

**IN THE SUPREME COURT
STATE OF FLORIDA**

CASE NUMBER SC19-211

HECTOR SANCHEZ-TORRES

Appellant,


v.

STATE OF FLORIDA

Appellee.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF CASE AND FACTS

Summary of Alleged Offense and Circuit Court Case

In its decision in *Sanchez-Torres v. State*, 130 So.3d 661 (Fla. 2013), this Court outlined the following facts and procedural history in its ruling on the direct appeal:

“On the evening of September 9, 2008, Erick Joel Colon had been at a friend's house playing board games and left at 11 p.m. to walk home. He had his cell phone with him at the time, as well as a wallet with cash in it.

Colon's body was discovered lying on the sidewalk close to his home in the early morning hours of September 10, at 1:30 a.m. The area was very dark. When Colon's body was discovered, his wallet and cell phone were missing.

Colon had been shot once in the head, but had no other injuries. The medical examiner testified that the characteristics of the gunshot wound indicated that the muzzle of the gun was in direct contact with, and pressed hard against, the skin. The entrance wound was just below the left eye, and the exit wound was on the right back side of the head.

On September 30, 2008, Colon's mother testified that she received a phone call from her son's number. When she answered, a young Hispanic woman was on the other end. Colon's mother began crying and told the caller that the cell phone belonged to her murdered son. The caller hung up.

Sanchez–Torres's younger sister, who was fifteen years old at the time of the crime, testified during the penalty phase that she had discovered the cell phone and recognized that it was not one of her brother's cell phones. She found a contact listing for “mom” and called it. A woman answered. She was crying and explained that the cell phone belonged to her murdered son. Sanchez–Torres's sister then hung up and called her mother, who told her to turn off the phone and wait for her to come home. Sanchez–Torres's sister also called Markeil Thomas, the codefendant in this case and Sanchez–Torres's good friend and roommate, who told her to turn off the phone and pull

out the battery, which she did. She gave the phone to Thomas, and her mother got it from him.

Detective Sharman with the Clay County Sheriff's Office spoke with Sanchez–Torres's mother, Maria Torres, on October 1, 2008. Torres stated that she had found the phone and that her daughter had used the phone to call someone who said the phone belonged to her son. Torres stated that she had taken the phone from her daughter and had thrown it in the trash. At some point later, Torres told law enforcement that she had given the cell phone to someone who had destroyed it. The Clay County Sheriff's Office was then able to locate pieces of the phone.

On October 2, Detective Sharman visited Sanchez–Torres in the Duval County Jail to question him about the phone. Sanchez–Torres stated that Thomas had bought the phone from an acquaintance known as “D.” When informed that the phone belonged to a murder victim, Sanchez–Torres denied having anything to do with the murder. The Clay County Sheriff's Office was able to identify and locate “D,” who denied ever selling or giving Sanchez–Torres or Thomas a phone.

Detective West, also with the Clay County Sheriff's Office, testified that he spoke with Torres on March 5, 2009, when he interviewed her at her home. When he met with her, he informed her that he had drafted an arrest warrant for her for tampering with the cell phone and showed her an unsigned arrest warrant. Torres testified that the next day, she told Sanchez–Torres about what happened, and he told her to contact the detectives and tell them to come see him.

After Detective West received a phone call from Torres, in which she stated that Sanchez–Torres wanted to speak to him, Detective West proceeded to the Duval County Jail to interview Sanchez–Torres. During the initial part of the interview, Sanchez–Torres stated that Thomas had shot the victim and drew a diagram of the scene and the body to describe what happened. Detective West left the room, and Sanchez–Torres wrote out a three-page handwritten statement, in which he stated that he, and not Thomas, had shot the victim. Detective West returned to the room and took Sanchez–Torres to a different location in order to conduct a videotaped interview. Sanchez–Torres then told Detective West again that Thomas was the shooter.

The State also presented evidence regarding Sanchez–Torres's prior violent felony, which was a murder that took place in Duval County on July 20 or 21, 2008, less than two months before the

murder in this case. Sanchez–Torres had confessed to shooting the victim in the Duval County murder, stating that he shot the victim because the victim had repeatedly threatened to kill his then-pregnant girlfriend. Sanchez–Torres was tried and found guilty of first-degree murder in the Duval County case and was sentenced to life in prison in December 2009.

Finally, the State presented a victim impact statement from the victim's mother. Presentation of defense witnesses was postponed until after the completion of codefendant Thomas's trial, at which the same judge presided. Pursuant to his guilty plea in this case, Sanchez–Torres was required to testify during Thomas's trial.

The penalty-phase proceedings then continued in Sanchez–Torres's case. Sanchez–Torres presented mitigation evidence in the form of testimony from numerous witnesses consisting of his family, friends, friends of the family, former teachers and coaches, and supervisors and fellow employees at the dog track where he worked. They universally described Sanchez–Torres as a respectful, polite, good, kind, loving, caring, and giving person, who was also a “clown” and a “goofball.” Specifically, they described him as family-oriented; bright and intelligent; someone who was always quick to help in any way, including helping people financially, assisting others with moving, volunteering, providing transportation to others, and being there if someone needed to talk; someone who got along with others and made friends everywhere he went; and someone who loved animals. Several individuals testified that Sanchez–Torres believes in God and attended church on a regular basis as part of the youth group. Witnesses also testified that Sanchez–Torres was a civic-minded individual who volunteered often at Hispanic heritage events.

Growing up, Sanchez–Torres played baseball. He was a very good baseball player and made the all-star team. He got along well with the other players and the coaches and was a team player. One of Sanchez–Torres's dreams was to play professional baseball.

A former high school teacher testified that Sanchez–Torres would meet her early in the morning so that he could study or do homework in her room in the mornings while she got ready for the day. He was a good student, and his grades improved while he was in her class. He tried out for the baseball team, but was “crushed” when he did not make the team.

When Sanchez–Torres was fifteen years old, his parents got divorced based on problems caused by his father's gambling and drug

and alcohol abuse problems, which his parents had kept from him. His mother testified that Sanchez–Torres was angry about the divorce. After the divorce, Sanchez–Torres's father moved to Connecticut. Sanchez–Torres then moved to Connecticut to be with his father, but only stayed for a short period of time upon discovering his father's gambling and drug abuse problems and after being disappointed that his father did not spend time with him. Sanchez–Torres then moved back to Jacksonville to live with his mother and younger sister.

Shortly thereafter, when Sanchez–Torres was sixteen years old, his father died as a result of problems caused by the alcohol and drug abuse. Sanchez–Torres's mother testified that Sanchez–Torres was “devastated” by his father's death. One of Sanchez–Torres's aunts testified that Sanchez–Torres's father's death was “very hard for him.” Sanchez–Torres did not pass the FCAT and therefore was unable to graduate from high school,² which was stressful to him.

Sanchez–Torres started working at the dog track when he was in high school and was still employed there the day of the murders. His fellow employees and his supervisors at the dog track universally described him as a good employee who took his work seriously and was quickly promoted because he was respectful, professional, and had no issues with attendance. He came in on his days off if someone called in sick and supervised eight other employees. He was known as a reliable employee and someone people could count on. He also frequently gave other employees rides to work.

Sanchez–Torres's girlfriend became pregnant, and his mother testified that Sanchez–Torres was very happy and excited about being a father. However, Sanchez–Torres's high school teacher testified that he had “mixed feelings” because being a parent was also a lot of responsibility. His girlfriend gave birth shortly before the murder in this case.

Several individuals testified that Sanchez–Torres would give or lend them money. He worked overtime at the dog track because he was trying to help his mother with the rent, as well as make payments on his new car that he had bought. He also felt that because he was going to be a father, he needed to make more money. About a month before the murder in this case, Sanchez–Torres moved out of his mother's apartment into an apartment downstairs with the codefendant, Thomas.

Sanchez–Torres also presented testimony from his former counsel in this case, who had represented him for a short period of

time. She testified that Sanchez–Torres was a “model client” who was always pleasant, personable, and cooperative. She suggested that Sanchez–Torres take a polygraph test, and Sanchez–Torres submitted to a polygraph examination without hesitation.

