IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

RICHARD ALLEN JOHNSON,

Petitioner,

v.

KENNTH S. TUCKER, Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This is Petitioner's first habeas corpus petition in this Court. This petition for habeas corpus relief is being filed in order to preserve Mr. Johnson's claims arising under recent United States Supreme Court decisions and to address substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; claims demonstrating that Mr. Johnson was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions and death sentences violated fundamental constitutional guarantees.

Citations to the record on the direct appeal shall be as "R. _____." Citations to the postconviction record shall be as "PC-R. _____." All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9), Florida Constitution. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Article I, Section 13, Florida Constitution. This petition presents issues

which directly concern the constitutionality of Mr. Johnson's convictions and sentences of death.

Jurisdiction in this action lies in this Court, *see e.g. Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Johnson's direct appeal. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Johnson requests oral argument on this petition.

STATEMENT OF CASE AND FACTS

The Circuit Court for the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, entered the judgments of convictions and death sentence currently at issue.

On February 21, 2001 Mr. Johnson was arrested in St. Lucie County, Florida. (R. 3-6). On March 7, 2001 Mr. Johnson was indicted for First Degree Murder, Kidnapping, and Sexual Battery Using Great Force. (R. 1-2). Later, in 2004, Mr. Johnson was also charged by information for Robbery and the cases

were consolidated. Trial occurred June 7-17, 2004 and Mr. Johnson was found guilty of first degree murder, kidnapping, robbery, and sexual battery with use of great force. (R. 625-27).

The circuit court conducted Mr. Johnson's penalty phase on June 21, 2004. At the penalty phase, trial counsel presented testimony of several family members and friends in support of non-statutory mitigation. (R. 2797-2893). Counsel also presented Dr. Theodore Williams, a forensic psychologist, who had evaluated Mr. Johnson. Dr. Williams found several diagnoses, the most important being mixed personality disorder, Personality Disorder NOS and moderate depression. (R. 2960). As a result, Dr. Williams testified that he believed Mr. Johnson met the "minimum criteria" for the statutory mitigator of extreme mental or emotional disturbance at the time of the murder. (R. 2956, 2960). Dr. Williams also testified in support of the statutory mitigator that Mr. Johnson had been unable to conform his conduct to the requirements of law on the night of the murder. Dr. Williams based this diagnosis from his interviews with Mr. Johnson, review of school records, and documentation that on the night of the murder Mr. Johnson had been intoxicated and possibly under the influence of ecstasy. (R. 2955).

The jury returned and 11-1 recommendation that Mr. Johnson be sentenced to death. (R. 656).

A *Spencer* hearing was held July 15, 2004. Following the *Spencer* hearing,

on August 9, 2004, the trial court accepted the jury's recommendation and sentenced Mr. Johnson to death. (R. 913-931). The court found three aggravating circumstances: the murder occurred during the course of kidnapping and sexual battery (great weight); Mr. Johnson was previously convicted of a felony and put on community control (moderate weight); and the murder was especially heinous, atrocious, or cruel (great weight). (R. 913-931). In mitigation, the court found that Mr. Johnson: had no significant history of criminal activity, particularly violent crimes (moderate weight); witnessed and was the victim of frequent physical and verbal abuse (some weight); had a history of extensive drug and alcohol abuse and was under the influence of alcohol at the time of the murder (moderate weight); was the victim of sexual abuse at a young age (some weight); was a slow learner (no weight); was able to show kindness to others (little weight); exhibited good behavior in court (little weight); and would adjust well to prison and would not commit further violent crimes (little weight). (R. 920-27). The circuit court rejected the two statutory mitigators presented by Mr. Johnson. (R. 921).

Mr. Johnson filed a notice of appeal on September 1, 2004. (R. 944). Mr. Johnson's appeal raised fourteen issues.[1] This Court affirmed Mr. Johnson's

[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 of the evidence of kidnapping, sexual battery, and felony

convictions and sentence on direct appeal on December 13, 2007. *Johnson v. State*, 969 So.2d 938 (2007).

