ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-2464

RICHARD ALLEN JOHNSON,

Appellant,

vs.

KENNETH S. TUCKER, ETC.,

Appellee.

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RESPONSE TO PETITION FOR
HABEAS CORPUS

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PRELIMINARY STATEMENT

Appellant, Richard Allen Johnson, was the defendant at trial and will be referred to as the "Defendant" or "Johnson". Appellee, the State of Florida, the prosecution below will be referred to as the "State." References to the records will be as follows: Direct appeal record - "ROA" or "T"; Postconviction record - "PCR"; Postconviction transcripts - "PCT"; any supplemental records will be designated symbols "SR", and to the Appellant's Petition will be by the symbol "P", followed by the appropriate page number(s).

PROCEDURAL HISTORY

On March 7, 2001 Richard Allen Johnson ("Johnson") was indicted for First Degree Murder, Kidnapping, and Sexual battery using great force for the death of T. H. on February 15, 2001. He was separately charged by information with robbery which was consolidated with the first case on June 7, 2004. The trial began on June 7, 2004 and resulted in guilty verdicts. [R. 625-27]. The penalty phase trial began on June 21, 2004 and concluded with a juror recommendation for death by a vote of 11 to 1. [R. 656].

The court held a Spencer hearing on July 15, 2004. It held the final sentencing hearing on August 9, 2004 and sentenced Johnson to death. He

appealed his conviction and sentence, raising thirteen issues1; the Florida Supreme Court affirmed both. Johnson v. State, 969 So.2d 938 (Fla. 2007). Subsequently, on April 21, 2008 certiorari review was denied. Johnson v. Florida, 128 S. Ct. 2056, 2008 U.S. LEXIS 3517(2008).

On direct appeal, the Florida Supreme Court found:

> The victim in this case is [T.H.]. Johnson met [T.H.] on the evening of February 14, 2001, at a nightclub in Port St. Lucie. After

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[1] The direct appeal issues were: (1) grant of a challenge for cause to a potential
juror over defense objection; (2) admission of a statement by the victim while she was being strangled; (3) allowing the State to proceed on a robbery count charged by information rather than indictment; (4) improper cross examination of the defendant; (5) sufficiency ofthe evidence of kidnapping, sexual battery, and felony murder; (6) proportionality of the death sentence; (7) imposition of a death sentence after the defendant rejected a plea bargain for a sentence of life imprisonment; (8) application of the HAC aggravator; (9) Florida's capital sentencing law is unconstitutional because the defendant bears the burden of proving death is inappropriate; (10) Florida's capital sentencing law is unconstitutional because a death sentence can rest on a nonunanimous jury recommendation based on facts that are not found beyond a reasonable doubt, contrary to Ring v. Arizona, 536 U.S. 584 (2002); (11) Florida's capital sentencing statute violates Furman v. Georgia, 408 U.S. 238, (1972), because a conviction of ?rst degree murder without more makes a defendant eligible for the death penalty, which fails to adequately narrow the field of first degree murderers sentenced to death; (12) the instruction that a jury should ?nd a mitigator only if it is reasonably convinced of its existence violates separationof powers; (13) an instruction to the jury that its role is advisory denigrates its responsibility, contrary to Caldwell v. Mississippi, 472 U.S. 320 (1985); and (14) Florida's capital sentencing law is unconstitutional because no specific number of votes is required for jurors to find aggravators or mitigators. See Johnson v. State, 969 So.2d 938 (2007).

Johnson and [T.H.] spent several hours together at the club, she accompanied Johnson to a residence he was sharing with others, including Johnson's roommate, John Vitale. [T.H.] and Johnson had several drinks at the club and left with a bottle of rum Johnson purchased. [T.H.]'s brother and a friend, who were also at the club, followed in another car. [T.H.] and Johnson began drinking from the bottle on the drive to Johnson's residence. At the house, Johnson and his guests had mixed drinks and played pool for several hours. [T.H.]'s brother and friend left after Johnson assured them he would get [T.H.] home. In the early morning hours of February 15, Vitale agreed to drive [T.H.] home to Vero Beach. Johnson, who did not have a driver's license, also went along. [T.H.] was ambivalent about returning home. The threesome went to Savannas State Preserve, a park where Johnson and [T.H.] had consensual sex while Vitale waited a short distance away. Afterward, [T.H.] remained uncertain whether she wanted to go home, so Vitale returned to the house in Port St. Lucie.

