IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON,

Petitioner,

v.

CASE NO. SC10-75
L.T. No. CR97-13379
DEATH PENALTY CASE

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

Respondents.
_____/

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

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

FACTS AND PROCEDURAL BACKGROUND

The Petitioner/Defendant, Ray Lamar Johnston, was charged by indictment filed in Hillsborough County on September 3, 1997, and by superseding indictment on September 10, 1997, with the first-degree murder of Leanne Coryell, kidnapping, robbery, sexual battery, and burglary of a conveyance. (DA V1/59-70). Johnston's jury trial was held on June 7 – 17, 1999, before

Circuit Judge Diana Allen and the jury returned verdicts of guilty as charged on each count. (DA V5/753-54; V15/1415-17).[1]

On direct appeal, *Johnston v. State*, 841 So. 2d 349 (Fla. 2002), this Court set forth the following summary of the facts adduced at Johnston's trial for the murder of Leanne Coryell:

> Leanne Coryell, a clinical orthodontic assistant for Dr. Gregory Dyer, went to work at 1 p.m. on August 19, 1997. At approximately 8:15 p.m., Dr. Dyer went home, leaving Melissa Hill and Coryell to close the office. Coryell clocked out at 8:38 and, after some difficulty setting the office's alarm, left within the next ten minutes. Coryell picked up groceries at Publix Super Market where the store's surveillance cameras documented her checking out at 9:23. She was not seen alive again.
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> Ray Johnston, Gary Senchak, and Margaret Vasquez shared a three-bedroom apartment at the Landings Apartment Complex-the same apartment complex in which Coryell lived. On the evening that Coryell was murdered, Johnston argued with his roommates over the utility bills and left the apartment between 8:30 and 9:30 p.m. Vasquez noted that around 9:45, Johnston's car [FN1] was still in the parking lot although Johnston had not returned. Sometime after 10:00, Johnston came back to the apartment and threw $60 at Senchak, telling him, "That's all you're getting from me, you son-of-a-bitch."
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> [FN1] Johnston drove a Buick Skyhawk that had recently been in a collision, causing one of his headlights to be out of adjustment. One of the taillights was also out.
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> Coryell's body was discovered around 10:30 p.m. on the evening of August 19 by John Debnar, who was

[1]In addition, Johnston has another first-degree murder conviction and death sentence for the murder of victim *Janice Nugent*. See, *Johnston v. State*, 863 So. 2d 271, 277 (Fla. 2003), *cert. denied, Johnston v. Florida*, 124 S. Ct. 1676 (2004).

playing catch with his dogs in a field close to St. Timothy's Church. While there, he noticed that a car with an out-of-place headlight entered St. Timothy's property and stopped briefly beside an empty black car. When Debnar walked his dogs home, one of his dogs stopped at a pond on the church's property, causing Debnar to notice the body of a woman floating in the water.

Hillsborough County sheriff's officers arrived at St. Timothy's Church shortly before 11:30 p.m. and found Coryell's body lying face down in the pond, completely nude. Her clothes were found on a nearby embankment. Dental stone impressions were taken of some shoe prints that were in the general area where the clothing was found. Coryell's empty black Infiniti was in the church's parking lot with the keys in the ignition and the engine still warm. Some, but not all, of her groceries were sitting in the back seat. Although the police were unable to lift any prints from the interior of the car, they did lift a fingerprint matching Johnston's from the exterior.

Dr. Russell Vega performed the autopsy and opined that the victim died sometime after 9 p.m. Based on the extensive bruising of the external and internal neck tissues, Dr. Vega concluded that the victim died from manual strangulation, as opposed to the use of a ligature. Dr. Vega also observed a laceration on the left side of the victim's lower lip and a laceration on her chin, both of which were caused by blunt impact. There were vertical scrapes on the victim's back which suggested that she was dragged to the pond. There were two unusually shaped bruises on Coryell's buttocks which were similar to the metal appliques on her belt, causing Dr. Vega to believe that she was hit with her own belt while still alive. Finally, the victim suffered both internal and external injuries to her vaginal area, injuries which were consistent with vaginal penetration. Her hand still clutched strands of grass.

In the late evening hours of August 19 and again early the next morning, the victim's ATM card was used to withdraw the $500 daily limit. The police used the ATM surveillance videos to capture pictures of the

person who was using the victim's card, and these photographs were provided to the news media, which aired them. Juanita Walker, a friend of Johnston, saw the televised pictures and called the authorities, identifying Johnston as the person in the photos. She also told police that she and Christine Cisilski saw Johnston a little before 10 p.m. on the night of the crime, driving a black, mid-size car out of the Landings Apartment Complex.

Based on telephone calls identifying Johnston as the person in the photos, the police obtained a warrant to search his apartment and found a pair of wet tennis shoes and shorts. The imprints from the tennis shoes matched three partial impressions that were found at the scene of the crime. However, the shoes did not have any individual characteristics which would enable an expert to conclude that Johnston's shoes were the exact shoes which made the impressions.

Johnston saw his picture on television and volunteered to give a statement in which he initially told police that he was a friend of Coryell and that they had gone out to dinner a few times. He told Detective Walters that on the evening of the 19th, he had met Coryell at Malio's for drinks at 6:15 p.m. The pair then went to Carrabba's and left around 8:30 or 9:00. According to Johnston, the victim indicated that she needed to stop at a grocery store before she went home, but before they parted, the victim gave Johnston her ATM card and PIN so that he could withdraw $1200 in repayment of a loan she had obtained from him. When he arrived home, he changed, went jogging, and then withdrew $500 from her account. He withdrew another $500 the following day.

Johnston was placed under arrest for grand theft, was read his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and agreed to continue the interview. The detective confronted Johnston with the fact that Coryell did not leave work until 8:38. Johnston's response was that other employees must have covered for her because he was with her at that time, but he was unable to provide the names of anybody who could corroborate this

explanation. The detective then told Johnston that they had found his jogging shoes, which were completely wet. Johnston justified the wet shoes by claiming that he jumped into the hot tub, shoes and all, to wash off after his run. The detective asked several times whether Johnston was involved with Coryell's death and Johnston responded by saying that they would not find any DNA evidence, hair, or saliva which would link him to the victim.

