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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-____

GERHARD HOJAN,

Petitioner,

v.

MICHAEL D. CREWS, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The present habeas corpus petition is the first filed by Mr. Hojan in this case. The petition preserves claims arising under decisions of the United States Supreme Court and puts forth substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Those claims demonstrate that Mr. Hojan was deprived of effective assistance of counsel on direct appeal and that his convictions and death sentences were obtained and affirmed on appeal in violation of fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be:

(R.) -- Record on Direct appeal;

(PCR.) -- Record of Post-Conviction Appeal (where necessary)

(Supp-PCR.) -- Supplemental Record of Post-Conviction Appeal (where necessary)

All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, section 3(b)(9) of the Florida Constitution. *See Wilson v. Wainwright*, 474 So. 2d 1162

1163 (Fla. 1985). The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." FLA. CONST. Art. I, § 13.

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

REQUEST FOR ORAL ARGUMENT

Mr. Hojan requests oral argument on the claims asserted in the present petition.

STATEMENT OF CASE AND FACTS

On October 17, 2003, Mr. Hojan was found guilty of two counts of first degree murder; one count of attempted first degree premeditated murder; one count of attempted first degree felony murder; three counts of armed kidnapping; and two counts of armed robbery (R. 2480-2481). The penalty phase of Mr. Hojan's trial began on November 24, 2003. For each count of first degree murder, the jury recommended a sentence of death by a vote of 9-3 (R. 2649) . Because Mr. Hojan refused to allow his lawyers to present mitigation evidence, the trial court appointed its own counsel, Hilliard Moldof, to investigate mitigation (R. 787;

2928). Upon completion of a *Spencer*[1] hearing in which limited mitigation evidence was presented, the trial court sentenced Mr. Hojan to death on August 2, 2005 (R. 3133). Mr. Hojan timely appealed and this Court affirmed his conviction and sentences on direct appeal.[2] *Hojan v. State*, 3 So. 3d 1204 (Fla. 2009).[3] On November 30, 2009, the United States Supreme Court denied certiorari review. *Hojan v. Florida,* 130 S. Ct. 741 (2009).

Pursuant to Fla. R. Crim. P. 3.852 (d), the Office of the Attorney General is required, within 15 days of the issuance of this Court's mandate affirming a sentence of death, to direct the Office of the State Attorney to submit its public records to the records repository and notify each law enforcement agency involved in the investigation to submit its public records to the repository. In Mr. Hojan's case, the Attorney General gave timely notice of this Court's mandate—issued on March 26, 2009—to the State Attorney for the Seventeenth Judicial Circuit (PCR.

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[1] *See Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[2] Mr. Hojan raised the following claims on direct appeal: (1) the surviving victim's statement to an officer at the scene was not an excited utterance; (2) the trial court improperly treated Hojan's waiver of the opportunity to present mitigating evidence in the penalty phase as a waiver of his opportunity to present motions challenging the death penalty; (3) his confession should have been suppressed; (4) Florida's death penalty statute is unconstitutional; and (5) the trial court committed error under *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), and *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001).

[3] On April 27, 2009, the CCRC-South Office filed its Notice of Appearance on Mr. Hojan's behalf (Supp-PCR 81-82).

15; Supp-PCR. 77-78). The Attorney General also filed a notice of this Court's mandate with the Florida Department of Corrections (Supp-PCR. 79-80).

Pursuant to Fla. R. Crim. P. 3.852 (e), the Office of the State Attorney had 15 days from receipt of the notice of the mandate to notify the law enforcement agencies to submit their public records to the repository. In other words, the State Attorney's Office should have notified the agencies involved on or before April 15, 2009 (PCR. 16). However, in Mr. Hojan's case, the State Attorney's Office inexplicably delayed notification to the Davie Police Department, the Fort Lauderdale Police Department, the Hollywood Police Department, the Broward Sheriff's Office, and the Broward Medical Examiner's Office until August 6, 2009 (PCR. 16; Supp-PCR. 90-99). Thus, due to the State's delay in notification, the agencies had until November 4, 2009, to submit their records to the repository. This they did not do, and therefore Mr. Hojan requested and obtained an extension of time to file additional public records demands pursuant to Fla. R. Crim. P. 3.852 (g) (PCR. 15-16).[4]

Additional public records demands to a variety of agencies were made on February 26, 2010 (PCR. 22-135). Agencies thereafter filed Notices of Compliance with the demands or objected to production of the requested records.

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[4] It does appear from the record that the Fort Lauderdale Police Department filed a Notice of Compliance on October 30, 2009 (PCR 20-21).

See, e.g. PCR. 137-148; 152-165 (Broward Sheriff's Office); PCR. 150-51; 250-254 (Florida Judicial Qualifying Commission); PCR. 166-176; 182-182; 185-186 (Florida Department of Corrections); PCR. 177-181; 193-195 (Office of the State Attorney for the Seventeenth Judicial Circuit); PCR. 187-189 (the Florida Medical Examiner's Commission); PCR. 190-192 (Florida Department of Law Enforcement; PCR. 196-231 (Office of the Florida Governor). An extensive public records hearing was held on August 23, 2013 (Supp-PCR. Volume 1).[5]

On November 23, 2010, Mr. Hojan filed a motion to vacate the judgment of convictions and sentences of death with special request for leave to amend pursuant to Fla. R. Crim. P. 3.851, raising eight claims. (PCR. 274-393).[6] The

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[5] The transcript of the August 23, 2010, public records hearing is not paginated in continuation with Volume 2 of the Supplemental Record.