There an argument ensued. A neighbor, Catherine Shipp, heard a woman screaming. When Shipp opened her front door a few minutes later, she heard the woman say, "I want to go home. Just let me go." Shipp saw Johnson and Vitale outside the car, holding the car doors to prevent [T.H.] from exiting. According to Shipp, [T.H.] ultimately got out of the car. Johnson grabbed her from behind, picked her up, and took her inside the house. The woman kicked her feet, grabbed the door frame, and yelled, "I don't want to go in and clean up."

> The commotion involving [T.H.] awoke other residents in the house where Johnson and Vitale were living. Thomas Beakley shared a bedroom with his girlfriend, Stacy Denigris, next to the bedroom Johnson shared with Vitale. Beakley heard a woman scream and then cry, and awoke Denigris, who left the room to check on the noise. Awakened by Beakley, Denigris heard a girl cry and say that she wanted to go home. Denigris opened the bedroom door to see a woman with brown hair holding onto the door frame of Johnson's bedroom. Johnson

> grabbed the woman from behind and yanked her into the bedroom. Denigris then saw Vitale in the garage, where the pool table and seating area were located, spoke to him there for a few minutes, and returned to bed.

Vitale, who had agreed to plead guilty to accessory to murder for a twenty-two-year sentencing cap, testified for the State. He stated that [T.H.] was loudly demanding to go to the bathroom and be taken home at the point when Johnson pulled her into his bedroom on the morning of February 15. The house then became quiet, and Vitale lay on the couch. Johnson eventually emerged from the bedroom and went into the bathroom. Vitale looked into the bedroom and saw that [T.H.] appeared to be sleeping. Johnson came out of the bathroom, found Vitale in the garage, and told him that [T.H.] was "gone." Asked what he meant, Johnson said he had broken her neck. Vitale testified that Johnson eventually told him that it takes longer to break someone's neck than he thought, and--over defense objection--that [T.H.] said as she was being strangled that she wanted to see her children.

Acting together, Johnson and Vitale wrapped [T.H.]'s body in a deflated air mattress and placed it in the trunk of Vitale's car. The two men attempted to enlist the help of Johnson's friend, Shane Bien, in disposing of the body at sea. Bien allowed Johnson to call boat rental businesses and gave Johnson a fishing pole so it would appear they were fishing as they disposed of the body. According to Bien, Johnson said he'd killed a woman who was "the most annoying person he had ever met" and who "had tried to stab him with an object." Johnson showed Bien the outline of a body wrapped in an air mattress in the trunk of Vitale's car.

Using money from [T.H.]'s purse, Johnson and Vitale purchased a large cooler, concrete blocks, a chain, and a padlock. They returned to the Savannas State Preserve, where they submerged the body in several feet of water. A fisherman discovered the body three days later.

Medical examiner Charles Diggs testified that [T.H.] died of strangulation in which the killer used both a ligature and a bare hand. Diggs testified that a strangulation victim starts to lose consciousness within fifteen to thirty seconds and that death occurs within three to four minutes. [T.H.] also had a superficial premortem cut on her scalp that was consistent with a knife wound, and bruises on her forehead and chin. There was also a postmortem laceration of her perineum, including the uterus, bladder, and vulva. Diggs could not rule out marine life as the cause of the damage to the perineum, although he said that marine animals will usually attack more than one area of the body. No semen was discovered in what remained of [T.H.]'s vagina or uterus. Her blood alcohol level was .186, of which .04 to .06 could have been the result of decomposition.