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. The State also called Laurie Pickelsimer, the defendant's pen pal in prison, who testified that Johnston asked her to provide a false alibi for him. Johnston suggested that she tell his attorneys that on the night of the murder, she and Johnston were working out in the gym at the apartment complex from 9:00 until about 10:30, except for a short time when he walked back to his apartment to get them a drink for the hot tub. The jury found Johnston guilty of first-degree murder, kidnapping, robbery, sexual battery, and burglary of a conveyance with assault.

The penalty phase of the trial began on June 16, 1999. The State introduced testimony from three victims of prior violent felonies that Johnston had committed against total strangers. Susan Reeder was the first witness to testify and recalled how Johnston grabbed her when she was stepping out of her car, put a hunting knife to her throat, drove her to an isolated area, and then beat her with his belt and raped her. Julia Maynard recounted how Johnston broke into her home, and when she arrived, grabbed her, held a knife to her neck, and took her to her bedroom so he could take pictures of her in various states of dress and undress and touch her sexually. Carolyn Peak testified that in June 1988, while she was getting out of her car, Johnston put a knife to her throat, forced her back into the car, and tied her hands with an Ace Bandage. She escaped when a police officer pulled the car over because a head light was out.

Dr. Vega, the medical examiner who performed the autopsy on Coryell, opined that Coryell was conscious at the time she was beaten and received her vaginal injuries. He believed the last injury to the victim was manual strangulation and that she was likely conscious for up to two minutes while being strangled. Finally, the State introduced three witnesses to provide victim impact evidence: the victim's father, Thomas Morris; her employer, Dr. Dyer; and her pastor, Matthew Hartsfield.

Defense counsel introduced four experts to testify that Johnston had frontal lobe brain damage and mental health problems. Dr. Diana Pollack, a neurologist, treated Johnston a few months before the murder because Johnston suffered from blackouts, headaches, a tingling sensation down one side of his body, and spells of confusion. She administered various neurological tests, including an MRI and an EEG, but was unable to find any structural deficiencies in his brain.

Dr. Harry Krop, a clinical psychologist, testified that he performed a neuropsychological evaluation on Johnston. When Johnston performed poorly, Dr. Krop recommended that a PET scan be performed. Based on Johnston's documented history and further testing, he concluded that Johnston suffered from a frontal lobe impairment and that this problem has three main manifestations: (1) difficulty starting an action; (2) difficulty stopping an existing action; and (3) being too impulsive or acting without thinking.

Dr. Frank Wood, a neuropsychologist, examined Johnston and reviewed the results of his PET scan. He concluded that Johnston's frontal lobe area had substantially less activity than was normal (below the first percentile) and that this deficiency correlates with poor judgment, impulsivity, and "disinhibited" behavior. Based on Johnston's medical and behavioral record, Dr. Wood concluded that this was a chronic condition.

Dr. Michael Maher, a physician and psychiatrist, evaluated Johnston and reviewed his history and

medical records. Dr. Maher agreed that it was evident from the PET scan that Johnston suffered from impairments of the frontal lobe of his brain, making it extremely hard for him to resist any strong urges. He also believed that Johnston suffered from seizures that were related to his brain abnormality and had dissociative disorder (a psychiatric disorder in which some aspect of a person's total personality or awareness is unavailable at certain times).

Several character witnesses testified in Johnston's behalf. According to Gloria Myer, a placement specialist for a correctional institution, Johnston was dedicated to his job, very organized, and followed Myer's instructions. She also recalled a time when she thought he was having a stroke because "his whole side of his face had fallen, had drooped." John Walkup, Johnston's probation officer, recommended Johnston for early termination because he had a stable family life, worked at a steady job, reported regularly, paid his fees, and was doing fine. William Jordon, a case manager for the Department of Corrections, knew Johnston while he was in prison and asserted that he got along well with other inmates and was not a disciplinary problem. John Field, a chaplain with the Department of Corrections, knew Johnston when he was incarcerated in the early 1990s and declared that Johnston was one of the chapel's best clerks. Bruce Drennen, the president of the Brandon Chamber of Commerce, testified that Johnston was a designated representative of a company that was a member of the chamber.

Johnston's family provided mitigation. His mother, Sara James, testified that at the age of three or four, Johnston had fallen out of a car and hit his head on the curb, resulting in an injury which required stitches. Johnston did not perform well in school, and by the time he was in the seventh grade, he became disruptive in class and was sometimes sent home. Problems became more serious the older he grew, and eventually he was sent to the Hillcrest Institution for treatment. Normally, Johnston had a sweet disposition, but he could get explosive at times. Susan Bailey, Johnston's ex-wife, testified that while she was married to him, Johnston was the

perfect husband - he cooked, cleaned, and helped raise her two daughters. She described him as very tenderhearted, remembering how it would upset him if she had to paddle her girls for misbehaving. She also stated that even though he would occasionally snap over minor issues, he would not vent his anger towards his family. Rebecca Vineyard, Johnston's younger sister, stated that Johnston never acted normal - he would try too hard to make people love him and would go overboard trying to get positive responses. However, his personality could quickly change, and he did not like being rejected or humiliated.

Finally, Ray Johnston took the stand and admitted that he killed the victim. According to Johnston, he saw Coryell drive in after he had just gotten out of the hot tub. He asked her if he could help carry her groceries to her apartment, but she ignored his request. Johnston stated that he just wanted her attention and meant to reach for her shoulders but grabbed her neck instead. He thought he held her for just a few seconds, but then her legs gave out. She hit her lip on the edge of the door, and her chin hit the ground, causing two lacerations on her face. When he rolled her over, he saw her eyes and mouth were open. He tried reviving her by giving CPR, but it had no effect. Thinking that he had broken her neck, Johnston put her in the back seat of her car and drove her to the church. To make it look like she had been assaulted, Johnston took off her clothes and scattered them out, kicked her in the crotch, beat her with her belt, and dragged her to the pond. A car drove into the parking lot, prompting Johnston to run home. After he took a shower, Johnston drove back to the church to see if anybody had discovered the body. While there, he found the victim's ATM card and its PIN, which was written on the cover of her address book. He took her ATM card and drove to Barnett Bank to withdraw some money. The next day, after Johnston learned his picture was being broadcast on the news, he turned himself in and made up the story that Coryell had given him the ATM card.

