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IN THE SUPREME COURT OF FLORIDA

Case No. SC13-05

GERHARD HOJAN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT IN REPLY

ARGUMENT I

MR. HOJAN'S CONVICTIONS ARE UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE OF THE INEFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND DURING THE GUILT PHASE OF HIS TRIAL. THE LOWER COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING ON THIS ISSUE.

1. Counsel was ineffective in the jury selection process where counsel came to an agreement with the state outside the presence of the and Mr. Hojan regarding the twelve jurors and four alternates without engaging in formal jury selection utilization strikes for cause and peremptory challenges

In his Rule 3.851 motion, Mr. Hojan alleged a facially sufficient claim of ineffective assistance of counsel with regard to the unorthodox, improper, and unprecedented manner in which the jury was selected in this case (PCR. 289-297). The lower court summarily denied this subpart of Mr. Hojan's claim of ineffective assistance of counsel, ruling solely on *Strickland*'s prejudice prong (PCR. 769)[1] ("This Court finds that even if Defendant could prove deficient performance, he would not be able to establish prejudice, since he accepted and ratified the procedure. Furthermore, in doing so, he had sufficient information regarding the jurors and the selection process to make an informed decision."). *See also* (PCR. 770) (reaffirming that ruling is based on prejudice prong, not deficiency prong).

[1] *See Strickland v. Washington*, 466 U.S. 668 (1984).

Because the lower court improperly denied this claim without an evidentiary hearing, and in doing so made factual assumptions that are not borne out by the record, reversal for a hearing is warranted because Mr. Hojan is entitled to relief under *Strickland.*

The State's brief raises more questions than it answers and thus highlights even more the need for evidentiary development of this claim. For example, the State asserts that Mr. Hojan "spent forty-five minutes discussing the procedure used to select his jury and its final composition with his attorneys" (AB at 10). Most of the factual statements contained in this argument are not supported by the record and/or are conclusively refuted by Mr. Hojan's allegations which must be accepted as true. *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

There is nothing in the record to establish that Mr. Hojan spent "forty-five minutes" with counsel, much less discussing the "procedure used to select his jury" and its "final composition." 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, 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. 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.
>
> 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). Thus, 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. The record is absent of any further detail about the length or nature of the "discussion" that occurred between Mr. Hojan and his counsel, hence the need for an evidentiary hearing to determine what, if any, reason counsel may have had for having an off-the-record agreement with the State; what, if any, reason counsel may have had for not having Mr. Hojan present; and what exactly took place during this off-the-record hearing at which Mr. Hojan was not present. *See*

Patton v. State, 784 2. dd 380, 387 (Fla. 2000) (improper to presume a strategic reason absent an evidentiary hearing).

In this case, trial counsel was ineffective under the Sixth Amendment for actively preventing Mr. Hojan from being able to exercise his rights under Florida law and his right to due process by engaging in a backroom deal with the State as to what the jury would be. There is no indication that counsel explained his intent to Mr. Hojan before meeting with the State, much less does the record reveal any strategic reason for (1) agreeing to an off-the-record jury selection, and (2) failing to ensure Mr. Hojan's presence at such. Counsel waived a substantial right of his client without his knowledge for the purpose of expediency. Indeed, counsel's lack of questioning caused him not to be aware, until opening statements, that one of the secretly selected jurors, Juror Fravel, knew Officer Kilpatrick from Davie Police Department (R. 1284). Additionally, Juror Fravel indicated that he had been previously arrested for battery (R. 818). Trial counsel failed to ask any follow-up questions of Juror Fravel. Had counsel not sought to expedite the jury selection process and allowed it to proceed before the court – in the courtroom – in the presence of Mr. Hojan and before an actual judge, Mr. Hojan would have likely known that Juror Fravel knew a Davie Police officer involved in the case and had a previous arrest for battery.

The State argues that the record contains "no information" to support Mr. Hojan's allegation that counsel did not further question Fravel due to the unorthodox manner in which the jury was "chosen" in this case (AB at 13), and presumes that defense counsel had a strategy (AB at 14) ("If defense counsel, who would be the one to object to a peremptory strike, saw such a pattern emerging during the discussions, he would not agree to the proposed panel"). The reason for the absence of any record evidence is the State's failure to agree that an evidentiary hearing should have been conducted. The State cannot, on the one hand, argue that no evidentiary hearing is warranted and, on the other hand, fault Mr. Hojan because there is nothing in the record to support his argument. The bottom line is that Mr. Hojan made factual allegations which must be accepted as true. The State's failure to accept the allegations establishes the error in summarily denying this issue without an evidentiary hearing.

