**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. _____**

**LOWER TRIBUNAL NO. 97-13379**

---

**RAY LAMAR JOHNSTON,**
**Petitioner,**
**v.**
**WALTER MCNEIL,**
**Secretary,**
**Florida Department of Corrections,**
**Respondent,**
**and**
**BILL MCCOLLUM,**
**Attorney General,**
**Additional Respondent.**

---

# PETITION FOR WRIT OF HABEAS CORPUS

---

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33619-1136
(813) 740-3544

Counsel for Petitioner

## PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without costs." This petition for habeas corpus is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. This petition will show that Mr. Johnston was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.

References made to the record prepared in the direct appeal of Mr. Johnston's conviction and sentence are of the form, e.g., (Dir. ROA Vol. #, pg. 123). References to the record of the most recent postconviction record on appeal are of the form, e.g. (PC ROA Vol. #, pg. 123).

## REQUEST FOR ORAL ARGUMENT

Mr. Johnston has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Johnston.

## Table of Contents

**TABLE OF AUTHORITIES**

**Page**

## INTRODUCTION

On Mr. Johnston's direct appeal from the adjudication of guilt and the imposition of the death sentence, appellate counsel failed to raise and argue significant errors. Moreover, some of the issues raised on the direct appeal were ineffectively presented to this Court for appellate review.

Appellate counsel's failure to raise and argue certain issues and failure to effectively present other issues, was clearly deficient and actually prejudiced Mr. Johnston to the extent that the fairness and the correctness of the outcome of his case was undermined.

This petition also presents questions that were raised on direct appeal, but should be reheard under subsequent case law or legal argument to correct errors in the appellate process that denied Mr. Johnston fundamental constitutional rights. This petition will demonstrate that Mr. Johnston is entitled to habeas relief.

## PROCEDURAL HISTORY

Ray Lamar Johnston was tried and convicted for the first degree murder of Leanne Coryell in the year 1999 and was sentenced to death. Tracy Neshell Robinson, the jury foreperson who signed the verdict form finding Mr. Johnston guilty (*see* the signed verdict form at Dir. ROA Vol. V, pg. 753-754), did not deliberate at the penalty phase for several reasons. First of all, she was arrested on the eve of the penalty phase closing arguments for various drug and weapons charges, including possession of crack cocaine, possession of burning marijuana, possession of a firearm during the commission of a felony, and for an outstanding *capias* related to a prior criminal case issued January 13, 1999 (*see* the *capias* for juror Robinson at Dir. ROA Vol. V, 787). Because Tracy Robinson did not disclose *her own* prior criminal case when directly questioned during *voir dire*, and because it was not discovered until *after* her arrest mid-penalty phase that she had an active *capias* for her arrest at the time of *voir dire*, she was permitted to serve on the jury.

Had Ms. Robinson been forthcoming and disclosed her own prior arrest, it most likely would have been revealed that she had an active *capias* related to that prior criminal case, and she more than likely would not have been permitted to serve on the jury. Instead, after concealing material information

concerning her own arrest during *voir dire*, she served on the jury as the foreperson and signed the guilt phase verdict form. Then she was arrested for drug possession on the eve of the penalty phase closing arguments.

On direct appeal from the murder conviction and death sentence, this Court ruled that the issue of juror nondisclosure had not been specifically raised in the trial court, and stated that "[the] issue should be addressed in a rule 3.850 motion—not on direct appeal." *Johnston v. State*, 841 So. 2d 349, 357 (Fla. 2003). This Court noted that "Appellate counsel concede[d]" that this issue was not specifically raised in the trial court. *Id.* at 357. With that concession, this issue was not addressed by this Court on direct appeal.

This petition follows the denial of the Appellant's direct appeal (*see Johnston v. State*, 841 So. 2d 349 (Fla. 2002)) and an order denying his motion for postconviction relief (*see* PC ROA Vol. XVI, pg. 3102-3233, and PC ROA Vol. XVII, pg. 3234-3238). Mr. Johnston is concurrently filing an Initial Brief with this Petition.

**GROUNDS FOR HABEAS CORPUS**

This is Mr. Johnston's first petition for habeas corpus in this Court. Mr. Johnston asserts in this petition for writ of habeas corpus that his capital conviction and death sentence were obtained in the trial court and then affirmed by this Court

in violation of Mr. Johnston's rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

**JURISDICTION FOR PETITION AND HABEAS CORPUS RELIEF**

This is an original action under Fla. R. App. Proc. 9.100(a). *See*. Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. Proc. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Johnston's death sentence.