[6] These claims were as follows: Claim I (denial of access to public records) (PCR 29-79-283); Claim II (application of Rule 3.851 violates due process and equal protection) (PCR 283-285); Claim III (ineffective assistance of counsel at the guilt phase of Mr. Hojan's capital trial) (PCR 286-306); Claim IV (trial court impermissibly allowed presentation of *Williams*-rule evidence at trial) (PCR 307-309); Claim V (ineffective assistance of counsel at penalty phase in failing to adequately counsel Mr. Hojan regarding the nature and consequences of waiving penalty phase mitigation) (PCR 309-317); Claim VI (rule prohibiting juror interviews is unconstitutional) (PCR 318-320); Claim VII (newly discovered evidence establishes unreliability of scientific evidence used at trial) (PCR 321-333); Claim VIII (Florida's lethal injection procedures violate the Eighth Amendment (PCR 334-344).

State was ordered to file a written response (PCR. 393), which it did on March 3, 2011 (PCR. 400-457).

In the meantime, the outstanding public records issues continued to be litigated by the parties and the agencies to which demands were made. *See*, *e.g.* PCR. 394-96; 397-398; 460-468; 470-471; 473-474; 475-485; 495-499. By July 3, 2012, the record reflects that public records litigation had concluded[7] and Mr. Hojan had received numerous additional records, including records that the lower court concluded warranted disclosure notwithstanding a claimed exemption (PCR. 511). On July 10, 2012, Mr. Hojan filed an amendment to his previously-filed Rule 3.851 motion (PCR. 514-683).[8] On July 16, 2012, a case management hearing pursuant to Fla. R. Crim. P. 3.851 (f)(5) was held (PCR. 913-944), after

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[7] By motion dated September 13, 2012, Mr. Hojan did seek an order compelling the Department of Corrections and the Davie Police Department to produce public records that the lower court had previously ordered produced (Supp-PCR 113-15). The lower court granted Mr. Hojan's motion to compel (Supp-PCR 116-17).

[8]The amendment added only one new claim, identified as Claim IX, to the previously-filed Rule 3.851 motion (PCR 554-560) (Florida' death penalty scheme is unconstitutional). The remainder of the amendment supplemented some of the previously-raised claims. The following claims were amended; Claim I (public records) (PCR 515-527); Claim V (ineffective assistance of counsel at penalty phase in failing to adequately counsel Mr. Hojan regarding the nature and consequences of waiving penalty phase mitigation) (PCR 527-543); Claim VIII (Florida's lethal injection procedures violate the Eighth Amendment) (PCR 543-554)

which the State filed a written response to Mr. Hojan's amended motion (PCR. 684-751).

On August 22, 2012, the lower court issued a short order following the case management hearing indicating that Mr. Hojan "is not entitled to an evidentiary hearing on any of his claims" and that a "final order" would be "forthcoming" (PCR. 752). That final order was filed on December 3, 2012 (PCR. 756-793). A timely Notice of Appeal was filed (PCR. 794-795), and on this date Mr. Hojan is filing his Initial Brief in the appeal from the denial of his Rule 3.851 motion. *Hojan v. State*, No. SC13-05. This petition for writ of habeas corpus is being filed at this time.

CLAIM I

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE UNDER THE SIXTH AMENDMENT IN FAILING TO RAISE ON APPEAL ISSUES WHICH WARRANTED REVERSAL. CONFIDENCE IN THE APPELLATE PROCEEDING IS UNDERMINED AND MR. HOJAN IS ENTITLED TO RELIEF.

I. Introduction.

Mr. Hojan had the constitutional right under the Sixth Amendment to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. *Strickland v. Washington*, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have

the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The *Strickland* test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Hojan's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Hojan's] direct appeal." *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Hojan's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985). *See also Farina v. Sec'y Fla. Dep't of Corrections*, 2013 WL 5432318 (11th Cir. Sept. 30, 2013) (unpub.) (finding that appellate counsel's unreasonable failure to raise fundamental error on direct appeal was prejudicial and that habeas corpus relief was warranted).

A. Appellate counsel unreasonably failed to raise on appeal the absence of a record of the selection of the jurors who sat on Mr. Hojan's capital jury as well as Mr. Hojan's absence from a critical stage of the proceedings. Appellate counsel unreasonably failed to seek a reconstruction of the unprecedented off-the-record jury selection that took place between trial counsel and the prosecutor.

The record in this case establishes that voir dire commenced on September 30, 2002. After conducting substantial voir dire, the trial court struck the panel

after a potential juror said disparaging remarks about defense counsel,[9] and an entirely new venire was assembled and voir dire commenced anew (R. 474). After a total three days of voir dire in which a jury panel had not been seated, trial counsel announced to the court that he and the State had collaborated and independently decided on a jury.[10] Counsel informed the court that they "met with the State and we looked at the group of people that we had, and we came up with a tentative panel of twelve with four alternates" (R. 1209-1210). When counsel informed the court of this development, he stated that Mr. Hojan still wanted to speak to more potential jurors (R. 1210). Specifically, counsel informed the court as follows:

> Judge, like I was saying, Friday afternoon we met with the State and we looked at the group of people that we had, and we came up with a tentative panel of twelve with four alternates. I say tentative because we don't know who's going to coming [sic] back or who has an excuse.

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[9] Specifically, when asked if she knew defense counsel, Mr. Cotrone, potential juror Walden stated, "I hired him to represent my boyfriend who is now in prison and all he did was take my money and be arrogant to me" (R. 465).

[10] That this occurred is not in dispute, as the lower court also recounted that "[o]n October 7, 2003, defense counsel informed the Court that the defense and the prosecution had met and agreed on a tentative panel of twelve (12) jurors and four (4) alternates out of the twenty-eight perspective jurors who had not been eliminated for cause" (PCR 767).

