the State was able to use those statements against him at trial. At the very least, trial counsel should have investigated and researched the possibility of a motion to suppress and discussed it with his client as recommended by ABA Guideline 10.8.

On pages 37-43, the State merely block quotes the lower court's order on this issue. The State's answer is wrong to simply repeat the lower court's order rather than provide a specific answer to the Appellant's explanation of why the lower court's order is wrong.

At page 45 the State summarizes the trial testimony of the officers who relayed the statements the Appellant made to them at the police station. Then finally, at page 46, they acknowledge that at some point, *after the Appellant was arrested for grand theft*, he was "read his *Miranda* rights. Johnston indicated he

understood his rights and ***agreed to continue speaking*** with the officers. (DAR V9/562-66; DAR V11/770-71)." (***emphasis added***).

At page 46 the State emphasizes that "Johnston went to the sheriff's station on his own." The Appellant only went there because the TV news reports said that he was a wanted man. The State says that it was there that Johnston "volunteered his self-serving version of events." The statements he provided were made in an small interrogation room with at least two detectives, a closed door, no counsel, and no *Miranda* advisements. At the time he made the statements, unbeknownst to Mr. Johnston, law enforcement had already secured his arrest warrant for grand theft. He was buzzed into the secured building and he was accompanied by deputies and detectives from the moment that he crossed the threshold of the secured door at CID.

Although the case cited by the State at page 46, *Davis v. State*, 698 So. 2d 1182, 1188 (Fla. 1997), indeed says that "the sole fact that police had a warrant for Davis' arrest at the time he went to the station does not *conclusively* establish that he was in custody," (*emphasis added*) that certainly should not encourage law enforcement with arrest warrant in hand to begin custodial interrogations without the benefit of *Miranda*. And that is exactly what happened in the case at bar. Officers actions in the case at bar *do* conclusively establish that the Appellant was in custody. *Davis* cites to *Roman v. State*, 475 So. 2d 1228, 1231 (Fla. 1985) and explains that

there must be a "restraint on freedom of movement of the degree associated with formal arrest." When the Appellant entered the "CID" ("Criminal Investigations Division") building, he was searched, his briefcase was taken from him, and he was escorted into a small room and interrogated. He certainly had restraints placed on his freedom of movement. Agent 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 Appellant knew that once he crossed the threshold into the CID building, his path was certain to lead him one place: to central booking. And law enforcement knew that as well, yet they willfully chose to elicit statements from the Appellant about the murder without the benefit of *Miranda*. The Appellant was not free to leave the scene when he arrived at the station. He should have been arrested up front for grand theft and read his *Miranda* rights. Law enforcement had an arrest warrant in hand and they should have served it immediately on him. Instead, they deceptively chose to engage in the two-step *Miranda* interrogation plan and extract statements from him about the murder before advising him his rights. Law enforcement wanted to coerce un-counseled statements from the Appellant. A motion to suppress the statements was certainly viable in this case. As *Mansfield v. Secretary, Department of Corrections*, 601 F. Supp. 2d 1267 (M.D. Fla. 2009)

recently stated:

> 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, Id. at 1311. A trial attorney with so much experience in criminal law should have realized that a motion to suppress should have been filed in this case.

This Court recently granted relief in similar circumstances in of *Ross v. State*, –So. 3d –, 2010 WL 2103971 (Fla. 2010). Analyzing the four factors discussed in that opinion, it is clear that the same result should be reached in the case at bar. "The first of the four factors, the manner in which police summon the suspect for questioning, weighs in favor of the State. Ross voluntarily came to the sheriff's office for a meeting with a victim's advocate. While he was at the office, Detective Waldron requested that Ross see him before he left, and Ross agreed." *Ross, Id.* at 9. In the case at bar, this factor weighs in favor of the Appellant. Mr. Johnston was clearly a wanted man. His face was plastered all over the TV to the point that Detective Shephard recognized his face on the news from a previous investigation. He testified as follows at the evidentiary hearing: "[O]n the 20th of August of '97 whenever I arrived home from work, turned on the television and there was a breaking news story that showed Mr. Johnston's photograph on the news. . .