The jury unanimously recommended the death penalty. After holding a *Spencer* hearing, [FN2] the trial court found four aggravating factors, [FN3] one

> statutory mitigator, [FN4] and numerous nonstatutory mitigators, and followed the jury recommendation.
>
> [FN2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).
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> [FN3] The trial court found the following aggravators: (1) the defendant was previously convicted of violent felonies; (2) the crime was committed while Johnston was engaged in the commission of sexual battery and a kidnapping; (3) it was committed for pecuniary gain; and (4) it was especially heinous, atrocious, or cruel.
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> [FN4] The court found defense counsel proved that Johnston's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired and gave it moderate weight.

Johnston, 841 So. 2d at 351-355.

On March 13, 2000, Johnston was sentenced to death for the first degree murder of Leanne Coryell. In addition, Johnston was sentenced to consecutive terms of life imprisonment for Kidnapping (Count 2); fifteen (15) years imprisonment for Robbery (Count 3), life imprisonment for Sexual Battery (Count 4); and life imprisonment for Burglary of a Conveyance with Assault or Battery (Count 5). (DA V5/892-896).

Johnston appealed his convictions and sentences in Case No. SC00-979. On direct appeal, Johnston was represented by an experienced criminal appellate lawyer, Assistant Public Defender Steven L. Bolotin, who raised the following four issues, including sub-claims, in a 100-page amended initial brief:

ISSUE I: IN THE FIRST PHASE OF THIS CAPITAL TRIAL, APPELLANT WAS DENIED HIS RIGHT, GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS, TO A FAIR, IMPARTIAL AND UNIMPAIRED JURY, AS A RESULT OF THE STATUTORY INELIGIBILITY AND GROSS MISCONDUCT OF JURY FOREPERSON TRACY ROBINSON, AND BY THE TRIAL COURTS ERRONEOUS REFUSAL TO GRANT A NEW TRIAL OR EVEN TO CONDUCT AN INQUIRY INTO THE JUROR'S MISCONDUCT.

A. The right to be tried by a panel of fair, impartial and unimpaired jurors.

B. The unfolding of the facts concerning Juror Robinson.

C. Juror Robinson was under prosecution by the Hillsborough County State Attorney's Office.

D. Juror Robinson committed prejudicial misconduct by concealing her capias status, as well as her underlying criminal conviction, from counsel and the court on voir dire.

E. The trial court abused her discretion in denying the motion for a new trial without any inquiry into the nature and extent of Juror Robinson's use of crack cocaine and marijuana during the guilt phase of Appellant's capital trial.

F. The combination of the acts of juror misconduct and the judicial errors arising out of Tracy Robinson's jury service require reversal for a new trial.

ISSUE II: APPELLANT WAS DEPRIVED OF HIS RIGHT, GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS, TO A FAIR AND IMPARTIAL JURY, WHERE THE TRIAL COURT AND COUNSEL FAILED TO FOLLOW THROUGH ON HER EARLIER RULING ALLOWING INDIVIDUAL AND SEQUESTERED VOIR DIRE OF PROSPECTIVE JURORS WHO HAD KNOWLEDGE OF THIS CASE THROUGH PRE-TRIAL PUBLICITY, AND AS A RESULT APPELLANT WAS UNABLE TO ASCERTAIN HOW EXPOSURE TO THE PUBLICITY (WHICH INCLUDED, AMONG OTHER THINGS, APPELLANT'S PRIOR CRIMINAL CONVICTIONS FOR SEXUAL AND OTHER FELONIES; HIS PRISON SENTENCES AND EARLY

RELEASES; HIS STATUS AS A SUSPECT IN THE MURDER OF ANOTHER WOMAN AND A SLASHING ATTACK ON YET ANOTHER WOMAN; POLICE REPORTS THAT HE HAD RECEIVED TREATMENT AS A SEXUAL PREDATOR; AND HIS OWN FAMILY'S OPINION THAT HE IS VIOLENT, DANGEROUS, AN HABITUAL LIAR, AND GUILTY OF THE CHARGED MURDER), AFFECTED THE JURORS, INCLUDING TWO WHO ACTUALLY SAT ON THE JURY WHICH CONVICTED HIM AND RECOMMENDED THE DEATH PENALTY.

A. The applicable law.

B. The vilification of Appellant in the news media.

C. The motion for individual and sequestered voir dire, and the jury selection proceedings.

D. Given the inflammatory and inadmissible information and innuendo contained in the print and electronic media reports of this case, individual voir dire was necessary to preserve Appellant's right to a fair and impartial jury.

E. If defense counsel's failure to ask to approach the bench is deemed a waiver of the trial court's obligation to ascertain whether the jurors possessed prejudicial and inadmissible information from the media coverage, then that omission deprived Appellant of his right to the effective assistance of counsel.

ISSUE III: THE TRIAL COURT ERRED BY FAILING TO FIND OR EVEN DISCUSS IN HER SENTENCING ORDER THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED WHILE APPELLANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

ISSUE IV: THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE EXTREME MENTAL OR EMOTIONAL DISTURBANCE MITIGATOR.

Amended Initial Brief of Appellant, SC00-979.

Johnston's appellate counsel also filed a 37-page reply brief. See, SC00-979. On December 5, 2002, this Court affirmed Johnston's convictions and sentences, including his death sentence. Rehearing was denied on March 13, 2003. *Johnston*, 841 So. 2d at 349. Johnston did not seek certiorari review in the United States Supreme Court.

In post-conviction, Johnston's amended Rule 3.851 motion alleged the following twelve claims and sub-claims:

> CLAIM 1: 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 filed a legally insufficient motion to disqualify the trial judge.
>
> CLAIM 2: 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 his post-trial amended motion for new trial.
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> CLAIM 2 SUPP: Ineffective assistance of counsel for failing to ensure that the jury panel was sworn.
>
> CLAIM 3: 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 individually voir dire members of the jury venire about pre-trial publicity.

