IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2149

GR0VER REED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION[1]

As Grover Reed's trial attorney, Richard Nichols, stated on the record in open court to the trial court while arguing Reed's motion for a new trial: "Mr. Reed has steadfastly maintained his innocence" (T850). Reed has now developed evidence that corroborates what he has said all along - that someone else committed the murder, he did not do it. The affidavits from Hazen and Kormondy demonstrated that a dying Dwayne Kirkland confessed to a murder in Jacksonville of a older white woman in February of 1986. He described what happened and how she was killed. Court records indicate that Kirkland was on the streets in early 1986, wanted on a capias that issued in November of 1985, but for which he was not arrested until July of 1986 (PC-R2 35-36). And this Court's opinion in the murder case for which Kirkland was convicted and sentenced to death certainly shows that manner in which Kirkland killed bears a striking resemblance to the murder of Betty Oermann. At a minimum, an evidentiary hearing should

[1]This proceeding involves the appeal of the circuit court's summary denial of a post-conviction motion. The following symbols will be used to designate references to the record in this appeal:

"R_" -- record on the first direct appeal to this Court;
"T_" –- transcript of trial;
"PC-R _" -- record on appeal from first Rule 3.850 motion;
"PC-R1 _" -- record on appeal following remand;
"SPC-R1 _" -- supplemental record on appeal from the denial of the second Rule 3.851 motion;
"PC-R2 _" -- record on appeal from the denial of the second Rule 3.851 motion;
"SPC-R2 _" -- supplemental record on appeal from the denial of the second Rule 3.851 motion.

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be ordered on this new evidence.

STATEMENT OF THE CASE

A. Procedural History

Reed was indicted on July 10, 1986, in Duval County, for the first degree murder of Betty Oermann and for armed robbery (R20). Reed had been arrested on April 2, 1986 (R1, 20). The public defender's office was appointed shortly after Reed's arrest on April 3, 1986, and an experienced assistant public defender, Alan Chipperfield, was assigned to represent Reed (R3). After having been Reed's counsel for over 3 months, Chipperfield filed a number of motions on behalf of Reed on July 23, 24, and 25, 1986. One of these motions was for the appointment of an mental health expert due to concerns about Reed's mental health (R23).[2] Also filed was a motion to incur costs of expert witnesses (R39). Chipperfield gave notice of Reed's intent to claim alibi (R27).

After Chipperfield had filed numerous motions on Reed's behalf, Reed's prosecutor on July 25, 1986, sought to remove Chipperfield from

[2]Chipperfield explained when called to testify at the 2002 evidentiary hearing that he and his co-counsel (Charlie Cofer) "were real concerned with Grover Reed's history of huffing gasoline and the hospitalization that he had after huffing gasoline and doing drugs where he was having convulsions and where they found an organic problem with his brain." (PC-R1 1191). Chipperfield was aware that Reed had been huffing gasoline since the age of nine and had been diagnosed in records as having "lead encephalopathy due to chronic lead poison seizure disorder caused by valium withdrawal or lead encephalopathy." (2/21/2002 Tr. at 73-74). According to Reed's live-in girlfriend, Chris Niznik, Reed was huffing gasoline and injecting cheap homemade crystal meth in early 1986 (PC-R1 1263-65).

the case after the prosecutor listed a former public defender client as a witness (R89). A hearing was held on the motion to remove Chipperfield as Reed's counsel on August 6, 1986, at which time Chipperfield had been serving as Reed's counsel for 4 months. At the commencement of the hearing, the presiding judge stated:

> THE COURT: This is Grover Reed, and the reason this was passed for today was the state had previously filed a motion to disqualify the Public Defender's Office from representing Mr. Reed because of some possible conflicts. At that time and I believe even **at this point in time Mr. Chipperfield of the Public Defender's Office cannot certify that a conflict in representation of Mr. Reed actually exists at this time**, however, based upon prior hearings as well as the representation of the state they intend to utilize the testimony of one - -
>
> MR. COLLINS: Dell Wade Sperry.
>
> THE COURT: Dell Sperry with regard to the alleged statements made by Mr. Reed to him while he was represented by the Public Defender's Office, in other words Mr. Sperry and Mr. Reed were both represented by the Public Defender's Office at the time, I discussed the possibility and the likelihood of a conflict arising if one does not in fact exist now.

(T19)(emphasis added).[3] Even though neither Chipperfield nor Reed

[3]The alleged witness's name was in fact Dell W. Spearing. Mr. Spearing's court files in Duval County in 1986 show that he was arraigned on three counts of burglary on January 27, 1986. The Duval County Clerk of Court's online docket does show that an assistant pubic defender appeared at court proceedings throughout the month of May and the first week of June of 1986 in Spearing's case. However, the charges against Spearing were nolle prossed on June 6, 1986.

The clerk's online docket also shows that on September 19, 1986, Spearing was arrested on loitering charges and that he waived his right to counsel. A disposition was entered on November 4, 1986.

The Clerk's online docket also shows that on October 5, 1986, Spearing was again arrested on loitering charges and waived his right to counsel. A disposition was entered on November 17, 1986.

The statement from Spearing that the State argued created a

believed that a conflict of interest existed, the trial court thereupon granted the State's motion to disqualify Chipperfield and appointed attorney Richard Nichols as substitute counsel (R205).[4] At Reed's trial, the State did not in fact call the conflict-creating witness, Spearing, to testify.

After the removal of Chipperfield as Reed's counsel, Nichols made a motion for a non-confidential competency evaluation on October 14, 1986 (T30).[5] At that time, an order for a competency evaluation was entered (R221). On October 30, 1986, it was put on the record that Dr. Miller had completed the competency evaluation of Reed.[6] Defense counsel, Nichols, noted that he had not seen the

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conflict of interest which required the removal of Chipperfield was dated July 7, 1986, well over a month after the burglary charges against Spearing had been dropped and he was no longer represented by anyone with the public defender's office. These circumstances certainly provide support for Chipperfield's position that there was no conflict and disqualification was unwarranted and not in Reed's best interest.

[4]Thus, Nichols became Reed's counsel on August 6, 1986 (R206). As a result, Reed was forced to waive his rights to a speedy trial two weeks later on August 20, 1986 (R207). Reed's trial commenced on November 17, 1986, 104 days after Nichols was appointed as his counsel.

[5]At the October 14, 1986, hearing, the State's motion to compel samples of Reed's fingerprints was heard. The motion was granted, and the State indicated that the fingerprint examiner, Bruce Scott, was present in the courtroom (T29-30). What was not mentioned was the fact that Scott had been suspended from his job as an FDLE fingerprint analyst on June 4, 1986 (over 4 months earlier), and resigned his position shortly thereafter, due to his theft and ingestion of cocaine from the FDLE crime lab.

[6]It was further explained on October 30, 1986, that the competency evaluation had been premised upon Nichols' "oral motion for

report nor spoken to the mental health expert, but that the prosecutor "has spoken to Dr. Miller and the indication is that he doesn't question the defendant's competency to stand trial or at the time of the offense" (T38).[7]

Nichols during the same hearing did "ask the Court to allow [him] to incur some expense, I would say 5 hundred dollars, to allow [him] to get assistance of an expert in trial preparation" (T56). Nichols explained he was "not asking for a private psychiatric expert to assist me in the preparation of a the defense based on insanity" (T57). Instead, he was asking for "expert advice of a psychologist either in voir dire or in cross-examination" (T58).

The trial began on November 17, 1986. On November 20, 1986, the jury returned its verdict.[8] Guilty verdicts were returned

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competency to stand trial" (T39).

[7]Thus at the October 30th hearing and less than 3 weeks before trial, Nichols in essence abandoned Chipperfield's motion requesting the appointment of a confidential mental health expert, which had been filed 3 months earlier, in late July.

[8]During the jury's deliberations, the forewoman sent a note requesting: "We need to read the testimony from the forensic serologist regarding the blood type in relation to the semen." (R275). Juror David Booker wrote a handwritten letter to the judge explaining his concerns:

> Your Honor
>
> If it may be possible; I would like to clear some confusion I have concerning the testimony of the witness said to be a blood expert.
>
> In the first part of his testimony, he said that he had determined two characteristics of Betty Orman [sic] and

on all three counts, and Reed was convicted as charged in the indictment (R276-78, T837).[9] His counsel, Nichols, then entered into a stipulation with the prosecutor that no penalty phase testimony would be presented to the jury (T846-47). Accordingly, no evidence was presented by the defense during the penalty phase. After hearing

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> Grover Reed's blood.
>
> My confusion stems from the second characteristic that he gave. It was my understanding, due to this second blood characteristic, that Betty Orman's [sic] body fluids would contain her blood type and that Grover Reed's blood type could not be obtained from his body fluids.
>
> In the last part of his testimony, the witness said that he had examined the sperm in question, and that the blood type obtained from it was the same as that of Grover Reed.
>
> Using the second characteristic of Grover Reed's blood, as I understand it; his blood type can not be obtained from his saliva or sperm.
>
> What I would like to know is whether or not his testimony is consistent to the fact that the sperm could and did contain Grover Reed's blood type.
>
> David Booker

(R261).

[9]As Nichols explained at the hearing on a motion for new trial, "[t]here were a couple of people whose testimony may have supported in some fashion [Reed's] theory of the case or the defense theory of the case and may have in some fashion operated as impeachment witnesses. We discussed at the time of trial and decided not to call these witnesses." (SPC-R1 85). However, Nichols stated on the record in open court: "Mr. Reed has steadfastly maintained his innocence" (T850). Indeed in the motion for new trial, Nichols as an officer of the court represented that the reason that he elected not to call any witnesses was because he believed that "the effect of their testimony would not be sufficiently probative to justify the Defendant's forfeiting the opening and closing arguments during the final argument." (R379).

closing arguments, the jury deliberated twenty minutes and returned an 11-1 death recommendation (T909).

The sentencing hearing before the judge was delayed at the defense's request to allow counsel the opportunity call witnesses. However, defense counsel, Nichols, explained when the time came to present the evidence on December 18, 1986, "we had passed the matter to today to try to get witnesses here from out of state to testify in Mr. Reed's behalf, primarily in the fashion of character witnesses and because of **finances and logistics**, none of those witnesses are available and I don't have any reasonable likelihood that they're going to be available so I cannot and will not at this time ask the court to delay this hearing any further on that basis."[10] (SPC-R1 86)(emphasis added). When the judge imposed the death sentence on January 9, 1987, he specifically noted while addressing the statutory mitigating factors, that "no evidence was offered to show that any of these three mitigating factors existed" (T939).[11] The judge did

[10]However, the record showed that the State was not so limited financially or logistically. Money was available to the State from the clerk's office to obtain the testimony of relevant witnesses that the State wanted to call which was apparently unavailable to the defense. For example, the State was permitted to obtain funds from the Clerk of Court to pay $67.00, in addition to the airfare and hotel accommodations provided by the State (R255-56). The State obtained an order directing the Clerk of Court to pay Debra Hipp "$350.00 for expenses she incurred by responding to the subpoena" (R257-58). The State also obtained an order directing the Clerk of Court to pay Patrick Hipp "$732.00 for expenses he incurred by responding to the subpoena" (R259-60). Of course, Patrick Hipp, who was Debra Hipp's husband, did not testify at Reed's trial.

[11]At the December 18, 1986, proceeding before Judge Southwood, Nichols

note that evidence of Reed's age was presented, but that it did not establish the age mitigating circumstance. The judge then turned to the non-statutory mitigating circumstances and observed that "no evidence has been presented to show the existence of any other factors which should be considered in mitigation." (T940). The trial judge followed the jury's recommendation and imposed a death sentence, finding six aggravators and no mitigating circumstances (R389-91; T938-40).

On direct appeal, Reed was represented by the same attorney who represented him at trial, Richard Nichols. On June 1, 1987, Nichols filed a ten page, one issue brief.[12] After receiving this ten-page, one-issue initial brief, this Court issued an order finding that the brief "does not appear to be a good faith effort to address

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did indicate that he would "like to file with the clerk" hospital records that "have to do with Mr. Reed's mental state as a result of some drug dependency and some toxic response to some lead from, I think it was what they allege was sniffing gasoline over a long period of time" (T921). At the same time, Nichols indicated he would "also like to file with the clerk" hospital records relating "to Mr. Reed's past emotional and drug problems" (T922). The judge concluded the proceeding asking counsel "to submit memorandum only dealing with the statutory aggravating and mitigating circumstances and that to be submitted to me no later than January the 6th." (T923). The record shows that Nichols filed no sentencing memorandum prior to the January 9, 1987, sentencing pronouncement, and during that proceeding made no arguments of any kind on behalf of Reed prior to the imposition of a death sentence (T928-31).

[12]Again, this was the same attorney who abandoned Chipperfield's motion for the appointment of a confidential mental health expert to assist the defense, who chose to present no evidence at the guilt phase of Reed's trial, who chose to present no mitigating evidence at the penalty phase of Reed's trial and who chose to call no witnesses (T921) and make absolutely no argument at Reed's sentencing (T928-31).

all of the issues available on appeal." *Reed v. State*, FSC Case No. 70,069 (September 9, 1987). This Court relinquished jurisdiction for a determination of "either that Reed's current counsel can fulfill his responsibilities as an appellate lawyer by filing an adequate supplemental brief or that new counsel should be appointed." *Id*. In answer to this Court's order, the circuit court appointed the public defender to serve as Reed's appellate counsel. Thereafter, a new initial brief was filed on Reed's behalf.

