Electronically Filed 12/19/2013 05:15:17 PM ET

RECEIVED, 12/19/2013 17:18:32, John A. Tomasino, Clerk, Supreme Court

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

INITIAL BRIEF OF APPELLANT

TODD G. SCHER
Assistant CCRC-South
Florida Bar No. 0899641

JESSICA HOUSTON
Staff Attorney
Florida Bar No. 0098568

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH
1 East Broward Boulevard
Suite 444
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Hojan's motion for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

"T." – trial transcript;

"R." – record on direct appeal to this Court;

"PCR." – record on appeal to this Court following the rule 3.851 motion;

"Supp-PCR." – supplemental postconviction record on appeal;

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Hojan requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

PROCEDURAL AND FACTUAL STATEMENT

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

---

[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).

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. 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

---

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

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. *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

[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).

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 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

[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).

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 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

[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)

(PCR. 756-793). A timely Notice of Appeal was filed (PCR. 794-795), and this Initial Brief follows.

SUMMARY OF THE ARGUMENTS

In Argument I, Mr. Hojan submits that he was denied an adversarial testing at the guilt phase of his capital trial due to trial counsel's ineffective assistance of counsel, and the lower court erred in summarily denying this claim without affording Mr. Hojan an evidentiary hearing. First, Mr. Hojan alleged that trial counsel were prejudicially deficient during the jury selection process in this case where counsel came to an "agreement" with the prosecutor—outside the presence of the trial judge and outside the presence of Mr. Hojan—regarding the selection of the 12 jurors and the 4 alternates. Second, trial counsel were prejudicially deficient in unreasonably failing to challenge the admissibility of the scientific evidence and testimony presented at trial, and in failing to investigate and challenge the qualifications and opinions of the State's forensic expert, Carl Haemmerle. Third, Mr. Hojan alleged that his counsel were ineffective in failing to argue and present evidence, during the hearing on the motion to suppress Mr. Hojan's statement to law enforcement, that Mr. Hojan was not capable of adequately understanding his *Miranda* rights and therefore did not knowingly, intelligently, and voluntarily waive those *Miranda* rights. Fourth, Mr. Hojan alleged that counsel were prejudicially deficient in failing to investigate his German and Jamaican heritage. Alone and combined, the

errors alleged by Mr. Hojan undermined confidence in the outcome of his capital trial. Because the files and records did not conclusively refute the allegations made by Mr. Hojan, the lower court erred in denying this claim without an evidentiary hearing.

In Argument II, Mr. Hojan submits that his counsel were ineffective at the penalty phase of his capital trial in that counsel failed to adequately ensure that Mr. Hojan understood the nature, circumstances, and consequences of waiving penalty phase mitigation, thus virtually assuring that Mr. Hojan would be sentenced to death. This claim raised extra-record allegations which were not conclusively refuted by the record, nor was this claim procedurally barred as having been raised and rejected on direct appeal. This Court should reverse the summary denial of this claim and remand for an evidentiary hearing.

In Argument III, Mr. Hojan submits that the trial court abused its discretion in denying access to public records from various state agencies, in violation of Fla. R. Crim. P. 3.852. Specifically, Mr. Hojan challenges the trial court's refusal to grant Mr. Hojan's requests for certain records from the Florida Department of Law Enforcement and the Broward County Sheriff's Office.

In Argument IV, Mr. Hojan submits that an evidentiary hearing is warranted on the newly discovered evidence that the forensic science used to convict him was neither reliable nor valid, thus depriving him of a fair trial under the United States Constitution.

In Argument V, Mr. Hojan submits that his rights have been abridged under the United States Constitution due to the prohibition in the Florida rules of professional conduct regarding juror interviews.

In Argument VI, Mr. Hojan submits that Florida's lethal injection protocol and its method of execution violates the Eighth Amendment.

In Argument VII, Mr. Hojan raises several issues which were rejected below and are being raised in the instant appeal for preservation purposes.

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.

I. Standard of Review.

This issue, like all of the claims raised below by Mr. Hojan, was denied by the lower court without the benefit of an evidentiary hearing. The lower court summarily denied Mr. Hojan's numerous allegations of serious deficiencies which singularly and cumulatively undermined confidence in the outcome of his capital trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996).

Mr. Hojan sought an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851(e)(1)(D) and Fla. R. Crim. P. 3.851(f)(5)(A) for all claims requiring a factual determination. Pursuant to Fla. R. Crim. P. 3.851(f)(5)(A)(i), an evidentiary hearing must be held "on claims listed by the defendant as requiring a factual determination." *Accord Amendments to Fla. R. Crim. P. 3.851*, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions

which assert . . . legally cognizable claims which allege an ultimate factual basis"). *See also Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

"Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence (if raised by the State) 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). A court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

Mr. Hojan's amended rule 3.851 motion pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively and conclusively refute Mr. Hojan's claim and that an evidentiary hearing is required.