CLAIM 4: The rules prohibiting Mr. Johnston's lawyers from interviewing jurors to determine if constitutional error was present violates equal protection principles, the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution and denies Mr. Johnston adequate assistance of counsel in pursuing his postconviction remedies.

CLAIM 5: Florida's capital sentencing scheme was unconstitutional as applied under Ring, denying Mr. Johnston his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. To the extent trial counsel failed to litigate these issues, Mr. Johnston was denied his Sixth and Fourteenth Amendment rights to counsel.

CLAIM 6: Execution by lethal injection is cruel and/or unusual punishment and violates Mr. Johnston's rights under the Eighth and Fourteenth amendments of the United States Constitution and under the corresponding rights of the Florida Constitution.

CLAIM 7: The jury did not receive adequate guidance in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution. Mr. Johnston's death sentences are premised on fundamental error which must be corrected. To the extent trial counsel failed to litigate these issues, Mr. Johnston was denied his rights to counsel under the Sixth and Fourteenth Amendments to the United States Constitutions and the corresponding provisions of the Florida Constitution.

CLAIM 8: Cumulatively, the combination of procedural and substantive 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.

CLAIM 9: A combination of trial instances amounting to ineffective assistance of counsel at the guilt and penalty phases 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.

CLAIM 9.2a: Ineffective assistance of counsel-prohibiting the Defendant from testifying.

CLAIM 9.2b: Trial counsel conducted an ineffective penalty phase, and provided the Defendant with ill-considered and improper advice about the need to testify at the penalty phase of the trial.

CLAIM 9.2c: Ineffective assistance of counsel-failure to call exculpatory witnesses-failure to challenge the State's case and impeach the State's witnesses.

CLAIM 9.2d: Ineffective assistance of counsel-conflict of interest-divided loyalties.

CLAIM 9.2e: Ineffective assistance of counsel-failure to challenge forensic evidence.

CLAIM 9.2f: Ineffective assistance of counsel-psychotropic medications.

CLAIM 9.2g: Ineffective assistance of counsel-prosecutorial misconduct.

CLAIM 9.2h: Ineffective assistance of counsel-the Court allowed an improper procedure to exist resulting in a jury not sworn to its duties as required under Florida law.

CLAIM 9.2h SUPP.: Ineffective assistance of counsel for failing to ensure that the jury panel was sworn.

CLAIM 10: Newly discovered evidence that the State's trial eyewitness, Juanita Walker, was convicted of perjury.

> CLAIM 11: Midstream recitation of *Miranda* warnings after interrogation and confession does not effectively comply with *Miranda's* constitutional requirement and the second statement repeated after warning in these circumstances is inadmissible-counsel was ineffective for failing to file a motion to suppress statements.
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> CLAIM 12: Ineffective assistance of trial counsel-counsel submitting pre-trial motions before the Court with Appellant's name on the motions, however, with another client's prior history with the motion.
>
> (PCR V3/590-592).

The trial court held a bifurcated evidentiary hearing on December 1, 2006, June 14-15, 2007, and July 12-13, 2007 on the following post-conviction claims: #2, in part (IAC/Juror Robinson), #3 (IAC/*voir dire*/pre-trial publicity), #9.2a through 9.2g (IAC/guilt phase and penalty phase) and #11 (IAC/*Miranda*). (PCR V3/588). Post-conviction relief was denied in the trial court's order of February 5, 2009. (PCR V16/3102-V17/3238).

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Preliminary Legal Principles and Standards of Review

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

The failure to raise a meritless issue on direct appeal will not render counsel's performance ineffective, and this is also true regarding new arguments that would have been found to be procedurally barred had they been raised on direct appeal. See, *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)

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

GROUND I

MENTAL ILLNESS AS *PER SE* BAR TO EXECUTION

CCRC first argues that the Petitioner/Defendant, Ray Lamar Johnston, is mentally ill and his execution is barred under the 8th and 14th Amendments. This habeas claim is procedurally barred - it was not raised at trial – on direct appeal – or in Johnston's Rule 3.851 motion and contemporaneous post-conviction appeal -- and it is also without merit. See, [*David Eugene*] *Johnston v. State*, 27 So. 3d 11 (Fla. 2010). As this Court recently explained in the [*David Eugene*] *Johnston case*:

> **Claim of Mental Illness as a Bar to Execution**
>
> Johnston argues, as he did in the postconviction court, that he is exempt from execution under the Eighth Amendment to the United States Constitution because his severe mental illness places him in the same category as those whose executions are barred because they were under the age of eighteen at the time of the murder or are mentally retarded. **The court below denied relief, finding Johnston's claim was procedurally barred for not having been raised on direct appeal or in prior postconviction proceedings and because, under this Court's precedents, mental illness is not a per se bar to execution. We agree with both these conclusions.**
>
> Relying on the reasoning behind the United States Supreme Court's rulings in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding the death penalty unconstitutional for defendants under age eighteen at the time of the crime) and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding the death penalty unconstitutional for mentally retarded defendants), Johnston argues that it similarly constitutes cruel and unusual punishment to execute a defendant who is severely

mentally ill. [FN7] He contends that his mental illness and neurological impairments, which have been documented in various proceedings in the record, cause him to experience the same deficits in reasoning, understanding and processing information, learning from experience, exercising good judgment, and controlling impulses as those experienced by mentally retarded individuals and by those who commit murder while under the age of eighteen. **However, we agree with the postconviction court that the claim is procedurally barred because it could have been, but was not, raised on direct appeal or in any of the numerous prior postconviction motions.** [FN8]

> [FN7] Johnston has already raised an *Atkins* claim in a prior proceeding. The postconviction court in that case denied the claim after an evidentiary hearing, concluding that Johnston is not mentally retarded. We affirmed in *Johnston v. State*, 960 So. 2d 757 (Fla. 2006).
>
> [FN8] We distinguish the claim Johnston makes here from a claim of insanity as a bar to execution. In order for insanity to bar execution, the defendant must lack the capacity to understand the nature of the death penalty and why it was imposed. See § 922.07(3), Fla. Stat. (2009); *Provenzano v. State,* 760 So.2d 137, 140 (Fla.2000). Florida Rule of Criminal Procedure 3.811 provides the procedure for asserting that a prisoner is insane, as that term is defined, and provides that the claim may not be made until a death warrant is signed.