Johnson and Vitale were both arrested within days of the discovery of [T.H.]'s body. Vitale, questioned first, incriminated Johnson. Confronted with Vitale's statement, Johnson stated that he was drunk and lost his mind when [T.H.] was killed. He then said that he and [T.H.] were having sex and she was not fighting him, but "I put my hand on her neck and she died." Asked when he realized she was dead, he stated, "When we stopped having sex, when I got up and I said get up, and she didn't get up." Johnson adamantly denied mutilating [T.H.]'s body.

Testifying in his own behalf at trial, Johnson stated that Vitale, who acknowledged at trial that he is gay and admitted being in love with Johnson, argued with [T.H.] throughout the evening and morning of February 14-15. When Johnson, [T.H.], and Vitale ultimately returned to the house after their trip to the Savannas park, all three were arguing. Johnson grabbed her to calm her down and pulled her into the room to keep from disturbing others sleeping in the house. He said that he and [T.H.] then had consensual sex and he passed out for about an hour, discovering she was dead only when he awoke. Johnson said that in his statement to police, he meant that he had placed his hand in the area of her neck during sex, but did not choke or kill her. He explained that when he said he lost control, he meant that he lost control of the alcohol, stating, "I couldn't control how I

was spinning, how I was standing." He also stated that he meant that he discovered she was dead after he had passed out, not immediately after sex.

Johnson further testified that after learning [T.H.] was dead, he found and told Vitale. Johnson testified that Vitale responded by saying "you killed her," and discouraged him from calling the police. Johnson believed that he had killed [T.H.] until he read Vitale's statement, particularly Vitale's assertion that Johnson stated he broke [T.H.]'s neck, which Johnson stated was false. Johnson testified that he eventually came to believe that Vitale had killed [T.H.].

The jury found Johnson guilty of first-degree murder and concluded in an interrogatory verdict that its finding of guilt was based on both premeditated murder and felony murder. The jury also found Johnson guilty of kidnapping, sexual battery with great force, and theft of less than $ 300.

During the penalty phase, the trial court instructed the jury on three aggravating factors--that the murder was committed while Johnson was on felony community control, that the murder was committed during the commission of a sexual battery or kidnapping or both, and that the killing was especially heinous, atrocious, or cruel (HAC). The jury was instructed on the statutory mitigating factors that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and that the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. The jury also received instructions on numerous nonstatutory mitigators. By a vote of eleven to one, the jury recommended the death penalty.

At sentencing, the court found the same three aggravators on which the jury had been instructed, giving moderate weight to the community control aggravator and great weight to the others. The court rejected the two mental statutory mitigating circumstances and the age mitigator. The trial court found the statutory mitigator of no

significant history of criminal activity, giving it moderate weight. The court found seven nonstatutory mitigators. 1 Finding that the aggravators outweighed the mitigators, the court sentenced Johnson to death for the murder and imposed consecutive sentences of thirty years for the kidnapping, life for the sexual battery, and sixty days for petit theft.

> 1 The trial court found the following nonstatutory mitigation: Johnson witnessed and suffered frequent physical and verbal abuse from his father (some weight); he had a history of extensive drug and alcohol abuse and was under the influence of alcohol at the time of the murder (moderate weight); he was sexually abused at a young age (some weight); he was a slow learner (no weight); he was able to show kindness to others (little weight); he exhibited good behavior in court (little weight); and he would adjust well to prison and would not commit further violent crimes (little weight).

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Johnson, 969 So.2d 943-946 (victim's name omitted).

Johnson filed a motion for post-conviction relief and the court granted an evidentiary hearing on a number of claims. Following the hearing, the Circuit Court denied relief in a written order on April 11, 2012. Johnson appealed the denial to this Court. Simultaneously with the filing of his initial brief on postconviction appeal (SC12-1204), Johnson filed the instant petition and the State was ordered to respond.

CLAIM I

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR NOT CHALLENGING THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS. (Restated)

Johnson claims that his appellate counsel was not a "zealous advocate" by failing to challenge the trial court's finding that Johnson's statement to the police was free and voluntary. He argues that because the detective was not utterly silent after Johnson said he did not want to say anything else and did not move away from him, then his conduct was impermissibly intimidating and, thus, coercive. A full review of the record refutes this contention and this claim should be denied.