Sanchez–Torres also presented testimony from the polygrapher who conducted his polygraph examination. The polygrapher asked Sanchez–Torres whether he had shot the victim, to which Sanchez–Torres answered that he did not. Sanchez–Torres passed the polygraph test with a score that was “very, very good.”

Finally, Sanchez–Torres read a statement in which he apologized to the victim's family, stating that he could not “apologize enough” and that he was taking responsibility, but denied that he killed the victim, stating that it was not supposed to “go down the way it did.”

Following the penalty-phase proceedings, the trial court found the following aggravating circumstances: (1) Sanchez–Torres had been convicted of a prior violent felony; and (2) the murder was committed during the course of a robbery (merged with pecuniary gain). The trial court gave both aggravators great weight. The trial court found that the cold, calculated, and premeditated aggravator was not established beyond a reasonable doubt because “it is not unreasonable to infer that evidence presented during the sentencing proceedings could suggest that the fatal gunshot was the result of an accidental discharge of the gun.”

The trial court then addressed the proposed statutory mitigating circumstance of age. However, the trial court stated that it “decline[d] to assign significant weight to this mitigator.” The trial court found the statutory mitigator that Sanchez–Torres was an accomplice and that his participation was relatively minor did not apply, because “whether or not [Sanchez–Torres] was the person who fired the fatal shot that killed Eric Joel Colon, his participation was not minor” and, further, the court “was presented with competent evidence that [Sanchez–Torres] may have in fact been the individual who pulled the trigger.”

The trial court found twenty-two nonstatutory mitigators: (1) Sanchez–Torres can have a positive impact on his family and friends, who continue to love and support him (slight weight); (2) Sanchez–Torres was a peaceful child and enjoyed spending time with his family (slight weight); (3) Sanchez–Torres was a good athlete and a baseball player (slight weight); (4) Sanchez–Torres's father had a

gambling problem and was addicted to drugs and alcohol (slight weight); (5) Sanchez–Torres's parents were divorced when he was twelve years old (slight weight); (6) Sanchez–Torres moved away from his mother and sister when he was fifteen to live with his father in Connecticut (slight weight); (7) Sanchez–Torres lived in a bad neighborhood while in Connecticut and received little supervision from his father (slight weight); (8) Sanchez–Torres's father died from complications of alcohol and drug abuse and Sanchez–Torres was very emotional at his father's funeral (slight weight); (9) Sanchez–Torres was a good brother to his siblings (little weight); (10) Sanchez–Torres was outgoing and was considered to be the “clown” of his family (some weight); (11) Sanchez–Torres was kind and respectful to his family, friends, and coworkers (some weight); (12) Sanchez–Torres had difficulty in school (slight weight); (13) Sanchez–Torres was a reliable employee, with a consistent work record from a young age (the trial court found this mitigator but failed to specify the weight given); (14) Sanchez–Torres did charitable deeds, volunteered for several organizations, and was helpful to others (slight weight); (15) Sanchez–Torres loves his child and desires to be a supportive father during imprisonment (slight weight); (16) Sanchez–Torres loves animals (slight weight); (17) Sanchez–Torres took responsibility for his crimes by confessing to police (little weight); (18) Sanchez–Torres has expressed remorse for his conduct (slight weight); (19) Sanchez–Torres has been a good inmate while incarcerated and is capable of adapting well to long-term incarceration (slight weight); (20) Sanchez–Torres exhibited appropriate conduct throughout the proceedings and was polite, cooperative, and respectful to his attorneys and legal staff during his criminal cases (slight weight); (21) Sanchez–Torres believes in God and joined a church on his own (slight weight); and (22) society can be protected by life sentences without parole (some weight).

After considering and weighing the aggravating and mitigating circumstances, the trial court determined that the aggravating circumstances outweighed the mitigating circumstances and sentenced Sanchez–Torres to death.”

Id. at 664-668

Summary of Direct Appeal

On direct appeal, this Court denied relief to Mr. Sanchez-Torres. See *Sanchez-Torres v. State*, 130 So.3d 661 (Fla. 2013). The court found his plea was knowing, free and voluntary. The court found there was no error in excluding the fact the Defendant passed a polygraph with regard to whether he was the shooter and further ruled that even if there was error it was harmless. Third, the court ruled there was no error in failing to give great weight to the age mitigator. Finally, the court ruled the death sentence was proportional.

Summary of 3.851 Motion and Litigation

a) Attorney History

The previous counsel tasked with representing Mr. Sanchez-Torres was Francis Jerome Shea. Mr. Shea replaced attorney Gonzalo Andux who withdrew after filing a 3.851 motion on the Defendant's behalf. *See, Exhibit A to Motion to Remand to Circuit Court filed April 23, 2019*. He apparently begged off the case because of a conflict that appears to be the result of his talking to the co-defendant. The co-defendant implicated himself as the actual killer to Mr. Andux and then recanted his story, ostensibly necessitating Mr. Andux' withdrawal as counsel. The problem of course being that Mr. Andux should not have put himself in the position of being a fact witness on an issue of this importance. After Mr. Andux was released from representation, attorney William Charles Fletcher filed a notice

of appearance on behalf of Mr. Sanchez-Torres. The State moved to strike his notice of appearance, arguing it did not include proof he had the proper certifications to handle a capital post-conviction case. *See, Exhibit B to Motion to Remand to Circuit Court filed April 23, 2019.* Significantly, the State argued:

“Without this information, this Court cannot ensure that the statutes and rules of court are being complied with. This Court also has a statutory obligation to ensure quality representation in postconviction proceedings. Section 27.711(12), Fla. Stat. (2017). And [sic] this Court cannot comply with that statutory obligation, [sic] unless notice of appearances in capital cases contain all this information.”

Id. The State in that motion acknowledges the necessity of assuring qualified individuals handle post-conviction capital cases.¹ Mr. Fletcher’s involvement in the case appears to have ceased after the State’s motion to strike was filed.

Mr. Shea was appointed to represent Mr. Sanchez-Torres because he was listed as a “registry counsel” with the Judicial Administrative Commission. Circuit Judge John H. Skinner found Mr. Shea was qualified to handle death penalty cases. *See, Exhibit C to Motion to Remand to Circuit Court filed April 23, 2019.* There is no reference in Judge Skinner’s order to the requirements of *Section 27.704*,

¹ The State has been aggressive in monitoring when attorneys are allowed to represent death row inmates in post-conviction cases. This is not a criticism. The undersigned views it as an effort to insure quality representation of death row inmates. In fact, the undersigned’s ability to represent another death row inmate, Donald Lee Bradley, was challenged in *Bradley v. Florida*, 3:10-cv-1078-TJC-JRK. The State’s motion was denied.

Florida Statutes or *Fla. R. Crim. P. 3.112*. Mr. Shea is not Florida Board Certified in criminal trial or criminal appellate law.

Registration and approval to act as a “registry counsel” requires the attorney certify “they meet the minimum requirements of s. 27.704(2), who are available for appointment by the court under this section to represent persons convicted and sentenced to death in this state in postconviction collateral proceedings, and who have attended within the last year a continuing legal education program of at least 10 hours’ duration devoted specifically to the defense of capital cases, if available.”

Fla. R. Crim. P. 3.112(k) states

“(k) Qualifications of Lead Counsel in Capital Postconviction Proceedings. In order to serve as lead counsel, as set forth in rule 3.851, for the defendant in a capital postconviction proceeding, an attorney shall have:

- (1) been a member of any bar for at least 5 years; and
- (2) at least 3 years of experience in the field of postconviction litigation; and
- (3) prior participation in a combined total of 5 proceedings in any of the following areas, at least 2 of which shall be from subdivision (k)(3)(C), (k)(3)(D), or (k)(3)(E) below:
 - (A) capital trials;
 - (B) capital sentencings;
 - (C) capital postconviction evidentiary hearings;
 - (D) capital collateral postconviction appeals;
 - (E) capital federal habeas proceedings.”

Mr. Shea did not in fact meet the requirements of 3.112. Yet he continued to represent Mr. Sanchez Torres throughout the rest of the circuit court proceedings.

Billy Nolas, who at the time was running the Federal Public Defender's Capital Habeas Unit in Tallahassee² sat with Mr. Shea during the hearing on Mr. Sanchez-Torres but apparently didn't speak. More importantly, he obviously did not look at Mr. Shea's underlying qualifications to handle this case.