In rejecting this claim without an evidentiary hearing, the lower court merely set out the history of how the jury selection process occurred in Mr. Hojan's case and reached the bald conclusion that no prejudice had been established (PCR. 769) ("This Court finds that even if Defendant could prove deficient performance, he would not be able to establish prejudice, since he accepted and ratified the procedure. Furthermore, in doing so, he had sufficient information regarding the jurors and the selection process to make an informed decision."). *See also* PCR.

770 (reaffirming that ruling is based on prejudice prong, not deficiency prong). However, the trial court's conclusion that Mr. Hojan "accepted the jury and ratified the procedure" contradicts the allegations set forth in Mr. Hojan's motion that Mr. Hojan's "ratification" was made through only *pro forma* responses to the court's inquiry after the entire procedure had taken place off-the-record at a proceeding at which he was apparently not present. Indeed, the State has conceded that Mr. Hojan was not present. *See* PCR. 418 ("Consequently, Hojan's absence from the actual selection of the panel does not involve a substantial or constitutional right."). That Mr. Hojan "accepted" the jury and "ratified the procedure" raises more questions than it answers, and this issue must be explored at an evidentiary hearing. And while the lower court wrote that Mr. Hojan had "sufficient information" regarding the jurors to make an "informed" decision, this finding lacks any record support, much less competent and substantial evidence. In fact, the record shows that when trial counsel informed the court of the "selection" process that had taken place, counsel informed the court that Mr. Hojan still wanted to speak to more potential jurors (R. 1210). This hardly establishes that Mr. Hojan had "sufficient" information to make an "informed decision," much less conclusively so. *See*, *e.g. Leigh v. State*, 58 So. 3d 396, 397 (Fla. 4th DCA 2011) (postconviction claim "may be denied if the record conclusively refutes the claim;

if the claim is denied on this basis, then the trial court must attach to its order of denial those portions of the record that conclusively refute the alleged claim.").

2. Counsel was ineffective in unreasonably failing to challenge the admissibility of scientific evidence and testimony

In his Rule 3.851 motion, Mr. Hojan alleged that his trial counsel was ineffective in failing to mount a challenge, under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to the admission of the toolmark and firearm evidence sought to be admitted by the State at Mr. Hojan's trial (PCR. 301). Further, he alleged that counsel unreasonably failed to adequately investigate and challenge the qualifications of the State's forensic expert, Carl Haemmerle, who was qualified to testify to his opinions without objection (PCR. 301; R. 2707). The trial court summarily denied Mr. Hojan's claim, concluding that it was insufficiently pled and without merit (PCR. 772).

Much as it did with the first claim, the State defends the lower court's refusal to grant an evidentiary hearing because Mr. Hojan's allegations were conclusory in nature (AB at 17). However, Mr. Hojan's allegations were more than sufficiently pled to warrant an evidentiary hearing. See Fla. R. Crim. P. 3.851 (e)(1)(D).

Not only did counsel not contest, under *Frye v. United States*, 293 F. 1013 (D.C. Cir.1923), the admissibility of the toolmark and firearm evidence, he

allowed the State's expert, Carl Haemmerle, to be qualified without objection (R. 2707). Counsel engaged in no investigation of Haemmerle or the field of toolmark examination. It is clear from cross-examination, which consisted of merely twelve pages, that counsel investigated not one iota of toolmark identification or Mr. Haemmerle or his excessive conclusion in this case. Specifically, Haemmerle did not testify to the usual conclusion that his opinion was based on a reasonable degree of scientific certainty. Rather, counsel allowed Haemmerle to repeatedly testify that locks at the crime scene were cut by the bolt cutters found in Mr. Hojan's truck to the exclusion of all others (R. 2086). In other words, Haemmerle was allowed to testify in the scientifically unprecedented manner that the only bolt cutters on the planet that have ever been manufactured in the history of the world that could have cut the locks was the one item found in Mr. Hojan's truck.

Specifically, Haemmerle testified that he compared bolt cutters that were found in Mr. Hojan's truck (R. 2020) to master locks from the Waffle House (State's Exhibit 29, R. 2086). Haemmerle told the jury that with respect to the small master lock identified as DS1, he found that the lock "was cut by this particular bolt cutter **beyond and to the exclusion of all other** bolt cutters" (R. 2086-87) (emphasis added). Similarly, Haemmerle determined that the padlock identified as DS4 "was also cut by these bolt cutters **to the exclusion of all other** bolt cutters" (R. 2087) (emphasis added). Such a conclusion is scientifically

offensive and patently absurd. *See generally Ramirez v. State*, 542 So. 2d 352 (Fla. 1989) ("We find the testimony positively identifying this particular knife as the murder weapon inadmissible."). Yet defense counsel allowed it before the jury with nary an utterance in opposition.