Jurisdiction for this petition lies with this Court because the fundamental constitutional errors raised occurred in a capital case in which this Court heard and denied Mr. Johnston's direct appeal. *see, e.g., Smith v. State*, 400 So.2d 956, 960 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Johnston to raise the claims presented herein. *See, e.g., Way v. Dugger*, 568 So.2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987).

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this petition, as this Court has done in the past. This petition pleads claims

involving fundamental constitutional error. *See Dallas v. Wainright*, 175 So. 2d 785 (Fla. 1984). This Court's exercise of its habeas corpus relief jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Johnston's claims.

**GROUND I**

**EXECUTION OF MENTALLY ILL INDIVIDUALS SUCH AS MR. JOHNSTON VIOLATES THE 8TH AND 14TH AMENDMENTS PROHIBITING CRUEL AND UNUSUAL PUNISHMENT. MR. JOHNSTON'S CURRENT DEATH SENTENCES, IMPOSED UPON A PROFOUNDLY MENTALLY ILL INDIVIDUAL CONSTITUTES ARBITRARY, CAPRICIOUS, CRUEL, AND UNUSUAL PUNISHMENT UNDER THE 8TH AND 14TH AMENDMENTS. THE LOWER COURT ERRED IN FAILING TO CONVERT MR. JOHNSTON'S DEATH SENTENCE TO A LIFE SENTENCE**

The United States Supreme Court in the new millennium has banned the execution of the mentally retarded and the execution of juveniles in the cases of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). Both cases cited to "evolving standards of decency" in today's society as the main factors justifying vacation of those death sentences. In light of the principles announced in *Atkins* and *Simmons*, and in light of the "evolving standards of decency" in today's society, this Court should vacate Mr. Johnston's death sentences. A watershed ruling in *Roper vs. Simmons* was handed down from the

United States Supreme Court since Ray Lamar Johnston was sentenced to death. This Court should reevaluate the mitigators in this case in light of a significant change in death penalty law, as well as the vast other mitigation that was presented at both the penalty phase and evidentiary hearing. This case is not the least of the mitigated of murder cases. Ray Lamar Johnston suffers from major mental disorders. In light of the *Atkins* and *Simmons* cases, and in light of Mr. Johnston's major mental disorders, this Court should reverse the death sentences now imposed.

The *Simmons* Court reaffirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. The Court outlined the similarities between its analysis of the constitutionality of executing juvenile offenders and the constitutionality of executing the mentally retarded. Prior to 2002, the Court had refused to categorically exempt mentally retarded persons from capital punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989). However, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that standards of decency had evolved in the 13 years since *Penry* and that a national consensus had formed against such executions, demonstrating that the execution of the mentally retarded is cruel and unusual punishment. *Atkins*, *Id.* at 307.

The majority opinion found significant that 30 states prohibit the juvenile death penalty, including 12 that have rejected the death penalty altogether. The Court counted the states with no death penalty, pointing out that "a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." In ruling that juvenile offenders cannot with reliability be classified as among the worst offenders, the *Simmons* Court found it significant that juveniles are vulnerable to influence, and susceptible to immature and irresponsible behavior. In light of juvenile's diminished culpability, neither retribution nor deterrence provides adequate justification for imposing the death penalty. Justice Kennedy, writing for the majority, said: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Simmons* at 571.

*Simmons* indicates that even eighteen-year-olds may not possess the adequate maturity level to have imposed upon them the ultimate penalty:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. . . . the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of

> the Eighth Amendment's prohibition of "cruel and unusual punishments." . . . The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. . . . As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. In 1930 an official committee recommended that the minimum age for execution be raised to 21. House of Commons Report from the Select Committee on Capital Punishment (1930), 193, p. 44. Parliament then enacted the Children and Young Person's Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence.

*Simmons* at 1197, 1198-1200. The evolving standards of decency in society prohibit the cruel and unusual execution of an individual who is severely emotionally disturbed.

The aggravating and mitigating circumstances in this case must be reweighed in light of *Simmons*, considering whether the instant case was, inter alia, the "least mitigated of the mitigated." *Stringer v. Black*, 503 U.S. 222, 229-232 (1992); *Williams v. Taylor*, 529 U.S. at 398 (2000) (faulting the lower court for "fail[ing] to evaluate the totality of the available mitigation evidence - - both that adduced at trial, and the evidence adduced in the habeas proceeding - -in reweighing it against the evidence in aggravation"). The lower court in the case at bar similarly and erroneously failed to consider Dr.