After the post-conviction relief motion was denied by the circuit court, Mr. Shea filed a notice of appeal with the First District Court of Appeal. *Exhibit D to Motion to Remand to Circuit Court filed April 23, 2019*. The next day he filed a notice of appeal with this Court. *Exhibit E to Motion to Remand to Circuit Court filed April 23, 2019*.

Following this, the Office of Attorney General filed a motion to remove Mr. Shea from further participation in the case. *Exhibit F to Motion to Remand to Circuit Court filed April 23, 2019*. They noted Mr. Shea did not appear to meet the requirements of Fla. R. Crim. P. 3.112 and filed no certification he met those requirements or those of Chapter 27. The State noted their review of this Court's website showed there was no evidence of Mr. Shea having been involved in capital direct appeals, post-conviction appellate litigation or any complex criminal appeals in the First District Court or this Court. The State did not represent to the court

² Mr. Nolas apparently no longer runs the CHU in Tallahassee because of alleged financial improprieties.

when they first decided to investigate Mr. Shea's qualifications (i.e. they do not indicate if they've known this all along).

In response, Mr. Shea filed a "motion to strike" the state's motion to remove him from the case. *Exhibit G to Motion to Remand to Circuit Court filed April 23, 2019*. In his defense, Mr. Shea asserted he had met the post-conviction evidentiary hearing requirement under 3.112(k) by representing Leo Kaczmar on a resentencing in Clay County. Mr. Shea was of the belief that a resentencing constituted a post-conviction proceeding akin to a 3.851 proceeding rather than a part of the original trial/sentencing process. *Id.*

Shea further asserted his representation of Michael Shellito on a resentencing in his case following this Court's order in *Shellito v. State*, 121 So.3d 445 (Fla. 2013) was probative of his experience handling post-conviction capital litigation. Again, the flaw in equating a resentencing with post-conviction representation should be obvious, but wasn't. *Id.*

Shea also listed under the heading "post-conviction appeals" the fact he represented Gary Eugene Doughton as "lead counsel under case number "2009-CF-1873." First of all, a "CF" case number is not reflective of an appeal in Florida. Rather, it indicates a felony case. Second, 2009-CF-1873 is not a case number assigned to Mr. Doughton. Third, there is a case number assigned to Mr. Doughton, 2005-CF-1873. It is a sexual battery case, not a capital murder case.

Fourth, a review of the First DCA website shows what appears to be a post-conviction **pro-se** case filed by Mr. Doughton, not Mr. Shea. Thus it is not clear what post-conviction work Mr. Shea was lead counsel on but in any event it is not relevant to his ability to handle a post-conviction capital case.

The State filed a response to Mr. Shea's motion to strike pointing out many of the flaws in Mr. Shea's position described above. *Exhibit H to Motion to Remand to Circuit Court filed April 23, 2019* .

Eventually, without ever conceding his lack of qualifications, Mr. Shea filed a motion to withdraw, asserting he had "completed his post-conviction trial representation and had filed his notice of appeal with the Florida Supreme Court." *Exhibit I*. The Florida Rules of Criminal Procedure do not separate post-conviction litigation between "trial" (Mr. Shea's term) and appeal. Mr. Shea seems to be confusing the requirements of Fla. R. App. P. 9.140(d) with post-conviction proceedings and appeals. Mr. Shea's motion, which was granted, can be construed as either a face saving measure, another example of Mr. Shea's lack of knowledge of post-conviction procedures – or more likely both.

In short, Mr. Shea, Mr. Nolas, the State Attorney's Office, the Attorney General's Office and Judge Skinner knew or should have known Mr. Shea lacked the qualifications to handle post-conviction capital litigation. He was nonetheless allowed to proceed with representation. All of these members of the Florida Bar

are charged with a specialized knowledge of post-conviction capital litigation and either knew or should have known (with a minimum of due diligence) Mr. Shea was unqualified to represent Mr. Sanchez-Torres. Moreover, the Judicial Administration Commission is tasked with monitoring the qualifications of post-conviction capital counsel. The JAC failed to recognize Mr. Shea's lack of qualifications and represented him to the public in general and the legal community in particular Shea was qualified to represent death row inmates in all post-conviction proceedings.³

In terms of a preliminary review of the post-conviction litigation in this case, it appears entirely possible that Mr. Sanchez-Torres' ability to file for federal habeas relief may have been forfeited based on the sequence of events surrounding the filing of the original motion (just short of the one year deadline) and a successful motion to strike filed by the State. U.S. Supreme Court review of his direct appeal was denied on February 24, 2014. A 3.851 motion was filed on February 13, 2015, seemingly leaving eleven (11) days of time left to file for federal habeas relief. But due to a formatting failure (apparently sections were titled using Hindu-Arabic numbers instead of Roman numerals), a motion to strike

³ The time may have come to reconcile the JAC's monitoring of Chapter 27 compliance with their lack of monitoring 3.112 compliance. The systemic failure here demonstrates the uselessness of seeking compliance with one and ignoring the other.

was filed by the State and granted by the trial court, but with leave to amend. The amended version was filed after the federal deadline, so if it comes to it, the only pathway to federal habeas relief would be through some sort of equitable tolling, which is, as this Court is perhaps aware, an exacting standard. *See, e.g., Holland v. Florida*, 560 U.S. 631 (2010). Whatever relief Mr. Sanchez-Torres would have been entitled to may have been artificially limited by errors that are no fault of his own.

b) The 3.851 Motion

The final iteration of the motion for post-conviction relief alleged the following issues. First, the Defendant alleged “ineffective assistance of counsel for failing to investigate, develop, and prepare witnesses to expand and establish non-statutory mitigating circumstances during the penalty phase. See ROA at 1074-1075 (as identified by trial court). Second, the Defendant alleged “ineffective assistance of counsel for failing to investigate, develop, and solicit testimony from a mental health expert during the penalty phase to prove non-statutory and statutory mitigating circumstances (specifically Dr. Krop and/or Dr. Bloomfield). *Id.* Third, the Defendant alleged “ineffective assistance of counsel for failing to request a separate hearing for the penalty phase and the *Spencer*⁴ hearing. *Id.* Fourth, the Defendant alleged “ineffective assistance of counsel for failing to file a

⁴ *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

motion for continuance of the trial pursuant to Fla. R. Crim. P. 3.190(f). Id. Fifth, the Defendant alleged “ineffective assistance of counsel for failing to file a motion to suppress the Defendant’s written and oral statements pursuant to Fla. R. Crim. P. 3.190(h) because the Defendant’s statements were not freely and voluntarily made as a result of coercive and intimidating tactics by law enforcement.” Id. Sixth, the Defendant alleged “ineffective assistance of counsel for failing to advise Defendant of his constitutional rights and the nature of the charges against him and for displaying a lack of preparation which resulted in Defendant not entering a knowing, intelligent and voluntary plea.”⁵ Id. Seventh, the Defendant alleged “newly discovered evidence based on Hurst v. Florida and request for life sentence of new penalty phase.” Id. Eighth, the Defendant alleged “newly discovered evidence based on recent testimony by co-defendant, Markeil Thomas, that the Defendant was not the shooter and not involved in the robbery or murder.” Id. Ninth, the Defendant alleged “the Defendant’s death sentence is unconstitutional under the Sixth and Eighth Amendments in light of Hurst v. Florida and Hurst v. State.” Id. Tenth, the Defendant alleged “cumulative error in counsel’s performance in the guilty [sic] and penalty phase.” Id. Eleventh, the Defendant alleged “Defendant’s Eighth Amendment right against cruel and unusual

⁵ In conjunction with this, the Defendant filed a “Motion to Vacate or Withdraw Guilty Plea and Jury Waiver.” (R at 891-923). The trial court addressed this motion in its order denying 3.851 relief. (R. at 1092 et. seq.).

punishment will be violated as Defendant may be incompetent at the time of execution.” Id. Finally, the twelfth allegation made by the Defendant was that “Defendant’s Eighth Amendment right against cruel and unusual punishment may be violated if Defendant is executed by lethal injection at the time of execution.” Id. Defense counsel moved to withdraw claims 11 and 12 because they were “unripe for consideration.” (R. 1075). Based on that representation, the trial court dismissed those two claims “without prejudice.” Id.