In deciding Reed's direct appeal, this Court initially granted him a new trial based upon the discriminatory manner by which the prosecutor used the State's peremptory challenges to exclude blacks from Reed's jury. *Reed v. State*, 14 Fla. L. Weekly S298, S299 (Fla. June 15, 1989). However, this Court subsequently granted the State's motion for rehearing and withdrew the opinion granting Reed a new trial. In its place, a new opinion issued affirming Reed's conviction and sentence of death. *Reed v. State*, 560 So. 2d 203 (Fla. 1990).

In reviewing Reed's death sentence, this Court struck two of the six aggravating circumstances, *i.e.* the prior violent felony and the cold, calculated and premeditated aggravators. Nonetheless, this Court then affirmed the sentence of death observing: "There remain four aggravating circumstances balanced against a total absence of mitigating circumstances." *Reed*, 560 So. 2d at 207.[13]

[13]Of course, there was no mitigating evidence because Reed's counsel,

On February 28, 1992, Reed filed a motion to vacate his conviction and sentence of death. On August 25, 1992, the circuit court summarily denied all relief (PCR 309). Reed appealed, and this Court reversed and remanded for an evidentiary hearing on Reed's ineffective assistance claim. *Reed v. State*, 640 So. 2d 1094 (Fla, 1994). This Court also vacated the erroneous denial of Reed's public records requests. This Court held: "Reed should be allowed a reasonable time to amend his petition under rule 3.850 to include any pertinent information obtained from the documents." *Reed*, 640 So. 2d at 1098.

While Reed's case was pending on remand, the Florida Legislature broke the Office of the Capital Collateral Representative apart and created a registry list of attorneys to be appointed where the three regional offices were unable for whatever reason to provide collateral representation. In the fallout from this legislative action, Reed was stripped of collateral representation by one of the CCR offices and a registry attorney, Chris Anderson, was appointed to serve as Reed's collateral counsel. An evidentiary hearing was conducted on August 26, 2002. Thereafter, the circuit court entered an order denying post conviction relief. Reed appealed challenging the circuit court's denial of Reed's numerous ineffective assistance

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Nichols, stipulated to the presentation of no mitigating evidence at the penalty phase proceeding and as he explained at the judge sentencing: "because of **finances and logistics**, none of those witnesses are available" (SPC-R1 86) (emphasis added).

of counsel and *Brady* claims.[14] Anderson, on Reed's behalf, also filed a 15 page habeas petition with this Court.[15] This Court affirmed the denial of Rule 3.851 relief and denied the habeas petition. *Reed v. State*, 875 So. 2d 415 (Fla. 2004).

On July 5, 2005, Reed filed a federal habeas petition after undersigned counsel was appointed to serve as Reed's federal habeas counsel by the federal district court. On September 29, 2008, the federal district court issued an order denying Reed's habeas petition. On appeal, the Eleventh Circuit affirmed. *Reed v. Sec'y, Dept. of Corrs.*, 593 F.3d 1217 (11th Cir. 2010).

On November 26, 2010, Reed served a motion seeking the appointment of the undersigned as Reed's registry counsel under §27.710. This motion was premised upon the fact that the circuit court had entered an order on July 13, 2005, which was not served on

[14]During the collateral appeal, Anderson filed a motion to withdraw as Reed's counsel citing irreconcilable conflicts. This motion was filed with this Court on March 28, 2003. This Court denied the motion. Thus in the history of Reed's case, he lost Chipperfield as counsel because the State alleged a conflict that neither Chipperfield nor Reed saw. Reed lost the assistance of attorneys at CCR when the Legislature decided to break the office up and create a registry of attorneys to handle capital collateral cases. Then when a motion was filed seeking the removal of an attorney due to irreconcilable conflicts, Reed was forced to continue with an attorney whom he did not trust.

[15]The first 11 pages of the habeas petition concerned *Ring v. Arizona*, 536 U.S. 584 (2002). The remaining 3 claims were each less a page in length and faulted Reed's appellate attorney for failing: 1) to challenge the trial prosecutor's improper remarks, 2) to challenge the instructions concerning aggravating circumstances as unconstitutional, and 3) to raise trial counsel's ineffectiveness in failing to challenge the sufficiency of the State's evidence.

Reed nor upon his federally appointed counsel, discharging Anderson as Reed's registry counsel (PC-R2 43).[16] It was only in the wake of *Porter v. McCollum*, 130 S. Ct. 447 (2009), that undersigned counsel learned of the order discharging Anderson and informed Reed that Anderson had been discharged as his counsel. In his 2010 motion for appointment of registry counsel, Reed asked that undersigned counsel be appointed *nunc pro tunc* to November 1, 2010, when he became aware that he was without registry counsel (PC-R2 42-45).

On November 29, 2010, Reed filed a Rule 3.851 motion to vacate his conviction and sentence of death (PC-R2 1). In this motion, Reed presented two claims for relief: 1) a claim premised upon the decision in *Porter v. McCollum*, 130 S. Ct. 44 (2009); and 2) a newly discovered evidence claim premised upon affidavits obtained from James Hazen and Johnny Kormondy (PC-R2, 30).[17]

On December 15, 2010, the circuit court granted the motion for appointment of collateral counsel and appointed the undersigned as Reed's state court registry counsel *nunc pro tunc* to November 1,

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[16]After Anderson was appointed to serve as Reed's registry counsel, Reed was aware that he had sought unsuccessfully to withdraw as Reed's counsel in a motion filed with this Court on March 28, 2003. *Reed v. State*, Case No. SC02-2191. A motion seeking to withdraw was also filed in the habeas proceeding pending in this Court on March 31, 2003. *Reed v. Crosby*, Case No. SC03-558. However, this Court denied these motions. It was not until the July 2005 order from the circuit court that he was formally discharged as Reed's registry counsel. As to this order of discharge, Reed was not informed.

[17]Since the filing of the Rule 3.851 motion, there have been numerous appellate decisions that bear upon the claims that Mr. Reed originally set forth.

2010 (PC-R2 52). Thus bringing to a close the five year and four month period that Reed was without registry counsel under § 27.710 who was available to pursue collateral relief on his behalf in the state courts of Florida.

On December 22, 2010, the State filed its answer to the Rule 3.851 motion (PC-R2 56). As to Reed's newly discovered evidence claim, the State argued that Reed was not diligent:

> This claim is being raised years too late. By February 5, 2007, when Reed filed an amendment to his federal habeas petition raising this same claim of newly discovered evidence of innocence.

(PC-R2 22).[18] The State also separately filed a motion to strike the Rule 3.851 motion (PC-R2 87).[19]

On February 15, 2011, a case management hearing was held in the circuit court (SPC-R2 23). At that time, Reed orally moved for leave to amend the Rule 3.851 motion to include a challenge to Florida's lethal injection protocol in light of new information that counsel had obtained indicating that sodium pentothal was no longer available to be used in executions in Florida (SPC-R2 30-32). The

[18]The State ignored the fact that between July of 2005 and November of 2010, Reed was without a court-appointed registry counsel who could raise the claim and that by law Reed is precluded from filing pleadings pro se (SPC-R2 82). *Gordon v. State*, 75 So. 3d 200 (Fla. 2011); *Davis v. State*, 789 So. 2d 978 (Fla. 2001).

[19]The State's motion to dismiss was premised upon the State's argument that court-appointed registry attorneys were not authorized to file successive Rule 3.851 motions (PC-R2 88-90). Thus, the State argued both that Reed should have filed the motion sooner and that he was precluded from filing the motion at all.

State did not object to the request:

> MS. MILSAPS: Well, obviously, you know, he - - if he wants to amend his successive motion to include a third claim then we can respond to the third claim as well, so that, you know.

(SPC-R2 33). After Reed asked for 30 days to amend the Rule 3.851 motion, the following occurred on the record:

> THE COURT: And after you have received whatever amendment he had done, Ms. Milsaps, how long would you like to respond to that?
>
> MS. MILSAPS: Well, I think, you know, the rule sets out, I think it's 20 days or 30 days, whatever is in the rule. Let me hop over to the rule, and I'll stick with the rule and answer the successive within that time. I think it's 20 days.
>
> THE COURT: I want to say that it's 20 days, but is it - - but does that also - - I guess it would make sense that that would apply to the amendment of the successive motion, wouldn't it, so.
>
> MS. MILSAPS: Yes, that would be the State's position and, therefore, would like to keep within that time frame.
>
> THE COURT: Okay.
>
> MS. MILSAPS: So I'll answer it within 20 days.

(SPC-R2 33-34).

Reed filed his amended Rule 3.851 motion on March 17, 2011 (PC-R2 117). The amended motion included a challenge to the constitutionality of Florida's method of execution. This challenge was based on the recently disclosed "unavailability of sodium thiopental, one of the drugs used in executions by lethal injection" (PC-R2 155). The State filed is answer on April 8, 2011 (PC-R2 165). As to the lethal injection challenge, the State asserted "[t]he lethal

injection claim should be denied as not yet ripe without prejudice to refile the claim when a protocol is adopted." (PC-R2 193).

A second case management hearing was conducted on April 18, 2011 (SPC-R2 39).

On May 9, 2011, Reed filed a motion for discovery. This motion for discovery was in connection with the newly discovered evidence claim premised upon the Hazen and Kormondy affidavits regarding incriminatory statements made by Dwayne Kirkland, a black male. Reed explained in his discovery motion:

> 2. As pled in the pending amended Rule 3.851 motion, handwritten notes of a police officer investigating Ms. Oermann's murder identify a witness named Edith Bosso who was interviewed regarding her observations on the evening of February 27, 1986. When she was returning home from the dogtrack, she saw a black man walking in the neighborhood at about 6:30 PM. The man was walking towards Ortega Forest Drive. The man was in dark clothes and had something sticking out of his back pocket. She was not sure what the item was, but she did notice it "standing up" out of the pocket, not hanging down. She described this black man as tall and slender, maybe around six feet tall.
>
> 3. On June 13, 1986, Alan Chipperfield, conducted pre-trial discovery depositions on behalf of Mr. Reed. One of the individuals deposed at that time was Bruce Carl Scott. As he indicated in the deposition, Mr. Scott was employed by the Florida Department of Law Enforcement and was "a fingerprint specialist" who had written three reports regarding his work in Mr. Reed's case (June 13, 1986, deposition at 54). Mr. Scott testified on June 13, 1986, that he had located "two prints" of value (*Id*. at 55). These two prints of value were found on "two checks both belonging to Reverend Oermann's account, check number 369 and check number 400 of Exhibit 3." (*Id*.). According to Mr. Scott's deposition testimony, he had received the checks in March of 1986 and analyzed them for latent fingerprints at that time. "I checked them out from the evidence section and took them to my office." (*Id*. at 56). In fact, Mr. Scott acknowledged that he had written a report concerning his analysis of Exhibit 3. In his written report, Mr. Scott identified Exhibit 3 as "[t]wo blank

> deposits slips, deposit receipt and four blank checks" (*See* Attachment A). Mr. Scott's written report was dated March 10, 1986. It specifically advised "[t]wo (2) latent fingerprints of value for identification were developed on Exhibit 3 (two checks). No latent prints of value for identification were developed on the remaining exhibits." The reports also indicated that Mr. Scott had been provided known prints from Betty Oerman, John Andrew Williams, Robert Killebrew and Ervin Oermann. According to the report, Mr. Scott compared the two latent prints of value to these known prints and concluded that "[t]he latent fingerprints were not made by the above named individuals." Mr. Scott also stated in his March 10th report that "[p]hotographs of the unidentified latent prints have been prepared for our files and will be available for any future comparisons you may desire" (Attachment A at 2).
>
> 4. It was shortly before the June 13th deposition that, on June 4, 1986, Mr. Scott admitted to Steve Platt that he had been removing cocaine from evidence containers and ingesting it. According to Mr. Platt's testimony during the evidentiary hearing on Mr. Reed's prior Rule 3.850 motion, he immediately suspended Mr. Scott from his job with FDLE. No mention was made of the suspension during the June 13th deposition.
>
> 5. It is clear from the March 10, 1986, FDLE report authored by Mr. Scott that "[t]wo (2) latent fingerprints of value for identification were developed" and that "[p]hotographs of the unidentified latent fingerprints [were] prepared for [FDLE's] files" (Attachment A at 2). One of the two prints, Mr. Scott ultimately concluded matched Mr. Reed's known prints. However, the other "latent fingerprint[] of value for identification" was not matched to Mr. Reed. Accordingly, Mr. Reed seeks to have the photograph of this print produced so that it may be compared with Mr. Kirkland's fingerprints which would have been placed upon the judgment and conviction that lead to his incarceration on death row for first degree murder. *Kirkland v. State*, 684 So. 2d 732 (Fla. 1996).

(PC-R2 196-97)(footnotes omitted).[20]

[20]At Reed's trial, a check book belonging to the victim was introduced into evidence as State's Exhibit 9 (T408). In the FDLE report dated March 10, 1986, and signed by Scott, reference was made to item no. 3, "[t]wo blank deposits [sic] slips, deposit receipt and four blank checks" (PC-R2 201). According to the March 10th report, "[t]wo (2) latent fingerprints of value for identification were developed on Exhibit 3 (two checks). No latent prints of value for identification

In a footnote at the end of paragraph 4 of the discovery motion, Reed noted:

> When Mr. Scott testified at Mr. Reed's trial, he indicated that he had concluded that the latent print of value on check number 369 matched Mr. Reed's known prints. Contrary to his March 10th report, he then testified that besides the one latent print of value found on check number 369, "I found no latent fingerprints or palmprints of value" (Trial testimony 696). By the time of Mr. Reed's trial in November of 1986, Mr. Chipperfield was no longer Mr. Reed's counsel. Richard Nichols had been appointed by the Court to replace him. Mr. Nichols asked no questions regarding either the March 10th report or the June 13th deposition which both contained information that Mr. Scott had found a latent print of value for identification purposes on check number 400.