Claims of ineffective assistance of appellate counsel are presented appropriately in a petition for writ of habeas corpus. See Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). When analyzing the merits of the claim of ineffectiveness of appellate counsel, the criteria parallel those for ineffective assistance of trial counsel outlined in Strickland). See Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (explaining that the standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the Strickland standard for trial counsel ineffectiveness, i.e., deficient performance and prejudice from the deficiency)).

In Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000), this Court set out the review appropriate for claims of ineffective assistance of appellate counsel stating:

> In evaluating an ineffectiveness claim, the court must determine whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla. 1986). *See also Haliburton*, 691 So.2d at 470; *Hardwick*, 648 So.2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So.2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *See Medina v. Dugger*, 586 So.2d 317 (Fla. 1991); *Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman, 761 So.2d at 1069. Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002) (citations omitted). "If a legal issue

'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Rutherford, 774 So.2d at 643. (quoting Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994).

Also, "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). See also Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989) (stating "habeas corpus petitions are not to be used for additional appeals on questions which could have been ... or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial."). As noted in Chavez v. State, 12 So.3d 199, 213 (Fla. 2009):

> capital defendants may not use claims of ineffective assistance of appellate counsel to camouflage issues that should have been presented on direct appeal or in a postconviction motion. *See Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000). Moreover, appellate counsel cannot be ineffective for failing to raise a meritless issue. *See Lawrence v. State*, 831 So.2d 121, 135 (Fla. 2002); *see also Kokal v. Dugger*, 718 So.2d 138, 142 (Fla. 1998) ("Appellate counsel cannot be faulted for failing to raise a nonmeritorious claim.").

Chavez, 12 So.3d at 213.

The trial court held a hearing on the motion to suppress where Detectives Flaherty and Hamrick, from the Fort Pierce Police Department, testified and introduced a videotape of Johnson's statement which was played for the court. Johnson himself did not testify or offer any evidence. Daniel Flaherty stated that he was a Detective Sergeant with the Fort Pierce Police Department and was the one who took Johnson to the police department on February 21, 2001 in order to interview him. (ROA p. 217) The interview with Johnson was videotaped and audio taped. Johnson appeared calm and not upset when Flaherty interviewed him. Flaherty did not make any promises to him nor did he coerce him in any way. (ROA p. 218-19) Detective Hamrick was there was well. Flaherty read Johnson his rights off of a standard form which was also a waiver form. He ascertained that Johnson could read and did understand the rights before him. He then told Johnson that he was being questioned on a homicide. The waiver form came in as State Exhibit 501. (ROA p. 220-23) Flaherty testified that Johnson waived his rights and spoke with him about the victim's killing and requested a cigarette at one point of the conversation. Flaherty said he could have one after the interview. Flaherty made a statement to Johnson saying "help yourself"; it was not a question and Johnson's reply was sarcastic. (ROA p. 237) Notably, Johnson had already begun

discussing meeting and then killing the victim; he did not, at that point, say anything about wanting to stop the interview. He continued to talk to Flaherty. (ROA p. 271) At one point Johnson said that he no longer wished to speak with him and Flaherty asked him if he was sure to which Johnson said yes. Flaherty said he stopped questioning him but Johnson continued to talk to him. Just after he initially said that he did not want to continue the conversation, Johnson asked him for a cigarette. He was allowed to go outside to smoke accompanied by the detective; the case was not discussed while they were outside and no questions were asked outside the interview room. All the questioning was done on the videotape of the interview. (ROA p. 224-26, 240) They returned to the interview room where Johnson continued to talk, apparently freely and voluntarily. (ROA p. 227, 233) The videotape continued to run after the detective left the room. He occasionally returned to ask a question and Johnson continued to speak with the police. He never asked for an attorney and appeared calm and cooperative. He was handcuffed at the end of the interview. (ROA p. 231-32)