c) Evidence

A report from Dr. Krop found Mr. Sanchez-Torres was experiencing a serious emotional disorder at the time of the offense. (R. 1080). In terms of live testimony, the trial court heard from Dr. Julie Kessel, a psychiatric physician. (R. 2544). Dr. Kessel testified she reviewed materials provided to her and spent six (6) hours with the Defendant at state prison. (R. 2545). Dr. Kessel opined the Defendant suffered from Attention Deficit Hyperactivity Disorder (ADHD), a learning disorder, an underdeveloped brain, and had marijuana abuse issues. (R. 2549-2552, 2563-2564). The Defendant was bullied when he was a child and he reacted by becoming “depending on the kindness of others.” (R. 2556). He sought others for “comfort” and “approval.” Id. He developed a “personality that was characterized by anxiety, a sense of loss, a sense of needing others’ approval.” Id. at 2557. She added with regard to the entry of a plea that “his mother and sister

were threatened with legal action and he pled, in part, to protect them.” Id. at 2557. She opined that another reason he entered a plea was a “relative infatuation with his attorney, Kate Bedell, and felt dependent and attached to her.” Id. at 2557-2558. One of the reasons he offered for pleading was that Ms. Bedell told him she was not prepared for trial and his best option was to plead guilty. Id. She added:

“So Hector trusted his attorney and the plea was read to him. In a very short interval of time he had to make a decision. And because of his attentional problems, his underdeveloped brain, his learning disability, he would not have been capable of internalizing the complexity of that plea and a jury waiver or to following the courtroom proceedings as rapidly as they were occurring.”

Id. at 2559. Finally, with regard to the factors affecting his ability to knowingly, intelligently and voluntarily entering a plea, she testified that he was suffering from Major Depressive Disorder. Id. at 2560-1. She summarized his situation this way:

“So when I think about his cognitive problems, the underdeveloped brain and his use of marijuana, the Attention Deficit Disorder specifically, he’s super in a position of major depression and then the characterological features of wanting to both protect his family, please his attorney and resolve his case. All of those things lead me conclude that he neither internalized – he neither had the innate capacity to understand what he was pleading to and waiving. That he did not have the right information to consider. That he did not know how to make the decision in his own best interest. And that he was – felt internally pressured by his desire to protect the family and please his attorney.

Id. at 2562. The trial court further noted that Dr. Kessel found that Levi Rollins, the victim in Mr. Sanchez-Torres’ other murder case, had been threatening the

Defendant and his girlfriend. *Id.* at 1080. Kessel found that his emotional distress at these threats was part of what led him to kill Mr. Rollins. *Id.* A State expert who interviewed the Defendant, Dr. Riebsame, was told by the Defendant that he did not have any remorse about killing Mr. Rollins. R. 1083.

The next witness to testify was Dr. Stephen Bloomfield. (R. 2593 et. seq.). Dr. Bloomfield is a licensed psychologist. *Id.* at 2594. He was asked by the defense to do an evaluation of the Defendant. *Id.* As part of his process he reviewed a large amount of materials about Mr. Sanchez-Torres. (R. 2596). Bloomfield saw him three (3) times. The first time he saw the Defendant he tested him for basic competency and found him to be competent. *Id.* at 2598. The trial judge in his order denying relief stated Dr. Bloomfield asserted Mr. Sanchez-Torres had the brain development “at the level of a fourteen or fifteen year old...which affected his decision making abilities. (R. 1081). Dr. Bloomfield did not say this. He said:

“So you see a 22-year old who really is a little less than 22 years of age. I’m **not** suggesting that he’s 14 – his brain development is the level of a 14 or 15 year old, but it’s not fully developed and he’s not making mature decisions.”

(R. at 2606). When asked by defense counsel whether Mr. Sanchez-Torres in fact entered into his plea knowingly, voluntarily and intelligently, Dr. Bloomfield said no. (R. 2613 et. seq.). From Bloomfield’s perspective, it was not a matter of an ability to manifest proper courtroom behavior or to utter the right things or answer

questions. (R. 2614). The point Dr. Bloomfield was making was that to a judge or a lawyer he would appear appropriate and would say the right things. Id. You wouldn't look at him and "say he looks like there's a problem." Id. He added:

"I also don't think that there's any reason for the Court to believe that [he was unable to make a knowing, voluntary and intelligent decision to plea]. The defense lawyer needed to take care of that. The defense lawyer presents somebody – presents a defendant to the Court and says: 'In my opinion the person is okay.' So then the Court does an excellent plea colloquy with the person and he answers the questions. I'm saying from a psychological perspective and my knowledge of Mr. Sanchez-Torres from 2009 to 2018, is that most likely not. Most likely he didn't enter into it in the manner he should have."

Id. at 2615-2616. Bloomfield stated "I would assume that at this moment [the moment of the 3.851 hearing] his brain is fully developed as it's going to get. At the time of the plea, it wasn't." Id. at 2617.

The next witness to testify was attorney Kate Bedell, one member of the "defense team" in Mr. Sanchez-Torres' case. (R. 2649 et. seq.). Ms. Bedell testified that when she was assigned Mr. Sanchez-Torres' case her task was "solely to work on mitigation, adding that "in terms of a defense for the case that was not part of my responsibility." (R. at 2652). Ms. Bedell said "that anything involving the actual facts and allegations against him in terms of the homicide would have been Mr. Till's responsibility. (R. 2661).

Attorney Quentin Till on the other hand said Ms. Bedell was the lead counsel on Mr. Sanchez-Torres' case. R. at 2707 and especially 2709. Till

testified he was not involved in the “day to day proceedings and preparation.” R. 2709. Till testified he was familiar with and supported Ms. Bedell’s repeated meetings with Angela Corey, then the State Attorney for the Fourth Circuit, in the hopes of negotiating a deal in cases “even though we didn’t get very good results from ever meeting with Ms. – Ms. Corey. R. at 2710. He cautioned though that he could not tell the court whether she did that in Mr. Sanchez-Torres’ case. Id. This is the person Ms. Bedell said was the lead counsel on the case. It actually shows there was no lead counsel in this case. In fact, Mr. Till stated he was not involved in the preparation of the case. (R. at 2714). This point is not discussed in Judge Skinner’s ruling denying relief. Till did assure the court that “I had that much confidence in her – that she would be prepared for trial.” (R. 2710).

The court found that the defense “strategy” in Mr. Sanchez-Torres’ case was to focus on remorse and taking responsibility. R. at 1083.

d) Relevant Aspects of the Plea

The plea in this case was alleged to have been based on no agreement with the State, yet read as follows on page 2:

“A. I have read and understood this entire **plea agreement**, including the rights I am giving up by entering into it;
B. I am not under the influence of any substance, drug, or condition (physical, mental, or emotional), which interferes with my appreciation of **this entire plea agreement** into which I am entering and all consequences thereof;

C. I have not been deprived of, and am properly taking, any medication which is essential to my full, complete, and **unimpaired understanding of the plea agreement** and these proceedings;
D. I have entered into and signed this plea of guilty **and negotiated sentence** freely and voluntarily;”
E. This plea of guilty form is true and correct in **all** respects.”
[emphasis added]

See Exhibit N to Motion to Remand to Circuit Court, filed April 23, 2019. Defense counsel did not make the written plea agreement part of the record in the post-conviction motion, and there is no evidence in the record suggesting they even read it. The emphasis is added here because there was no plea agreement and no “negotiated sentence,” yet the Defendant and the trial judge signed a form acknowledging a non-existent agreement. *Id.* There is a notation at the bottom left hand corner of both pages of the plea agreement stating “Fel-027 PLEA STRAIGHT UP.” A “straight up” plea is a term of art used in trial courts across this state to suggest the trial court will be solely responsible for sentencing a defendant. At the time the form was signed, there had been no waiver of the Defendant’s right to have a jury decide what sentence would be appropriate. *Id.*