> That being said, we also spoke with our client, Mr. Hojan. He indicated to us, and I hope that you would inquire a little bit more for us, that he wanted to speak to more potential jurors.

(R. 1209-1210).

The court read to Mr. Hojan the names of the twelve jurors that the State and counsel agreed upon along with the names of the four alternates. The court's attempt at a colloquy with Mr. Hojan to cure his absence and counsel's unorthodox jury selection was as follows:

> THE COURT: Mr. Hojan, the individuals whose names I've called out -- you've been sitting here since we started picking this jury last Tuesday; is that correct?
>
> MR. HOJAN: Yes, sir.
>
> THE COURT: And you had an opportunity Tuesday and Wednesday -- even though we dismissed the panel that were here Tuesday and Wednesday until we started again in the afternoon -- you've been here participating with your lawyers through every stage of the jury selection process; correct?
>
> MR. HOJAN: Yes, Your Honor.
>
> THE COURT: And you've consulted with your lawyers as it relates to the challenges for cause that were raised by the Defense?
>
> MR. HOJAN: Yes, Your Honor.
>
> THE COURT: And you're aware that as of today we have twenty-seven individuals that have not been stricken for cause?

MR. HOJAN: Yes, Your Honor.

THE COURT: From those twenty-seven, I read out a group of twelve, which includes Mr. Murphy, Ms. Dailey, Mr. Janowski, Ms. Mahoney, Ms. Yuran, Ms. Olson, Ms. Winburn, Mr. Fravel, Mr. Masur, Ms. Creveling, Ms. Coll and Mr. Demille as our twelve primary jurors; is that correct?

MR. HOJAN: Yes, Your Honor.

THE COURT: And of course you were here during all of the questioning with those individuals; correct?

MR. HOJAN: Yes, Your Honor.

THE COURT: Is that an acceptable group of individuals to try your case?

MR. HOJAN: Yes, Your Honor.

THE COURT: And you understand your lawyers along with the State and yourself, have decided that Ms. Finan, Ms. Alcala, Mr. Ticknor and Mr. Yarnold would be our alternates in that order?

MR. HOJAN: Yes, Your Honor.

THE COURT: And they're acceptable to you; correct?

MR. HOJAN: Yes, Your Honor.

THE COURT: Now, you understand in the process of selecting a jury, in addition to challenges for cause, both the State and the Defense have what we call preemptory challenges, which you can utilize to strike individuals from the panel?

MR. HOJAN: Yes, sir.

THE COURT: Your side has ten and the State has ten for a total of twenty.

MR. HOJAN: Yes, Your Honor.

THE COURT: **You understand that effectively we have not gone through the process of actually exercising strikes?**

MR. HOJAN: Yes, Your Honor.

THE COURT: What you and your attorneys and the State have done is, you've looked at the initial group of twelve people, and from that you effectively struck Mr. Yarnold as a primary juror and Mr. Dadouche, and Ms. Alcala, Ms. Prince, Mr. Newman, Mr. Sing. They were taken out of the initial twelve that would be primary jurors in your case.

MR. HOJAN: Yes, Your Honor.

THE COURT: And from there, Mr. Masur was added, Ms. Creveling was added, Ms. Coll was added, Mr. Demille was added, and Mr. Fravel was added making the a group of twelve.

MR. HOJAN: Yes, sir.

THE COURT: So, effectively, without the exercise of preemptory strikes, effectively both sides were striking certain individuals to get us to the twelve primary, four alternates.

MR. HOJAN: Yes, Your Honor.

THE COURT: And these individuals are acceptable to you to try the case?

MR. HOJAN: Yes, Your Honor.

THE COURT: Are you under the influence of any alcohol or drugs?

MR. HOJAN: No, Your Honor.

THE COURT: Do you need additional time or wish additional time with your lawyers to consult with them on this matter?

MR. HOJAN: No, Your Honor.

THE COURT: And, in fact, you have had an opportunity, at this point it's more like forty-five minutes, to sit, talk with your lawyers, to go through this process?

MR. HOJAN: Yes, Your Honor.

THE COURT: And understand the jury and the selection of the jury has to be acceptable to you?

MR. HOJAN: Yes, Your Honor.

THE COURT: This is your case.

MR. HOJAN: Yes, Your Honor.

THE COURT: And you've involved yourself and participated in this selection process; correct?

MR. HOJAN: Yes, Your Honor.

THE COURT: And again, they are acceptable?

MR. HOJAN: Yes, Your Honor.

(R. 1215-1219).

The record clearly reflects that counsel conducted a back-room jury selection with the State that was off-the-record and outside the presence of Mr. Hojan. Although the record may be unclear about Mr. Hojan's presence,[11] trial counsel stated that he met with the State and "also" met with Mr. Hojan. Had Mr. Hojan been present, counsel would have stated that they met with the State *and* Mr. Hojan. Additionally, if Mr. Hojan had been present, his initial reaction in court would not have been to question more jurors. Only after significant cajoling by counsel did Mr. Hojan relent and agree to the horse-traded jury panel. However, Mr. Hojan never waived his right to be present at the off-the-record secret "selection" of the jurors.