II. Mr. Hojan's Allegations.

A. Introduction.

The United States Supreme Court has consistently affirmed the right of a capital defendant to the effective assistance of counsel and emphasized counsel's duties in a capital case. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). With respect to his claims of ineffective assistance of counsel, Mr. Hojan can establish both of *Strickland*'s prongs -- deficient performance and prejudice which undermined the adversarial testing process at trial.

Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief State obliged to hand over evidence); *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991) (failure to conduct pretrial investigation was deficient performance)*; Chambers v. Armontrout*, 907 F.2d 825 (8th Cir. 1990) (en banc) (failure to interview potential self-defense witness was ineffective assistance); *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989) (failure to have obtained transcript of witness's testimony at co-defendant's trial was

ineffective assistance); *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance through any portion of the trial. *Washington v. Watkins*, 655 F.2d 1346, 1355, *rehearing denied with opinion*, 662 F.2d 1116 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Even a single error by counsel may be sufficient to warrant relief. *Nelson v. Estelle*, 626 F.2d 903, 906 (5th Cir. 1981) (Counsel may be held to be ineffective due to a single error where the basis of the error is of constitutional dimension); *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir. 1979) ("...[s]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard.").

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 477 U.S. 625 (1980). The United States Supreme Court noted that, in the context of ineffective assistance of counsel, the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do

> not establish mechanical rules. Although those principles should guide the process of decision, **the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether**, despite the strong presumption of reliability, **the result** of the particular proceeding **is unreliable** because of a breakdown in **the adversarial process** that our system **counts on to produce just results**.

Strickland, 466 U.S. at 696. The evidence presented below and to this Court demonstrates that the result of Mr. Hojan's trial is unreliable. An evidentiary hearing should have been granted and this Court should remand for such a hearing.

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) ("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). 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 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]

---

[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).

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. 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

[11] In summarily denying this claim, 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

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.

Florida law and federal due process mandate that a defendant has the right to be present at all critical stages of the proceedings. Indeed, 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). Indeed, 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

---

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.").

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, 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.[12]

As further evidence that Mr. Hojan was not present at the "meeting" between his counsel and the State, the record is clear that upon learning of defense counsel's backroom jury dealing, Mr. Hojan expressed an immediate desire to want to question more jurors (R. 1210). Given Mr. Hojan's concern, it took counsel approximately forty-five minutes to cajole him into accepting the backroom jury deal with the State. Counsel's advice to Mr. Hojan was directed more at the expediency of the trial than finding jurors suitable to sit on Mr. Hojan's case.

---

[12] Mr. Hojan demanded public records from the Broward County State Attorney's Office and the Florida Department of Law Enforcement (FDLE) regarding each of the jurors who served on his panel which would indicate whether or not any juror appears in any civil or criminal matter or whether a juror appears as a defendant, witness, suspect and/or victim (PCR. 24-27; 65-69). Objections to disclose were filed (PCR. 180; 190-92). The lower court sustained the objections from both the State Attorney's Office and FDLE regarding records pertaining to the jurors' criminal histories (PCR. 464). *See* Argument III, *infra*.

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).

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. 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, a defendant in Florida has 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.

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.").

"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 trial counsel was ineffective under the Sixth Amendment for conducting jury selection outside the courtroom, outside Mr. Hojan's presence and off the record. Given 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 are 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. In order to ensure the integrity of the system particularly where a death sentence is involved, all matters must be of record for proper judicial review. Counsel's conduct entirely prevents any judicial review whatsoever of the jury selection process causing yet another affront to Mr. Hojan's Fifth, Sixth, Eight and Fourteenth Amendment rights. As such Mr.

[13] Simultaneously with the filing of this brief, Mr. Hojan filed a petition for writ of habeas corpus along with a request to remand the case to attempt to reconstruct the off-the-record jury selection process that occurred in this case.

Hojan is entitled to relief. At a minimum, an evidentiary hearing is warranted in order for the lower court, the parties, Mr. Hojan, and this Court to have as ample a record as possible about precisely what took place in this case.

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).

Mr. Hojan's allegations were more than sufficiently pled to warrant an evidentiary hearing. See Fla. R. Crim. P. 3.851 (e)(1)(D). Trial counsel should have known that a *Frye* hearing is required before the State is allowed to present, and the trial court admit into evidence, certain scientific

evidence. *Frye,* 293 F. at 1014 ("While the court will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."). This Court formally adopted the *Frye* test in 1989 when it reversed a conviction that had been obtained partially on the basis of hypnotically induced testimony. *See Stokes v. State*, 548 So. 2d 188 (Fla. 1989). The Court has reversed convictions in cases in which DNA evidence was admitted without a *Frye* hearing or when the *Frye* hearing conducted by the trial court failed to adequately determine the reliability of the scientific theory espoused by the State. *See Murray v. State*, 692 So. 2d 157 (Fla. 1997); *Brim v. State*, 695 So. 2d 268 (Fla. 1997); *Hayes v. State*, 660 So. 2d (Fla. 1995). Had a *Frye* hearing been requested by counsel with respect to toolmark and firearm comparisons, the State would have been unable to meet its burden in order to establish the admissibility of the scientific evidence presented in this case. Thus, Mr. Hojan can establish prejudice resulting from counsel's failure to challenge the State's "scientific" evidence.