[p]ossibly the 5 o'clock news or the 6 o'clock news. . . .it said something to the effect, do you know this man or something. I immediately recognized him from having prior contact." Vol. LXI PCR 1679-1680.

The video image shown on the news of the Appellant withdrawing money from the ATM machine is a lasting and profound image. It was played repeatedly on TV news spots after the discovery of the victim's body. The Appellant was basically summoned by law enforcement via this top news story. It was clear that the Appellant was the prime suspect in a murder investigation and he was wanted for questioning. His extensive criminal record was even discussed as a top news story. In *Ross*, the defendant was merely meeting with a victim's advocate at the police station. Ross was not informed through a top news story that he was the prime suspect in his parents' murder investigation. In *Ross* a detective simply asked to see the defendant before he left, and he complied. The manner is which the Appellant was summoned to the police station was quite foreboding and ominous, unlike the situation in *Ross*. Also unlike in *Ross*, the detectives already had an arrest warrant.

The second factor, purpose, place, and manner of the questioning weighs heavily in favor of the Appellant. The Appellant was questioned at the police station because law enforcement wanted him to provide incriminating statements in connection with the murder of Leanne Coryell. They wanted to know why he was

seen on videotape repeatedly withdrawing money from a dead woman's bank account. Exactly as in *Ross*, the Appellant was interrogated "in a very small room at the station with at least two officers in the room." *Ross, Id.* at 9.

"The third factor to consider is the extent to which Ross was confronted with evidence of his guilt. This factor also weighs in favor of a finding that Ross was in custody. Ross was confronted with very strong evidence of his guilt during the January 9 interview-most importantly, that pants Ross wore on the night in question had blood on them that matched the crime scene." *Ross, Id.* at 10. This factor also weighs heavily in the Appellant's favor. The Appellant was confronted and reminded of videotape evidence showing him withdrawing money from a dead woman's bank account. Law enforcement wanted an explanation for this. And before they asked him to provide an explanation, they should have read *Miranda*. The Appellant should have been advised that whatever statements he might make regarding his recent cash withdrawals could and would be used against him at trial. The Appellant should have been informed that he had the right to speak with an attorney before providing the story that was rejected by the jury.

"The fourth and final factor to consider is that Ross was never informed he was free to leave. At the point when Ross was informed that the police had evidence that blood on his pants matched the crime scene, a reasonable person would not

believe he or she was free to leave. Moreover, all of the circumstances after this point conveyed the clear impression that he was not free to leave." *Ross, Id.* at 10. This factor also weighs heavily in the Appellant's favor. Upon entering the station, he was searched, his briefcase was taken, and he was led into a small interrogation room. He was never informed he was free to leave. Vol. LXI PCR 1635. Even a simple trip to the restroom would require a police escort. All of the circumstances after the point the Appellant entered the CID building sent a clear message that he was not going anywhere, except to a small interrogation room to speak with the homicide detectives, and eventually, jail.

Ross cites to *Mansfield v. State,* 758 So. 2d 636 (Fla. 2000) to support the fact that Ross was in custody:

> Mansfield was interrogated by three detectives at the police station, he was never told he was free to leave, he was confronted with evidence strongly suggesting his guilt, and he was asked questions that made it readily apparent that the detectives considered him the prime, if not the only, suspect.

Mansfield, Id. at 644. The interrogation in the case at bar proceeded much in the same fashion as in *Mansfield*. The Appellant was questioned at CID, he was never told he was free to leave, he was confronted evidence of his guilt, and it was obvious from the news reports that law enforcement considered him the prime and only suspect. In both cases, law enforcement chose to question each suspect without

providing *Miranda* rights. This case needs to be retried without mention of the unconstitutionally-obtained statements, purely inculpatory or not.

The law is very simple: law enforcement must read a suspect *Miranda* rights before the custodial questioning begins, not mid-stream after the suspect has already made compromising statements.