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

> Lastly, Nixon asserts that the trial court erroneously denied him a hearing on his claim that mental illness bars his execution. We rejected this argument in

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

Id. at 146. **In *Lawrence v. State*, 969 So.2d 294 (Fla. 2007), we also rejected the claim Johnston makes here - that defendants with mental illness must be treated similarly to those with mental retardation because both conditions result in reduced culpability. *Id.* at 300 n.9. We find no reason to depart from these precedents. For all these reasons, relief is denied on Johnston's claim that his mental illness is a bar to execution.**

Johnston, 27 So. 3d at 26 (e.s.)

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

GROUND II

THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM (Failure to Raise the Sub-Claim of Juror Tracy Robinson's Assumed "Deliberate Failure To Disclose" Her Previous Misdemeanor Plea as "Fundamental Error")

Although a claim of ineffective assistance of appellate counsel is properly raised in a petition for writ of habeas corpus, *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000), "appellate counsel cannot be considered ineffective . . . for failing to raise issues that were not properly raised during the trial court proceedings and do not present a question of fundamental error." *Peterka v. State*, 890 So. 2d 219, 242 (Fla. 2004). On direct appeal in the Coryell murder case, Johnston was represented by Assistant Public Defender Steven Bolotin, a very experienced criminal appellate attorney. See, *Brown v. State*, 538 So. 2d 833, 834 (Fla. 1989) (reversing conviction and death sentence in 1989 in case where the appellant/defendant, James Richard Brown, was represented by Assistant Public Defender Steven Bolotin). The "strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel." *Chandler v. United States*, 218 F. 3d 1305, 1316 (11th Cir. 2000) (en banc) (quoting *Provenzano v. Singletary*, 148 F. 3d 1327, 1332 (11th Cir. 1998)). For the following reasons, Johnston's claim of ineffective assistance of appellate counsel must fail.

On direct appeal, SC00-979, the very first issue raised on Johnston's behalf focused on juror Tracy Robinson. This first issue, alone, comprised approximately 40% of Johnston's 100-page amended initial brief (*Amended Initial Brief of Appellant*, SC00-979 at pages 29-69). Sub-claim "D" of this issue concentrated on an unpreserved claim -- Juror Robinson's alleged concealment [failure to disclose] her misdemeanor plea and capias. (See, *Amended Initial Brief of Appellant*, SC00-979 at pages 45-52). Thereafter, approximately 1/3 of the reply brief addressed the Juror Robinson issue (See, *Reply Brief of Appellant*, SC00-979 at pages 1-11), and the majority of this first issue in reply emphasized the "concealment/failure to disclose" sub-claim. (*Reply Brief of Appellant*, SC00-979 at pages 3-9). And, at oral argument, appellate counsel Bolotin focused, almost exclusively, on the Juror Robinson issue and underlying sub-claims. *See,* The Florida Supreme Court's Gavel to Gavel Archives, Oral Argument of May 7, 2002, SC00-979. In short, the Juror Robinson claims, including the *unpreserved* concealment/failure to disclose sub-claim, were raised on direct appeal and steadfastly pursued at oral argument by Johnston's experienced appellate counsel.

Habeas petitions may not serve as a second or substitute appeal and may not be used as a variant to an issue already raised. See, *Brown v. State,* 894 So. 2d 137, 159 (Fla. 2004).

Furthermore, appellate counsel cannot be deemed ineffective for failing to raise an issue which was not preserved for appeal. See, *Israel v. State*, 985 So. 2d 510, 520-521 (Fla. 2008).

In this case, as in *Branch v. State*, 952 So. 2d 470, 482 (Fla. 2006), the defendant "disagree[s] with the manner in which his appellate counsel raised the issue on direct appeal. However, this is an insufficient ground to be heard in a habeas corpus petition." *Id.* at 482, citing *Brown v. State*, 894 So. 2d 137, 159 (Fla. 2004) ("Habeas petitions, however, should not serve as a second or substitute appeal and may not be used as a variant to an issue already raised."); *Swafford v. Dugger*, 569 So. 2d 1264, 1266 (Fla. 1990) ("After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance.").

Although Johnston admits that Mr. Bolotin did raise a Juror Robinson "failure to disclose" sub-claim on direct appeal, Johnston nevertheless argues that Mr. Bolotin was ineffective in failing to raise this sub-claim as alleged "fundamental error." (Petition at pages 11-22). On direct appeal, *Johnston*, 841 So. 2d at 357, this Court applied a procedural bar to the unpreserved "failure to disclose" sub-claim:

> **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. [FN8] 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. [FN9]
>
> > [FN8] See *Steinhorst v. State*, 412 So.2d 332, 338 (Fla.1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").
> >
> > [FN9] See *Bruno v. State*, 807 So.2d 55, 63 (Fla.2001) ("Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and-of necessity-have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal.") (footnotes omitted).

Johnston, 841 So. 2d at 357 (e.s.)

This sub-claim was correctly denied as procedurally barred and the alleged "failure to disclose" Juror Robinson's misdemeanor plea does not constitute fundamental error. See, *Lucas v. Mast*, 758 So. 2d 1194, 1196 (Fla. 3d DCA 2000) (new trial denied where claim regarding failure of juror to disclose litigation history was not preserved and *not fundamental*).

Moreover, as this Court emphasized in *Carratelli v. State*, 961 So. 2d 312, 325 (Fla. 2007), "**if an appellate court refuses to consider unpreserved error, then by definition the error could not have been fundamental**." As this Court explained:

> "[t]he sole exception to the contemporaneous objection rule applies where the error is fundamental." *F.B. v. State*, 852 So.2d 226, 229 (Fla.2003). To be fundamental, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991) (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960)). **Because, as we noted above, the failure to raise or preserve a cause challenge is not reviewable on direct appeal, it cannot constitute fundamental error *per se*. If an appellate court refuses to consider unpreserved error, then by definition the error could not have been fundamental**.
>
> *Carratelli*, 961 So. 2d at 325 (e.s.)