Mr. Johnson filed a Petition for a Writ of Certiorari in the United States Supreme Court which was denied on April 21, 2008. *Richard Allen Johnson v. State of Florida*, US S. Ct No. 07-9402.

After his arrest, Mr. Johnson gave a statement to the police. During this statement he terminated the interrogation. Later, the interrogation continued. Before trial, Mr. Johnson moved to suppress the statement on the grounds it violated his rights under *Miranda*. (R. 395-396)

A hearing was held on Mr. Johnsons' motion to suppress on October 13, 2003. The State presented several witnesses at the hearing. Officer Daniel Flaherty

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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 first 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 find a mitigator only if it is reasonably convinced of its existence violates separation of 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).

was a sergeant with the Fort Pierce Police Department and was assigned to the investigation of the death of Ms. Hagin. (R. 215-16). As part of that investigation he came into contact with Mr. Johnson on February 2, 2001 at the probation office located off of U.S. 1. (R. 217). Mr. Johnson was eventually taken to the nearby police station where he was placed in an interrogation room with both video and audio taping and a custodial interrogation was conducted. (R. 218) Flaherty testified that he did not have any conversations with Mr. Johnson prior to arriving at the interrogation room. (PRC. 219). Flaherty denied making any promises to Mr. Johnson in exchange for speaking with them. (R. 219). Assisting Flaherty with the interrogation was Detective Hamrick. (R. 220).

Prior to interrogating Mr. Johnson, Flaherty testified that they read Mr. Johnson his Miranda rights. Flaherty testified that they used a standard Miranda form and had Mr. Johnson memoralize his waiver. (R. 220). Flaherty stated that Mr. Johnson indicated that he could read, that he understood his rights, and that he understood he was being questioned about a homicide. (R. 221). Flaherty confirmed that the date on top of the Miranda waiver form was incorrect, listing February 20, 2001 instead of the correct date of February 21, 2001. (R. 222) (State Ex# 501).

Initially, Mr. Johnson spoke freely with authorities but there came a point where he indicated no longer wanted to talk with them. (R. 224). Flaherty asked

Mr. Johnson if he was sure that he no longer wanted to talk with them and Mr. Johnson indicated he was certain. (R. 224). After Mr. Johnson indicated he did not wish to speak with them, Flaherty testified that the officers did not ask any additional questions. (R. 225). Flaherty claimed, however, that Mr. Johnson continued to speak with them. (R. 225).

Shortly thereafter Mr. Johnson asked to have a cigarette and was permitted to go outside, away from any video or audio recording, to have a cigarette. (R. 226). Flaherty testified that during this smoke break there was no form of conversation between Mr. Johnson or any authorities. (R. 226). Following the break, they returned to the interrogation room where Flaherty testified that it was Mr. Johnson who continued the discussion with them. (R. 227). At some point Flaherty left the room and came back shortly thereafter to ask a few more questions to attempt to gain more information regarding the investigation. (R. 231). Flaherty did not hear Mr. Johnson request an attorney at any time. (R. 232).

As the evening went along Mr. Johnson was placed in handcuffs inside the interview room. (R. 232). At some point Flaherty recalled Mr. Johnson "tripped" while Detective Griffith was handcuffing him and fell to the floor. (R. 233). Flaherty did not contest that Mr. Johnson was in custody throughout the interrogation.

On cross examination Flaherty conceded that after Mr. Johnson stated he did

not want to talk anymore Flaherty still attempted to ask him again if "he was sure." (R. 234). It was then that Mr. Johnson asked again for a cigarette. Flaherty also confirmed that during this portion of the interrogation he stated to Mr. Johnson "my question to you is, I mean, you ended up killing, you know, I mean, help yourself." (R. 235). To which Mr. Johnson replied, "help myself? Can I smoke a cigarette?" (R. 235). Flaherty admitted that Mr. Johnson's reply denoted a sarcastic tone in which he was questioning Flaherty as to what he meant, and how he was going to help himself. (R. 237).