Haemmerle also testified regarding several bullets and bullet fragments retrieved from the victims or from the crime scene. Haemmerle testified that he identified the piece of bullet jacket contained in State's Exhibit 59E "back to this particular firearm **to the exclusion of all** other firearms" (R. 2078) (emphasis added). The firearm at issue in Haemmerle's analysis was identified as State's Exhibit 78. Detective Franquiz claimed to have recovered the gun from the bushes outside the Coliseum night club. (R. 1938). Without previous objection or challenge from defense counsel Haemmerle once again testified that he identified the projectile contained in State's Exhibit 55 "back to this particular firearm **to the exclusion of all** other firearms" (R. 2079) (emphasis added). Still without challenge or objection to his conclusions, Haemmerle continued and testified that State's Exhibit 52 was likewise identified as a projectile that "was fired from this particular firearm **to the exclusion of all** other firearms" (R. 2080) (emphasis added). These conclusions are similarly overreaching, yet trial counsel failed to object or challenge the conclusions in any regard.

The State argues that Mr. Hojan failed to allege prejudice (AB at 13-14), but this is not the case. Failing to challenge the toolmark and firearms evidence caused substantial prejudice because the evidence strongly and graphically linked an item found in Mr. Hojan's truck to the crime scene and likewise linked a firearm said to have belonged to Mr. Hojan to the crime scene. Had counsel competently challenged the evidence it would not have had an impact on the jury and the result at trial would have been different. Mr. Hojan is entitled to an evidentiary hearing and relief is proper.

3. Counsel was ineffective for failing to argue in the motion to suppress Mr. Hojan's statement that he was not capable of adequately understanding his *Miranda* rights and therefore did not knowingly, intelligently, and voluntarily waive *Miranda* rights

In his Rule 3.851 motion, Mr. Hojan alleged that he was arrested in the early morning hours of March 12, 2002. He was detained by Lee County Sheriff's and held until Davie Police officers arrived in Lehigh Acres. When the Davie Police arrived, Mr. Hojan was interrogated for approximately forty minutes before the police decided to activate a recorder. The Davie Police claimed in the suppression hearing that they read Mr. Hojan his rights pursuant to *Miranda*[2] and that he understood those rights, waived those rights, and agreed to talk to police. Once the tape recording was activated, there was no re-warning of *Miranda* rights, the police

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966)

merely referenced the previously claimed waiver to which Mr. Hojan assented. At the suppression hearing, counsel only argued that there was no valid waiver because the police did not use a waiver form and he was interrogated for forty minutes before the recording began (R. 2884). Thus, counsel argued that the State failed to carry its burden establishing a valid *Miranda* waiver. What counsel did not argue was that at the time of the claimed waiver, Mr. Hojan's mental state prevented him from adequately understanding his rights and knowingly and intelligently and voluntarily waiving them. Counsel's performance under *Strickland* was constitutionally deficient in this regard.

As Mr. Hojan's Rule 3.851 motion alleged, before trial and prior to the suppression hearing, counsel had Mr. Hojan evaluated by Dr. Allen Ribbler. According to Dr. Ribbler, Mr. Hojan was sleep deprived at the time of the claimed waiver, having probably been awake for at least 24 hours or more. As a result of this sleep deprivation he was not thinking clearly about the consequences of giving up his *Miranda* rights. Dr. Ribbler was also of the opinion that the sleep deprivation in conjunction with the fact that Mr. Hojan had no previous contacts with police and interrogations compromised his appreciation for the consequences of waiving his constitutional rights (PCR. 305-06).

Without a reasonable tactical or strategic decision, Mr. Hojan's counsel failed to call Dr. Ribbler to testify at the suppression hearing or offer his opinion in

documentary form. Thus, the trial court was never appraised of Mr. Hojan's mental state at the time of the claimed waiver. Given that the waiver was not recorded or reduced to writing, the only evidence the court could consider was the testimony of the police officer. Had counsel presented Dr. Ribbler and argument about his findings regarding Mr. Hojan's mental state, there is a reasonable probability that the outcome of the suppression hearing would have been different, which is the prejudice component of the *Strickland* standard. Thus, counsel was ineffective for failing to present Dr. Ribbler's findings at the suppression hearing and Mr. Hojan is entitled to relief.