(PC-R2 197 n. 2).

On May 9, 2011, Reed also moved to supplement the lethal injection claim with information regarding news media reports indicating that a spokesperson for Florida's Department of Corrections had announced that the lethal injection protocol had been

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were developed on the remaining exhibits" (PC-R2 202). In his testimony at trial, Scott identified State's Exhibit 9 as what he examined and referred to in his report as item no. 3 (T684-85, 695-96). Scott testified before the jury as follows:

> Q Did you also examine, when you processed check no. 369, did you also examine the other checks and deposit slips in State's Exhibit 9?
> A Yes, I did.
> Q And did you use the same means and procedures with those other checks and deposit slips as you did with check no. 369?
> A Yes.
> Q Did you find any latent fingerprints, any fingerprints that were readable or identifiable?
> A I found no latent fingerprints or palmprints of value for identification.

(T695-96).

changed by switching a drug to be used in a lethal injection execution (PC-R2 203-04).

On June 13, 2011, Reed submitted a notice of filing which included the new lethal injection protocol that was dated June 8, 2011 (PC-R2 214, 232-46).

On September 9, 2011, the circuit court entered an order summarily denying the Rule 3.851 motion (PC-R2 294). As to the newly discovered evidence claim, the circuit court found the claim was untimely. The circuit court also ruled that "there is no possibility, much less probability, that the results would have been different" had the jury been aware of the new evidence (PC-R2 297).[21] In a separate order contemporaneously issued, the circuit court denied the motion for discovery (PC-R2 292-93).

As to the lethal injection claim, the circuit court denied the claim citing to this Court's decision in "*Valle v. State*, SC11-1387, August 23, 2011" (PC-R2 297).

Reed filed a motion for rehearing. After this motion for rehearing was denied, Reed filed a notice of appeal on October 31, 2011.

B. Relevant Facts

On Thursday, February 27, 1986, Irvin Oermann left his home

[21]The circuit court did not conduct any cumulative analysis, *i.e.* an evaluation of the newly discovered evidence cumulatively with the previously presented *Strickland/Brady/Giglio* evidence that was presented in Reed's previous motion to vacate (PC-R2 296-97).

at around 5:45 PM (T385). His wife, Betty Oermann, remained home alone (T385). Upon his return home at close to 10:00 PM, Oermann found his wife lying dead on the living room floor (T387). Ms. Oermann had been raped and stabbed repeatedly in the throat (PC-R2 35).

Investigators who processed the crime scene that night found no point of forceable entry. The house had not been ransacked (T432-33). The only item identified as missing was Betty Oermann's wallet which she normally kept in her purse (T433-34).[22] That night police found State's Exhibit 9 which contained a number of blank checks on the Oermann's joint bank account in the backyard near a fence (T435-38).[23]

According to undisclosed[24] handwritten notes of a police officer investigating Ms. Oermann's murder, a neighbor named Edith Bosso was interviewed regarding her observations on the evening of February 27, 1986. When she was returning home from the dogtrack,

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[22]Approximately five months after the homicide, the Oermann's neighbor, Lamona Smith, found the wallet in the canal which ran behind her house (T538-43).

[23]For reasons that are never explained on the record, the check book contained "four blank checks," two of which were numbered 369 and 400 according to Scott's June 13, 1986 deposition. The check numbers of the other two checks that remained in the check book were not identified. According to Scott's deposition, he identified Reed's fingerprint on the lower right face side of check no. 369, and he found an unidentified latent print of value on the lower left back of check no. 400.

[24]The notes were undisclosed at the time of Reed's trial. Their existence was learned during collateral proceedings.

she saw a black man walking in the neighborhood at about 6:30 PM. The man was walking towards Ortega Forest Drive. The man was in dark clothes and had something sticking out of his back pocket. She was not sure what the item was, but she did notice it "standing up" out of the pocket, not hanging down. She described this black man as tall and slender, may be around 6 feet tall (PC-R2 35).

Sometime after obtaining this information from Ms. Bosso, law enforcement abandoned the lead in order to try to build a case against Reed, a white male who stands 5' 6" in height.[25] A short time before the murder, Reed and his girlfriend Chris Niznik had lived permissibly in the victim's home and had helped her out with household chores such as vacuuming, dusting and cleaning.[26] According to the victim's husband, Reed and his family stayed with the Oermann's from December 11, 1985, until December 22, 1985 (T372).[27] Oermann testified that "[w]e treated them just like our family, just like

[25]This shift in focus occurred after the police taped a TV crime watch segment publicizing some of the details of the crime and asking for leads from the public (T547-48). Among the details presented in the TV segment was the discovery of a Dr. Pepper baseball cap at the scene (T548). An individual named Mark Reiney saw the segment and claimed to recognize the cap as one he had given to Reed (T478-79).

[26]In December of 1985, Reed and Niznik and their two children were destitute and homeless. On December 11, 1985, Travel's Aid contacted Irvin Oermann about Reed's problems, and the Oermanns opened their home to Reed and Niznik (T372). Reed was given a key to the house, and he stayed with the Oermanns until December 22, 1985, when he moved into a place in Ware's Trailer Park, a mile away (T373-74).

[27]Oermann testified that Reed was accompanied by a woman, Oermann had believed was Reed's wife, and two children, one of which was a five week old baby (T372).

members of our family" (T373). Even after Reed and his family moved into their own place, the Oermanns maintained a good relationship with Reed and his family. They loaned Reed money, gave him and his family food and even loaned him their car (T374). Though the Oermanns had concluded that Reed was not acting responsibly and decided to stop providing him and his family additional help "about the middle of February" (T376), there had been no open hostility, animosity or overt quarreling (T414-15) ("there hadn't been any confrontations or, as I described, any kind of open hostility").

While staying with the Oermann's, Reed and his family used the victim's laundry facilities (PC-R1 1262-1263). They also did household chores, *i.e.* "Vacuuming, dusting, cleaning" (PC-R1 1263). Throughout January and into February, Reed was often at the Oermanns even after he and his family moved out on December 22nd, receiving food, money and borrowing a car. Because of this, much of the physical evidence at the crime scene was consistent with Reed's previous presence there. For the State to obtain a conviction, it was important to find and use evidence that could only have been left on the day of the homicide, February 27, 1986.

1. Fresh fingerprint evidence[28]

[28]This Court in 2004 rejected an ineffective assistance claim that Nichols rendered deficient performance in failing to adequately challenge Scott's "freshness" testimony. This Court concluded:

> However, substantial evidence in the form of testimony by Chipperfield, Nichols, and even Ronald Fertgus supports the conclusion that Nichols could not have foreseen the presentation of that particular testimony.

One such piece of evidence was a fingerprint that a fingerprint examiner testified in his opinion was "fresh."[29] During Reed's trial in the fall of 1986, Bruce Scott testified for the State. He had been employed by the Florida Department of Law Enforcement as a fingerprint examiner. He testified that, while working for FDLE, he identified Reed's latent fingerprint on a check which had been found in the back yard of the Oermann residence.[30] At Reed's trial,

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> Counsel cannot be found ineffective for failing to arm himself with a defense expert **to counter testimony that was unforseeable**.

Reed v. State, 875 So. 2d 415, 427 (Fla. 2004) (emphasis added). Apparently, trial counsel was not ineffective; he was just sandbagged by the prosecutor. This Court rejected the ineffectiveness claim because there had been a discovery violation and a failure by the State to comply with *Brady v. Maryland*, 373 U.S. 83 (1963), and then after making such a finding, this Court failed to conduct an analysis of whether the State's presentation of "unforseeable" testimony, which is not supportable by science, violated due process.

[29]In his closing argument, the prosecutor relied upon Scott's testimony regarding the "freshness" of the latent print that he found on check no. 369:

> The checks that were found in that backyard had the defendant's fingerprint, a fingerprint that in Mr. Scott's opinion was made within the last ten days, right around the time of the murder, between February 23 and March the 3rd or 4th. I believe it was the 4th.

(T780).

[30]Though his March 10th report indicated that he had found two latent prints of value on State's Exhibit 9, at Reed's trial he testified that he only found one latent print on the exhibit, the one that he matched to Reed. This false testimony indicating that there had been only one latent print of value was seized upon by the prosecutor in closing argument:

> And he told you that the fingerprint that he found on that

Scott claimed in his testimony that he could date when the fingerprint was left on the check. Scott testified that he could tell that Reed's fingerprint was fresh and sweaty (T687).[31] It was the "dating" of the fingerprint to a time when Reed no longer resided in the victim's house and no longer in regular contact with the victim that was a critical piece of evidence in the State's case.[32]

> check discovered in the backyard - - well, first he said he examined all of those checks and of all those documents found there in the backyard he found only one fingerprint. Only one. The checks that were discarded, thrown by the water, by the rapist, by the murderer, there was only one fingerprint in all of them and of all the people in the world, whose fingerprint was it? That defendant (indicating). Is that a coincidence? No, it's a fact of guilt.

(T776).

[31]Scott testified that the latent print on check no. 369 was "a fresh print or a print that, because of the dark purple reaction, because of how the chemical reaction occurred, you're dealing with a print that's - - I've never seen one react like that older than ten days" (T687). Since his examination of the check occurred on March 4th, his testimony narrowed the time frame when the print could have been left on the check considerably. Of course, what had not been disclosed to Reed's counsel was that at the time of Scott's examination of check no. 369, Scott was stealing cocaine sent to FDLE for testing and using the cocaine while acting as a fingerprint analyst for FDLE. Only he was present to witness the "quick reaction," "the chemical reaction" when he developed the latent print on check no. 369 (T687). Because his cocaine use at the time had not been disclosed, the defense was precluded from cross-examining Scott about the impact on his brain and its ability to accurately perceive this "quick reaction," as well as inquiring about the possibility he spilled cocaine into the chemicals he was using.

[32]Because Scott contradicted his March 10, 1986, report and his testimony at his June 13, 1986, deposition that both indicated that there was a second unidentified latent print of value, and testified at Reed's trial that he only found one latent print of value which he concluded matched Reed's fingerprints, no examination regarding

Unknown to Reed, his counsel or his jury, Scott was at the time of his testimony under investigation for possible criminal prosecution by the same State Attorney's Office that was prosecuting Reed. At the 2002 collateral proceedings, FDLE Bureau Chief Steven Platt testified regarding Scott's misconduct while working at the FDLE crime lab which was discovered in June of 1986 (PC-R1 962-963). At that time five months before Reed's trial, Scott admitted to Platt that he had been collecting and ingesting cocaine in the FDLE crime lab that had been provided to him for testing (PC-R1 962-963, 965). The cocaine that Scott admitted taking and using had been submitted to the crime lab for analysis (PC-R1 963). Scott admitted that he had ingested cocaine while on the clock at the crime lab and that he was under its influence while at work (PC-R1 973). Scott showed Platt how he shook the cocaine out of the bags and scraped it into piles for ingestion with a rolled up piece of paper (PC-R1 984).

As a result of Scott's confession, Platt was so concerned about these revelations that he reviewed all of Scott's work between

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the "freshness" of the second print could occur before the jury. Indeed at the June 13, 1986, deposition which had been conducted by Chipperfield, Scott made no mention of the latent print's alleged "freshness" on check no. 369. In fact, Chipperfield testified at the 2002 evidentiary hearing that he happened to be attending Reed's trial the day that Scott testified. When he heard Scott's testimony as to the "freshness" of the latent print, Chipperfield was "shocked and surprised" (PC-R1 1206). He believed the testimony "was bologna" (PC-R1 1206). In fact, Chipperfield's view of the "freshness" testimony was corroborated by the Ernest Hamm, a witness that the State called at the 2002 who had been Scott's supervisor in 1986 when they both worked for FDLE (2/22/2002 Tr. at 6-7). Hamm testified in 2002: "I know of no scientific or technical way to date a fingerprint" (2/22/2002 Tr. at 13).

January of 1985 and June of 1986 (PC-R1 967).[33] Platt testified, "I believe it was June 4th, 1986 when he made those statements to me concerning removing cocaine from evidence containers and ingesting it and I suspended him from all action at that time. He later resigned during the course of an internal investigation."[34] (PC-R1 968). Scott's confession to stealing and ingesting cocaine while on the job was referred to the Duval County State Attorney's Office for a determination as to whether to file charges (PC-R1 969). In late August of 1986, a decision was made not prosecute Scott without more evidence (PC-R1 992).

Former Duval County Assistant State Attorney Steven Kunz testified in 2002 that FDLE did send his office information about Scott's cocaine consumption for investigation and possible prosecution (PC-R1 1013-1014, 1017). Kunz testified that his office chose not to prosecute Scott saying it lacked any proof beyond Scott's own words (PC-R1 1014-1015). Also, Scott had use immunity for some

[33]This time period encompassed the time of the subject murder and the date on which evidence in the case was provided to FDLE: March 3, 1986. Thus, at the time of Scott's work on the case he was stealing and using cocaine on the job. At the 2002 evidentiary hearing, evidence was presented that Scott's preposterous claim that he could tell that Reed's fingerprint was fresh and sweaty led another fingerprint expert to "have serious concerns about [Scott's] concentration level during the [fingerprint] identification process" (PC-R1 899). Yet, Reed's jury was kept in the dark as was his counsel.