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[11] In summarily denying Mr. Hojan's claim in his Rule 3.851 motion regarding trial counsel's ineffective assistance of counsel with regard to the jury selection "process" in this case, the lower court made no finding one way or the other regarding Mr. Hojan's presence or attendance at this "meeting" between defense counsel and the State. While the lower court did note that Mr. Hojan was present *in court* during voir dire (PCR 767), this is decidedly not the issue here. The issue is whether he was present during the off-the-record jury "selection" that took place without judicial involvement or oversight. The State's position is that Mr. Hojan was *not* present at this backdoor meeting between the prosecutor and defense counsel. *See* PCR 418 ("Consequently, Hojan's absence from the actual selection of the panel does not involve a substantial or constitutional right"). Mr. Hojan alleged that he was not present at this "meeting" between defense counsel and the State (PCR 922) ("He's never waived, nothing on the record he's waiving his right to be present at that selection process"). For purposes of this state habeas petition, the record does not reflect Mr. Hojan's presence at the backdoor meeting between the prosecutor and defense counsel.

1. Failure to raise on appeal Mr. Hojan's absence from a critical stage of the proceedings.

Without a sound – much less a reasonable – tactical decision, Mr. Hojan's appellate counsel failed to raise on direct appeal the issue of Mr. Hojan's absence from a critical stage of the proceedings. Florida law and federal due process mandate that a defendant has the right to be present at all critical stages of the proceedings. Indeed, in evaluating Mr. Hojan's claim of trial counsel's ineffectiveness in acceding to this secret jury selection, the lower court recognized that this due process right was "well established" and constitutes a "critical stage" of the criminal proceedings. *See* PCR. 766-67. The selection of potential jurors and the use of peremptory and cause challenges is considered a critical stage of the proceedings requiring a defendant's presence. *Muhammad v. State,* 782 So. 2d 343, 351 (Fla. 2001). A defendant must be present at the immediate site where challenges are exercised; merely being in the courtroom is insufficient. *See Coney v. State*, 653 So. 2d 1009, 1013 (Fla. 1995). Furthermore, Fla. R. Crim. P. 3.180 mandates that a defendant shall be present "at the beginning of the trial during the examination, challenging, impaneling and swearing of the jury." Fla. R. Crim. P. 3.180(a)(4). *Accord Muhammad*, 782 So. 2d at 353; *Coney*, 653 So. 2d at 1013. *See also Carmichael v. State*, 715 So. 2d 247 (Fla. 1998). A defendant is considered to be present when he "is physically in attendance for the courtroom

proceedings, and has a meaningful opportunity to be heard through counsel on the issue being discussed." Fla. R. Crim. P. 3.180(b).

In this case, Mr. Hojan was absent from the secret behind-closed-doors "meeting" between his trial counsel and the prosecutor, at which "meeting" the parties, without judicial monitoring, "selected" the jurors and alternates who were to adjudicate Mr. Hojan's guilt and recommend a sentence. While the trial court did conduct a colloquy with Mr. Hojan, this occurred *after the fact.* All Mr. Hojan did in this colloquy was assent to the jury and the concept of peremptory challenges as prompted by the court's questions. In responding to the court's pointed and leading questions, Mr. Hojan merely agreed with the court's authority by responding repeatedly, "Yes, Your Honor." Mr. Hojan never said he waived his right to be present during the selection of jurors. He never said he waived his right to have the court preside over the selection of jurors or have the court preside over the cause and peremptory challenges that appear to have functionally occurred outside of the court's presence when the State and defense counsel engaged in their back-room juror horse trading. Indeed, the very definition of a defendant's presence in Florida Rule of Criminal Procedure 3.180 contemplates the presence being in open court. Nothing in the Rules of Procedure or Florida Law sanctions the backroom jury selection process counsel and the State undertook themselves. What happened in this case was unprecedented.

In its colloquy of Mr. Hojan, the trial court seemed to indicate that what the State and defense counsel did amounted to exercising peremptory challenges. However, given the functional proceedings that must have occurred, this cannot be the case. For instance, if both the State and defense counsel agreed that a juror should not be seated that does not equate to a peremptory challenge necessarily. It may be a cause challenge that was bilaterally determined by lawyers without the necessary judicial determination that the juror was incapable of sitting as a juror. Thus, the lawyers prevented the court form exercising its constitutional duties. Furthermore, if there were disputes as to a particular "peremptory challenge" there was no judge present in order to resolve the dispute and protect Mr. Hojan's right to a fair and impartial jury of his peers. The functional result of the backroom jury horse trading between the State and defense counsel was that this jury was chosen through mediation without the presence of a mediator or the client. In order to "sell" this bizarre jury selection, counsel had to cajole Mr. Hojan for forty-five minutes. Due process and fundamental fairness cannot tolerate a jury selection behind closed doors as was done in this case. Indeed, if such a process is condoned a veritable star chamber may not lurk too much further in the shadow.

Beyond the attempt to get Mr. Hojan to assent to an unprecedented manner of jury selection, there are grave due process concerns with what occurred. As mentioned above, Mr. Hojan had the right to be present at all critical stages of the

proceedings, of which jury selection is one. *See* Fla. R. Crim. P. 3.180. That presence means presence in court with an impartial tribunal presiding. In this backroom deal between the State and defense counsel, Mr. Hojan was deprived of being present and making decisions. Mr. Hojan was not present when the so-called "peremptory challenges" were made. Additionally, in the court's effort to explain that peremptory challenges occurred, it did not explain to Mr. Hojan the law regarding the bar against using racial motives in a peremptory challenge. *See generally Batson v. Kentucky*, 476 U.S. 79 (1986). In other words, it was not explained to Mr. Hojan that even if the State chose to strike a juror, the defense could still object to that attempt and request a race neutral reason for the strike. If the court was not satisfied that reason provided was genuine and race neutral, it could disallow the attempted strike. *See generally Melbourne v. State*, 679 So. 2d 759 (Fla. 1996). Because Mr. Hojan is of African American dissent, racially motivated peremptory challenges were important to him. And because this jury selection did not take place in the cold light of an impartial courtroom but rather in the shadows of a back-room deal, it cannot be known how juror decisions were made and to what degrees Mr. Hojan's constitutional rights violated. In this sense, what occurred here is not even amenable to a standard *Strickland* analysis and must be considered structural error warranting automatic reversal.