The taped interrogation was then played for the court's review. During the tape Flaherty is overheard speaking with Mr. Johnson about the crime and Johnson clearly attempts to break off communication:

> Flaherty: But my question is to you, what made you—I mean, what happened, Rich that you ended up killing her? You know, I mean, help yourself.
>
> Johnson: Help myself, huh? Can I smoke a cigarette?
>
> Flaherty: After we chat.

(R. 272).

During argument on the motion to surpress Stone stressed to the Court that it needed to consider the totality of the circumstances surrounding the interrogation and the confession. (R. 324). Stone noted that despite what the State had contended, Mr. Johnson was in fact in custody for the investigation of the homicide

rather than simply violation of probation. (R. 324). Stone noted that Flaherty even said as much to Mr. Johnson early on in the interrogation. (R. 324). Stone noted the intimidating nature of the interrogation and the fact that Mr. Johnson asked for a cigarette repeatedly and was denied one for some time. (R. 325). Stone also noted that the police told Mr. Johnson to "help yourself" and that while not a direct promise, it was indication that a statement from him would be beneficial to him at some later point in time. (R. 326). Stone further noted that the promise seeking to induce a confession need not be specific, merely the fact that there is some form of anticipation of receiving something in return is sufficient for purposes of the law.(R. 326).

From his review of the videotape, Stone noted that following Mr. Johnson's indication that the did not wish to speak anymore, Flaherty did not immediately disengage with him but instead did move an inch. He remains steadfast in his proximity to Mr. Johnson even after his desire to terminate the interrogation. (R. 327). That failure to disengage, the failure to step back and remove the specter of intimidation, Stone argued was sufficient to establish coercion. (R. 327).

The trial court denied the motion finding that Mr. Johnson waived his Miranda rights and that he was not induced by promises into continuing with the interrogation. At trial, the contents of Mr. Johnson's confession were played to the jury. The issue regarding the legality of Mr. Johnson's statement was not brought

before this Court on direct appeal.

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.

Mr. Johnson had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. *Strickland v. Washington*, 466 U.S. 668 (1984). "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The two-prong *Strickland* test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989). Appellate counsel's performance was deficient and Mr. Johnson was prejudiced because these deficiencies compromised the appellate process to such a degree as to undermine confidence in the correctness of the result of the direct appeal. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000).

Appellate counsel failed to present for review to this Court compelling issues concerning Mr. Johnson's rights under the Fifth, Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution. Counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Johnson involved "serious and substantial deficiencies." *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," *Barclay v. Wainwright*, 477 So. 2d 956, 959, (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." *Wilson*, 474 So. 2d 1162, 1165 (Fla. 1985).

In *Wilson v. Wainwright*, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Id. In Mr. Johnson's case appellate counsel failed to act as a "zealous advocate." Mr. Johnson, therefore, was deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise meritorious issues to this court, which, had they been raised, would have entitled him to relief.

This Court has established the criteria for proving a claim of ineffective assistance of appellate counsel:

> The criteria for proving ineffective assistance of appellate counsel parallels the *Strickland* standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Id. at 1163, citing *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases (ABA Guidelines). "Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003). Appellate counsel failed to raise such grounds. In light of the serious reversible error that appellate counsel failed to raise, there is more than a reasonable probability that the outcome of the appeal would have been different.