[34]On June 13, 1986, Scott was deposed in Reed's case and did not reveal that he was under suspension at the time, nor that he was being criminally investigated by the State Attorney's Office that was prosecuting Reed.

of his statements admitting his theft and use of cocaine (PC-R1 1024, 1026). Kunz did realize that having an FDLE employee accused of stealing and using cocaine could jeopardize prosecutions (PC-R1 1020). He also believed that the decision not to prosecute protected any future prosecutions in which Scott was a witness (PC-R1 1020).[35]

Kunz knew about Scott's cocaine use nearly three months before Reed's trial (PC-R1 361, 1013, 1016-1017). At all relevant times ASA Kunz (who investigated Scott's cocaine problems) and ASA George Bateh, who prosecuted Reed, both worked in the same Duval County State Attorney's Office (PC-R1 361). Bateh stated that if he had known about Scott's suspension from the FDLE crime lab, it is something that he probably would have disclosed to the defendant (PC-R1 1297).[36] Whether or not Bateh personally knew of this information, the State Attorney's Office knew, both actively and constructively, of Scott's theft and use of cocaine and the investigation into his illegal conduct.

An internal FDLE investigator, Wayne Thompson, testified

[35]Nevertheless, Kunz was personally convinced that Bruce Scott did indeed use cocaine while on the job (PC-R1 1028).

[36]In his testimony in 2002, Bateh was not asked about the fact that he had arranged for Scott to be at the Duval County Courthouse on October 14, 1986, more than a month before Reed's trial, to obtain Reed's fingerprints pursuant to the State's motion to compel samples of the defendant's fingerprints (T29). Bateh had to have known that Scott was no longer employed by FDLE at that time, and had not been for 4 months, when he used him to obtain Reed's fingerprints. Yet, he put nothing on the record regarding the fact that Scott was no longer a law enforcement officer.

at the 2002 evidentiary hearing that FDLE did not consider it acceptable for a crime lab to be staffed by an individual known to be using cocaine (PC-R1 1071). "When it comes to the quality of our process, yeah, it was a concern. It was a serious concern as to how could this occur within our lab" (PC-R1 1071). Thompson testified that when Scott later asked for his job back, he was found unsuitable for rehire (PC-R1 1079-1080, 1085).[37]

The evidence of Scott's theft and use of cocaine could have been used by the defense to attack Scott's credibility at Reed's trial had it been disclosed.[38] Scott could have been impeached because he

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[37]Clearly Scott wanted to get back his job with FDLE when he testified at Reed's trial in November of 1986. He thus had reason to curry favor with the State when he testified.

[38]This Court in denying Reed's *Brady* claim based upon Scott's use of cocaine while on the job, his resulting suspension, and the criminal investigation into his conduct said:

> The *Breedlove* decision indicates that in order for Reed to have introduced at trial for impeachment purposes evidence of Scott's cocaine use and the subsequent investigation, he first would have been required to show the investigation was both related to Reed's case and not too remote in time.

Reed v. State, 875 So. 2d at 431. However, this Court's analysis failed to properly read and take into consideration the due process requirement that a witness's reasons for currying favor with the State must be disclosed. This Court's similar failure to appreciate this due process obligation in *Smith v. State*, 931 So. 2d 790 (Fla. 2006), was found to be "unreasonable" in *Smith v. Sec'y Dept. Of Corrs.*, 572 F.3d 1327, 1343 (11th Cir. 2009) ("the Florida Supreme Court's decision was unreasonable insofar as it determined that the prosecutor's 1989 note about Melvin Jones' fears that he would be facing charges that he had sexually abused his daughter was not impeachment evidence under *Brady*."). This Court has since accepted the Eleventh Circuit decision in *Smith v. Sec'y Dept. of Corrs*. as

had reason to curry favor with the State, both to avoid any chance of a criminal prosecution (the statute of limitations had not run) and to try to get back his job with FDLE. When he testified for the State at Reed's trial, Scott was not a disinterested scientist, but a drug abuser who had reason to help the State in order to help himself. Certainly, the undisclosed evidence would have provide a basis for the jury to find Scott incredible and to reject his testimony.[39]

Scott's work in Reed's case examining the fingerprint was done while he was under the influence. Since as FDLE acknowledged, such examinations should not be done by someone under the influence of drugs, the reliability of Scott was subject to attack because of the undisclosed cocaine use. At trial, Scott's testimony went unimpeached. His unimpeached claim of finding Reed's "fresh" and "sweaty" fingerprint on the victim's personal checks was critical to the State's case against Reed and the jury's deliberations. By denying trial counsel information about Scott's theft and use of cocaine while on the job, the State not only withheld favorable information from the defense, but allowed Scott's false testimony that he only found one fresh print of value on State's Exhibit 9 to

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controlling authority. *Smith v. State*, 75 So. 3d 205 (Fla. 2011).

[39]The significance of Scott's testimony was to try to date Reed's fingerprint to a time period that Reed could not explain. On this critical aspect of his testimony, Scott had not previously (in either his report or his deposition) made a claim that he could date the fingerprint. Besides adding the "freshness" allegation to his testimony, he subtracted the existence of another latent print of value which he had noted in his report and discussed in his deposition.

go uncorrected.

2. The Dr. Pepper baseball cap

The State's theory of prosecution was that Mr. Reed was wearing a Dr. Pepper cap on February 27, 1986, up until the time that he committed the murder and left the cap at the crime scene. However, an undisclosed police report authored by Officer David Summersill of the Jacksonville Sheriff's Office was introduced at the 2002 evidentiary hearing which showed that Reed was not in possession of the cap at 4:00 PM on February 27, 1986 (PC-R1 953). The fact that Mr. Reed was not in possession of the hat at 4:00 p.m. means that he did not have the hat to leave at the crime scene on the evening of February 27th.[40]

As Summerstill explained in his 2002 testimony, he found Grover Reed passed out in the backseat of a car at approximately 4:00 PM on February 27, 1986 (PC-R1 942).[41] The time given on the police report he prepared at that time listed 4:00 PM, but Summerstill was unsure of whether that was the time that he was dispatched or the time that he started filling out the form recording the incident. In the report, Summerstill recorded Grover Reed's name, date of birth, place

[40]Reed had left his home earlier in the day. If he did not have the cap at 4 PM, then he could not have had the cap to leave at the Oermann residence an hour or two later because he did not return home in between.

[41]Of course, this undisclosed police report was also significant for the evidence of Reed's substantial impairment at 4:00 PM on February 27, 1986.

of birth and other identifying information (PC-R1 944). Summerstill included a description of Reed: "height of five foot six, his weight at 165, his hair as brown, his eyes brown" (PC-R1 945). He also recorded Reed's appearance and the clothes he was wearing: "a cross on his right shoulder, mustache, beard and an Opryland T-shirt" (PC-R1 945-46). He also noted that Reed was wearing "blue jeans" (PC-R1 946). Missing from the police report was any indication that Reed was wearing or had a Dr. Pepper cap at approximately 4:00 PM on February 27, 1986.[42]

3. Serological evidence

An FDLE analyst testified at Reed's trial that the victim had blood type O and was a secretor, meaning trace elements of her blood type could be found in other body fluids. The FDLE analyst testified that Reed was blood type O and a non-secretor, meaning that trace elements of his blood would not be found in his body fluid, including seminal fluid and sperm. The FDLE analyst testified that spermatozoa was visible on slides prepared using the vaginal swabs from the victim. The FDLE analyst then testified that he was able to detect "on the vaginal swabs H antigenic activity. Now, H antigenic activity is consistent with or is equivalent to blood type

[42]Summerstill testified as follows:

> Q Okay. If he would have worn for example a Jacksonville Suns hat or a Dr. Pepper cap you would have written those down, too, right?
> A In most cases, yes, sir.

O" (Trial Tr. 638). No discussion followed regarding the fact Mr. Reed was a non-secretor, and thus was not the source of the H antigenic activity. Indeed, the prosecutor in his closing argument relied upon the FDLE analysts testimony and argued that the FDLE analyst "typed the semen, the sperm that was found in Betty Oermann's body ... The blood typing was consistent with this defendant, the blood typing of the sperm was consistent with this defendant's blood type because he was the one that raped Betty Oermann." (Trial Tr. 772-73).

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. Where as here the circuit court denied an evidentiary hearing, the facts alleged must be accepted as true and the circuit court's legal conclusion are reviewed *de novo*. *Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

SUMMARY OF THE ARGUMENTS

1. Accepting the Hazen and Kormondy affidavits as true and evaluating this newly discovered *Brady* evidence cumulatively with Reed's previously presented *Brady/Giglio* and *Strickland* claims, it was error to summarily deny Reed's claim without conducting an evidentiary hearing.

2. The circuit court erred in denying Reed's motion for

(PC-R1 946).

discovery and refusing to give Reed access to the photograph of the latent print of value on check no. 400 so that it could be compared to Dwayne Kirkland's fingerprints.

3. Reed was deprived of the proper analysis of his *Brady/Giglio* and *Strickland* claims when this Court heard his prior appeal of the denial of his motion to vacate his conviction and sentence of death. The failure to apply the proper *Strickland* standard of review in Reed's case while numerous similarly situated individuals have received the benefit of the proper *Strickland* analysis and as a result obtained relief from the conviction and/or sentence of death, violates Reed's equal protection and due process rights, as well as his Eighth Amendment rights.

4. Reed was deprived of his due process rights of notice and opportunity to be heard and to present evidence on his challenge to Florida's lethal injection procedures when the circuit court summarily denied his Rule 3.851 challenge to the new lethal injection protocol and in denied his request for an evidentiary hearing on the claim.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED WHEN RULING THAT REED'S NEW DISCOVERED EVIDENCE OF A *BRADY* CLAIM WAS NOT TIMELY, AND IN ALTERNATIVELY RULING THAT AN EVIDENTIARY HEARING WAS NOT WARRANTED ON THE NEWLY DISCOVERED EVIDENCE.

A Introduction

Reed was convicted of the murder of Betty Oermann who was found dead by her husband when he returned home from a night class on February 27, 1986. The Oermanns resided on Ortega Forest Drive in Jacksonville, Florida. Irvin Oermann testified that he had left his wife alive and unharmed at approximately 5:40 PM (T385). When he returned home, she was dead having been raped and stabbed repeatedly in the throat.

According to handwritten notes of a police officer who had investigated the Oermann murder (notes that had apparently been undisclosed at the time of trial), a witness named Edith Bosso was interviewed regarding her observations on the evening of February 27, 1986. When she was returning home from the dogtrack, she saw a black man walking in the neighborhood at about 6:30 PM. The man was walking towards Ortega Forest Drive. The man was in dark clothes and had something sticking out of his back pocket. She was not sure what the item was, but she did notice it "standing up" out of the pocket, not hanging down. She described this black man as tall and slender, about 6 feet tall.

Affidavits from two individuals reporting that a black man named Dwayne Kirkland confessed to having committed the murder for which Reed was convicted were obtained by Reed's court-appointed federal habeas attorney.[43] According to the affiants, Kirkland

[43]When federal habeas counsel obtained the affidavits, there was no registry counsel under §27.710 to represent Reed in state court proceedings and present his claim premised upon the affidavits in a Rule 3.851 motion.

confessed while he was incarcerated on death row for another murder. Kirkland was dying of AIDS when he confessed to the murder.

James Wayne Hazen swore in the affidavit that he executed on January 30, 2007, that Dwayne Kirkland, a black man, told him that he had murdered an older white woman in Jacksonville in February of 1986. In his affidavit, Hazen swore:

> 1. My name is James Hazen and I am presently an inmate at Sumter Correctional Institution. I was convicted of first degree murder and sentenced to death in 1994. Shortly thereafter, I was transported to the death row at Florida State Prison. New arrivals on death row were initially housed at Florida State Prison. Later, they would be transferred to Union Correctional Institution.
>
> 2. Dwayne Kirkland and I arrived at Florida State Prison (FSP) at about the same time in 1994. Because we were both new to death row, we were both housed at FSP for awhile. While we were both at FSP, I knew Kirkland by name and face because we lived on the same floor. However, it wasn't until we were both moved to Union Correctional (UCI) that we started talking. When we got to UCI, we didn't know anybody else and were both newbies and outsiders for awhile. Since we both recognized each other from FSP, we started talking. He was black with dark skin, average height and kind of heavy set. At UCI, Kirkland and I were housed on the same wing and we had the same yard time.
>
> 3. People at UCI did not take to Kirkland because he had a bad hygiene problem. People just stayed away from him. During yard time, he spent most of the time alone and he seemed pretty lonely. Because no one else was talking to him and because we were both newbies to UCI and I didn't know anyone else that I wanted to talk to, I began to talk with Kirkland. We would often sit and talk during our yard time together. For me, it was just a matter of trying to ease the loneliness.
>
> 4. During my conversations with Kirkland on the yard, sometimes he would just start talking about murders he had committed. This would happen totally out of the blue. We would just be sitting there talking, and suddenly he starts telling stories about stuff he had done. He said he killed a little girl in Blountstown in 1993, and he

> wanted to cut her head off. I think that was the murder he was on death row for. I also remember Kirkland telling me about another murder. He said that in February of 1986 he was in Jacksonville. He said that one day he saw this old woman there and he raped her and then he killed her. He said he tried to cut the old woman's head off. Kirkland told me that after he had robbed and killed the woman in Jacksonville, he got real scared. So, he took off right away to Georgia to hide out and then later went to stay with family in Quincy, Florida.
>
> 5. Kirkland seemed like he wanted to understand why he did those things. He said that he had this thing when it came to old women and young ladies. He knew that they got something going inside of him, but he didn't know why and really couldn't explain it. He talked about how women, the old and the young, just did something to him, they got him riled up inside. These problems really upset him and it sounded like he felt bad about it.
>
> 6. I got off of death row in late 1997. But just the way things work there, we had only been housed near each other for awhile in 1995. It wasn't too long before we got moved to different wings, and I never saw Kirkland again.