Jeff Hamrick also testified, saying he with the Fort Pierce Police Department in February 2001 and participated in the interview of Johnson. (ROA p. 245-46) Hamrick also stated that he never promised Johnson anything nor did he threaten or coerce him. Johnson also never asked for an attorney and was very cool and

calm. He appeared to be talking to them freely and voluntarily. (ROA p. 247) During his testimony the videotape of the interview was played for the court. That tape showed Flaherty reading the Miranda rights from a form to Johnson. Johnson says that he understands. Flaherty immediately tells him he is being questioned on a homicide. (ROA 263-64) Johnson discusses going to the bar where he met the victim and taking her home. He tells how he had sex with her, strangled her, and that she died. Flaherty begins questioning Johnson on the victim's missing vagina and killing her. He then asks for the details of how Johnson met the victim, when Johnson says that he doesn't want to talk anymore. (ROA p. 276-77) The exact exchange when that occurred follows:

Flaherty Q: Okay. How did you meet?

Johnson A: At the bar.

Q: All right. Go ahead, tell me the story then, you know.

A: I don't want to say no more.

Q: You sure?

A: Yes.

Q: If you're sure, that's your right.

A: Can I have a cigarette, please?

Q: I don't have a cigarette here. We'll see if I can get one for you.

A: I know I did not pull a knife on her.

Q: How do you know that?

A: Why would I pull a knife on her?

(ROA p. 277) The record clearly shows that Flaherty only made sure Johnson was certain and asked no more questions which could have incriminated Johnson. Johnson is the first to speak and launches back into a discussion of the crime. The interview continues for several pages then Hamrick enters and they take a cigarette break. (ROA p. 248) Johnson restarted the conversation which continued for some time before the cigarette break, contrary to the timeline Johnson presents in his petition. (Petition p.14) They return and the interview continues without Johnson ever asserting his right to stop talking. He went through a detailed account of the incident, always shying away from any admission of mutilating the body after the killing although he repeatedly admitted to killing her. Eventually the following exchange took place:

> Flaherty Q: You said you didn't want to talk anymore, then I said that's your right and you started talking again, so –
>
> A: I don't know what to say , man.
>
> Q: Here's what I want you to do, okay, and then we'll deal with that and do what we have to do. We're going to start from the time you guys left the bar and take me through it step by step, what you did, what happened at the apartment after you figured out she was dead,

what you did there, okay; can you do that?

A: I already told you.

(ROA p. 284-85) Even given the opening by Flaherty, Johnson does not say he wishes to stop talking. Hamrick eventually takes over the questioning, again focusing on the perineal wounds. After he re-initiated the interview, Johnson never again stated, or even indicated, that he wished to stop talking.

In Davis v. United States, the U.S. Supreme Court held that a suspect who wishes to invoke previously waived Miranda rights and to confer with an attorney "must unambiguously request counsel" in order for police officers to cease an interrogation already in progress. 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The Court held that only a clear, unequivocal, and unambiguous request for counsel will suffice: "If the suspect's statement [regarding the need for a lawyer] is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." Id. at 462, 114 S.Ct. 2350.

The Florida Supreme Court followed that decision with State v. Owen, explaining that:

> [a] suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent. If the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may

proceed with the interrogation....

Owen, 696 So.2d 715, 718 (Fla.1997) (quoting Coleman v. Singletary, 30 F.3d 1420, 1424 (11th Cir.1994)). Owen applies only where the suspect undergoes questioning after validly waiving the right to counsel pursuant to a proper Miranda warning at the outset of interrogation. Id. at 719; see Almeida v. State, 737 So.2d 520, 523 n. 7 (Fla.1999) (recognizing that Owen rule "applies only where the suspect has waived the right earlier during the session"); accord Davis, 512 U.S. at 461, 114 S.Ct. 2350 (holding that "after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney").

The state court cases following Owens focused on whether a suspect's assertion to stop the questioning or to have counsel was unequivocal. See, e.g., Walker v. State, 957 So.2d 560, 571 (Fla.2007) (concluding that suspect's statement, "I think I may need a lawyer," and subsequent question asking detectives whether he needed counsel, were not unequivocal requests for attorney and did not require cessation of interrogation); Jones v. State, 748 So.2d 1012, 1019–20 (Fla.1999) (concluding that suspect who confessed after telling jail guards he wanted "to talk to his mother, his attorney, and [a detective]" did not unequivocally invoke right to counsel).