During the plea colloquy, the judge makes reference to a waiver of the Defendant’s right to jury during the sentencing process. (R. 3176). Specifically, the judge says he received case law indicating a citizen can waive an advisory jury in the penalty phase. *Id.* There is nothing in the record suggesting who gave him and under what circumstances he was given this case law. There are hearings and

status conferences reported and are part of the record. None of them reflect a discussion of a jury trial waiver. The record does reflect the judge and the state attorney and defense counsel engaged in conferences on this case in chambers outside the presence of the Defendant. (R. 3181). Such conferences would violate Fla. R. Crim. P. 3.180(a)(3). There, the trial judge refers to “one of our chamber conversations.” The plea paperwork does not reflect an advisory jury waiver. *Id.* The person who brought up the advisory jury waiver both times was the judge. (R. 3176 and R. 3190-1). In a memo dated April 27, 2011, two days before the plea, attorney Till states “Hector Sanchez-Torres is scheduled for trial May 2, 2011. We plan to enter a plea of guilty, waive the penalty phase and put on our case at the Spencer hearing.” R. 1490. Sanchez-Torres then enters his plea two days later. On the day the sentencing hearing was to commence, Ms. Bedell announces to the court she has “spoken again with Mr. Sanchez and he wishes to waive the penalty phase with the jury.” R. 3208. The record does not reflect the trial judge explaining the “value of a jury trial” as outlined in this Court’s decision in *Tucker v. State*, 559 So.2d 218 (Fla. 1990). The trial court did not explain to the Defendant here that the “value of a jury” in his situation is that there are twelve more people participating in the decision and that even if they all voted for death, the trial judge could still overrule them and give him life. This would of course been at odds with the testimony that if it is left to a Clay County jury they would

“give him death.” (R. 1083). The “give him death” language leaves the listener a wildly inaccurate version of what happens in the penalty phase, even as it existed in 2011. Although the judge references a recommendation by the jury he does not further explain it and certainly doesn’t address the “give him death” motif. R. at 3209.

Separately, the trial court did not enter the findings required by Fla. R. Crim. P. 3.172(e). That rule states:

“Before the trial judge accepts a guilty or nolo contendere plea, the judge **must** determine that the defendant either (1) acknowledges his or her guilt or (2) acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence.”

Neither the plea paperwork nor any evidence of compliance with Fla. R. Crim. 3.172(e) appears in the court’s final order denying 3.851 relief.

e) Court Rules on 3.851 Motion

Circuit Judge Skinner denied all of the remaining claims for post-conviction relief.

With regard to Claim I, the court denied the claim. (R. 1077-1079). The court found that post-conviction counsel Jerome Shea failed to present any testimony to establish the additional non-statutory mitigating circumstances, the court could therefore not find that the outcome of the penalty phase would have been different. *Id.* at 1078.

With regard to Claim II, the court denied the claim. (R. 1079-1085). Judge Skinner ruled the defense counsel made a reasonable strategic decision for keeping the mental health testimony out of the sentencing proceeding. *Id.* at 1081. Specifically, the court found that the defense determined not to put on the experts because the Defendant had told the State’s mental health expert, Dr. Riebsame, that he did not regret killing the victim in the other case. *Id.* at 1082-3. The court thought this “would have been detrimental [to] the defense presentation of [of] the Defendant as remorseful.” *Id.* The court made no mention of the clear distinction between the two cases. The Court does not discuss the fact Mr. Rollins, the victim in the other case, had been threatening and harassing the Defendant and the mother of his child. The trial court did not offer this as a clear reason Mr. Sanchez-Torres would not be remorseful for that killing. Elsewhere in the ruling, the court does note the Defendant was remorseful for the death in the instant case. The distinction between the two is readily apparent. The trial court added “Ms. Bedell and Mr. Till were both of the opinion that a Clay County jury would absolutely convict the Defendant of first-degree murder and **give him death.**” [emphasis added] *Id.* at 1083. The court did not note in its analysis that the court itself could determine to give a defendant a life sentence despite a jury recommendation to the contrary – an obvious flaw in the defense “strategy.”

With regard to Claim III, the court denied this motion regarding the argument a separate *Spencer* hearing. (R. at 1085-6).

With regard to Claim IV, the court rejected the notion a motion for continuance should have been sought by the defense. R. 1086-1088. The court ruled the defense counsel represented to the court on April 21, 2011 that it was prepared for trial to start on May 2, 2011. *Id.* at 1086. The court does not address the fact there is clear record evidence showing there was no first chair attorney preparing the case for trial. *Supra.* The trial court noted the Defendant's responses during the plea colloquy to find there was no reason to give the defense extra time. *Id.* at 1086. The court noted "at the evidentiary hearing, Ms. Bedell testified that she **did not recall** advising the Defendant that the defense was not prepared for trial." *Id.* [emphasis added]. The Defendant did recall being told this, (R. 2558). Therefore, the court seems to credit Ms. Bedell not recalling as trumping Mr. Sanchez-Torres' sworn memory – a memory consistent with the fact there was no first chair lawyer preparing the case for trial.

With regard to Claim V, that claim was denied by the trial court. R. 1088-1092. This was the claim involving failure to file a motion to suppress. *Id.* The court found that there was no meritorious claim and therefore whether a motion to suppress was filed or not was immaterial. *Id.*

With regard to Claim VI, the court denied the claim regarding the entry of the plea and furthermore denied the accompanying motion to withdraw the plea and jury waiver. R. at 1092-1102. The court essentially ruled it was a strategic decision. Id.

With regard to Claim VII regarding Hurst relief, the claim was denied.

With regard to Claim VIII, the claim regarding the newly found evidence, the court denied that claim as well. R. at 1102-1105. The court found that even if co-defendant Markeil Thomas was the actual killer, the court still would have sentenced Mr. Sanchez-Torres to death. Id. at 1104. Moreover, the court found that it would not in its opinion have prompted Mr. Sanchez-Torres to reach a different conclusion regarding entering a plea. Id. at 1105.

With regard to Claim IX regarding the death penalty being unconstitutional, the court denied the claim.

With regard to Claim X regarding cumulative error, the court denied the claim.

Motion to Remand

On April 23, 2019, counsel filed a motion to remand for further proceedings designed to attempt to cure the harm done by Mr. Sanchez-Torres' prior counsel. The State quickly responded. To date, this Court hasn't ruled. Therefore the Court has left the undersigned no alternative but to file what he believes is a premature

pleading seeking relief. The Appellant still contends a remand is appropriate under the circumstances outlined in his April 23, 2019 motion. Remand is even more important now based on new findings that there was an inadequate waiver inquiry by the trial court. See R. 3208-3211.

This appeal follows.

SUMMARY OF ARGUMENT

Mr. Sanchez-Torres was denied his Sixth Amendment right to effective assistance of counsel in this case. The testimony of his two attorneys at the time of his plea is instructive. Ms. Bedell testified her responsibility in the case was to prepare for mitigation at sentencing. She stated she had no responsibilities with regard to preparing for trial. She further stated the responsibility for trial preparation lied with Mr. Till. When Till testified, he assured the court that Ms. Bedell was responsible for trial preparation and was well prepared for trial. He did not consider himself the first chair lawyer. In other words, there was no “first chair lawyer” in Mr. Sanchez-Torres’ case. Though responsible for the mitigation portion of the case, Ms. Bedell had not prepared mitigation and relied on the generosity of the trial judge to get sufficient time to prepare for sentencing. Thus, when Mr. Sanchez-Torres was urged to enter a plea by his unprepared lawyer(s), no preparation for trial had been done. The Defendant stated his lawyers told him they weren’t prepared for trial. The testimony of Bedell and Till confirms this. The decision here was not strategic – it was nothing less than an unconditional surrender to mask their utter lack of preparation.

The pressure to make that decision was the result of this failure to do basic trial preparation which includes, but is not limited to, the filing of a motion to suppress. Mr. Sanchez-Torres’ statement to police was the result of conduct that

meets the legal definition of extortion under Florida law. Law enforcement used the threat of arrest of Mr. Sanchez-Torres' family members to coerce a confession out of the Defendant. While it is lawful to use dishonesty to coerce confessions, it is not legal for law enforcement to engage in acts that violate the criminal laws of Florida to coerce statements out of citizens. The nominal reason for not filing a motion to suppress was State Attorney Angela Corey's policy of not negotiating with any attorney who files a motion to suppress on behalf of their client, thus punishing citizens who dare to assert their constitutional rights.