Johnny Shane Kormondy swore in an affidavit that he executed on January 30, 2007, that Dwayne Kirkland, a black man, told him that he had murdered an older white woman in Jacksonville in the mid-1980's. In his affidavit, Kormondy swore:

> 1. My name is Johnny Shane Kormondy and I am currently an inmate at Union Correctional Institution (UCI). I am on death row. I was sent to death row in 1994. I met Dwayne Kirkland here at UCI in 1995 when we were housed on the same wing of the northeast unit together. The northeast unit is death row. I don't remember knowing him before we ended up on E-wing together. Being on the same wing the way the prison worked, it meant sometimes we would have yard time together. He was black and a few inches shorter than me (I am about 5 foot 11 inches tall).
>
> 2. When we met, we were both still considered new guys. On death row, it takes years for the old-timers, or even the not so old-timers, to accept those who are considered new. So often, the new guys would have to rely on each other. When we had yard together, Kirkland and I

would often walk together, talking and smoking cigarettes. We would talk about prison life and life on the streets. Kirkland was up and down. When he was in the mood, he just had to talk. You couldn't stop him. When he got going, he would start telling details about crimes he committed. I really didn't want to know about it. I told him to stop. I said that it was none of my business. But, he just had to talk about things. He just continued to tell me about the murders anyway. He said he knew he was going to die soon. It wasn't the death penalty that would do him in. He said he had AIDS and it was going to get him soon. He knew he was dying, and I guess he had to make peace with what he had done. He didn't seem to be holding anything back; he just had to talk about his life and what bad things he had done. Kirkland would ramble on about murders he had done. I wasn't really wanting to listen, but he talked about his murders often enough that the facts just got stuck in my head.

3. One of the murders that Kirkland would talk about was one he said he did in Jacksonville. He said that he had killed an old white woman in Jacksonville about ten years before (meaning the mid-1980's). He said one early evening, he was walking down a street somewhere in Jacksonville. He notice the old woman outside her house with a garden hose. Suddenly, she went inside her house. Kirkland seemed to think it was because she saw a black man, Kirkland, walking down the street. So when she went inside, he knocked on the door to her house and asked her if he could get a drink of water because he was thirsty. But she said "no" and refused to let him have some water. This really set Kirkland off. Kirkland said that made him so angry that he lost it and raped her. He then killed her and took whatever he saw laying around that he could get away with fast. Kirkland said that he was so mad that he tried to cut the woman's head off. He then got out of town as fast as he could and went and stayed with family in Georgia.

Kirkland was on death row for a murder that he committed in Blountstown, Florida. According to this Court's opinion affirming his conviction and sentence of death, the murder occurred on April 13th or 14th of 1993. *Kirkland v. State*, 684 So. 2d 732 (Fla. 1996). The victim was found dead with "a very deep, complex,

irregular wound of the neck." *Id*. at 733. As a result of this wound, the victim was unable to breath and sustained extensive loss of blood. Before the victim's body was found, Kirkland took off and went to Atlanta, Georgia. He subsequently went to Fort Myers, Florida, where he was arrested on April 19, 1993. Kirkland raised an insanity defense at his trial. However, he was convicted of first degree murder and sentenced to death. On appeal, this Court found insufficient evidence of premeditation and reduced the first degree murder conviction to second degree murder.[44]

Once the police became focused upon Reed as their suspect in the case, the lead provided by Ms. Bosso was not pursued. Records from Gadsden County, Florida, show that in November of 1985 a capias was issued for Mr. Kirkland in connection with his failure to appear for pending criminal proceedings. However, he was not arrested on the capias until July of 1986 (PC-R2 36). Between November of 1985 and July of 1986, Mr. Kirkland's whereabouts were, according to the records, officially unknown.

The Hazen and Kormondy affidavits were obtained in 2007 by Reed's federally appointed habeas counsel who was representing Reed in federal habeas proceedings challenging the judgment and sentence entered in the above-entitled case. Reed's federally appointed counsel did not know that Reed was without state court

[44]Soon after this Court issued its decision affirming, Kirkland died from AIDS related illnesses. As a result, he is not available as a witness. However, his statements which were against his penal interest are admissible.

registry counsel; he was unaware that the circuit court in Duval County had entered an order discharging Christopher Anderson as registry counsel for Reed in 2005. Accordingly, Mr. Reed was left with no registry counsel contrary to the requirements of *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988) ("We recognize that, under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral proceedings."). Without representation, Reed was left without access to the state courts to present his newly discovered evidence claim based upon the Hazen and Kormondy affidavits. *See Gordon v. State*, 75 So. 3d 200 (Fla. 2011); *Davis v. State*, 789 So. 2d 978 (Fla. 2001). At the very least, the circumstances presented here warrant invocation of the judiciary's equitable powers, since it was a court that left Reed without counsel in violation of Florida law.

A court's inherent equitable powers were recently discussed in *Holland v. Florida*, 130 S. Ct. 2549 (2010), where the U.S. Supreme Court explained:

> But we have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." *Baggett v. Bullitt, 377 U.S. 360, 375 (1964)*. In emphasizing the need for "flexibility," for avoiding "mechanical rules," *Holmberg v. Armbrecht, 327 U.S. 360, 375 (1946)*, we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity," *Hazel-Atlas Glass Co. V. Hartford-Empire Co., 322 U.S. 238, 248 (1944)*. The "flexibility" inherent in "equitable procedure" enables

> courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid.*

Holland v. Florida, 130 S. Ct. 2563. Reed has always maintained his innocence of the murder of Betty Oermann, and these new affidavits support his claim of innocence.

B Timeliness of the claim

As to Reed's newly discovered evidence claim, the circuit court ruled that because the affidavits were signed on January 30, 2007, and the Rule 3.851 motions was filed on November 29, 2010, the claim was not timely. Overlooked by the circuit court was the fact that during that period of time Reed in violation of Florida law did not have a duly appointed registry attorney who could file a Rule 3.851 motion on his behalf. Moreover, Florida law precludes a Florida capital defendant from filing *pro se* pleadings because it requires capital defendants to be provided collateral counsel. *Gordon v. State*, 75 So. 3d 200 (Fla. 2011); *Davis v. State*, 789 So. 2d 978 (Fla. 2001). And in fact, neither Reed nor his federally appointed federal habeas counsel knew that Reed's registry counsel had been discharged in July of 2005 and no replacement counsel had been appointed by the circuit court because neither were served with the order of discharge. Accordingly, the circuit court erred in failed to consider that the State of Florida had failed to provide Reed with a registry attorney who could filed a Rule 3.851 motion until the motion to appoint was granted *nunc pro tunc* to November 22, 2010.

As has been recognized in cases in which DNA evidence established that the convicted defendant was in fact innocent, the demonstration of innocence must trump the State's interest in finality and the erection of any and all procedural bars. Certainly, the State has no interest in keeping a man who is innocent on death row awaiting execution. Due process warrants the invocation of the judiciary's inherent equitable powers in the circumstances presented here.

C. Evidentiary hearing is warranted

At this juncture, Hazen's and Kormondy's affidavits must be accepted as true. *Smith v. Dugger*, 565 So. 2d 1293 (Fla. 1990). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). The same rule applies as to successive Rule 3.851 motions. *Mungin v. State*, 79 So. 3d 726, 737 (Fla. 2011); *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). Numerous successive Rule 3.850 petitioners have received evidentiary hearings based on newly discovered evidence and merits consideration. *State v. Mills*, 788 So. 2d 249, 250 (Fla. 2001)(the Florida Supreme Court affirmed the circuit court's grant of sentencing relief on a third Rule 3.850 motion premised upon a testifying co-defendant's inconsistent statements to an individual while incarcerated); *Lightbourne v. State*, 742 So. 2d 238, 249 (Fla.

1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998)(noting that lower court held an evidentiary hearing on defendant's allegations that another individual had confessed to committing the crimes with which defendant was charged and convicted); *Swafford v. State*, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce an acquittal); *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness recanting her testimony); *Scott v. State*, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); *Johnson v. Singletary*, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]"); *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)(remanding for an evidentiary hearing on allegations that another individual confessed to the murder with which Jones was charged and convicted and was seen in the area close in time to the murder with a shotgun). In the present case, the lower court erroneously failed to accept the Hazen and Kormondy affidavits as true, consider those affidavits cumulatively with *Brady/Giglio* and *Strickland* claims previously presented, and grant an evidentiary hearing on Reed's constitutional claim premised upon those

affidavits. *Smith v. State*, 75 So. 3d 205 (Fla. 2011).

Under this Court's case law, newly discovered evidence must be evaluated cumulatively with the other evidence that the jury did not hear due either to a *Brady/Giglio* violations or *Strickland*. And, according to *Smith v. State*, the analysis requires the cumulative consideration to follow the refinements in the law that have developed since the original *Brady/Giglio* and/or *Strickland* analyses were conducted.[45] Thus, the cumulative analysis of the newly discovered evidence must comport with *Smith v. Cain*, 132 S. Ct. 627 (2012); *Porter v. McCollum*, 130 S. Ct. 447 (2009); *Guzman v. Sec'y Dept. of Corrs.*, 663 F.3d 1336 (11th Cir. 2011); *Johnson v. Sec'y Dept. of Corrs.*, 643 F.3d 907 (11th Cir 2011); *Cooper v. Sec'y Dept. of Corrs.*, 646 F.3d 1328 (11th Cir. 2011); *Smith v. Sec'y Dept. of Corrs.*, 572 F.3d at 1348. When the proper cumulative analysis is conducted, it is clear that an evidentiary hearing is required. A reversal of the summary denial is warranted, and remand for an evidentiary hearing should be ordered.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING REED'S MOTION FOR DISCOVERY SEEKING ACCESS TO THE UNIDENTIFIED LATENT FINGERPRINT ON STATE'S EXHIBIT 9 SO THAT A COMPARISON TO KIRKLAND'S FINGERPRINTS COULD BE CONDUCTED.

[45]In *Smith v. State*, 75 So. 3d at 206, this Court directed the circuit court to employ the analysis used by the Eleventh Circuit in *Smith v. Sec'y Dept. of Corrs.*, 572 F.3d at 1348 wherein the Eleventh Circuit had found that this Court's previous analysis of Smith's *Brady* claims were contrary to or an unreasonable application of well established federal law.

On May 9, 2011, Reed filed a motion for discovery. This motion for discovery was in connection with the newly discovered evidence claim premised upon the Hazen and Kormondy affidavits regarding incriminatory statements made by Dwayne Kirkland, a black male. A March 10, 1986, FDLE report authored by Scott noted that "[t]wo (2) latent fingerprints of value for identification were developed" and that "[p]hotographs of the unidentified latent fingerprints [were] prepared for [FDLE's] files" (PC-R2 at 2). Scott ultimately concluded that one of the latent prints matched Reed's known prints. However, the other "latent fingerprint[] of value for identification" was not matched to Reed. Accordingly, Reed sought to have the photograph of this print produced so that it may be compared with Kirkland's fingerprints which would have been placed upon the judgment and conviction that lead to his incarceration on death row for first degree murder. *Kirkland v. State*, 684 So. 2d 732 (Fla. 1996).

The circuit court erroneously denied this motion for discovery. This Court should order the photograph of the latent print of value found on check no. 400 be produced and provided to Reed.

ARGUMENT III

REED'S CONVICTION AND SENTENCE OF DEATH VIOLATE THE SIXTH AND EIGHTH AMENDMENTS UNDER THE PROPER *BRADY, GIGLIO,* AND *STRICKLAND* ANALYSIS FOR THE REASONS EXPLAINED IN *PORTER V. McCOLLUM* AND THE FAILURE TO APPLY *PORTER V. McCOLLUM* TO REED'S *BRADY/GIGLIO* AND INEFFECTIVE

ASSISTANCE OF COUNSEL CLAIMS IS ARBITRARY AND VIOLATES *FURMAN V. GEORGIA*, AND THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

On November 29, 2010, Reed filed his Rule 3.851 motion in circuit court. The motion presented Reed's claim that this Court had erroneously failed to apply the proper *Strickland* standard as set forth in *Porter v. McCollum*, 130 S. Ct. 447 (2009), when analyzing Reed's *Brady*[46] and ineffective assistance of counsel claims in his previous Rule 3.851 motions, and that reconsideration of these claims was appropriate under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), in light of the November 30, 2009, opinion in *Porter v. McCollum*. Reed also argued that principles of fairness under due process required that he receive the benefit of the *Porter v. McCollum* ruling which was applied there to a 1986 capital trial, and that failure to give him the benefit of the ruling in *Porter v. McCollum* would render his conviction and sentence of death "arbitrary" in violation of *Furman v. Georgia*, 408 U.S. 238 (1972).