Cunningham's testimony concerning the diagnosis of ADHD.[1]

The rule announced in *Roper v. Simmons* alters the class of persons eligible for the death penalty and therefore applies retroactively. *Simmons* at 551 ("In holding that the death penalty cannot be imposed upon juvenile offenders, we ... [hold] that *Stanford* [*v. Kentucky*, 492 U.S. 361 (1989)] should no longer control in those few pending cases or in those yet to arise."). Given the overwhelming mitigation in this case, the imposition of the death penalty would violate the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment.

The Petitioner prays that the Court vacate the sentence of death in the case at bar in light of the "evolving standards of decency," reevaluate the vast mitigation in this case, impose a life sentence, grant a new penalty phase, or remand for the lower court to consider the diagnosis of ADHD and the other mitigation presented. The statutory and non-statutory mitigators related to mental illness and frontal lobe damage should be reevaluated in light of the vast mitigation in this case.

[1]Dr. Cunningham discussed Mr. Johnston's diagnosis of ADHD at PC ROA Vol. LIII, pg. 784-786.

Mr. Johnston's sentence of death violates the 8th and 14th Amendments prohibiting cruel and unusual punishment, as well as the arbitrary and capricious imposition of the ultimate penalty as applied. This Court should conduct a new proportionality analysis, convert Mr. Johnston's death sentence to a life sentence in light of the 8th and 14th Amendments, or in the alternative, grant a new penalty phase to allow Mr. Johnston to present evidence of his current physical and mental health, or grant other appropriate relief. Mr. Johnston asks this Court to perform a new proportionality analysis taking into account all of his mitigation including that which was developed and presented in postconviction, and asks that this Court vacate his death sentence.

## GROUND II

**APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE JUROR TRACY ROBINSON MISCONDUCT ISSUE AS FUNDAMENTAL ERROR, THUS VIOLATING THE PETITIONER'S 5TH, 6TH, 8TH AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.**

Although appellate counsel on direct appeal raised the issue of juror Tracy Robinson's deliberate failure to disclose her own criminal history during *voir dire*, counsel failed to raise this vital issue as fundamental error. Consequently, Mr. Johnston was not afforded relief from this unconstitutional conviction and death sentence because the error was held unpreserved.

As the concept of fundamental error was discussed by this Court in *Brown v. State*, 124 So. 2d 481, 484 (1960), fundamental error "reach[es] 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." This error *does* reach down into the validity of the trial itself, and as foreperson, juror Robinson was primarily responsible for the finding of guilt at trial. Juror Tracy Robinson deceived the lower court, she deceived the prosecution, and she deceived trial counsel under direct questioning in *voir dire*.

Juror Robinson became the foreperson of this jury, and actually signed off on the verdict form finding the Petitioner

guilty. That would not have been possible unless she in fact deceived the court. Presumably, juror Robinson would not have been permitted to serve on the jury if information was forthcoming that she herself had been arrested not less than a year prior to *voir dire*; and, she herself had a *capias* for her arrest in connection with that criminal case.

Had this information been forthcoming during *voir dire*, it would have been too risky to keep her on as a juror in this capital case; the notion of Tracy Robinson as foreperson of the jury would have been too risky for the lower court given her legal situation, too risky for the prosecution given her arrest record, and too risky for the defense given her possible fear of arrest and possible attempts to curry favor with the State. Juror Robinson duped everyone during *voir dire*; she was able to serve as foreperson, and was arrested yet again on crack cocaine, burning marijuana, and weapons charges on the eve of closing arguments in a death penalty case. Like the opportunistic jailhouse snitch who attempts to curry favor with the State by offering incriminating testimony at another defendant's trial to help his own case, there is a risk here that Tracy Robinson handed the State a guilty verdict in hopes that she would not be taken into custody for the situation and *capias* that she actively sought to conceal. As a first degree misdemeanor, the risk to a defendant is one year in jail. This

Court should not take the risk of affirming this conviction and death sentence penned by a risky, flighty, and deceiving juror who was perhaps high on crack cocaine at the time of trial.