"The petit jury has occupied a central position in our system of justice by safeguarding a person accused of a crime against the arbitrary exercise of power by prosecutor or judge." *Batson*, 476 U.S. at 86. Jurors on a petit jury in a criminal case "must be 'indifferently chosen' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'" *Id*. at 86-87 (citations omitted). Mr. Hojan's appellate counsel was ineffective under the Sixth Amendment for failing to raise on appeal the fact that the jury selection in this case was conducted outside the courtroom, outside Mr. Hojan's presence and off the record.[12] Given appellate counsel's conduct there is no record or transcript of the so-called jury selection proceedings so there is no possible way to properly conduct a review of the proceedings to assure Mr. Hojan's rights were protected.[13] Such an error is troubling in the normal course but is especially disturbing in the context of Mr. Hojan's capital case and resultant death penalty.

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[12] The off-the-record proceedings were not akin to a "general qualification of the jury" to determine the actual jury pool to be questioned. *See Wright v. State*, 688 So. 2d 298, 300-01 (Fla. 19978). Rather, the proceeding in question related to "the qualification of a jury to try a specific case." *Id*. at 300. The "general qualification" process is not "a critical stage of the proceedings," *Robinson v. State*, 520 So. 2d 1, 4 (Fla. 1988), whereas the proceeding in the instant case at which Mr. Hojan was not present does constitute a critical stage.

[13] Simultaneously with the filing of this petition, Mr. Hojan is filing a motion requesting a remand of this case to attempt to reconstruct the off-the-record jury selection process that occurred in this case.

2. Appellate counsel unreasonably failed to seek a reconstruction of the backdoor jury selection.

As noted above, the actual jurors (and the alternates) who were chosen to sit on Mr. Hojan's jury were selected in a secret off-the-record "meeting" between the State and trial counsel. Mr. Hojan was not present at this "meeting." Despite the fact that the trial record makes it abundantly clear that a critical proceeding took place off-the-record, appellate counsel made no attempt on direct appeal to have this Court remand the case to attempt to reconstruct what occurred at this "meeting" at which the actual jurors were selected. In failing to do so, Mr. Hojan's appellate counsel rendered ineffective assistance of counsel.

"The law is well established that a defendant who has exercised the right to appeal is entitled to a full appellate record, including a full transcript of the trial." *Jackson v. State*, 984 So. 2d 668, 669 (Fla. 4th DCA 2008) (citing *Delap v. State*, 350 So. 2d 462 (Fla. 1997). Indeed, "[i] is indisputable that a complete and accurate record is indispensable to a defendant's right to a full and fair direct appeal. *Reynolds v. State*, 99 So. 3d 459, 500 (Fla. 2012). *See Douglas v. California,* 372 U.S. 353 (1963) (a defendant is entitled to a full and fair appellate review). Appellate counsel has a duty to ensure that a full and complete record of the proceedings is prepared and forwarded to this Court. *See* Fla. R. App. P. 9.200 (e) ("[t]he burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or appellant"). Because

appellate counsel failed to attempt to have the record reconstructed, counsel rendered prejudicially deficient representation to Mr. Hojan and the direct appeal process is undermined.[14]

B. Appellate counsel failed to raise on appeal the trial court's error in admitting unduly prejudicial and remote prior bad acts.

1. The trial record.

During the trial proceedings of October 10, 2003, Mr. Hojan's defense counsel alerted the trial court to a potential issue with regard to upcoming prosecution witness Shannon Murphy. The record reveals the following arguments made by defense counsel, the State, and the trial court's ruling on an oral motion *in limine* made by defense counsel:

> Mr. Polay [defense counsel] Judge, there is one matter. I'm sorry.
>
> THE COURT: Quick. What?
> Hold it up, Earl.
>
> Mr. Polay: With respect to the State attorney's next witness by the name of Shannon Murphy.
>
> Mr. Satz [State Attorney] She's the second. First one is short. Go ahead. Sorry.

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[14] As noted earlier, Mr. Hojan will be moving this Court to relinquish jurisdiction for a reconstruction proceeding. Mr. Hojan reserves the right to seek leave to amend this petition pending the outcome of any reconstruction proceedings this Court may order.

Mr. Polay: She sees a gun in the defendant's truck a month or two months before the incident. She indicates in her deposition that the gun in question looks similar to it.
Am I correct?

Mr. Satz: Uh-huh.

Mr. Polay: My issue really pertains to the fact of relevance. It's nothing to say that it is (A) in fact the gun.

And (B) it's something that's far removed from the time of the incident. We're talking a month or two months prior to an incident.

In other words I'm sure she will testify that he was working security at the Colosseum nightclub and she was crawling through the truck and sees the butt end or handle of a firearm. And she remembers it being, you know, dark in color and somewhat beat up.

But my problem is really two-fold. Like I said the relevance issue and it's so far removed from the crime that it's just evidence of him being in possession of a firearm or having a firearm in his truck.

I mean, in effect it's a concealed firearm.

Mr. Satz: Your Honor, the fact that he had a gun that's similar to the gun that was found that killed two people and shot a third one is certainly relevant, and there's several witnesses here who are going to testify.

They can't testify it's the exact same gun because they don't write down the serial number when they see something, but they'll say it looks like the gun that the defendant had.

THE COURT: If you're raising a motion in limine at this point to preclude the witness's ability to mention the gun, it's denied.