[46]This Court's materiality analysis under *Brady* is fungible with and indistinguishable from its analysis of prejudice under *Strickland*. In *Rivera v. State*, 995 So. 2d 191, 205 (Fla. 2008), this Court recognized that "the materiality prong of *Brady* has been equated with the *Strickland* prejudice prong," and thus an analysis of one precludes the need to perform an identical analysis for the other. In *Rivera,* this Court cited *Derrick v. State*, 983 So. 2d 443 (Fla. 2008) for the proposition that *United States v. Bagley*, 473 U.S. 667 (1985) expressly applied the *Strickland* standard of "reasonable probability" to *Brady* cases. Thus, the U.S. Supreme Court's rejection of this Court's *Strickland* prejudice analysis implicates and applies to this Court's *Brady* materiality analysis as well.

However on December 1, 2011, this Court ruled in *Walton v. State*, 77 So. 3d 639 (Fla. 2011), that *Porter v. McCollum* did not constitute new Florida law within the meaning of *Witt v. State*, 387 So. 2d 922 (Fla. 1980). This Court instead indicated in *Walton* that *Porter v. McCollum* "involved a mere application and evolutionary refinement and development of the *Strickland* analysis." *Walton*, 77 So. 3d at 644. As the *Bing Online Dictionary* explains, the word "refinement" means "an addition or alteration that improves something by making it more sophisticated or effective." Clearly then, this Court found in *Walton* that *Porter v. McCollum* altered or added to the *Strickland* standard in order to improve it; however, it was not a substantial enough of a change in this Court's opinion to qualify as a "fundamental" one under *Witt v. State.*[47]

In *Porter v. McCollum*, the US Supreme Court found that this Court had unreasonably applied *Strickland*. Thus, *Porter v. McCollum* is a finding by the US Supreme Court, not that this Court had merely erred in its decision denying Rule 3.851 relief in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), but that this Court had unreasonably

[47]Indeed in a recent decision from this Court, the refinement in the analysis of an ineffective assistance of counsel claim is apparent. *See Walker v. State*, 2012 WL 1345408 (Fla. April 19, 2012) ("To show prejudice under *Strickland,* the defendant 'must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [postconviction] proceeding"—and "reweig[h] it against the evidence in aggravation."' *Porter,* 130 S.Ct. at 453–54 (quoting *Williams v. Taylor,* 529 U.S. 362, 397–98 (2000)).").

applied *Strickland*. This Court in *Porter v. State,* 788 So. 2d at 923, indicated that it was bound by its own "case law" to defer to the circuit court's decision to discount Dr. Dee's testimony. Clearly, the "case law" that this Court relied upon in *Porter v. State* has been determined to be an unreasonable construction of *Strickland*. Describing *Porter v. McCollum* as an evolutionary refinement was itself an unreasonable application of clearly established federal law.

The "case law" that this Court felt bound by in *Porter v. State* was *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). In *Porter*, this Court relied upon *Stephens* for the following:

> So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court.

788 So. 2d at 923. Accordingly, this Court discounted Dr. Dee's testimony because "[t]he trial court did this and resolved the conflict by determining that the greatest weight was to be afforded the State's expert." *Id*.

The US Supreme Court found that this Court failed to follow *Strickland* which required: "To assess that probability, we consider 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding' and

'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 130 S. Ct. at 453-54. The failure of this Court to independently reweigh the evidence as *Strickland* required was in the word of the US Supreme Court "unreasonable." However, this failure arose from this Court's case law which had been formulated in *Stephens v. State*. In failing to appreciate this, this Court in *Walton* unreasonably applied *Porter v. McCollum. See Evans v. Sec'y Dept. of Corrs*, 2012 WL 1860802 (11th Cir. 2012) ("what is important under *Strickland*'s prejudice analysis is the jury's appraisal of the evidence, including credibility.").

Furthermore, the decision in *Walton* by its unreasonable reading of *Porter v. McCollum* has rendered Reed's conviction and sentence of death a product of an arbitrary and capricious process. It stands in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and in violation of the Eighth Amendment.

This Court's ruling in *Walton* creates an the Eighth and Fourteenth Amendment violation since Reed's conviction and sentence of death was returned during a 1986 capital trial. The proceedings resulting in George Porter's sentence of death occurred in 1986. *See Porter v. State*, 564 So. 1060 (Fla. 1990). Under *Porter v. McCollum*, the "evolutionary refinement" of *Strickland* was thus part of George Porter's right to effective representation in a capital sentencing conducted in 1986. The Eleventh Circuit has applied the decision in *Porter v. McCollum* to a penalty phase proceeding conducted in 1980.

Johnson v. Sec'y, Dept. of Corrs., 643 F.3d 907 (11th Cir. 2011); it has also applied the decision in *Porter v. McCollum* to a penalty phase proceeding conducted in 1984. *Cooper v. Sec'y, Dept. of Corrs.*, 646 F.3d 1328 (11th Cir. 2011). To have such an "evolutionary refinement" apply in a 1980 capital trial, a 1984 capital trial, and 1986 capital trial, but not in Reed's 1986 trial, can only be described as arbitrary. It is arbitrary within in the meaning of the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972). And, it is arbitrary within the meaning of the Equal Protection and Due Process Clauses of the Fourteen Amendment.

To deny Reed the benefit of *Porter v. McCollum*, a benefit that Porter, Johnson and Cooper have received, is in essence to strip him of his Sixth Amendment rights as defined by the US Supreme Court. According to the US Supreme Court, what this Court calls an "evolutionary refinement" actually dates back to *Strickland* itself. The US Supreme Court in *Porter v. McCollum* found that this Court's failure to properly understand and apply *Strickland* was unreasonable. The failure to give Reed the benefit of *Porter v. McCollum* injects an arbitrary factor into his conviction and sentence of death in violation of *Furman v. Georgia*. The failure to give him the benefit of *Porter v. McCollum* arbitrarily distinguishes his right to effective representation at his capital trial from the right to effective representation that was accorded to Terrell Johnson at his 1980 capital trial, to Richard Cooper at his 1984 capital trial, and

to George Porter at his 1986 capital trial. Use of such a distinction between the right of effective representation accorded to Johnson, Cooper, and Porter and the right of effective representation accorded to Reed constitutes a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Reed's right to equal protection and due process must mean that at his 1986 trial, he was entitled to the same Sixth Amendment right to effective representation that was accorded to Johnson, Cooper, and Porter. Accordingly, regardless of this Court's resolution of how *Witt v. State* applies to *Porter v. McCollum*, to deny Reed the benefit of *Porter* deprives him of the his Sixth, Eighth and/or Fourteenth Amendment rights.

Certainly, the manner in which the retroactivity rules operate currently has as at least as much to do with who gets executed and who does not, as does the facts of the crime and the character of the defendant.[48] The manner in which this Court applies its retroactivity rules is now clearly arbitrary and violates *Furman*. The very purpose of the standard enunciated in *Strickland* and applied

[48]The ABA Report that issued on September 17, 2006, and addressed Florida's capital sentencing scheme, identified numerous defects and flaws in Florida's capital process that inject arbitrariness into the decision-making. One of the flaws specifically identified by the ABA Report was the arbitrary way that the Florida Supreme Court had deprived death sentenced individuals of the benefit of new decisions designed to produce more reliable death sentences. The ABA Report cited a number of the areas "in which Florida's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures." ABA Report on Florida at iii.

in *Porter v. McCollum* was and is to insure that a constitutionally adequate adversarial testing occurred and that it produced a constitutionally reliable result. Allowing Porter as to his 1986 trial, Johnson as to his 1980 trial, and Cooper as to his 1984 trial, to receive the benefit of a standard designed to guarantee a constitutionally adequate adversarial testing, while denying the benefit to Reed can only be described as arbitrary.

Over thirty years ago, the U.S. Supreme Court announced that the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*. Yet in the manner in which Porter, Johnson, and Cooper have received the benefit of *Porter v. McCollum* while this Court in *Walton* declared the change in Florida law brought about by *Porter* to have been an "evolutionary refinement," it is now clear that in Reed's case an arbitrary factor has infected the process. His execution will be as arbitrarily imposed as if he had been "struck by lightning". *Furman*, 408 U.S. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual").

This *Furman* error is present in Reed's conviction and sentence of death renders them constitutional infirm. The failure to apply the proper construction of *Strickland* that was outlined in *Porter v. McCollum* constitutes an ongoing due process deprivation that renders the Florida capital sentencing scheme unconstitutional

in Reed's case and warrants Rule 3.851 relief.

At the 2002 evidentiary hearing, Reed presented extensive mitigating evidence which had not been presented by Nichols during the penalty phase. The evidence established Reed's case as a classic example of extreme physical and mental abuse as a child leading to substance abuse in a way dramatically similar to the progression of Porter's troubled life in *Porter v. McCollum*.

Reed's brother, William Reed, who was not called at trial "because of **finances and logistics**" (SPC-R1 86) (emphasis added), testified in 2002 about the extremely rough childhood which the Reed children endured (PC-R1 1126).[49] Yet, this Court applied the

[49]William described the household with his parents as one of drinking and fighting (PC-R1 1126). He recounted the time when his mother put the children in the room across from her where they heard their father threaten to kill them all (PC-R1 1127). The next thing they heard was the shotgun blast that killed their father (PC-R1 1127). Then the cops came and took their father away (PC-R1 1127). Jurors hearing that Reed listened to his mother kill his father would undoubtedly have been moved. Yet, this Court failed to consider the impact on the jury as it deferred to the circuit court's decision to discount this evidence. *See Evans v. Sec'y Dept. of Corrs.*, 2012 WL 1860802 (11th Cir. 2012) ("what is important under *Strickland*'s prejudice analysis is the jury's appraisal of the evidence, including credibility.").

William also testified that their mother remarried and had a baby, Melanie, with a man named Duck Sanders (PC-R1 1127-28). When the couple split up, Reed's grandmother took custody of the children (PC-R1 1127). The whole family thought their grandmother did this because of the checks the children were receiving due to their father being deceased (PC-R1 1128). This too would have moved jurors. *See Evans v. Sec'y Dept. of Corrs.*

Evidence was also presented in 2002 that during the time they lived with their grandmother, the children were seemingly abandoned by their mother (PC-R1 1142). During that time, the children's grandfather was caught molesting Reed's sister, Diana (PC-R1 1145). Diana told her grandmother what was going on, but she didn't believe

Stephens standard and failed to properly evaluate the potential impact this mitigating evidence would have had on the jurors as *Porter v. McCollum* made clear that *Strickland* required.

Evidence was presented in 2002 that to escape the hell hole

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her (PC-R1 1145). As a result, Reed's grandfather became more violent with all the children (PC-R1 1146). This too would have moved jurors.

William further explained how their mother again remarried, this time to a man named Charles Lassman (PC-R1 1128). She decided she now wanted the family back together (PC-R1 1128-29). After the children moved back in with their mother and Lassman, they got drunk every day and Lassman beat the kids (PC-R1 1130). Lassman targeted Grover Reed for severe beatings for bed wetting (PC-R1 1140). The beatings drew blood and left welts and scars (PC-R1 1132-33). Diana Reed testified in 2002 about the beatings by Lassman (PC-R1 1220). Lassman had a rope that he hung out on the back porch to get wet by the dew every day (PC-R1 1220). When it dried it would get real hard (PC-R1 1221). This way, the children could feel it more when they were hit (PC-R1 1221). Grover Reed and his sister, Diana, were favorite targets because of their bed wetting (PC-R1 1220). Lassman would beat them badly every day (PC-R1 1221).

There came a time when Lassman told the children that if they wanted to go back to live with their grandmother, they just had to tell him (PC-R1 1223). Grover Reed was brave enough to tell him, which turned out to be a mistake (PC-R1 1223). The children had to spend the next three days kneeling down in front of their mother and asking for forgiveness (PC-R1 1223). This Court failed to evaluate the potential impact of this evidence on Reed's jurors.

William explained in his 2002 testimony that finally on one day while Lassman beat their mother, he couldn't take it anymore (PC-R1 1131). William got a shotgun from the house and told Lassman that they weren't going to take any more from him, and that if he didn't get off his mother, William was going to blow his brains out (PC-R1 1131). Grover Reed was right there during all of this because Lassman had made them sit on the couch and watch him beat their mother (PC-R1 1131-32). Reed's mother called his grandmother and told her to come and get the kids (PC-R1 1132). While waiting for her to arrive, Lassman began beating Grover Reed and his sister, Diana (PC-R1 1132-33). Both had welts and bad bruises as a result (PC-R1 1133). When their grandmother arrived, she almost killed Lassman with a butcher knife after seeing how badly he had beaten the children (PC-R1 1132). Again, this would have had significant impact on Reed's jurors, yet this Court did not assess that impact. *See Evans v. Sec'y Dept. of Corrs*.

that was his life, Reed began sniffing gasoline at the age of 9, which as it usually does seriously damaged his brain and impaired Reed's impulse control (PC-R1 1134).[50] Soon Reed got involved with a variety of illegal, mind-numbing drugs (PC-R1 1134). Reed was put in a drug rehabilitation center, but when he got out, he started sniffing gas all over again (PC-R1 1135-38).[51] Yet, this Court failed to properly evaluate the potential impact this mitigating evidence would have had on the jurors as *Porter v. McCollum* made clear that *Strickland* required.