This issue should have been decided in favor of the Petitioner on direct appeal, but due to the ineffective assistance of appellate counsel, it has been deferred until now. The Petitioner prays that this Court will grant him long-awaited relief.

The law in this area has a colorful and complex procedural history, but the law is crystal clear: "It is clear that nondisclosure along with partial or inaccurate disclosure is concealment in the *voir dire* process." *Roberts v. Tejada*, 814 So. 2d 334, 345-346 (Fla. 2002) which warrants a new trial. *Zequiera v. De La Rosa*, 659 So. 2d 239 (Fla. 1995) was good law for Mr. Johnston at the time of this trial, it was good law at the time of direct appeal, it is *still* good law, and the case law warrants immediate relief.

In the case of *Roberts v. Tejada*, 814 So. 2d 334, 342 (Fla. 2002), this Court vacated a decision from the Third DCA reinstating a verdict, wisely reasoning that "Lawyers representing clients in litigation are entitled to ask, and receive truthful and complete responses to, the relevant questions which they pose to prospective jurors." *Roberts* cites to another case from this Court, *Zequeira v. De La Rosa*, 659 So.

2d 239 (Fla. 1995) and reminds that "a juror's nondisclosure need not be intentional to constitute concealment." *Roberts* at 343. *Roberts* mentions the dissenting opinion from the Third DCA's opinion in *Zequiera* that was approved and adopted by the Florida Supreme Court, which opined that even if a juror did not intentionally mislead or conceal, the omission still prevented counsel from having all necessary information to make an informed choice during *voir dire*. In *Roberts*, this Court reversed *Tejada v. Roberts*, 760 So. 2d 960 (Fla. 3rd DCA 2000), a decision by the 3rd DCA that reinstated a jury verdict notwithstanding juror nondisclosure.

Procedurally, in *Roberts*, Ms. Roberts lost at trial in a wrongful death lawsuit against her husband's doctors, but was successful in her motion for new trial in circuit court due to juror nondisclosure of prior litigation history during *voir dire*. The Third DCA reversed the trial court's award of a new trial and reinstated the verdict. This Court reversed the Third DCA's decision in that case.

Not only did juror Robinson mislead and conceal her arrest record, but she misled and concealed information that could have led to her arrest in the courthouse at the time of serving on the jury. Juror Robinson had an active *capias* that stemmed from her own criminal case, and she failed to reveal this information when questioned directly in *voir dire*. Had all of this

information been revealed to the defense, they could have made a fully informed choice concerning whether to strike Ms. Robinson in light of her own criminal case and *capias*.

Presumably, juror Robinson was aware that she had failed to pay court costs on her own criminal case, and that she faced possible arrest. Absent amnesia, that is really the only possible explanation for her nondisclosure and concealment. Knowing that she would be jeopardizing her own freedom by answering truthfully in response to the State's questions, she gave the false impression that she herself had never been arrested. Defense counsel should have simply asked her a direct question (i.e. "Have *you* ever been arrested, Ms. Robinson?"; or rather, "Was your answer to the prosecutor's question complete, Ms. Robinson, was anyone else, and I hate to sound meddlesome, but, even yourself, ever accused?"). Then her history would have been revealed (if she told the truth) and she would have been taken into custody on the *capias* and not allowed to serve as forewoman on the jury. This is the same juror who was arrested for possessing crack cocaine and burning marijuana following the guilt phase portion of the trial. Trial counsel was ineffective for failing to question juror Robinson further in *voir dire*. Additionally, defense counsel was ineffective for failing to raise the specific issue of deliberate failure to disclose at the trial level.

This Court effectively referred this issue for postconviction. This Court stated as follows on direct appeal:

> 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. 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.

*Johnston v. State*, 841 So. 2d 349, 357 (Fla. 2003). Had appellate counsel raised this claim as fundamental error, any such concession would be rendered moot.

Given her unique precarious personal legal situation, Ms. Robinson could not have sat on the jury and deliberated objectively. Under active *capias* status, she assured the State she would not hold them to a higher burden of proof, and then she sat as foreperson and signed a verdict of guilty within one hour. Under *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998) and *Reese v. State*, 739 So. 2d 120 (Fla. 3rd DCA 1999), prejudice is "inherent" (*Lowrey, Id.* at 1368, and *Reese, Id.* at 121) when a juror who is under prosecution by the same state attorney's office serves on the jury. To exacerbate the juror misconduct and nondisclosure situation, shortly after the commencement of the penalty phase, juror Robinson was arrested on drug charges.