Here, Mr. Johnson was compelled to give a statement to the police after he terminated the confrontation with the police. Mr. Johnson plainly told Flaherty "I don't want to say no more." (R. 277). Instead of scrupulously honoring Mr. Johnson's request to terminate the interrogation, Flaherty asked "are you sure?" to

which Mr. Johnson responded emphatically "Yes." (R. 277). Once again, instead of scrupulously honoring Mr. Johnson's demand that questioning cease, Flaherty stated "if you're sure, that is your right." (R. 277). At that point Mr. Johnson only asked for the cigarette he was previously promised if he talked to the police. (R. 271). The police conduct here, rendered Mr. Johnson's confession involuntary and violated his Miranda rights. The trial court erred in failing to suppress the confession and appellate counsel was ineffective for failing to present this issue on direct appeal.

Relying on *Miranda,* the Unites States Supreme Court held that

> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ." The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."

Michigan v. Mosley, 423 U.S. 96, 103-04, 96 S. Ct. 321, 326, 46 L. Ed. 2d 313 (1975)(citations omitted). In *Mosley,* the Supreme Court held that the scrupulously

honoring a suspect's right to cut off questioning is established by the police immediately ceasing interrogation once the suspect invoked his right, by waiting to two hours to resume questioning, and giving fresh Miranda warnings. 423 U.S. at 104, 106.

Here, Mr. Johnson's desire to terminate questioning was immediately met with a plea to reconsider when Flaherty asked "are you sure?" (R. 277). Therefore, the police failed to immediately cease the interrogation. Furthermore, the police resumed questioning immediately by asking Mr. Johnson if he was sure he wanted to stop talking. When Mr. Johnson responded that he was sure, the police again failed to honor his invocation. After giving Mr. Johnson the promised cigarette the interrogation continued without fresh Miranda warning. Given that this issue was heavily litigated in the trail court, it was undoubtedly preserved for appellate review and counsel was ineffective for failing to raise this matter on direct appeal.

There was competent and substantial evidence that Mr. Johnson's Miranda rights were violated, that the police failed to scrupulously honor his termination of the interrogation and the police use of promises to induce him to continue being interrogated. Mr. Johnson was told he had to help himself by confessing, was promised a cigarette after he "chatted" with the police and when he emphatically declared he no longer wanted to speak to the police, they failed to honor this request and continued asking questions regarding the certainty of the invocation of

his rights. Given established law on this issue, this court would have been compelled to reverse Mr. Johnson's conviction and remand this matter with directions that his statement to the police be suppressed.

A new trial would be warranted because, given the record in its entirety, Mr. Johnson's confession cannot be said to have been harmless error. As this Court has noted,

> "[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. The focus is on the effect of the error on the trier of fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. 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.

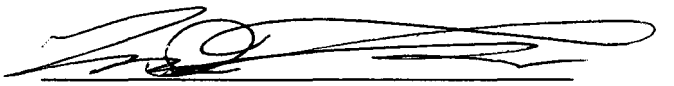
State v. DiGuillio, 491 So. 2d 1129 (Fla. 1986). Without the confession, the state's evidence would have relied almost exclusively on the self-serving testimony of co-defendant and state agent John Vitale. Vitale was acting as a state agent in an attempt to gather incriminating statements from Mr. Johnson. Additionally, Vitale had written a letter in which he admitted that he killed Ms. Hagin in a jealous rage and drugged Mr. Johnson so it would look like Mr. Johnson killed her. When the real possibility of the death penalty descended upon Vitale he changed his story entirely and began efforts with the state to implicate Mr. Johnson. Had appellate

counsel raised the issue of Mr. Johnson's confession, this court would have reversed Mr. Johnson's conviction and ordered the confession suppressed. Without Mr. Johnson's confession, the state's case become threadbare and the result on trial would have been different.

CONCLUSION

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

Respectfully Submitted,



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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 16th day of November, 2012.

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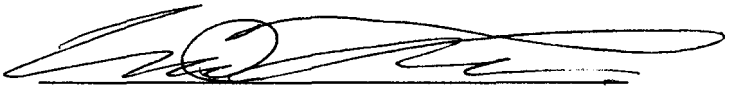
CERTIFICATE OF FONT

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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