Mr. Polay: Well that's exactly what I'm asking.

THE COURT: Making sure the record was clear on that.

(R. 1809-11).

Following this exchange and the presentation of another witness, the State called Shannon Murphy to testify (R. 1820). Among other matters, Murphy testified that Mr. Hojan (whom she knew as "Chip") worked at both the Waffle House and a place called the Colosseum (R. 1836-37). He worked at the Colosseum about seven or eight months (R. 1838-39). The prosecutor then asked Murphy "Did there come a time when you saw a gun" and defense counsel objected, stating "Same objection as before" (R. 1839). The court overruled the objection (*Id.*). Murphy then told the jury that "[i]t was sometime before March 11. I couldn't say the exact date, it was a little while before" (*Id.*). The prosecutor then elicited the following testimony from Murphy:

> Q [by Mr. Satz] And what were the circumstances that you saw this gun?
>
> A [by Murphy] We were getting into Chip's truck. And was going to sit in the middle. They lifted the middle console, and I was crawling over the bench.
>
> And when they moved – how the seat moved, the seats are disconnected where the middle console is connected to the passenger's side. And the driver's side has its own movable area.
>
> And in that crack right there, the gun was pushed in there.

> Q Okay. Let me show you State's Exhibit marked 3-W for Identification; and ask you, does that look like what you saw?
>
> A Looks exactly like what I saw.
>
> Q And what part of State's Exhibit 3-W or what part of the gun that you saw in Gerhard Hojan's truck did you see?
>
> A I saw the butt end of it. It was face down in a crack, so it was like the back of the handle and back of the gun.
>
> Q Okay. And you saw it that one time?
>
> A Yes.

(R. 1840).

On cross-examination, Murphy testified to essentially what she had already acknowledged on direct—that she only saw the butt end of the gun, that the gun shown to her by the prosecutor "looks like the gun that I saw" but could not say that it was the "same gun" (R. 1843). She saw this gun approximately two months before March 11, 2002 (*Id.*). She was told by Jimmy Mickel that the gun belonged to Mr. Hojan (R. 1844). Mr. Hojan himself never said it was his gun (R. 1849).

The State's next witness was Jacqueline Kendrick (R. 1852). Prior to her testimony, Mr. Hojan's defense counsel objected again to the State being allowed to introduce evidence that Mr. Hojan had "a gun" some months prior to the relevant date in question (March 11, 2002). Defense counsel argued:

> Mr. Cotrone: Judge. Why don't we – this witness, Jacqueline Kendrick is going to testify back in November 2001 she claims

Mr. Hojan worked for her at a bar. And he was a security, slash, manager.

One night she saw in her office Mr. Hojan allegedly with a black gun.

Now this happened in November 2001, which is obviously remote in time to when this incident occurred.

We haven't been given any Williams Rule notice in this case, number one.

And two, this just goes – I don't know what the relevance of this would be fore some four months before this incident that he possessed a gun once.

THE COURT: First, why would it be Williams Rule?

Mr. Cotrone: Showing a bad act that he's carrying a gun around.

THE COURT: Is that illegal?

Mr. Cotrone; Well if you don't have a license for it, yeah. I would say it's illegal. We don't know the answer to that question.

THE COURT: Exactly. It's not in and of itself illegal.

Mr. Cotrone: Inference is out there it could be illegal, because there's going to be no testimony whatsoever whether the gun was licensed or whether it was properly held by Mr. Hojan.

And this is four months before the incident occurred.

Mr. Satz: Your Honor, doesn't matter if it's four years before the incident occurred. If this is the gun that killed Christina De La Rosa and Willie Absolu and shot Barbara Nunn, it's similar to the gun they found and matched projectiles.

> Unless they want to stipulate this gun is Mr. Hojan's?
>
> Mr. Cotrone: No, we don't.
>
> Mr. Satz: I guess not.
>
> THE COURT: Motion in limine, which is being raised ore tenus is denied. Bring the jury back.

(R. 1851-52).

Thereafter, the State presented the testimony of Jacqueline Kendrick, who testified, *inter alia*, that she was presently in federal prison serving a prison sentence for tax evasion (R. 1853). In November, 2011, she owned a club called Club Ecstasy in Broward County, Florida, and hired Mr. Hojan to work at the club (R. 1853-54). The following testimony was then elicited:

> Q [by Mr. Satz] . . . I would like to call your attention to November of 2001. Was Gerhard Hojan working for you then?
>
> A Yes.
>
> Q And did there come a time when you saw him doing something?
>
> A Yes.
>
> Q Okay. Let me show you State's Exhibit marked there 3-W; and ask you if you can identify that.
>
> A Yes. It is something like that.
>
> Q Looks like this?
>
> A Yes.

Q And where did you see him with something that looks like State's Exhibit 3-W?

A He was in my office.

Q And what was he doing with the gun?

A He was cleaning it or something like that.

Q He was cleaning it?

A Yeah.

Q And that was in November, 2001?

A Yes.

(R. 1854-55). On cross-examination, Kendrick explained again that the gun she saw Mr. Hojan with in November, 2011, "looks something like" the one showed to her by the prosecutor, but she could not say it was the same gun (R. 1857).

The final witness in the triad to testify about this "gun" was Troy Burkhardt (R. 1858). Burkhardt was a manager of the Colosseum nightclub in Fort Lauderdale, Florida, and knew Mr. Hojan from working together at the club (R. 1858-59). The prosecutor then elicited the following testimony from Burkhardt, during which defense counsel again objected:

Q [by Mr. Satz] Did there come a time when you saw a gun?

A Yes.

Q Who showed you the gun?