Here, as in *Carratelli*, 961 So. 2d at 325, where this Court refused to consider the "unpreserved error, *then by definition the error could not have been fundamental.*" Accordingly, the juror Robinson sub-claim of alleged concealment/non-disclosure is procedurally barred and CCRC's unauthorized re-argument is improper. See, *Happ v. Moore*, 784 So. 2d 1091, 1097 (Fla. 2001) (faulting the habeas petitioner for "using this writ to reargue the trial court's order . . . because he is dissatisfied with the outcome on direct appeal. The writ of habeas corpus is not to be used to reargue issues which have been raised and ruled

upon by this Court.") Moreover, Johnston's blatant attempts to resurrect his direct appeal complaints, submitted under the guise of habeas, conspicuously rely on the *SAME* cases which were previously cited by Mr. Bolotin on Johnston's direct appeal. (Compare Habeas Petition at pages 13-16 with *Amended Initial Brief of Appellant, Reply Brief of Appellant*, and *Notice of Supplemental Authority* filed by Mr. Bolotin, SC00-979, citing, *inter alia*, *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998), *Reese v. State*, 739 So. 2d 120 (Fla. 3d DCA 1999), *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995), and *Massey v. State*, 760 So. 2d 956 (Fla. 3d DCA 2000), and *Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002).

To the extent that the Juror Robinson "concealment/failure to disclose" sub-claim is predicated on alleged ineffectiveness of trial counsel, this issue is cognizable under Rule 3.851, not habeas. Johnston's concurrent post-conviction brief includes a claim of ineffective assistance of trial counsel for failure to assert Juror Robinson's alleged concealment/deliberate failure to disclose her misdemeanor plea. "Habeas corpus petitions cannot be used as a means to seek a second appeal or to litigate issues that could have been or were raised in a post-conviction appeal." *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006). Furthermore, Johnston cannot establish any prejudice under

Strickland without a showing of actual bias of the juror, and actual bias means

> . . . bias-in-fact that would prevent service as an impartial juror. **Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial -- i.e., that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record.**
>
> *Smithers v. State*, 18 So. 3d 460, 464 (Fla. 2009), citing *Caratelli* (e.s.)

Finally, on direct appeal, the State addressed, alternatively, the lack of merit on the Juror Robinson concealment/failure to disclose sub-claim. (See, *Answer Brief of Appellee*, SC00-979, at pages 17-21). Once again, habeas petitions "should not serve as a second or substitute appeal and may not be used as a variant to an issue already raised." *Brown v. State,* 894 So. 2d 137, 159 (Fla. 2004). Furthermore, as the State previously emphasized on direct appeal, Johnston could not prevail on the three part test announced in *De La Rosa*. First, Johnston could not argue that Juror Robinson's prior conviction was material to the case. One factor in determining whether the withheld information was sufficiently material is whether Johnston would have exercised a peremptory challenge. Based upon the fact that Johnston challenged the *removal* of Juror Robinson from the jury *after* she was arrested for drug possession during trial, Johnston could not argue that a

peremptory challenge would have been used against Juror Robinson during jury selection. Juror Robinson's prior misdemeanor plea was not sufficiently material or relevant to service on Johnston's jury such that a failure to disclose this information requires a new trial. See, *Conde v. State*, 860 So. 2d 930, 939 n. 6 (Fla. 2003) (Where a juror failed to include in questionnaire information regarding two arrests and to fully reveal information about the arrests during *voir dire*, this Court concluded that nondisclosure "was not material to the degree that the denial of a cause challenge was an abuse of discretion").

Second, as the State previously noted on direct appeal, a juror's answer cannot constitute concealment where counsel does not inquire further to clarify any ambiguity relating to the information sought. See, *Birch v. Albert*, 761 So. 2d 355, 358 (Fla. 3d DCA 2000). Inasmuch as both the prosecutor and defense counsel failed to follow up with Juror Robinson to clarify any additional prior criminal accusations, no improper concealment can be attributed to Juror Robinson's answers. Finally, defense counsel failed to diligently discover this information. Where defense counsel failed to follow up with any of the jurors on their prior criminal litigation history or to follow up with Juror Robinson on the criminal history she did reveal, ". . .

any failure to disclose additional prior legal proceedings was due to the defendant's lack of due diligence and thus cannot constitute active concealment on the part of the juror." See, *Birch*, 761 So. 2d 355, 358. Therefore, even if, *arguendo*, this claim had been preserved for direct appeal, which was not the case, Johnston still could not demonstrate that the claimed error regarding Juror Robinson violated the *De La Rosa* test. See also, *Lugo v. State*, 2 So. 3d 1, 15-16 (Fla. 2008) (Capital defendant was not entitled to a new trial under *De La Rosa* based upon juror's non-disclosure, which was immaterial and the failure to disclose was attributable, in part, to the lack of diligence of trial counsel. And, as in *Carratelli*, Lugo failed to demonstrate that the juror in question was *actually biased* against him.)

Lastly, Johnston attempts to "revisit" the trial court's denial of his request for a juror interview. (Petition at pages 19-21). Habeas is not "a substitute for or an additional appeal" of his post-conviction motion. See, *Rodriguez v. State*, 919 So. 2d 1252, 1284 (Fla. 2005).

GROUND III

THE PROCEDURALLY-BARRED *MIRANDA* CLAIM

Lastly, CCRC asserts that Johnston's statements to law enforcement were obtained in alleged violation of *Powell v. State*, 998 So. 2d 531 (Fla. 2008), a "clarification of the law" in *Miranda v. Arizona*, 384 U.S. 436 (1966). (Habeas petition at page 22).

Any challenge to Johnston's statements to law enforcement involves an issue that was cognizable at trial and on direct appeal and is procedurally barred. See, *Green v. State*, 975 So. 2d 1090, 1115 (Fla. 2008). Furthermore, Johnston's reliance on this Court's decision in *Powell* is misplaced. First, as Johnston concedes, the rights form used in this case did include an advisory of "the right to the presence of an attorney *during* questioning." (Habeas Petition at page 25). Second, the United States Supreme Court reversed this Court's judgment in *Powell*. See, *Florida v. Powell,* 130 S. Ct. 1195 (2010).