The First District Court of Appeal addressed the issue that is now before this Court. It held that a law enforcement officer may verify if a suspect is certain after that suspect unambiguously indicates he wishes to remain silent after he previously waived his Miranda rights. It reasoned:

> Owen prohibits further interrogation after an unequivocal assertion of the right to counsel. 696 So.2d at 718–19. Nothing in the case law, however, necessarily prevents police officers from asking harmless questions to clarify a suspect's assertion of the right to counsel, even if a reviewing court determines, in hindsight, that the suspect unequivocally requested an attorney. Miranda applies, for Fifth Amendment purposes, only to questions designed to elicit incriminating testimonial responses: questions "the police should know [are] reasonably likely to evoke an incriminating response from a suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); see Edwards v. Arizona, 451 U.S. 477, 485–86, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) ("The Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation.").
>
> Because a suspect's yes-or-no response to a question seeking verification of even an unequivocal clear invocation of the right to counsel could hardly be characterized as incriminating or testimonial, an officer's question to confirm the suspect's wishes, without more, does not violate clearly established law. See Owen, 696 So.2d at 718 (describing effect of unequivocal assertion of right to counsel upon propriety of further "interrogation"); Traylor v. State, 596 So.2d 957, 966 (Fla.1992) (noting that, "if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop" (emphasis added)). This approach squares with the rule in Edwards "that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-

> initiated custodial *interrogation* even if he has been advised of his right." 451 U.S. at 484, 101 S.Ct. 1880 (emphasis added). Because a question clarifying the suspect's wishes does not amount to interrogation, under the view of interrogation taken in Innis and subsequent cases, nothing in the case law prohibits such a question. A clarifying question must, of course, remain narrowly focused on verifying the request for counsel; officers may not "engage[ ] in conduct they could reasonably anticipate would elicit an incriminating response." Cuervo v. State, 967 So.2d 155, 164 (Fla.2000) (holding confession inadmissible where defendant said, through Spanish interpreter during interrogation, he would "declare nothing," but where officers subsequently asked series of questions "explaining" that defendant had opportunity to talk if he wanted, among other things).

Serrano v. State, 15 So.3d 629, 635-36 (Fla. 1st DCA 2009). The situation in this case is the same in that Flaherty's only question was to determine if Johnson was certain; he asked nothing else. Remaining where he already was in the room for a moment while saying that it was Johnson's right was not intimidating nor is there any indication that he meant it to be. He paused after Johnson's invocation but did nothing either physically or verbally to induce Johnson to speak. Johnson felt comfortable enough to again ask for a cigarette. He is the one who made the decision to re-start the conversation when he again denied pulling a knife on the victim. The trial court viewed the tape and concluded that Johnson's statement was freely and voluntarily made; that determination was fully supported by the record. Flaherty's conduct was not impermissible under either the Supreme Court's

precedent or this Court's. Since the denial of the motion to suppress was proper given the record and the Miranda law, the issue would have been without merit if appellate counsel had raised it on direct appeal. Raising a non-meritorious issue is not deficient performance. Rutherford, 774 So.2d at 643; Chavez, 12 So.3d at 213. Johnson cannot show deficient performance under the Strickland standards and, consequently, habeas relief must be denied.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court deny the petition for writ of habeas corpus.

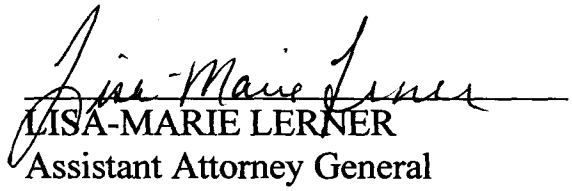
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. mail to Scott Gavin and Craig Trocino, Assistant CCRC-South, One East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301 this 30th day of January, 2013.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL



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