In response to Mr. Hojan's claim, the State first argues that this claim is procedurally barred because, on direct appeal, this Court "addressed the waiver issue" (AB at 22). In rejecting Mr. Hojan's Rule 3.851 claim, the lower court also determined that this issue was procedurally barred because "[t]he waiver issue was raised on appeal and the Supreme Court of Florida upheld this Court's finding that Defendant was advised of his constitutional rights and knowingly and voluntarily waived those rights" (PCR. 776). In determining that the issue in the Rule 3.851 motion was the same as that raised on direct appeal and thus procedurally barred in a Rule 3.851 motion, the lower court decidedly erred and the State's argument on appeal is meritless. As Mr. Hojan explained in his Initial Brief (but never addressed in the State's brief), a review of the issue raised by Mr. Hojan on direct

appeal unmistakably reveals that the issue on direct appeal was not the "same" issue raised in Mr. Hojan's Rule 3.851 motion. On direct appeal, Mr. Hojan argued that "there is not sufficient evidence in the record indicating that he was ever read *Miranda* warnings or that any such warnings given were proper." *Hojan v. State*, 3 So. 3d 1204, 1212 (Fla. 2009) In contrast, in his Rule 3.851 motion, Mr. Hojan alleged ineffective assistance of counsel in failing to present evidence from a forensic mental health professional that would have undermined the voluntary and intelligent nature of the putative confession. The two issues are distinct, as this Court has explained in a similar situation:

> Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and-of necessity-have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant thus has little choice: As a rule, he or she can *only* raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal. Thus, the trial court erred in concluding that Bruno's claim was procedurally barred.

Bruno v. State, 807 So. 2d 55, 63 (Fla. 2002) (footnotes omitted). Under *Bruno*, the lower court's determination of procedural bar must be reversed. The mere fact that the State failed at all to address *Bruno* in its Answer Brief speaks volumes. This claim is not procedurally barred.

The lower court also concluded that Mr. Hojan's claim was without merit because neither prong of *Strickland* had been established (PCR. 776), a position defended by the State (AB at 23-24). However, the State never addresses Mr. Hojan's argument that the trial court's ruling contradicts the factual allegations in Mr. Hojan's motion. For example, the trial court ruled that no Sixth Amendment violation occurred by defense counsel because the motion to suppress testimony established that Mr. Hojan declined a bathroom break and something to eat or drink during the interrogation (PCR. 776). Similarly, the court relied on law enforcement testimony that Mr. Hojan was "calm and cooperative" during the interrogation and that he was asked whether he was taking medications or felt that his judgment was impaired, to which Mr. Hojan responded no (PCR. 777). Whether Mr. Hojan told the police that his judgment was impaired is as probative as asking a drunk driver if they are driving under the influence. Mr. Hojan alleged the availability of a specific mental health expert who counsel themselves had located and who would have provided relevant important information regarding Mr. Hojan's state of mind at the police station. The lower court's rejection of this claim fails to accept Mr. Hojan's allegations as true, allegations which are not conclusively refuted by the record. Moreover, to the extent that the State suggests that trial counsel must have had a strategic reason for failing to present Dr. Ribbler (AB at 24) ("Trial counsel was not ineffective for failing to present Dr. Ribbler

given the evidence of Hojan's physical and mental state in the record"), a strategy cannot be presumed absent an evidentiary hearing. *See Patton v. State*, 784 So. 2d 380, 387 (Fla. 2000). The lower court's order should be reversed and this matter remanded for an evidentiary hearing.

4. Counsel was ineffective for failing to investigate Mr. Hojan's German and Jamaican Nationality

Mr. Hojan relies on his Initial Brief in reply to the arguments set forth in the State's brief as to this subclaim.

ARGUMENT II

COUNSEL PROVIDED INEFFECTIVE ASSISTANCE FOR FAILING TO ADEQUATELY COUNSEL MR. HOJAN REGARDING THE NATURE, CIRCUMSTANCES AND CONSEQUENCES OF WAIVING PENALTY PHASE MITIGATION AND THUS VIRTUALLY ASSURING MR. HOJAN WOULD BE SENTENCED TO DEATH.