Johnston's habeas petition (Habeas Ground III, at pages 22-25) essentially attempts to expand the procedurally-barred *Miranda* claim which is alleged in Johnston's initial post-conviction brief (*Initial Brief of Appellant*, SC09-780, Claim II, at pages 31-53). As this Court has repeatedly stated, habeas corpus petitions cannot be used as a means to seek a

second direct appeal or to litigate issues that could have been or were raised in a post-conviction motion and collateral appeal. Therefore, this claim is procedurally barred. See, *McDonald v. State,* 952 So. 2d 484, 498 (Fla. 2006); *Smithers v. State*, 18 So. 3d 460, 472 (Fla. 2009).

Johnston's current attempts to challenge his pre-*Miranda* statements to law enforcement are (1) not a cognizable basis for relief in a habeas corpus proceeding, (2) procedurally barred in post-conviction, (3) irrelevant because trial counsel did not want Johnston's pre-*Miranda* exculpatory statements suppressed and (4) alternatively, without merit.[2]

Lastly, in denying Johnston's IAC/*Miranda* claim in post-conviction, the trial court ruled, in pertinent part:

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[2]A law enforcement officer's obligation to administer *Miranda* warnings extends only to those instances where the individual is "in custody" and under interrogation. See, *Davis v. State*, 698 So. 2d 1182, 1188 (Fla. 1997). In this case, Johnston called the Sheriff's Office and advised Lieutenant Caimano that he wanted to talk to the detective on the case. Johnston then drove himself to the Sheriff's office and sat in the lobby waiting for the detective's arrival. Not surprisingly, Johnston's interview was not conducted in the lobby, but in an interview room. Johnston was not "in custody" simply because he was interviewed at a law enforcement office. See, *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714 (1977) ("But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."); *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517 (1983) (*Miranda* warnings were not required where the defendant, although a suspect, voluntarily came to police station and was not "in custody.").

Claim 11

Defendant alleges ineffective assistance of counsel due to counsel's failure to file a motion to suppress his statements. Specifically, Defendant alleges that when he arrived at Detectives Walters' and Iverson's office at 1:20 a.m., he was not initially given the *Miranda* [fn2] warning, was not given a consent to interview form to sign, was not afforded counsel, and was not free to go because both Detectives Walters and Iverson were going to arrest him for grand theft third degree for using Ms. Coryell's ATM card. He alleges his statements at the police station were a product of custodial interrogation, thereby triggering *Miranda* requirements where Detectives informed Defendant of crimes with which he was charged. Defendant alleges he did sign a consent to search form for the purpose of allowing his car and briefcase to be searched.

* * *

After reviewing claim 11, the testimony, evidence, and argument presented at the January 28, 2008, January 29, 2008, January 30, 2008, January 31, 2008, February 1, 2008, March 6, 2008, and March 7, 2008, evidentiary hearings, the written closing arguments, the notice of supplemental authority, the applicable law, the court file, and the record, the Court finds **"*Miranda* warnings are required whenever the State seeks to introduce against a defendant statements made by the defendant while in custody and under interrogation." *Davis v. State*, 698 So. 2d 1182, 1188 (Fla. 1997). "Absent one or the other, *Miranda* warnings are not required." *Id*. Moreover, the Court finds the single fact that law enforcement had a warrant for Defendant's arrest at the time he arrived at the station does not automatically demonstrate that Defendant was in custody. *Id*. ("Although custody encompasses more than simply formal arrest, the sole fact that police had a warrant for Davis's arrest at the time he went to the station does not conclusively establish that he was in custody.").** The Court finds "there must exist a 'restraint on freedom of movement

of the degree associated with a formal arrest." *Id;* see also *Roman v. State*, 475 So. 2d 1228, 1231 (Fla. 1985).

Moreover, the Court finds the testimony of Detective Iverson to be credible. **Therefore, the Court finds Defendant was free to leave up until Detective Iverson realized that Defendant's time frames when he was with Coryell were inconsistent with what co-workers were saying she was at work, and when Detective Iverson realized the inconsistency in his time frames, he advised Defendant he was under arrest and gave him his *Miranda* warnings**. The Court further finds if Defendant would have given Detective Iverson a plausible explanation for why he was on video using Ms. Coryell's ATM card, it would not have been necessary for Detective Iverson to make an arrest at that time. The Court finds post-*Miranda* he talked to Defendant about searching his vehicle and Defendant signed the consent form to search the vehicle and handed over the keys.

Additionally, the Court finds Defendant initiated contact with law enforcement, drove himself to the Sheriff's office, was sitting in a chair in the lobby without law enforcement personnel around him, was wearing a suit and his chamber of commerce pin, and was not handcuffed or restrained physically in the lobby. The Court also finds as Detective Walters, Detective Iverson, and Defendant walked to the interview room, Defendant initiated small talk about his golf game, and neither Detective Walters or himself laid a hand on Defendant, raised their voice towards Defendant, made any type of threatening or menacing gesture towards Defendant, or were confrontational with Defendant either verbally or physically prior to advising Defendant he was under arrest. The Court further finds that at no time prior to *Miranda* did Defendant ever indicate to Detective Iverson in words or substance that he did not want to talk anymore and wanted to leave, and prior to his arrest, 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 open.

Moreover, the Court finds, by Defendant's own admission, he called the sheriff's office and advised Lieutenant Caimano that he wanted to talk to the detective on the case. The Court further finds when Defendant arrived at the building, he was buzzed in and patted down for weapons. The Court also finds Defendant gave permission for Lieutenant Caimano to search his briefcase and a search for weapons was conducted. The Court finds once Detectives Iverson and Walters arrived, they escorted Defendant to a room where they shut the door. The Court also finds that although Defendant testified that he did not know if the door was locked, he testified he felt like he could not leave. However, when asked at what point he felt that he was not going to be able to leave the police station, Defendant replied, "That's hard to say. I think I knew before I even went there I wouldn't be able to leave." (See January 30, 2008, transcript, p. 684, attached). Therefore, the Court finds although Defendant voluntarily went to the station, he had a preconceived notion that he was going to be arrested prior to entering the station. However, Defendant admitted that prior to *Miranda* being read to him, the detectives were courteous to him, never did anything physically threatening or intimidating to him, and never raised their voice to him. **The Court further finds after Defendant admitted to using the ATM card, he was arrested. However, the Court finds that prior to such admission, Defendant was not in custody for purposes of *Miranda*.**

Based on Detective Ernest Walters' deposition to perpetuate testimony (State's exhibit #68), the Court finds when he met with Defendant, Defendant voluntarily went with him into the interview room and did not indicate to him that he did want to speak with him or that he wanted an attorney present. (See trial transcript, p. 554, State's exhibit #6B, attached). The Court further finds Detective Walters did not promise Defendant anything to go back and speak with him. (See trial transcript, p. 554, attached). The Court also finds it was not until Defendant admitted to using Ms. Coryell's ATM card that he was arrested, and then read his *Miranda* rights. (See trial transcript, pps. 56 1-562, attached).