Christine Niznik, Reed's girlfriend at the time of the murder, testified at the 2002 evidentiary hearing about his substance abuse problem (PC-R1 1259). As Niznik testified, life was rough, and as a result, Reed drank a lot and abused drugs (PC-R1 1259). Reed made a cheap "crystal meth" where he would "take Vicks inhalers and

[50]Admittedly at one point, Reed while huffing gasoline, lost control and hit his grandmother in the nose (PC-R1 1135-36). William explained that when Reed sniffed gas, he didn't know what he was doing or what he was striking at (PC-R1 1137). Indeed brain damage and loss of impulse control are known side effects of gas huffing that children often do not take into account when desperate for escape from a horrible childhood. Certainly, this incident is no worse than Porter's action in going AWOL which the US Supreme Court in *Porter v. McCollum* ruled did not subtract from the mitigating value of his military service, but instead was consistent with the horror of his war experiences.

[51]This evidence could have been tied in with testimony from Officer Summerstill about finding Reed passed out in the back seat of a car at approximately 4 PM on February 27, 1986. Reed's method of coping when life got rough was to escape through drugs and alcohol. This Court failed to evaluate the potential impact on the jurors of the obvious pattern of Reed's life which was clearly at play on February 27, 1986.

you take the insides out, some kind of acid stuff and you cook it and lay it on the stove top . . . and you put it in the freezer and it's junk" (PC-R1 1260-65). Niznik and Reed would then inject this in themselves with needles (PCR. 1260). Additionally, Reed would huff gasoline (PC-R1 1262). This caused him to go wild and raise his voice at things that weren't there (PC-R1 1262-63). And according to Officer Summerstil, Reed was passed out in the back of a car at 4 PM on February 27, 1986. Yet, this Court failed to consider the potential impact this mitigating evidence could have had on Reed's jurors. *See Evans v. Sec'y Dept. of Corrs.*, 2012 WL 1860802, at *23 (11th Cir. 2012) ("what is important under *Strickland*'s prejudice analysis is the jury's appraisal of the evidence, including credibility.").

In 2002, Dr. Larson, a psychologist, testified that he had reviewed various records pertaining to Reed's past, including medical and school records (PCR. 699-700). Larson testified that Reed was under an extreme emotional disturbance on February 27, 1986 and that Reed's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired (PC-R1 702). Larson testified that his opinion was based on his own psychological testing as well as many of the kinds of childhood events that William and Diane Reed testified about, as well as the information from Niznik and Summerstill (PC-R1 703-20).

Larson's testimony would have assisted the jurors in

understanding the multiple nonstatutory mitigating circumstances that applied, including Reed's impaired judgment, his educational deprivation, child abuse and cultural deprivation he endured, his path into alcohol abuse and drug abuse, his likely lead poisoning, Reed's organic brain syndrome which had been diagnosed by medical doctors well before February 27, 1986, Reed's personality disorder, his history of mental illness as diagnosed by other physicians, and the likely interaction between organic brain syndrome and alcohol/drug abuse (PC-R1 702-03). Larson would have explained to Reed's jurors that Reed's gasoline huffing caused lead poisoning that was so severe that he had to be hospitalized and given anti-psychotic medications (PC-R1 708-09). Larson personally observed residual symptoms of the lead poisoning in the form of low intellect, slowness of rhetoric or motor behavior and shakiness (PC-R1 710). Yet, this Court discounted Larson's testimony in light of the circuit court's denial of the ineffectiveness claim and failed to properly evaluate the potential impact this mitigating evidence would have had on the jurors as *Porter v. McCollum* made clear that *Strickland* required.

Reed was sentenced to death by a judge who said no mitigating evidence had been offered and by a jury who heard none of the available mitigation "because of **finances and logistics**" (SPC-R1 86) (emphasis added). In evaluating this mitigating evidence presented in 2002, this court applied its *Stephens* standard of review, deferred to the circuit court's order denying relief, and failed to

consider the potential impact of this evidence on Reed's jurors when considering whether to recommend a death sentence. To fail to apply the same law to Reed's case that was applied in *Porter v. McCollum*, *Johnson v. Sec'y Dept. of Corrs.*, and *Cooper v. Sec'y Dept. of Corrs.* denies Reed equal protection and renders his conviction and sentence of death arbitrary and capricous.

Further, the recent ruling of the US Court of Appeals for the Eleventh Circuit in *Guzman v. Sec'y, Dept. of Corr.*, 663 F.3d 1336 (11th Cir. 2011) demonstrates that the holding in *Porter* applies to improper *Giglio/Brady* analyses, as well as the *Strickland* analysis discussed above. In *Guzman*, the Eleventh Circuit found the *Giglio/Brady* analysis conducted by this Court to have been objectively unreasonable. *Guzman*, 663 F.3d at 1339. In doing so, the Eleventh Circuit directly applied *Porter* to the *Giglio* claim at issue in that case, finding that:

> . . . although the Florida Supreme Court acknowledged that both Cronin and Detective Sylvester lied . . . during trial, the court either did not consider or unreasonably discounted the import of the fact that *both* Cronin and Sylvester testified falsely. *Cf. Porter v. McCollum,* ––U.S. ––, 130 S. Ct. 447, 454, 175 L. Ed. 2d 398 (2009) (finding the Florida Supreme Court's decision, in the context of an ineffective assistance of counsel claim, was an unreasonable application of the general *Strickland* standard, where the state court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing").

Guzman, 663 F.3d at 1352-53.[52] The Eleventh Circuit also found:

[52]FDLE agent Scott testified before the jury that he only found one latent print on State's Exhibit 9. The defense was not apprised in

> . . . the Florida Supreme Court's materiality determination unreasonably discounted not only the fact that Cronin was the State's key witness in the case, but also the fact that her credibility was critical to the State's case against Guzman.

Id. at 1351. The Eleventh Circuit's finding of *Porter* error, i.e. unreasonable discounting of evidence with regard to a prejudice analysis, in the *Giglio* context demonstrates that *Porter* applies to *Giglio* analyses such as the one that must be conducted in this case. This is critical, as "*Giglio's* materiality standard is 'more defense-friendly' than *Brady's*." *Hammond v. Hall*, 586 F.3d 1289, 1306 n.4 (11th Cir. 2009).

Employing the proper analysis outlined in *Porter v. McCollum*, the Eleventh Circuit concluded that "Guzman demonstrated an unreasonable application by the state court of the *Giglio* standard." *Id*. at 1339. And that same unreasonable analysis was conducted in this case. This Court's previous analysis of Reed's ineffectiveness and *Brady/Giglio* claims gave deference to the circuit court and disregarded the potential impact on jurors:

> Additionally, this Court's standard of review is two-pronged: (1) this Court must defer to the circuit

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advance that Scott was going to testify to the latent print's freshness. The defense was not apprised that he had been suspended and resigned under a cloud with a criminal investigation looming. The defense was not apprised that Scott wanted his old job back. The defense did not know that he had reasons to be currying favor with the State.

> court's findings on factual issues so long as competent, substantial evidence supports them; but (2) must review *de novo* ultimate conclusions on deficiency and prejudice prongs. *Stephen v. State*, 748 So. 2d 1028, 1033 (Fla. 1999) ("Thus, under *Strickland*, both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court's factual findings.").

Reed v. State, 875 So. 2d 415, 421-22 (Fla. 2004).

This Court's analysis of the guilt and penalty phase ineffective assistance claims were erroneous under *Porter*, so to was this Court's analysis of Reed's *Brady/Giglio* claim. Reed argued in his previous motion to vacate that the State failed to disclose information about the State's fingerprint analyst, Bruce Scott,[53] it failed to disclose a police report by Officer Summersill,[54] and other notes in the State's possession, including handwritten notes of a police office investigating Ms. Oermann's murder, which included reference to the observations of Edith Bosso on the evening of February 27, 1986 (PC-R2 28). In this Court's *Brady* analysis of the undisclosed cocaine use by FDLE agent Scott, this Court deferred to the circuit finding that the prosecutor had he disclosed the

[53]The State did not disclose that Scott had been suspended and then resigned as the matter had been over to Duval County State Attorney's Office for criminal investigation and possible prosecution. At the time he testified, Scott had reason to curry favor with the State. *See Davis v. Alaska*, 415 U.S. 308 (1974).

[54]Officer Summersill had observed Reed passed out in a car shortly before Oermann was murdered. In his police report regarding this, Summersill described Reed's condition and the clothing he was wearing.

suspension of Scott for cocaine use would have simply substituted Ernest Hamm's testimony for Scott's. But this overlooked the fact that Hamm would not have testified to the "freshness" of the print because he said there was no scientific basis for such testimony. Thus, this Court never considered the potential impact of the "freshness" evidence on the jury's evaluation of the case.

Guzman clearly demonstrates that this Court's *Porter* error is not confined to *Strickland* analyses or the *Porter* case. The *Guzman* Court found that "the Florida Supreme Court's materiality determination was more than just incorrect—it was an objectively unreasonable application of clearly established Supreme Court precedent." *Guzman*, 663 F.3d at 1349. Thus, it can be seen this Court was not merely off the mark with its *Giglio* analysis, it was *objectively unreasonable*. And the analysis in *Guzman* is the analysis here: a simple discounting of evidence and claims rather than an analysis and meaningful consideration of the evidence and the claims.

It is noteworthy that in *Guzman* the State's allowance of false testimony was not cured by the fact that the witness was impeached to some degree. Indeed, the Eleventh Circuit in *Guzman* acknowledged that the falsely testifying witness there was impeached, but that did not render the *Giglio* error harmless beyond a reasonable doubt:

> But even taking this impeachment evidence into account, it was objectively unreasonable for the state court to

> conclude that Cronin's impeachment was so complete that "there is no reasonable possibility that the false testimony regarding the $500 reward could have affected the judgment of the factfinder."

Guzman, 663 F.3d at 1350.

Further, evidence corroborating portions of a witness's testimony does not cure the *Giglio* violation that occurs when that witness in fact testifies falsely about other matters and the State does not correct the false testimony.[55] The *Guzman* Court explained that "we are mindful that the Florida Supreme Court's materiality determination also relied upon a finding that Cronin's testimony regarding Guzman's guilt was independently corroborated and supported by other evidence." *Id*. That fact did not change the Eleventh Circuit's *Porter* analysis that knowing presentation of false testimony and/or argument violates *Giglio*.

This Court did not conduct a *Porter*-compliant analysis in ruling on the *Brady/Giglio* and/or *Strickland* claims. Certainly, this Court conducted no cumulative analysis of the materiality and

[55]Scott gave conflicting sworn testimony as to the number of latent prints of value that he found on State's Exhibit 9. In his June 13th deposition, he testified that there were two and at Reed's trial he swore there was only one. That is perjury per se. The March 10th report also indicates two latent prints were found; thus, the trial testimony was false. Yet, this Court ignored this false testimony from Scott. This Court also acknowledged as the State's own witness at the 2002 evidentiary hearing conceded, that there is no scientific basis for the "freshness" testimony that Scott. This Court then held that trial counsel was not ineffective for failing to anticipate that Scott would fabricate his freshness testimony that has no basis in fact; but then ignored the due process implications of false or misleading testimony from a State's witness who has an unknown reason to be currying favor with the State.

prejudice prongs of the *Brady/Giglio* and/or *Strickland* claims. *See Smith v. Sec'y Dept. of Corrs.*, 572 F.3d at 1348. This Court deferred to the circuit court, discounted the facts that the circuit court discounted, failed to consider the jury's role and the potential impact on the jurors, and completely failed to conduct a cumulative analysis as required by *Strickland*, *Porter, Guzman, Smith*, *Johnson*, *Cooper*, and *Evans*. The Eighth Amendment requires that the law applied in *Strickland*, *Porter, Guzman, Smith*, *Johnson*, *Cooper*, and *Evans* be applied to in evaluating his constitutional challenges to his conviction and sentence of death.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. REED'S CHALLENGE TO THE JUNE 8TH ADOPTION OF A NEW LETHAL INJECTION PROTOCOL CHANGING OUT ONE OF THE DRUGS USED TO CARRY OUT AN EXECUTION, AND IN DENYING MR. REED AN EVIDENTIARY HEARING ON HIS CLAIM.

After Reed filed his Rule 3.851 motion in November of 2010, he learned in early 2011 that the State of Florida was unable to obtain one of the three drugs necessary for carrying out an execution under lethal injection protocol promulgated in the course of the litigation in *Lightbourne v. McCollum*, 969 So. 2d 326, 330 (Fla. 2007). He then asked the circuit court for the opportunity to amend his pending Rule 3.851 motion with a challenge to constitutionality of Florida's lethal injection procedures. The circuit court granted leave to amend the Rule 3.851 motion, and Reed filed an amended Rule 3.851 motion on March 17, 2011. In the amended motion, Reed alleged that

Florida was indeed changing its protocol to provide for a change in the three drug cocktail.

At the case management hearing held on the amended Rule 3.851 motion on April 18, 2011, the State contested Reed's factual allegation and asserted that the three drug cocktail was not being changed. A short time later on June 8, 2011, the Secretary of the Department of Corrections signed a new lethal injection protocol which had been drafted in December of 2010, thereby formalizing the change in the three drug cocktail.

On September 9, 2011, the circuit court entered an order denying the amended Rule 3.851 motion (PC-R2 294). As to the lethal injection claim, the circuit court denied the claim citing to this Court's decision in "*Valle v. State*, SC11-1387, August 23, 2011" (PC-R2 297)(*Valle v. State*, 70 So. 3d 530 (Fla. 2011)).