A Mr. Hojan.

Q And approximately when was that?

A About a month before this incident.

Q Approximately a month before March 11, 2002?

A Yes.

Mr. Polay: Judge, same objection as before.

THE COURT: It's overruled.

Q And do you have any guns yourself?

A Yes.

Q So you're familiar with guns?

A Yes.

Q Let me show you State's Exhibit marked 3-W for Identification; and ask you if you can identify that.

A That's the gun he showed me.

Q And do you know when he showed it to you, did you know what caliber it was?

A Yes.

Q What caliber?

A Three eighty.

Q And what was the circumstances that he showed it to you?

A He was in his truck and pulled it out of his center console and showed it to me, just to show me.

Q He showed it to you, and that was it?

A Right. Yes.

(R. 1861-62).

On cross-examination, Burkhardt testified that he was "positive" that the gun Mr. Hojan showed to him was black and that he saw the gun for only a few seconds (R. 1864-65). However, in his deposition, Burkhardt had testified that the gun was silver (R. 1866). He said he was telling the truth in his deposition but must have been "mistaken" in his deposition (R. 1866; 1872). Burkhardt met with the prosecutor after his deposition, and the prosecutor showed him the gun in question, and the prosecutor asked him if "this looks like it" and Burkhardt said yes (R. 1867). Burkhardt also admitted being "mistaken" in his deposition testimony and in his statement to the police about his familiarity with types of weapons (R. 1868).

2. Legal Argument.

Mr. Hojan submits that the trial court erred in admitting the above-described testimony at trial, and that appellate counsel unreasonably failed to raise this issue on direct appeal. This evidence amounted to evidence that Mr. Hojan was illegally carrying a gun in violation of the *Williams* Rule.[15] *Williams* Rule evidence must be

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[15] *Williams v. State*, 110 So. 2d 654 (Fla. 1959); See also §90.404(2), Fla. Stat (2009).

relevant to a material issue other than bad character or propensity to commit crime. *Wright v. State,* 10 So. 2d 142 (Fla. 2010). *Williams* Rule evidence of other crimes or wrongs is used to prove identity, opportunity, intent, knowledge or motive. *See generally,* Ehrhardt's Florida Evidence §404. Here, the evidence was not presented to establish Mr. Hojan's identity, intent, motive or opportunity. Rather, it was used to prejudicially establish that Mr. Hojan carried an illegal gun and that he was the type of character who carried a gun and would use it. None of those reasons are permissible under *Williams* Rule.

Furthermore, the time in which Burkhart and Kendrick claim they saw Mr. Hojan with the gun is too attenuated in time from the offense charged. *See Riechmann v. State*, 581 So. 2d 133, 140 (Fla. 1991); *Hitchcock v. State*, 413 So. 2d 741, 744 (Fla. 2982). Here, the evidence adduced about Mr. Hojan having a gun some months (or more) prior to the homicides in question was "so remote and so slightly probative of any relevant issue" that the court erred in its admission. *Hitchcock*, 413 So. 2d at 744. Just because at some point in the past a person saw Mr. Hojan with a gun does not tend to prove or disprove any fact in issue in this case. It only tends, as was the State's purpose, to establish that Mr. Hojan was violent man who carried a gun. This evidence substantially prejudiced Mr. Hojan and relief should be granted.

The only purpose for the State seeking the introduction of this testimony was to assail Mr. Hojan's character and portray him to the jury as a person who has a propensity for gun violence. The admission of such evidence creates "a great danger that the jury will convict the defendant for his prior activity or because of his reputation in the community rather than because of the particular crime in question was committed by the defendant." *See,* Ehrhardt's Florida Evidence §404.4, p. 199-200 (2010 ed). The only time such evidence is admissible is if it is sufficiently similar to the charged crime. *Id.* at 200. Here, the mere act of carrying a gun does not bear on the issues in the crime charged. The illegal possession of a firearm is not sufficiently related to the murders charged against Mr. Hojan. Allowing the jury to hear such evidence unduly prejudiced Mr. Hojan in violation of his substantial constitution rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments and appellate counsel's unreasonable failure to raise this meritorious issue on appeal violated his Sixth Amendment right to the effective assistance of counsel. Mr. Hojan is entitled to relief.

C. In light of the Fourth District Court of Appeals' decision in the co-defendant's appeal, appellate counsel unreasonably failed to challenge aggravating circumstances in Mr. Hojan's case, failed to challenge the rejection of statutory mitigation, and failed to provide this Court with critical information relevant to this Court's proportionality review.

On June 7, 2006, the Fourth District Court of Appeals issued its decision in *Mickel v. State*, 929 So. 2d 1192 (Fla. 4th DCA 2006). Jimmy Mickel was Mr.

Hojan's co-defendant but his trial was severed from Mr. Hojan's based on Mickel's motion to sever because Mr. Hojan had made incriminating statements to the police that inculpated Mickel. *Id*. at 1193 n.1. At the time of the decision in *Mickel*, the appeal in this Court in Mr. Hojan's case was pending. The Initial Brief filed by Mr. Hojan's appellate counsel was filed on or around February 18, 2008, well after the decision in *Mickel* had issued. Neither of the briefs filed by Mr. Hojan's appellate counsel mentioned or made any reference to the decision in *Mickel*.

Appellate counsel's performance with regard to the *Mickel* opinion was prejudicially deficient. One aspect of the *Mickel* opinion bears directly on several of the issues in contention in Mr. Hojan's case and should have been raised on direct appeal. Yet Mr. Hojan's appellate counsel failed in his obligation to provide effective representation to Mr. Hojan.