Additionally, the Court finds that prior to his arrest, Defendant did not indicate to Detective Walters that he wanted to terminate the interview, did not indicate any hesitancy in speaking with Detective Walters, did not appear to be intoxicated, appeared to understand the questions being asked of him, appeared to understand who Detective Walters was and where he was, and did not at any time ask to speak with an attorney regarding the situation. (See trial transcript, pps. 562-563, attached). **The Court further finds, based on Detective Walters' testimony, Defendant indicated that he understood the *Miranda* rights as they were being read to him, and agreed to speak with him and Detective Iverson.** (See trial transcript, pps. 563-566, attached).

Furthermore, the Court finds Mr. Littman to be credible. Therefore, the Court finds although he considered filing a motion to suppress those statements, because he was familiar with the law on suppressing statements, he concluded that he did not want his statements suppressed. The Court further finds the statements Defendant made to law enforcement prior to being given his *Miranda* rights were denials of guilt and he never incriminated himself in Ms. Coryell's death. The Court further finds with respect to the discrepancy between the time Defendant alleged to have had dinner with Ms. Coryell and the time she punched out of work at the dental office, Mr. Littman admitted that he would want to exclude any evidence which could show Defendant had made a false statement, but asserted there was no legal basis for suppressing his statements in addition to the fact that Defendant made those statements before he was arrested. **The Court further finds Mr. Littman was a very experienced criminal attorney who based on the version of events relayed to him by Defendant and depositions taken by he and Ms. Goins concluded Defendant was not under custodial interrogation at the time he made the statements to law enforcement. The Court also finds that if Mr. Littman had somehow successfully prevented admission of Defendant's statements to law enforcement as evidence at trial, the jury would have been left with the fact that Defendant was on video using the victim's ATM card in close proximity to the time of her death, which would have left the jury to infer**

that the only way he could have obtained the victim's ATM card was he obtained it at the time of and as a result of Ms. Coryell's murder. Consequently, the Court finds Mr. Littman wanted his statements to law enforcement to come in so the jury would have a lawful and rational reason for Defendant having possession and use of her ATM card, evidence the State intended to present to the jury.

Additionally, the Court finds Defendant never advised Mr. Littman that when he arrived at the sheriff's office on the night in question that sheriff personnel took his car keys from him, that they made him remove his jewelry, empty his pockets, took his wallet, and put all that stuff in his briefcase. The Court further finds at the time Mr. Littman made the decision not to file a motion to suppress, there was no fact before him that Defendant was in custody or that his freedom was restrained in any fashion at the time Defendant gave his statement and, therefore, he did not believe he had a valid basis to file a motion to suppress.

The Court also finds former Hillsborough County Sheriff detective Jim Caimano (currently FBI agent) to be credible. Therefore, the Court finds although Agent Caimano patted Defendant down for officer safety, he did not take any of Defendant's personal items such as briefcase, wallet, keys, or money for the entire time Defendant was there. The Court further finds Defendant did not indicate to Agent Cainiano that he wanted to leave the criminal investigations division, nor did Agent Caimano conduct any questioning of Defendant before the arrival of Detectives Iverson and Walters. The Court also finds although Agent Caimano did not tell Defendant he was free to leave, Defendant was free to leave the Sheriff's Office after he entered the Sheriff's Office, and if Defendant asked him to leave, he would have conferred with the on-scene supervisors and called the detectives saying that Defendant wanted to leave.

> **Moreover, the Court finds Agent Caimano's contact with Defendant was in no way different than that of a citizen not involved in this case and who had appeared at 1:30 in the morning, including that a citizen unrelated to the Coryell case would not have been allowed to roam freely throughout the entirety of the offices. Consequently, the Court finds Defendant was treated as a normal citizen unrelated to the Coryell case would have been treated.**
>
> **The Court also finds Detective Tony Shepherd's testimony to be credible. Therefore, the Court finds on August 21, 1997, Detective Shepherd did not at any time search Defendant, nor did he take from him any personal items, including his wallet, keys, money, or briefcase, nor did he witness anybody else take any items from Defendant.**
>
> **In conclusion, the Court finds Defendant was not in custody for the purposes of *Miranda*. Therefore, the Court finds Defendant failed to demonstrate how counsel acted deficiently in failing to file the alleged motion to suppress when Defendant was not in custody for purposes of *Miranda*. The Court further finds Defendant failed to demonstrate how counsel's alleged deficient conduct resulted in prejudice as the alleged motion to suppress would have been meritiess. As such, no relief is warranted upon claim 11.**
>
> (PCR V16-17/3209-10; 3231-36, e.s.)

Johnston improperly seeks to use the extraordinary writ of habeas corpus as a vehicle to assert claims which are procedurally barred and not cognizable in habeas. See, *Baker v. State,* 878 So. 2d 1236, 1241 (Fla. 2004), citing, *Mills v. Dugger*, 574 So. 2d 63, 65 (Fla. 1990) ("[H]abeas corpus is not to be used 'for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or

which were waived at trial or which could have ... or have been, raised in prior post-conviction filings.”) Johnston’s petition for writ of habeas corpus should be denied.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF LAW has been furnished by U.S. mail to David D. Hendry, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 26th day of April, 2010.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

s/ Katherine V. Blanco

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

COUNSEL FOR RESPONDENTS