By the time the circuit court had entered its order denying Reed's Rule 3.851 motion, the Governor had signed a death warrant on Manuel Valle. In early July, 2011, Valle had filed Rule 3.851 motion that challenged the June 8th lethal injection protocol as unconstitutional. The circuit court presiding over Valle's case summarily denied the claim without conducting an evidentiary hearing. Valle appeal to this Court. On July 25, 2011, this Court issued an order relinquishing jurisdiction and ordered the circuit court to conduct evidentiary hearing on Mr. Valle's lethal injection claim. *Valle v. State*, 70 So. 3d 525 (Fla. 2011). This ruling established

that the claim that Reed presented to the circuit court required an evidentiary hearing on the merits of the claim. Yet, the circuit court did not grant Reed an evidentiary hearing, but instead waited for the evidentiary hearing to occur under warrant in *Valle* and denied the claim on the basis of a proceeding that Reed did not have representation and was not permitted to be present, call witnesses and/or cross-examine the State's witnesses. Reed was denied his right to an evidentiary hearing on his claim, his right to be present at the evidentiary hearing, and his right be represented by counsel at the evidentiary hearing.

In 2007, similar circumstances occurred. Following the Angel Diaz execution in December of 2006, the CCRC-South office filed an all writs petition with this Court raising a lethal injection claim that challenged the constitutionality of Florida's lethal injection protocol. The petition was filed on behalf of all of CCRC-South's clients and listed all of that office's clients as Petitioners. The first named Petitioner was Ian Lightbourne. This Court determined that an evidentiary hearing was necessary on the claim presented therein and remanded to the circuit court in which Mr. Lightbourne's case had been tried (the 5th Judicial Circuit) because Mr. Lightbourne's name was listed first on the all writs petition.

The remand order issued in December of 2006. Because the Governor had appointed a commission to review the Diaz execution and recommend any necessary changes to the protocol, the circuit court

in Mr. Lightbourne's case waited to hold the evidentiary hearing until after the revised protocol became effective on May 9, 2007. *Lightbourne v. McCollum*, 969 So. 2d 326, 330 (Fla. 2007). The evidentiary hearing lasted thirteen days and approximately forty witnesses testified. After it ended, the presiding judge agreed with Mr. Lightbourne and ordered the State to revise its protocol yet again. *Lightbourne*, 969 So. 2d at 330.

Within weeks the State revised the protocol. Once the revised protocol was adopted, the circuit court conducted another evidentiary hearing on the newly revised protocol. After that hearing concluded, the judge entered an order on September 10, 2007, finding that the revised protocol was constitutional. *Lightbourne*, 969 So. 2d at 331. Lightbourne appealed.

Meanwhile, the Governor had signed a death warrant on July 18, 2007, on Mark Schwab, setting his execution for November 15, 2007. *Schwab v. State*, 969 So. 2d 318 (Fla. 2007). Mr. Schwab, who was represented by attorneys from CCRC-Middle, had not been named as a petitioner in the all writs petition that had resulted in an evidentiary hearing in Mr. Lightbourne's case. After his death warrant was signed, Mr. Schwab filed a Rule 3.851 motion that included a lethal injection claim based upon the Diaz execution. This motion was filed in late July of 2007. The circuit court entered an order summarily denying Mr. Schwab's motion to vacate on August 29, 2007. Mr. Schwab appealed.

On November 1, 2007, this Court issued opinions in both *Lightbourne v. McCollum* and *Schwab v. State*. In *Lightbourne*, this Court affirmed the circuit court's September 10th order denying Mr. Lightbourne's claim and affirmed the finding therein that the August 2007 revised protocol was constitutional.

In Mr. Schwab's appeal, this Court found that the circuit court had erred in denying Mr. Schwab's lethal injection claim:

> In the order denying postconviction relief, the court below recognized that judicial oversight of the protocol was appropriate but found that judicial economy would not be served by holding a hearing on the matter when this same issue was already extensively explored by Judge Angel in Lightbourne. Despite this ruling, the court then stated without elaboration: "The parties have stipulated that the Lightbourne hearing testimony may be judicially noticed in this case, but the Court has deliberately elected not to take judicial notice at this time and has not reviewed the evidence presented therein." Schwab challenges this decision, asserting that the postconviction judge should have granted the motion, particularly since both parties stipulated to the introduction of this material and reasonably relied upon the Lightbourne materials being in the record based on the court's initial representations indicating that it would take notice of that testimony.
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> * * *
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> Under the unique circumstances of this case and based on the court's other ruling summarily denying relief, we hold that the postconviction court erred in failing to take judicial notice of the record in Lightbourne. Since Schwab's allegations were sufficiently pled, the postconviction court should have either granted Schwab an evidentiary hearing, or if Schwab was relying upon the

> evidence already presented in Lightbourne, the court should have taken judicial notice of that evidence.

Schwab v. State, 969 So. 2d at 322-23. This Court then found the error harmless in light of its ruling in *Lightbourne* because it therein considered all of the evidence that Mr. Schwab had sought to have judicially noticed. In a footnote, this Court observed:

> In this case, judicial notice would have been sufficient because Schwab has not presented any argument as to specific evidence he wanted to present in this case that had not been presented in the Lightbourne proceeding.

Schwab, 969 So. 2d at 323 n 2.

The procedural situation faced here with Reed's lethal injection claim is somewhat akin to the procedural situation in *Schwab* in 2007, except Reed did not have a pending death warrant to expedite his appeal. Schwab filed his claim while the *Lightbourne* proceedings were ongoing. The reopened evidentiary hearing in *Lightbourne* concerning the August 2007 revised protocol had not yet begun when Schwab first filed his claim.

Here, Reed served his amended motion to vacate in April and supplemented with the new lethal injection protocol in June before the circuit court in Valle's case had summarily denied his Rule 3.851 motion on July 15th. Reed had sought the opportunity to present his claim in the same fashion that Valle presented his. When the Florida Supreme Court issued its July 25th order relinquishing jurisdiction

and ordering an evidentiary hearing to be conducted on Valle's lethal injection claim, its ruling established that the claim that Reed had presented required an evidentiary hearing on the merits of the claim. *Valle v. State*, 70 So. 3d at 526. Thus, Reed's circumstances were virtually the same as those presented in *Schwab*. The *Schwab* decision should govern. However unlike Schwab, Reed does not wish to take judicial notice of the transcript from the *Valle* evidentiary hearing. Reed seeks his own evidentiary hearing where he is present in court represented by counsel with the right to present evidence and contest the State's evidence.

On August 23, 2011, this Court issued its opinion in *Valle v. State*, 70 So. 3d 530 (Fla. 2011), and affirmed the denial of relief on the lethal injection claim after the evidentiary hearing had been conducted.[56] The circuit court's action in denying Reed's claim

[56]This Court deferred to the circuit court's credibility findings, credibility findings that a different judge presiding at an evidentiary hearing on the matter may not have made. The lethal injection claim is not solely a question of law. Resolution of the merits of the claim requires fact finding by the judge who presides at the evidentiary hearing. It is certainly possible that the presiding judge in Reed's case may reach different factual conclusions on Reed's lethal injection claim which this Court on appeal would be required to defer to. This is not unlike lawsuits against a tobacco company in which different factfinders in different cases brought by different plaintiffs reach different conclusions on the same issue.

This Court also addressed challenges to evidentiary rulings made by the judge presiding in *Valle*. In addressing those challenges made by Valle, this Court concluded that the presiding judge did not abuse her discretion when excluding evidence that Valle sought to present. In other words those evidentiary rulings excluding evidence would be within the discretion of a different presiding judge presiding in a different case who may exercise his discretion differently and admit

deprive Reed of an evidentiary hearing on the merits of his claim that July 25th *Valle* order indicated was required. Reed was not present for the evidentiary hearing that was conducted on the merits of the claim in *Valle*. *See* Rule 3.851(c)(3) ("prisoner's presence is not required at any hearing or conference held under this rule, **except at the evidentiary hearing on the merits of any claim**"). Reed was not represented by counsel in the *Valle* proceedings, yet Florida law gives him the right to counsel in 3.851 proceedings. *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988) ("We recognize that, under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings.").[57] Having an evidentiary hearing on the merits of Reed's pending claim at which he is not permitted to be present and is not represent by counsel violates Rule 3.851(c)(3), and Florida Statute § 27.702, as set forth in *Spalding v. Dugger*.

Reed seeks to exercise his constitutional right to due process. The touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice

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the evidence.

[57]The State was well aware of Reed's efforts to obtain an evidentiary hearing on his lethal injection claim when the July 25th *Valle* opinion issued. If the State had wanted Reed to be bound by whatever occurred in the *Valle* proceedings, it could have moved for joinder and insured that Reed's due process rights were protected, as well as his rights under Florida law to be presented and represented by counsel.

and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment). For Reed to lose the right to an evidentiary hearing on the merits of his lethal injection claim on the basis of a proceeding at which was not present nor represented by counsel violates the basic tenets of due process.

The State cannot rely upon this Court's denial of lethal injection claims presented by capital defendants relying upon the Diaz execution after the issuance of its opinion in *Lightbourne* on the basis of *Lightbourne*. The State has maintained in other cases that because this Court relied upon *Lightbourne* to deny lethal injection claims raised by other death sentenced individuals, this Court should rely on *Valle* to deny Reed's claim. However, there is no indication that those capital defendants who lost on the basis of *Lightbourne*, had sought to present, as Reed has done, a lethal injection claim immediately upon learning the Department of Corrections was in the process of adopting a revised protocol and even before Lightbourne's submission of his claim and well before the commencement of Lightbourne's evidentiary hearing on the newly revised protocol. Here, Reed was in line before Valle to have this

claim presented and heard in his Rule 3.851 proceedings.

Further, approximately 60 death row inmates had been listed as petitioners in the all writs petition filed in the Florida Supreme Court that commenced the *Lightbourne* litigation. Though those 60 death row inmates were not present for the evidentiary hearing that was conducted in *Lightbourne*, they were all represented by CCRC-South and therefore in essence by the same attorneys representing Lightbourne.[58] There is no indication that any of those individuals had their counsel who was present at the evidentiary hearings in *Lightbourne* seek to invoke their right as capital defendants to be present at the *Lightbourne* evidentiary hearings on the merits of their claim on which they were co-petitioners with Lightbourne. Arguably, counsel's failure to invoke a client's right to be present at a hearing at which counsel is present is a waiver of the right.[59] Thus, those

[58]It is significant that Schwab was represented by attorneys with CCRC-Middle who were not involved in the *Lightbourne* litigation and not part of the all writs petition. In those circumstances, this Court held that Mr. Schwab had been entitled to an evidentiary hearing on the merits of his lethal injection claim.

As in *Schwab*, Reed's counsel did not represent Valle. As in *Schwab*, Reed's counsel was not present for the evidentiary hearing conducted in *Valle*. Thus, Reed should be entitled to an evidentiary hearing on the basis of this Court's ruling in *Schwab*.

[59]It is one thing to argue that the decisions in *Lightbourne* and *Valle* are binding upon other capital defendants who had not filed a lethal injection claim that was pending in their case before or during the evidentiary hearings in *Lightbourne* and *Valle*. It is entirely another thing to claim that a capital defendant who had filed a claim on which he was entitled to an evidentiary hearing can lose his right to evidentiary hearing, lose his right to be present at the evidentiary hearing being conducted on the merits of his pending claim, and lose the right to be represent by counsel at that hearing.

capital defendants who were represented by CCRC-South and named petitioners in the all writs petition were in an entirely different procedural posture than the posture Schwab was in, and the posture Reed is in currently.

Many other capital defendants waited until after the *Lightbourne* hearing was conducted and decided by this Court. Those capital defendants are also in an entirely different procedural posture than the posture Schwab was in, and the posture Reed is in currently.

Accordingly, Reed seeks what the July 25th *Valle* opinion said he was entitled to, an evidentiary hearing. He seeks to invoke his right to be present and his right to collateral representation at the evidentiary hearing on the merits of his claim. He seeks what due process guarantees, "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. at 542, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 313.

The touchstone of due process is notice and reasonable opportunity to be heard. The circuit court in denying Reed's lethal injection claim, deprived Reed of due process. The deprivation of this bedrock due process right is structural error that cannot be harmless any more than the denial of the right to trial by jury can be found harmless. *See Teffeteller v. Dugger*, 676 So. 2d 369 (Fla.

1996).[60]

CONCLUSION

In light of the foregoing arguments, Mr. Reed requests that this Court remand to the circuit court for a full and fair evidentiary hearing claim, and/or vacate his sentence of death.

[60]At issue in *Teffeteller* was the impact upon a capital defendant's right to effective and conflict-free representation at trial when the particular public defender assigned as counsel was a card carrying special deputy sheriff. At the consolidated proceeding, the joined capital defendants were present in court with counsel for the some of the testimony. However, large portions of the proceedings were conducted with only one defendant and his counsel in the courtroom. This Court found that Rule 3.850 movants were entitled to be present with counsel for the entirety of their own separate evidentiary hearing on the individual claim, even though each defendant's claim was premised upon common factual allegations concerning the special deputy status that was enjoyed by the public defender. Under *Teffeteller*, due process requires each Rule 3.851 movant to a separate evidentiary hearing at which he can be present, be represented by counsel and present evidence in support of his claim while confronting any evidence presented by the State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol PL-01, Tallahassee, FL 32399-1050, on May 30, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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