Relief is warranted here; this claim involving fundamental error should not have been procedurally barred on direct appeal; and the error should be cured by this Court immediately. By analogy, if a Florida Bar applicant concealed his own criminal record and failed to elaborate on his past arrests in the same fashion as juror Tracy Robinson, this Court would surely deny that applicant's admission to practice law in this State. This Court should affirm no lower court's decision allowing this verdict to stand signed by the deceiving juror Robinson. Just as an untruthful Florida Bar applicant might be less than forthcoming in his disclosures to avoid denial of his admission to practice law in this State, the deceptive juror Robinson may have misled the Court during *voir dire* to avoid arrest on the *capias.*

In the Petitioner's initial brief, he directs this Court's attention to a May 2007 Florida Bar Journal article entitled "The Burden of Truth – Have Florida Courts Gone Far Enough Addressing the Problem of Juror Misconduct." The Petitoner submits that the courts have *not* gone far enough. While the Petitioner's initial brief was being drafted, counsel noted that the Florida Bar Journal's feature article for its January 2010 publication is entitled: "Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers." The article is written by authors Ralph Artigliere, Jim Barton, and Bill Hahn. At page 10

of the publication, the authors cite to this Court's opinion in *Kelly v. The Community Hospital of the Palm Beaches, Inc.*, 818 So. 2d 469, 476 (Fla. 2002), and state, "The parties have a fundamental right to a proper jury, and juror misconduct invokes issues of fairness and due process." Justice Lewis, indeed, writing for this Court's majority in *Kelly, at 476*, spoke of "the ***fundamental right*** to a proper jury." (***emphasis added***). The opinion reads as follows, "It is difficult to envision a more egregious concealment and active misrepresentation than occurred here." *Id.* at 476. *This*, is *that* case. Death is different. And if juror concealment of material facts during *voir dire* entitles a civil litigant to a new trial seeking mere monetary damages, it certainly should entitle a capital defendant a new trial seeking to regain his life and liberty.

In the juror concealment case of *Massey v. State*, 760 So. 2d 956 (Fla. 2d DCA 2000), the Second District Court of Appeal ruled:

> A juror did not truthfully respond to a direct question on voir dire as to whether she had a personal involvement in the criminal justice system by failing to disclose that, less than four years before the trial, she had been charged with a felony, placed in Pretrial Diversion through the intervention of the State Attorney's Office which was prosecuting the instant case and later had the case dismissed after she successfully completed the program. When these facts became known to the defense after a guilty verdict and conviction, it moved for a new trial on this ground. Although the motion was denied, the prevailing law requires the determination that it

should have been granted.

*Massey* at 956. In the case at bar, juror Robinson actually pled *nolo contendre* to a criminal charge ***just six months*** prior to the Johnston trial; in *Massey*, the juror's ***four year old*** case was dismissed through successful PTI completion. In the case at bar, juror Robinson actually pled, failed to pay her court costs, and subsequently found herself on *capias* status at the time of *voir dire* due to the arrest. Then she was arrested on new drugs and weapons charges one day into the penalty phase. Just like she deceptively did in *voir dire*, during her arrest, once again, Tracy Robinson blamed her son's father as the culprit, even though her son's father was in jail at the same time a marijuana cigarette burned in her ashtray. The juror misconduct and concealment in the case at bar is much more egregious than in *Massey*, and warrants a new trial, or at the very least, a juror interview.

THIS COURT SHOULD PERMIT A JUROR INTERVIEW AT THE VERY LEAST

The lower court denied the Appellant's postconviction Motion for Juror Interview filed under the relatively new rule of Fla. R. Crim. Proc. 3.575 (*see* Motion at PC ROA Vol. III, pg. 504-506). The lower court did so verbally without a written court order. (*See* transcript at PC ROA Vol. XXXXVIII, pg. 387-391). The lower court stated during the hearing on that Motion, "You don't have to ask [juror Tracy Robinson] any questions

regarding that. The sole question is what her answers were, what the reality is from the conviction and why didn't defense counsel address that to the Court in his motion. All right. Based on the Supreme Court decision and what transpired at the trial level, I'm going to deny the motion to interview." PC ROA Vol. XXXVIII, pg. 387-388. In response, counsel for the Appellant stated:

> Just for the record, []as far as Mr. Johnston's due process rights are concerned, it's our position that those issues with regards to whether this juror deliberately failed to disclose this—this arrest, this conviction, we cannot effectively pursue this claim, that issue, unless we have a juror [] interview and other states allow juror interviews. And number two, whether this woman was on drugs or whether she was in her right mind to be the foreperson of this jury and sit [and] deliberate the guilt[] of Ray Lamar Johnston. We cannot know whether she was on drugs [without a juror interview].