Defense counsel at sentencing decided not to use psychiatric experts in their sentencing presentation. The Defendant had been convicted of another murder, one where the person he killed had harassed and threatened both he and his girlfriend. He was unsurprisingly not remorseful for that killing, but he was remorseful for the one at issue here. The logic of that distinction eluded defense counsel who decided to offer no psychiatric or psychological evidence.

The failure to put this issue before the trier of fact was exacerbated by the fact his lawyers convinced him to waive jury sentencing. The alleged logic of this was that Clay county jurors would inevitably vote to sentence him to death. What this ignores is a) the same citizens the defense believe would want Mr. Sanchez-Torres sentenced to death vote on judges who decide what sentence Mr. Sanchez-Torres would receive and b) the judge would be able to override a jury

recommendation anyway so there is no “down side” to submitting it to the jury first. The only people benefiting from Mr. Sanchez-Torres’ decision were the lawyers who didn’t want argue their case for life any more than they wanted to argue the case for innocence to a jury. Mr. Sanchez-Torres, while not being incompetent to stand trial, was susceptible to being coaxed into decisions that were not in his best interest because of his unique set of personal history and mental health issues.

Individually and cumulatively, these errors merit a remand for a withdraw of the plea and waiver of jury sentencing.

**ARGUMENT I – THE TRIAL COURT ERRED IN DENYING THE
DEFENDANT’S MOTION FOR POST-CONVICTION RELIEF WITH
REGARD TO THE ISSUE OF WHETHER HIS PLEA WAS KNOWING
AND INTELLIGENT**

Trial counsel rendered ineffective assistance of counsel in the events leading up to trial and in their self-serving decision to convince the Defendant to plead guilty without any agreement from the State. They failed to review the plea paperwork and make note of its internal contradictions. They did not look at the judge’s obligation to find under Fla. R. Crim. P. 3.172 whether it was a guilty plea or a best interests plea. In this case it was a little bit of both but neither standing alone.

The problems here start with the fact there was no “first chair” lawyer handling the case. Ms. Bedell was a second chair lawyer in charge of mitigation. She didn’t commence her mitigation work in earnest until the plea was entered. She testified the “first chair” was Mr. Till. The “first chair” lawyer, Mr. Till, thought Ms. Bedell was the first chair lawyer. He was not responsible for trial preparation. When bundled together, this team of a second chair lawyer and a kibitzer didn’t prepare the case for trial. Instead, they hoped for a generous plea offer from the State although they were on notice that Ms. Corey was not the kind of elected State Attorney to engage in such acts of generosity. They did nothing to chip away at the case in order to incentivize the State to come to the bargaining table. They simply spent a couple of years hoping for a negotiated plea and when

that did not materialize, they talked a weak-willed Defendant who was eager to please into a plea that kept their utter lack of preparation from being exposed. The judge hearing the 3.851 motion carefully avoided the problem created by the lack of a first chair lawyer problem by omitting to mention it anywhere in his 44-page order denying relief. Finally, the unqualified attorney who handled the 3.851 hearing contributed to his client's situation by failing to call him to the stand to testify. They did file an affidavit from him. A qualified attorney would have put the Defendant on the stand, but the courts have denied him a qualified attorney.

The Defendant reported to his examining mental health experts that his lawyer told him she wasn't prepared for trial. He also states the same thing in his affidavit. (R. 1357). The evidence at the hearing completely bore that out. Again, an experienced post-conviction counsel would have explored in detail exactly what the non-existent first chair lawyer's strategy for the guilt phase would have been had they not successfully worked the Defendant into bailing them out with a plea. As it is, there is a lack of evidence as to what the non-existent first chair lawyer would have done had that person a) ever materialized and b) investigated the guilt aspect of the case. Counsel didn't even file a motion to suppress, ostensibly because the State wouldn't negotiate with them if they did. Mr. Till himself said Angela Corey didn't negotiate these cases. Even if she did though and ultimately rejected the notion of an agreement to life, a motion to suppress could have been

filed then. It is unexplained why defense counsel, after over a year of “negotiating” didn’t say to the State either decide by “x” date or I’m going to file a motion to suppress. Part of the problem of course was there was no one to make that threat because Ms. Bedell said she was not responsible for guilt phase preparation and Mr. Till wasn’t responsible for anything. There are no attorney notes in the attachments to the Judge’s order denying relief outlining a grand plan for trial. The obvious reason for this is there was no grand plan and there was no lawyer to conjure one up.

Sadly, this is par for the course in Clay County. See the Appellant’s Motion to Remand, filed on April 27, 2019.

The Defendant’s personal history and psychological profile made him the particularly susceptible to being talked into something that was not in **his** best interests. Dr. Kessel opined the Defendant suffered from Attention Deficit Hyperactivity Disorder (ADHD), a learning disorder, an underdeveloped brain, and had marijuana abuse issues. The Defendant was bullied when he was a child and he reacted by becoming “depending on the kindness of others.” He sought others for “comfort” and “approval.” He developed a “personality that was characterized by anxiety, a sense of loss, a sense of needing others’ approval.” She added with regard to the entry of a plea that “his mother and sister were threatened with legal action and he pled, in part, to protect them.” She opined that another reason he

entered a plea was a “relative infatuation with his attorney, Kate Bedell, and felt dependent and attached to her.” One of the reasons he offered for pleading was that Ms. Bedell told him she was not prepared for trial and his best option was to plead guilty. he added:

“So Hector trusted his attorney and the plea was read to him. In a very short interval of time he had to make a decision. And because of his attentional problems, his underdeveloped brain, his learning disability, he would not have been capable of internalizing the complexity of that plea and a jury waiver or to following the courtroom proceedings as rapidly as they were occurring.”

Finally, with regard to the factors affecting his ability to knowingly, intelligently and voluntarily entering a plea, she testified that he was suffering from Major Depressive Disorder. She summarized his situation this way:

“So when I think about his cognitive problems, the underdeveloped brain and his use of marijuana, the Attention Deficit Disorder specifically, he’s super in a position of major depression and then the characterological features of wanting to both protect his family, please his attorney and resolve his case. All of those things lead me conclude that he neither internalized – he neither had the innate capacity to understand what he was pleading to and waiving. That he did not have the right information to consider. That he did not know how to make the decision in his own best interest. And that he was – felt internally pressured by his desire to protect the family and please his attorney.

Id. at 2562. The trial court further noted that Dr. Kessel found that Levi Rollins, the victim in Mr. Sanchez-Torres’ other murder case, had been threatening the Defendant and his girlfriend. Kessel found that his emotional distress at these threats was part of what led him to kill Mr. Rollins. A State expert who

interviewed the Defendant, Dr. Riebsame, was told by the Defendant that he did not have any remorse about killing Mr. Rollins. Given the actions of Mr. Rollins, that should not be an earth-shattering proposition. This testimony was bolstered by that of Dr. Stephen Bloomfield.

When asked by defense counsel whether Mr. Sanchez-Torres in fact entered into his plea knowingly, voluntarily and intelligently, Dr. Bloomfield said no. From Bloomfield's perspective, it was not a matter of an ability to manifest proper courtroom behavior or to utter the right things or answer questions. The point Dr. Bloomfield was making was that to a judge or a lawyer he would appear appropriate and would say the right things. Id. You wouldn't look at him and "say he looks like there's a problem." He added:

"I also don't think that there's any reason for the Court to believe that [he was unable to make a knowing, voluntary and intelligent decision to plea]. The defense lawyer needed to take care of that. The defense lawyer presents somebody – presents a defendant to the Court and says: 'In my opinion the person is okay.' So then the Court does an excellent plea colloquy with the person and he answers the questions. I'm saying from a psychological perspective and my knowledge of Mr. Sanchez-Torres from 2009 to 2018, is that most likely not. Most likely he didn't enter into it in the manner he should have."

Bloomfield stated "I would assume that at this moment [the moment of the 3.851 hearing] his brain is fully developed as it's going to get. At the time of the plea, it wasn't." At the time of the plea, even in the court's own order, the Defendant

operated under the belief that if he submitted his case to a jury they would “give him death.” In other words, he was making decisions based on a lie.

