IN THE SUPREME COURT OF FLORIDA

CASE NO. 12-2464

RICHARD ALLEN JOHNSON,

Petitioner,

v.

MICAEL D. CREWS, Secretary
Florida Department of Corrections,

Respondent.

REPLY TO STATE'S RESPONSE FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The Petitioner, Richard Allen Johnson, hereby replies to Respondent Crews' Response. Mr. Johnson replies to Respondent's repeated arguments that his claim in his state habeas petition is unsupported by the record and does not support a claim for relief based upon ineffective assistance of appellate counsel.

CLAIM I

MR. JOHNSN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Respondent argues that Johnson's statement to police was properly admitted into evidence because Johnson waived his *Miranda* rights and freely and voluntarily spoke with authorities. In support of that argument, Respondent contends that following waiver of his *Miranda* rights, Johnson made only equivocal invocations to cease conversation with authorities. (Response at 15). Respondent argues that given Johnson's equivocal invocation, Officer Flaherty and Investigator Hamrick were permitted to engage in follow up questions in order to ascertain whether Johnson was certain he wished to cease communication with them. (Response at 14, 18). Respondent further contends that because the follow up questions were not intended to illicit incriminating responses, they were not in violation of Johnson's constitutional rights. (Response at 14, 18).

Review of the record establishes that the police conduct here rendered Mr. Johnson's confession involuntary and violated his *Miranda* rights. The trial court's denial of Johnson's motion to suppress was in error and properly preserved by counsel for direct appeal. Appellate counsel's failure to present the issue on direct

appeal rendered their performance deficient for purposes of the Sixth Amendment.

Regardless of the Respondent's contention, the record establishes that Mr. Johnson was compelled to give a statement to the police after he expressed his intent to terminate further communication with them. Mr. Johnson clearly told Flaherty "I don't want to say no more." (R. 277). Rather than scrupulously honoring this request to terminate the interrogation, Flaherty continued on to inquire of Johnson "are you sure?" Tellingly, the record reflects that Johnson again stated emphatically "Yes." (R. 277). Flaherty then stated "if you're sure, that is your right." (R. 277). Following that exchange Johnson merely requested a cigarette break that he had been promised earlier. (R. 271).

Requesting a cigarette is not the same thing as re-initiating a custodial interrogation. This is especially the case in light of Mr. Johnson saying definitively twice that he no longer wanted to talk. For the police then to grant his request for a cigarette and use that as a gateway to elicit more incriminating statements is the equivalent of conducting an end run around the Fifth Amendment. Such conduct cannot be countenanced consistent with the Fifth Amendment.

Contrary to the Respondent's argument, the record does not clearly show that Flaherty was only making sure Johnson was certain he no longer wanted to talk, asking no further questions which could incriminate him. (Response at 14, 18). Respondent's contention that Flaherty's conduct was neither intimidating nor

intended to be, and that he did nothing physically or verbally to induce Johnson to speak, is also belied by the record. (Response at 18). Furthermore, given Mr. Johnson's plain and direct language there was no need to make sure he was certain. Mr. Johnson said "I don't want to say no more." (R. 277). As if something about that statement required clarification in Flaherty's mind he asked if Mr. Johnson was sure to which Mr. Johnson replied "yes." (R. 277). It strains credulity to the extreme to conclude that something about Mr. Johnson's statements required clarification or necessitated the police to be sure what he was saying.

Interestingly, absent in the Respondent's Answer is any response to the incident which occurred during interrogation where Johnson allegedly "tripped" while being handcuffed by Detective Griffith. (R. 233). Also absent is mention of the close proximity to Johnson that Flaherty maintained throughout Johnson's attempts to break off communication. (R. 327). The record establishes that Johnson was handcuffed to a chair, isolated in a small interrogation room, with two officers who repeatedly ignored his attempts to disengage from conversation with them.

Furthermore, questions of the type which Flaherty and Hamrick were asking were hardly the type which are narrowly focused on verifying the intention to cease communication as required under the cases cited by Respondent. See *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *Cuervo v State,* 967 So. 2d 155, 164 (Fla. 2000). The simple fact is that Mr. Johnson told Hamrick and Flaherty that he

did not wish to speak with them any further yet they persisted in overpowering his will through repeated questioning and deceptive interrogation tactics. Those conditions are hardly the type which are neither coercive nor intended to overbear the will of an individual. Behavior such as that which Hamrick and Flaherty engaged in cannot be characterized as scrupulously honoring a suspect's right to cut off questioning once the suspect has invoked that right. *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975).

Admission of Johnson's statement cannot be said to have been harmless. As this Court has noted in *State v. DiGuillio*, "[t]he test for harmless error is not a sufficiency of the evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. 491 So. 2d 1129 (Fla. 1986). The focus is on the effect of the error on the trier of fact. *Id.* The question is whether there is a reasonable possibility that the error affected the verdict and the burden to show the error was harmless remains on the state. *Id.* If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Admission of Johnson's statements to police cannot be said to have been harmless beyond a reasonable doubt. Absent his statements to police the State's case would have rested primarily upon testimony of Johnson's co-defendant, John

Vitale. As preserved reversible error, appellate counsel was required to raise this issue as a ground for reversal. Failing to raise this issue amounts to ineffective assistance of appellate counsel.

CONCLUSION

For the reasons stated herein, Mr. Johnson respectfully requests that this court grant his petition for writ of habeas corpus and order a guilt and penalty phase proceedings and grant any other relief that this Court deems just and proper.

Respectfully Submitted,

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for

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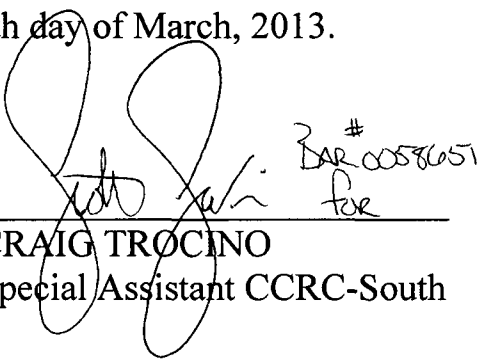
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first-class postage prepaid to Lisa Marie Lerner, Assistant Attorney General, Concourse Center 4, Suite 200, 3507 East Frontage Road, Tampa, Florida 33607-7013, this 13th day of March, 2013.



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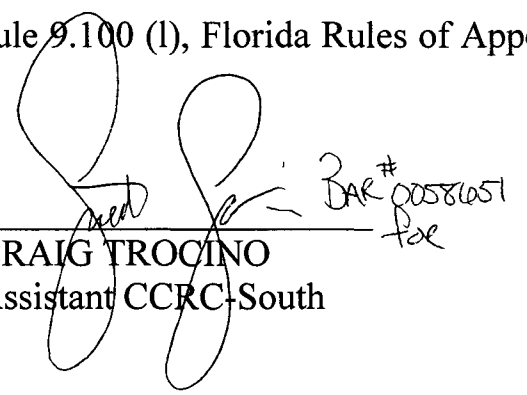
CERTIFICATE OF FONT

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.



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