PC ROA Vol. XXXVIII, pg. 388-399.

The Appellant urges this Court to revisit this issue, consider the position of the Florida Bar Journal article cited above, and adopt the position taken by Justice Pariente in her dissent in this case. *See Johnston v. State*, 841 So. 2d 349, 361 (2003), wherein the following dissent was made by Justice Pariente:

> I would [] remand this case for [] a juror interview to determine whether juror Robinson was using drugs during the guilt-phase portion of the trial. Juror Robinson was the *forewoman of the jury*. Robinson was arrested for possession of crack cocaine, marijuana and a loaded firearm on the evening of the first day

> of the penalty phase. . . .[T]he proximity in time and nature of the arrest in relation to the guilt phase amount to more than mere speculation or conjecture as to whether Robinson abused drugs during trial.
> . . . .[U]se of crack cocaine by a juror during trial would be an overt act subject to judicial inquiry[.]
>
> . . . .It is troubling that we are affirming this death case without obtaining an answer to the question of whether the forewoman of the jury used crack cocaine during the trial and in deliberations. . . .I would remand for a jury interview . . . .the circumstances of this case demand this action at a minimum.

*Johnston, Id.* at 361.

The Appellant submits that it is unfair and unreasonable to deny a juror interview here. The majority stated on direct appeal: "Johnston is not entitled to relief because his request for an interview is based on mere speculation." *Johnston, Id.* at 357. Without a juror interview, all that is really available to the Appellant at this point is speculation. To deny this claim and motion in this fashion is analogous to denying a defendant relief for failure to present any evidence of ineffective assistance of counsel, while at the same time denying the opportunity to present such evidence at an evidentiary hearing.

There *is* record evidence here that juror Robinson was arrested mid-trial for drugs and weapons charges. (Dir. ROA Vol. XVIII at 1687. It would be reasonable to assume that she was using drugs at the time of trial. There is also evidence

that she had a *capias* for her arrest on an unrelated charge at the time. And there is evidence that she failed to disclose that arrest during *voir dire*. At the very least, a juror interview is warranted under these circumstances in this death penalty case.

**GROUND III**

**THE INTRODUCTION OF RAY LAMAR JOHNSTON'S STATEMENTS TO LAW ENFORCEMENT AT TRIAL VIOLATED HIS RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS UNDER THE UNITED STATES CONSTITUTION AS WELL AS MIRANDA and POWELL**

At trial, as a predicate to the admission of statements made to law enforcement during a custodial interrogation, the state must show that a suspect was advised of his right to an attorney *during* questioning. See *Powell v. State*, 998 So. 2d 531 (Fla. 2008). *Powell* is not new law. *Powell* is clarification of the law that was well-established in *Miranda v. Arizona*, 384 U.S. 436 (1966).

In the case at bar, not only did law enforcement fail to advise the Petitioner of his *Miranda* rights until 30 minutes into the interrogation, but additionally, when they finally advised him of *Miranda*, the trial testimony fails to indicate that the Petitioner was advised of his *full Miranda* rights, more specifically: the right the presence of an attorney ***during*** questioning.

The trial testimony from Detective Ernest Walters regarding

the interrogation proceeded as follows:

ANSWER: When Mr. Johnston advised me that he, in fact, was the one that had took money from the ATM card belonging to Ms. Coryell, at that point he was placed under arrest for two counts of grand theft and advised of his rights.
QUESTION: How was he advised of his rights?
ANSWER: Detective Iverson read the form verbatim from the Hillsborough County Sheriff's Office consent form.
QUESTION: I'm handing you what's been previously marked as States exhibit No. 1. Would that be a copy of the form that was utilized that evening?
ANSWER: Yes, it is.. . . .
QUESTION: Okay. And did Mr. Johnston initial the block that said, 'I do hereby consent to be interviewed by the below listed Hillsborough County Sheriff's Office law enforcement official concerning the above-listed offense. And I further understand' – did he initial that block?
ANSWER: Yes.
QUESTION: And the first right he was given, 'I have a right to remain silent, and I can invoke this right at any time during questioning—'
ANSWER: Yes.
QUESTION: --Did Mr. Johnston indicate he understood that right?
ANSWER: Yes.
QUESTION: Was he read the next right, 'If I do make a statement, it can and will be used against me in a court of law.'
ANSWER: Yes.
QUESTION: Did Mr. Johnston indicate he understood that statement?
ANSWER: Yes, he did.
QUESTION: Was he next given, 'I have the right to the presence of an attorney before any questioning?'
ANSWER: Yes.
QUESTION: Did he indicate to you he understood that right?
ANSWER: Yes, he did.
QUESTION: Was he next given, 'If I cannot afford an attorney one will be appointed to me without charge before questioning, if that is my desire?'
ANSWER: Yes.
QUESTION: Did he indicate he understood that right?
ANSWER: Yes, he did.

> QUESTION: Did he indicate he wanted an attorney?
> ANSWER: No.
> QUESTION: And was he next given, 'If I wish to make a statement, I may invoke my right to an attorney or remain silent at any time during questioning?'
> ANSWER: Yes.
> QUESTION: Was he given—did he understand that right?
> ANSWER: Yes he did.
> QUESTION: Did he agree to go ahead and speak with you?
> ANSWER: Yes, he did.
> QUESTION: Was he finally given, 'I understand these rights. No one has threatened, coerced, or promised me anything in order to induce me to make a statement. I presently wish to make a statement and/or answer these questions without an attorney being present?
> ANSWER: Yes.. . . .
> QUESTION: Before you began to speak to him? After he was given his rights, what occurred?
> ANSWER: We reviewed the statements that he had just given and we reiterated the same information. And at that point Detective Iverson and myself started to bring up inconsistencies. . ."

Vol. IX R 562-566.

In the above description of what occurred at the police station, it is clear that law enforcement violated the Petitioner's constitutional rights at least twice. Initially, law enforcement was wrong for failing to provide a *Miranda* rights advisement up front. Just because they were not bringing up inconsistencies in his statements during the first 30 minutes of the interrogation, this did not absolve them of their duty to provide a *Miranda* rights advisory. Furthermore, from the testimony above, there is a failure to mention a clear advisory of the Petitioner's right to court-appointed counsel ***during*** questioning. Appellate counsel should have raised this issue

notwithstanding the lack of objections based on a lack of predicate for *Miranda*.

At "ROA Exhibits, Vol. I of IV, pg. 2," the Petitioner will concede that the rights form *does* indeed include an advisory of "the right to the presence of an attorney during questioning." *But*, this right is dangerously misplaced as *Miranda* right #3 on the form, coming confusingly *before Miranda* right #4 advising the following: "if [he] cannot afford an attorney, one [could] be appointed to [him] without charge ***before any questioning***." (***emphasis added to "before any questioning"***). As such, the form used in this case is constitutionally-flawed in that carries the risk of misleading an indigent suspect to believe that the only way they could have counsel present during questioning is if they pay for the attorney himself. And, this would not be such an unreasonable, erroneous conclusion on the part of the indigent suspect. What indigent suspect would think that they could have the right to summon an assistant public defender out of bed in the middle of the night to attend a lengthy, multiple-hour interrogation? It would make sense for the indigent suspect to erroneously conclude from HCSO's consent form in this case that, "OK, I can either pay for attorney and have him actually attend the interrogation, or, a court-appointed attorney can speak to me only before the interrogation."

Under *Miranda* and *Powell* and this Court's inherent habeas

powers, relief should be granted.

## CONCLUSION

This Court should grant all relief requested in this petition for the reasons stated above. Moreover, this Court should grant any other relief that allows this Court to do justice.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by hand delivery to all counsel of record on this 19th day of January, 2009.

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive,
Suite 210
Tampa, Florida 33619-1136
813-740-3544

Copies furnished to:

Katherine Blanco
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, FL 33607-7910

Ray Lamar Johnston
DOC# 927422; G-2215
Florida State Prison
7819 NW 228th Street
Raiford, Florida 32026

**CERTIFICATE OF COMPLIANCE**

I hereby certify that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS was generated in a courier new 12 point font, pursuant to Fla. R. App. P. 9.210.

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive,
Suite 210 Tampa,
Florida 33619-1136
813-740-3544