None of this of course explains why, with regard to just the guilt phase portion of the case, the solution to a possible or perhaps even likely jury verdict of guilt is to bypass the verdict and go straight to a guaranteed verdict of guilt. All this does is give up the chance of a verdict to a lesser offense. More importantly, if the real strategy is to bypass the sentencing jury as well, why would anyone need to abandon the guilt phase jury? At least if you retained the guilt phase jury and built equity with them by pleading guilty, there is some perceived benefit in the sentencing phase. Here the legal advice didn't even take that possible strategy into account. The weakness in that strategy is of course it was a point of contention with the Defendant that he was not the shooter and a guilt phase defense could have least been goaled toward a verdict that answered that question. Abandoning that at least sounds like a strategy. It's a grossly inferior strategy, but at least it earns the name “strategy.”

There is no rational explanation for the “waive everything” strategy where that strategy works to the benefit of the Defendant. There is an obvious explanation when you focus on the fact that it benefits the imaginary first chair lawyer, the second chair mitigation lawyer, and the kibitzer. Their lack of trial preparation never sees the light of day in a courtroom. Significantly, Ms. Bedell

says she “doesn’t think” she told Mr. Sanchez-Torres she wasn’t prepared. The Defendant says she did – so it is uncontradicted on the record.

The prejudice here is quite simple. If the Defendant had not been talked out of exercising his constitutional right to trial, he would have had a jury decide whether he was the shooter or a secondary character, albeit a culpable one. The State would not have had enough evidence to prove beyond a reasonable doubt he was the actual shooter. This would have then carried over into the jury deliberations on the issue of whether his crime merited a death sentence.

The sentencing proceeding scenarios require discussing two possibilities. The first scenario involves the defense maintaining their “strategic” decision not to introduce the mental health evidence because of the Defendant’s statement to Dr. Riebsame that he did not regret the other killing. The issue of whether this decision merits the status of “strategy” will be discussed elsewhere in this Brief. It should be noted at this point that this Court, in *Beasley v. State*, 774 So.2d 649 at (Fla. 2000) said lack of remorse can’t be used as an aggravator or an enhancement of an aggravator:

“As observed in *Robinson v. State*, 520 So.2d 1, 6 (Fla.1988), a lack of remorse is not considered an aggravating factor in death penalty cases. While “[a]ny convincing evidence of remorse may properly be considered in mitigation of the sentence,” the absence of remorse “should not be weighed either as an aggravating factor [or] as an enhancement of an aggravating factor.” *Pope v. State*, 441 So.2d 1073, 1078 (Fla.1983).”

Trial counsel has a responsibility to know this. With a jury, the defense would have been entitled to a jury instruction to that effect. Ms. Bedell, as second chair mitigation counsel would have been responsible for knowing this. First chair counsel would of course be charged with knowing this as well – if there had been a first chair counsel.

The defense still would have been able to get into evidence the Defendant's bleak familial history and his struggles to find his way in the world. A competent lawyer could have laid out that history through either Mr. Sanchez-Torres himself or through the many people who knew him over his two decades on this Earth. Investing his trust in his fellow citizens as opposed to a judge who might be concerned with his status among the electorate was the only logical decision available. Even if the people of Clay County are as backward as the defense thinks, there were at least 12 of them as opposed to the one elected official they put the Defendant's fate in the hands of. The fundamental problem with pleading out is that the Defendant was left to think it is an either/or scenario. It is not. He could have had the jury **and** the have the judge decide since the court has to decide if the evidence is sufficient to sustain the conviction anyway. The notion that Mr. Sanchez-Torres had to "choose" is simply a lie unworthy of a practicing attorney, much less ones that purport to have the expertise necessary to handle matters of

life and death. Defense counsel didn't even try arguing the non-statutory mitigator of an uncoerced plea.

The second scenario would involve the superior decision to explain the Defendant's arguably appropriate lack of remorse for the other killing, given the threats and harassment he and his girlfriend were suffering from at the hands of the deceased. It would have actually enhanced the argument for remorse in the instant case. The Defendant would have explained how Mr. Colon was a truly innocent victim and didn't deserve his fate. The mental health testimony that could have been developed based on the record now before us would have contextualized the bleak upbringing and mental health history that led him to appear in front of a jury. A reasonable jury could certainly have found that a life sentence was appropriate.

The simple fact of the matter was that if there had been a jury trial on Monday, May 2, 2011, the defense would have been unprepared for a guilt phase defense. The record evidence in this case is clear on this. But this is not the only problem. If there had been a trial and verdict that week, the case would have then gone into a penalty phase immediately. It is clear from the record here that the second chair mitigation lawyer, Ms. Bedell, was not ready for that penalty phase that soon. If a penalty phase with jurors was still in play after the guilty plea, the defense would have been unable to proceed on that front either. Jury selection for that phase would have commenced on May 2 as well. The State had witnesses

ready to go and the court was not going to grant a continuance. Defense counsel would have been just as unprepared to go forward with sentencing as they were with regard to the guilt phase trial. Creating an opportunity to continue the case through having Mr. Sanchez-Torres waive everything he could waive bought the second chair defense lawyer time to put together a presentation for sentencing. Moving the court proceedings from Monday, May 2 to a future date was essential to the second chair/kibitzer team.

In *Strickland*, the Court wrote:

“Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”

* * * * *

“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364–365, 101 S.Ct. 665, 667–668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the

defense in order to constitute ineffective assistance under the Constitution.”

The court found that the defense plea “strategy” in Mr. Sanchez-Torres’ case was to focus on remorse and taking responsibility. R. at 1083. Invoking the word “strategy” does not make a decision “strategic.” It is not a talisman that cleanses the sins of counsel. It is arguable that a plea of guilty without an agreement by the State to a life sentence never meets the definition of “strategic” but the Court does not have to reach that *per se* conclusion here. All post-conviction cases are fact driven and fact-specific. The undersigned would have been thrilled to cite cases where 1) a first-chairless, unprepared trial team convinced a client to plead guilty and waive jury sentencing specifically because they were utterly unprepared, combined with 2) an unqualified attorney being appointed to challenge that decision and whose own performance was bad enough that successor post-conviction counsel felt compelled to seek a remand to assess the damage done – but surprisingly there aren’t any cases like that. On these facts there was no strategy here since the Mr. Sanchez-Torres could not have derived any benefit from the decision. This was apparent at the time. There was no ability to obtain a net gain or avoid a net loss through this decision. This is not hindsight and it would be clearly inappropriate to argue this as hindsight. At the time the decision

was being foisted upon Mr. Sanchez-Torres, there was no discernable benefit to him for doing it. None.

Separate from all of that, the plea in this case was alleged to have been based on no agreement with the State, yet page 2 of the plea paperwork says:

- “A. I have read and understood this entire **plea agreement**, including the rights I am giving up by entering into it;
- B. I am not under the influence of any substance, drug, or condition (physical, mental, or emotional), which interferes with my appreciation of **this entire plea agreement** into which I am entering and all consequences thereof;
- C. I have not been deprived of, and am properly taking, any medication which is essential to my full, complete, and **unimpaired understanding of the plea agreement** and these proceedings;
- D. I have entered into and signed this plea of guilty **and negotiated sentence** freely and voluntarily;”
- E. This plea of guilty form is true and correct in **all** respects.”
[emphasis added]

See Exhibit N to Motion to Remand to the Circuit Court filed April 23, 2019.