Before addressing the specific arguments as they relate to Mr. Hojan, it is important to point out those portions of *Mickel* that impact Mr. Hojan's capital appeal. In *Mickel*, the opinion relates that the trial court (the same judge presided over the trials of both Mr. Hojan and Mickel) ordered a Pre-Sentence Investigation report (PSI). At Mickel's sentencing, following review of the PSI in Mickel's case, the trial judge made the following statement:

> There is no question having sat through both Mr. Hojan's trial and your trial that *you were the mastermind behind this entire thing. Your*

> *manipulated Mr. Hojan. He was there, he did your bidding, and the three times that he left that freezer and went back to your location, there was no question what was going on at that point. You were telling him no witnesses, no witnesses, no witnesses, and he went back and he went forth, and he pulled the trigger and that pull of the trigger was a cold, calculated, premeditated act that was precipitated by your direction. No question about that.*

Mickel, 929 So. 3d at 1195-96 (emphasis added) .[16]

The contents of Mickel's PSI and the judge's comments at Mickel's sentencing bear on the issues in Mr. Hojan's case, yet appellate counsel failed to raise any issue with regard to the *Mickel* opinion. First, when sentencing Mr. Hojan to death, the trial judge (the same judge who made the comments at Mickel's sentencing) determined that the cold, calculated, and premeditated (CCP) aggravating circumstance had been proven beyond a reasonable doubt (R. 974-76). In so finding, the trial court found that Mr. Hojan's actions were "the product of cool and calm reflection" and amounted to an "execution style murder" based on "heightened premeditation" (R. 975-76). Yet in his statements at Mickel's sentencing, the very same judge acknowledged that Mr. Hojan was "manipulated" by Mickel, that Mickel was the "mastermind," and that Mr. Hojan was merely doing Mickel's "bidding." The statements made by the judge cannot reasonably be reconciled with the findings he made in his sentencing order in Mr. Hojan's case.

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[16] Mickel was ultimately sentenced to five consecutive life sentences. *Mickel*, 929 So. 2d at 1196.

In fact, given the judge's conclusion that Mickel was the mastermind, had manipulated Mr. Hojan, and had repeatedly told Mr. Hojan to leave no witnesses, there is strong evidence to suggest that Mr. Hojan did, in fact, have a pretense of a legal or moral justification with regard to the murders. He was manipulated and merely did Mickel's bidding. While not an excuse for the terrible events that occurred, the judge's statements at Mickel's sentencing, as reported in the Fourth District Court of Appeal's decision, more than call into question the trial court's finding of CCP in Mr. Hojan's case. Appellate counsel unreasonably failed to raise this issue on appeal; had he done so, there is a reasonable probability that this Court would have struck the CCP aggravator and determined that Mr. Hojan was entitled to a new sentencing proceeding.

The *Mickel* decision also impacts the trial court's rejection of the "under substantial domination of another person" statutory mitigating circumstance. *See* §921.141(6)(e), Fla. Statutes. In fact, the trial court rejected this statutory mitigating circumstance because there was "[n]o evidence . . . provided to this Court that the Defendant acted under the substantial domination of his codefendant, Jimmy Mickel" (R. 978). The court went on to write that there was "no indication that Mr. Mickel threatened, intimidated, or coerced the Defendant into committing these crimes" and that Mr. Hojan's involvement was "voluntary, active, and significant" (*Id.*). Yet, in the *Mickel* opinion, clearly in existence at the

time of Mr. Hojan's direct appeal, the very same trial court found that Mr. Hojan had been "manipulated" by Mickel, that Mickel was the "mastermind behind this entire thing," and that Mr. Hojan's role was to do Mickel's "bidding." *Mickel*, 929 So. 2d at 1195-96. Appellate counsel unreasonably failed to raise a challenge on Mr. Hojan's direct appeal to the trial court's rejection of this statutory mitigating circumstance despite having evidence in the form of the *Mickel* opinion at his easy disposal.

Finally, the information contained in *Mickel* regarding the trial judge's comments impacts on this Court's proportionality review and the analysis it conducted in Mr. Hojan's direct appeal. In concluding that Mr. Hojan's case was not disproportionate, the Court included the CCP aggravator and did not include the improperly rejected statutory mitigator described above. *Hojan*, 3 So. 3d at 1218-19. On that basis alone, this Court should revisit its proportionality review. Moreover, in light of the information that appellate counsel unreasonably failed to raise in his briefs to this Court—the judge's statements at Mickel's sentencing—Mr. Hojan submits that his sentence is disproportionate and violates the Eighth Amendment. The "mastermind" behind these events that "manipulated" Mr. Hojan and who demanded that Mr. Hojan do his "bidding" received life imprisonment, while Mr. Hojan sits on Florida's death row awaiting his execution. A more stark violation of the Eighth Amendment can hardly be imagined. For

these reasons, the Court should revisit its proportionality analysis and vacate Mr. Hojan's death sentences at this time.

CONCLUSION

The errors described above, and appellate counsel's failure to present such errors to this Court on direct review, entitle Mr. Hojan to relief. Appellate counsel's failure to present the meritorious issues discussed above demonstrates that the representation of Mr. Hojan involved serious and substantial deficiencies. *See Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986); *Farina v. Sec'y Fla. Dep't of Corrections*, 2013 WL 5432318 (11th Cir. Sept. 30, 2013) (unpub.) The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967). In light of the serious reversible error that appellate counsel never raised, relief is appropriate. For the foregoing reasons and in the interest of justice, Mr. Hojan respectfully urges this Court to grant habeas corpus relief.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 19th day of December, 2013, and opposing counsel will be served on this date. Counsel further certifies that this Petition is typed in Times New Roman 14-point font.

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