In his Rule 3.851 motion and the amendment thereto, Mr. Hojan alleged in detail that he waived his right to present mitigating evidence due to trial counsel's failure to effectively counsel him on the harsh and real consequences of his decision and due to counsel's failure to utilize the necessary mental health experts as part of the defense team responsible for counseling Mr. Hojan on his decision. Due to counsel's ineffectiveness, substantial mitigating evidence was not presented for the consideration of the sentencing jury and the judge. The lower court denied this claim as both procedurally barred and without merit, declining to order an evidentiary hearing despite the mandate set forth in Fla. R. Crim. P. 3.851(f)(5)(A)(i), which requires an evidentiary hearing "on claims listed by the defendant as requiring a factual determination" (PCR. 779-784).

In his Initial Brief, Mr. Hojan set out an extensive analysis regarding the error in the lower court's imposition of a procedural bar to this claim. The State altogether fails to address Mr. Hojan's arguments except to contend, as it did below, that Mr. Hojan was raising the "same issue" that was raised on direct appeal but under the "guise of ineffective assistance of counsel" (AB at 30). In his Initial

Brief, Mr. Hojan set out the exact issues that were raised on appeal and explained why the present claim raised in the Rule 3.851 proceeding was neither the "same claim" nor was it procedurally barred. Given that the State has advanced no position with regard to Mr. Hojan's arguments, the Court should determine that Mr. Hojan's assessment of the lower court's procedural ruling is correct and find that the lower court erred in imposing a procedural bar.

With regard to the merits of the claim, Mr. Hojan relies on the arguments and authorities set forth in his Initial Brief and would only note that nothing in the State's brief lessens Mr. Hojan's argument that an evidentiary hearing should have been conducted on this claim. His motion set forth the factual allegations required under Fla. R. Crim. P. 3.851(f)(5)(A)(i), which requires an evidentiary hearing "on claims listed by the defendant as requiring a factual determination" (PCR. 779-784). Reversal for an evidentiary hearing on the merits of Mr. Hojan's claim is warranted.

ARGUMENT III

THE CIRCUIT COURT ABUSED ITS DESCRETION IN DENYING ACCESS TO FILES AND RECORDS PERTAINING TO MR. HOJAN'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES IN VIOLATION OF FLA. R. CRIM. P. 3.852.

Mr. Hojan relies on his Initial Brief in reply to the State's arguments on this Argument.

ARGUMENT IV

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT THE FORENSIC SCIENCE USED TO CONVICT AND SENTENCE MR. HOJAN WAS NEITHER RELIABLE NOR VALID, THUS DEPRIVING HIM OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Mr. Hojan relies on his Initial Brief in reply to the State's arguments on this Argument.

ARGUMENT V

MR. HOJAN WAS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE OF THE RULES THAT PROHIBIT HIS LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

Mr. Hojan relies on his Initial Brief in reply to the State's arguments on this Argument.

ARGUMENT VI

FLORIDA'S LETHAL INJECTION PROTOCOL AND PROCEDURES VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Mr. Hojan relies on his Initial Brief in reply to the State's arguments on this Argument. One matter, however, merits brief discussion. In his Initial Brief, Mr. Hojan acknowledged that, since his claim was presented and adjudicated in the lower court and since this instant appeal was filed, there was another substantial

change to Florida's lethal injection protocol and that he was continuing to investigate the present constitutionality of Florida's new lethal injection protocol. He also asserted that was raising this argument in this Brief for purposes of preservation. *Sireci v. State*, 773 So. 2d 34, 40 n.14 (Fla. 2000). The State contends that Mr. Hojan should be deemed to have "waived" this argument because of the "lack of argument in support of this claim" (AB at 48). However, as he explained, the claim that was raised below was not the same claim because of the new protocol adopted by the Department of Corrections in September, 2013. Mr. Hojan preserved his claim in the manner that the Court directed him to in *Sireci*. Mr. Hojan did not "waive" any claim.

ARGUMENT VII

VARIOUS CLAIMS RAISED BY MR. HOJAN ARE RAISED ON APPEAL IN ORDER TO PRESERVE THEM IN ACCORDANCE WITH *SIRECI V. STATE*.

In this Argument, Mr. Hojan raised a number of issues for preservation purposes in accordance with the procedure set forth by this Court in *Sireci v. State*, 773 So. 2d 34, 40 n.14 (Fla. 2000). Now the State suggests that these claims have been "waived" (AB at 49). The State's argument contravenes this Court's decision in *Sireci* and does not contend that Mr. Hojan did not comport with the *Sireci* procedure. The State's "waiver" arguments should be rejected.

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 25th day of April, 2014, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

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