On page 48 the State argues that because the Appellant made similar statements to the press after his arrest, the doctrine of "inevitable discovery" applies. This argument fails because *had Miranda* been advised initially, the Appellant might have chosen to exercise those *Miranda* rights. And subsequently, he might have chosen to remain silent and not speak to the press while incarcerated. But because in effect, "the cat was out of the bag" when law enforcement obtained the initial un-counseled statements regarding his whereabouts on the evening Ms. Coryell was seen alive, there was no downside to the Appellant repeating the same story to the press. But, had *Miranda* been read, and had the Appellant remained silent, there is a reasonable probability that the Appellant would have remained silent in the face of press inquiries as well. Therefore there would have been no "inevitable discovery" of the statements if *Miranda* was advised and in fact invoked.

The State makes mention at page 48 that *Missouri v. Seibert*, 542 U.S. 600 (2004) requires that "the two step interrogation technique [must be] used in a

calculated way to undermine the *Miranda* warning. 542 U.S. at 62." [sic, 622]. Law enforcement clearly plotted and calculated to undermine the *Miranda* warnings in this case. This is evidenced in part through lead Detective Iverson's outrageously disingenuous evidentiary hearing testimony wherein he claimed that even armed with an arrest warrant, he might have let the Appellant leave the police station:

> 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 1034-1035. Testimony that the Appellant could have walked out of the CIB building notwithstanding a signed arrest warrant is perhaps the most

disingenuous testimony ever presented in a capital evidentiary hearing. After this testimony, the *postconviction court* even asked the State to conduct some overnight "research," commenting skeptically and incredulously: "[H]e'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." Vol. LV PCR 1042.

Detective Iverson provided his disingenuous testimony in the hopes that he might help defeat whatever claims he perceived were being made in postconviction concerning his interrogation practices in this case. He knew that he failed to read *Miranda* in a calculated manner in this case in hopes of diminishing its significance and to obtain a confession at all costs.

ISSUE III (FAILURE TO CALL DIANE BUSCH)–REPLY

Regarding Issue III, at page 50 the State opens with the following statement: "Next, Johnston repeats five of the IAC sub-claims which were denied after several days of evidentiary hearings." Throughout its brief, the State seems to suggest that because an evidentiary hearing was held, and because the lower court denied relief, offense should be taken to this appeal. As this Court is well aware, due process in death cases does not end at the circuit court level. A simple inspection of the lower court's order reveals extreme flaws in the lower court's analysis of the law and the

facts in this case.

Dangerously, in the quick stroke of a keyboard it can be suggested that Diane Busch's value as a witness should be curtly dismissed. The State makes such a suggestion at page 50 of the brief. The lower court agreed with this suggestion contrary to common sense and to the U.S. Constitution. The State's alleged motive in this case was money. Diane Busch could have testified at trial that Ray Johnston had access to $10,000 of her cash money during the time that he allegedly needed to drain Leanne Coryell's bank account. He chose not to take her money, thus negating the State's financial motive. At the time, Ms. Busch was in the hospital with a life-threatening illness, and she credits the Appellant with saving her life. Mitigation does not get any stronger than that at a penalty phase. The Appellant urged his defense attorneys to speak with Diane Busch outside the presence and influence of other parties, and they failed to do so. As such, they were ineffective.

The State suggests that Ms. Busch just recently became a favorable witness for the Appellant. That is not the case. The Appellant informed the trial attorneys back at the time of pre-trial preparations that Ms. Busch could refute the alleged financial motive in the case and could corroborate the fact that he saved her life. But the attorneys chose not to speak with her.

At pages 51-61, the State simply block quotes the lower court's order denying

this claim. Because the Appellant already discussed the flaws in the lower court's order, he will not again repeat those flaws. He will simply say that repeating the lower court's order for 10 pages and bolding half of the text is unavailing appellate practice .