Defense counsel did not make the written plea agreement part of the record in the post-conviction motion, and there is no evidence in the record suggesting they even read it. The emphasis is added here because there was no plea agreement and no “negotiated sentence,” yet the Defendant and the trial judge signed a form acknowledging a non-existent agreement. *Id.* There is a notation at the bottom left hand corner of both pages of the plea agreement stating “Fel-027 PLEA STRAIGHT UP.” A “straight up” plea is a term of art used in trial courts across this state to suggest the trial court will be solely responsible for sentencing a

defendant. At the time the form was signed, there had been no waiver of the Defendant's right to have a jury decide what sentence would be appropriate. *Id.*

During the plea colloquy, the judge makes reference to a waiver of the Defendant's right to jury during the sentencing process. (R. 3176). Specifically, the judge says he received case law indicating a citizen can waive an advisory jury in the penalty phase. *Id.* There is nothing in the record suggesting who gave him and under what circumstances he was given this case law. There are hearings and status conferences reported and are part of the record. None of them reflect a discussion of a jury trial waiver. The record does reflect the judge and the state attorney and defense counsel engaged in conferences on this case in chambers outside the presence of the Defendant. (R. 3181). Such conferences would violate Fla. R. Crim. P. 3.180(a)(3). The trial judge refers to "one of our chamber conversations." *Id.* The plea paperwork does not reflect an advisory jury waiver. *See Exhibit N to Motion to Remand to the Circuit Court filed April 23, 2019.* The person who brought up the advisory jury waiver both times was the judge. (R. 3176 and R. 3190-1). In a memo dated April 27, 2011, two days before the plea, attorney Till states "Hector Sanchez-Torres is scheduled for trial May 2, 2011. We plan to enter a plea of guilty, waive the penalty phase and put on our case at the Spencer hearing." R. 1490. Sanchez-Torres then enters his plea two days later. It is a reasonable to glean from this that the Defendant may have been the last to

know that he was waiving his jury sentencing at the very least. The record certainly is suggestive of the likelihood there were improper discussions regarding important matters in the Defendant's case that he was not allowed to be present for. Of course, if the case is remanded for further proceedings, this impropriety can be fleshed out.

Separately, the trial court did not enter the findings required by Fla. R. Crim.

P. 3.172(e). That rule states:

“Before the trial judge accepts a guilty or nolo contendere plea, the judge **must** determine that the defendant either (1) acknowledges his or her guilt or (2) acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence.”

Neither the plea paperwork nor any evidence of compliance with Fla. R. Crim.

3.172(e) appears in the court's final order denying 3.851 relief.

Literally every aspect of the plea and waiver here is deeply disturbing. The trial court erred in not allowing Mr. Sanchez-Torres to set aside his plea.

**ARGUMENT II—THE TRIAL COURT ERRED IN DENYING THE
DEFENDANT’S MOTION FOR POST-CONVICTION RELIEF WITH
REGARD TO HIS WHETHER HIS ADVISORY JURY WAIVER WAS
KNOWING AND INTELLIGENT**

Mr. Sanchez-Torres incorporates all of his first argument into this second argument focused on his purported waiver of the advisory jury. This Court has held in *Tucker v. State*, 559 So.2d 218 (Fla.1990):

“An appropriate oral colloquy will focus a defendant's attention on the value of a jury trial and should make a defendant aware of the likely consequences of the waiver.”

559 So.2d at 87-88. Although *Tucker* deals with waivers under Fla. R. Crim. P. 3.260, there is no reason to view the trial court’s obligation any differently here. The entire jury waiver colloquy appears at R. 3208-3211. What the record in this case shows clearly is that the Petitioner was led to believe if he didn’t waive a jury in Clay County they “would give him death.” R 1083. This is a gross misstatement of the sentencing process. It ignores the fact that a judge has an independent authority to override a death recommendation anyway. It ignores the fact there is no down side to first submitting the case to the jury for a recommendation precisely because the judge is an independent actor except that he cannot override a life recommendation. It ignores the fact that circuit judge is an elected office, so any condemnation by trial counsel of “Clay County juries” necessarily is a condemnation of Clay County voters who decide whether a judge

who overrides a jury recommendation of death keeps his or her job. Finally, it ignores the basic fact that a jury is an additional obstacle to the State getting the death sentence they covet. There is no rational reason for a waiver. Here, though, the judge did not explain the above points to the Defendant.

What the judge likely didn't know was that the reason for seeking a waiver was to cover up the fact the defense was not ready to present a penalty phase case to the jury on Monday, May 2, 2011. The public defender's office had from late 2008 to May 2011 to prepare a guilt phase and penalty phase presentation to a jury. As of the May 2, 2011, they were not ready to go. "Unprepared lawyer" is not a basis for a plea and is not a basis to waive jury trial. What defense counsel did here was manufacture a continuance at the expense of a guilty plea and a jury sentencing waiver. If this is now what the Court will now call "strategy" then this case is the perfect vehicle for such a declaration. From the public defender's perspective perhaps they prefer the post-conviction challenge to be on grounds they can blame on the Defendant (i.e. "he plead out") as opposed to the scenario where he says he'd just as soon go to trial with a jury and if need be sentencing with a jury recommendation. In post-conviction proceedings on that battleground, the lack of a first chair lawyer, the failure of the second chair lawyer to prepare for sentencing, their non-feasance would have been laid bare for all to see. It can't be stressed enough that the record evidence in this post-conviction proceeding is that

Mr. Sanchez-Torres said Ms. Bedell told him they weren't prepared. Ms. Bedell does not recall whether she said it or not. Significantly, her response was not "I would never have said that because I was, as was the first chair attorney Mr. Till, 100% prepared for trial." Rather, she simply says she doesn't recall.

Finally, if proper post-conviction work had been done, or if remand was granted prior to the filing of this Brief, this Court would have had information on what happened in this case where there appear to be in-chambers discussions of this case between the second chair counsel, the State and the trial judge – without the presence of the Defendant as required by rule. It appears from the record that the discussions of whether the Defendant would be entering a plea and waiving his right to have a jury participate in sentencing occurred behind those closed doors.

In *Strickland*, the Court wrote:

“Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”

* * * * *

“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364–365, 101 S.Ct. 665, 667–668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.”

If “adequate assistance” is met on these facts, then *Strickland* is not worth the paper it’s written on.

**ARGUMENT III—THE TRIAL COURT ERRED IN DENYING THE
DEFENDANT’S MOTION FOR POST-CONVICTION RELIEF WITH
REGARD TO HIS CLAIM A MOTION TO SUPPRESS SHOULD HAVE
BEEN FILED ON HIS BEHALF**

The trial court determined that a motion to suppress the Defendant’s statements in this case would not have been granted and therefore the failure to file such a motion was harmless. What the prior post-conviction counsel failed to argue is that the conduct described through the hearing and in the court’s order constitutes extortion under Florida law, a violation of Section 836.05, which states:

“Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will, shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.”

Law enforcement leveraged the threat of arresting his mother and sister. This is extortion. Sadly, this was not argued by trial counsel or post-conviction counsel. Law enforcement is allowed to lie to suspects in order to obtain confessions. See *Frazier v. Cupp*, 394 U.S. 741 (1969). It is a different matter entirely to commit crimes in order to obtain a confession. All the elements of extortion under Florida law are there. The statute on its face does not exclude law enforcement,

commencing with the word “whoever.” The statute then allows for the communication to be verbal, as it was here. “Maliciously threatens to accuse another of a crime or offense” is met here by the threat to arrest the Defendant’s family. “With the intent to compel the person so threatened, or any other person to do an act...against his or her will” –i.e. the act of confessing to the alleged crime. The malice requirement is outlined in *Alonso v. State*, 447 So.2d 1029, 1030 (Fla. 4th DCA 1984), where that court said:

“[Actual malice] is not contemplated by the crime of extortion. The basic statutory ingredients are a threat made maliciously with the intent to require another to perform an act against his will. The malice requirement is satisfied if the threat is made “willfully and purposely to the prejudice and injury of another,....” Black's Law Dictionary, 4th Ed.”

But see Calamia v. State, 135 So.3d 1007 (Fla. 5th DCA 2013)(then 5th District Judge Lawson writing for that court that proper legal standard at that point in time was actual malice but encouraging review by Florida Supreme Court because of the panel’s belief that it should in fact be legal malice). Under a legal malice standard, the law enforcement behavior here would be a violation of the extortion statute as the acts were willful and purposeful and therefore the statements of the Defendant would have been obtained illegally. This assumes that law enforcement officers can’t break criminal statutes to obtain confessions.

The Appellant requests a remand so that this important issue may be litigated.

CONCLUSION


The Appellant requests this Court reverse the denial of post-conviction relief in this case and remand for further proceedings.

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished through the eportal to Jennifer A. Donahue, Assistant Attorney General, this 20th day of May, 2019.


RESPECTFULLY SUBMITTED

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CERTIFICATION OF COMPLIANCE

I HEREBY CERTIFY this Petition complies with the font and formatting requirements of Fla. R. App. P. 9.210(a)(2). A Times New Roman 14 font was used.

By: 
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