At page 61, the State points out that "Johnston did not inform Diane Busch of his criminal background; and she would not have had any relationship with Johnston had she known, in 1997, that he was a convicted felon who had recently been released from state prison."[1] The issue here is not the Appellant's failure to *sua sponte* reveal his regrettable past during the early stages of a romance. The issue is her testimony, the value of her testimony, and, were there any valid excuses for trial counsel's failure to investigate and interview her prior to trial. Though Ms. Busch may not have dated the Appellant had she known of his past, she still would have testified and told the truth had she been called as a witness. She would have refuted motive and provided powerful mitigation if necessary. The State says at page 62 that had Ms. Busch known of his past, she "would not have entrusted Johnston around her children or with her money; it 'wouldn't have gotten that far.'" But, it *DID* go that far, and the Appellant *did not take her money*, and *did not harm her*

[1]Such prejudice is one of the reasons why the Appellant is so strenuously challenging the introduction of this murder as *Williams* Rule evidence in concurrent pending case SC09-496.

children. She described him as "very polite" and a "gentleman" while they were dating. Vol. LX PCR 1535.

The State claims at page 62 that "Johnston never had possession of Ms. Busch's cash, other than counting it." Actually, counting money would qualify as possession, albeit temporary, under Florida law. The Appellant actually had the option of overpowering Ms. Busch's friend and taking the cash for his own means, but he chose instead to follow Ms. Busch's wishes.

Viewing the testimony of Ms. Busch, and in light of the fact that the trial attorneys did not even interview Ms. Busch prior to trial, it is clear that they provided prejudicially ineffective representation at both the guilt and penalty phases.

Regarding the improper advice to testify at the penalty phase, the State highlights at page 70 that the trial court found that the trial team *"all discouraged* Defendant from testifying." This factual finding runs completely contrary to Gerod Hooper's testimony wherein he stated that the trial attorneys were "trying to decide whether or not to put him on. There were going back and forth with it." Gerod Hooper ultimately recommended that he felt their "best shot at this point seems to be put him on the stand, try and show some remorse and maybe connect with some of the jurors." Vol. LVI PCR 1073, 1075. Contrary to the State's claim here, Johnston *DOES* "dispute this dispositive factual determination." Trial counsel was

indeed ineffective for recommending that the Appellant take the stand and admit the offense at the penalty phase.

Regarding the Dr. Simon Cole fingerprint claim, although full consideration of the issue of the admissibility of his testimony was not accepted in *Armstrong v. State*, 945 So. 2d 1289 (Fla. 2006), this Court should now fully consider the issue and grant the appropriate relief. Such relief would include at the very least, a remand back to the circuit court to determine if Simon Cole's testimony would have had a reasonable probability of changing the outcome of the trial. The Appellant submits that in this case based largely on circumstantial evidence, Dr. Simon Cole's testimony would have made a difference.

ISSUE IV(INDIVIDUAL *VOIR DIRE*)–REPLY

The State largely block quotes the lower court's order in their answer regarding this claim. Regarding Juror Ursetti, at page 89,they cite testimony from Ken Littman wherein he surmises that there appeared nothing wrong with Juror Ursetti's fitness to serve on the jury. Such testimony is merely an illustration of Mr. Littman's typical knee-jerk denial of any claim that he might have been ineffective at trial. Trial counsel could not recall his actual thought processes at the time of trial when he neglected to perform any individual *voir dire*. As such, he and the State should refrain from speculating as to alleged strategic reasons why he would retain

this juror and not ask follow up, individual questions about Juror Ursetti's exposure to the media in this case.

ISSUE V(SUMMARY DENIALS)–REPLY

At the very least, an evidentiary hearing should have been granted on the issue of why the defense failed to file a legally sufficient motion to disqualify the trial judge. Had an evidentiary hearing been granted, additional areas for disqualification could have surfaced in postconviction. It must be noted that even the State joined the defense in the motion to disqualify the judge at the time of trial.

ISSUE VI (CUMULATIVE ERROR)–REPLY

The State claims that this claim is waived because it is too "perfunctory" and it is a "*pro forma* allegation." If the Appellant was allowed another 100 pages on his brief, he could have made this claim less "perfunctory." But, if the Appellant went on for another 100 pages on this claim of cumulative error, the State would then characterize this claim as "merely cumulative."

CONCLUSION–REPLY

Contrary to the State's claim on page 96, this Court should **REVERSE** the lower court's order denying relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by FedEx to the Katherine Blanco and by U.S. mail to Ray L. Johnston on this 25th day of June, 2010.

_____

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CERTIFICATE OF COMPLIANCE

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

_____

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