Not only did counsel not contest, under *Frye*, 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 National Academy of Sciences conducted lengthy analysis of the various forensic science disciplines. *See* Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009) (hereinafter "NAS Report"). In that analysis it identified many serious problems with accuracy in pattern evidence disciplines such as toolmark and firearm comparisons. According to the NAS:

> The task of the firearms and toolmark examiner is to identify the individual characteristics of microscopic toolmarks apart from class and subclass characteristics and then to assess the extent of agreement in individual characteristics in the two sets of toolmarks to permit the identification of an individual tool or firearm.

(PCR. 303) (quoting NAS Report at 5-19). Making this assessment and knowing the extent of the agreements between marks is "a challenging task." *Id.* Ultimately, toolmark evidence suffers from sever limitations including the lack of a precisely defined process. (PCR. 303). With respect to toolmark evidence, the NAS committee identified problems that negatively impact the reliability of the entire field of endeavor. Specifically the committee wrote that

> not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result. Sufficient studies have not been done to understand the reliability and repeatability of the methods. The committee agrees that class characteristics are helpful in narrowing the pool of tools that may have left a distinctive mark. Individual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable.
>
> * * *
>
> Although some studies have been performed on the degree of similarity that can be found between marks made by different tools and the variability in marks made by an individual tool, the scientific knowledge base for toolmark and firearms analysis is fairly limited.

(PCR. 304).

Thus, from the determination of the National Academy of Sciences it does not appear as though toolmark evidence satisfies the test for admissibility in Florida under *Frye*. *See also, Ramirez v. State*, 651 So.2d 1164 (Fla. 1995); *Ramirez v. State,* 810 So. 2d 836 (Fla. 2001). Even if the evidence could be considered admissible, it is clear from the scientific underpinnings that it is impossible to state the evidence in the way that Haemmerle did. In other words, there is nothing in the literature that suggests that a toolmark and firearms analyst can say that a particular tool or firearm made a mark to the exclusion of all others in existence. Such a conclusion is pure fantasy and counsel was ineffective for not challenging it.

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*[14] and that he understood those rights, waived those rights, and agreed to talk to police. Once the tape recording was activated,

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

there was no re-warning of *Miranda* rights, the police 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.

One of the cornerstones of a valid *Miranda* waiver is that it be voluntary. The question of voluntariness is a question of state law but is circumscribed by the minimum requirements of the Fourteenth Amendment's Due Process Clause. *Jackson v. Denno,* 378 U.S. 368, 393 (1964). Although diminished mental capacity is not *per se* grounds to hold a confession inadmissible it is one of the factors that a court should consider in the totality of the circumstances surrounding a waiver of *Miranda* rights. *Ross v. State*, 386 So. 2d 1191, 1194 (Fla. 1980). *Thompson v. State*, 548 So.

2d 198, 203-04 (Fla. 1989). Here, counsel's ineffectiveness prevented the trial court from seeing a full picture of Mr. Hojan at the time of the claimed waiver of *Miranda*. Thus, the court was prevented from fully assessing the totality of the circumstances. Had Dr. Ribbler testified as to Mr. Hojan's diminished mental state at the time of the claimed waiver, the totality of the circumstances analysis would have changed dramatically and there is a reasonable probability that the court would have been required to grant the motion to suppress Mr. Hojan's confession as involuntary.

In rejecting Mr. Hojan's Rule 3.851 claim, the lower court first 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.

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 lower court also concluded that Mr. Hojan's claim was without merit because neither prong of *Strickland* had been established (PCR. 776). In so concluding, 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. As such, 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

Article 36 of the Vienna Convention on Consular Relations (Apr. 24, 1963), [1970] 21 U.S.T. 77, 100-101, T.I.A.S. No. 6820 establishes a system of rights that enables consular officers to protect nationals who are

detained in foreign countries. Mr. Hojan's father is a German citizen and his mother was born in Jamaica. Additionally, Mr. Hojan lived extensively in both countries as a child. While Mr. Hojan was born in the United States, specifically New Jersey, his established ties to Germany and Jamaica would entitle him to assistance from those foreign governments and make him eligible for citizenship in either country. Although, at the time of his arrest there would have been no legal requirement to inform Mr. Hojan of any rights under the Vienna Convention, Article 36 is certainly instructive of the assistance that would have been available to him had his trial counsel effectively investigated Mr. Hojan's background and ties to Germany and Jamaica.

Article 36(1)(b) requires authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of the arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance. Finally, Article 36(2) requires that a country's "laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

To date, 168 nations have ratified the Vienna Convention, making it one of the most widely ratified multilateral treaties in force. The United States has described the rights and obligations set forth in Article 36 as "of the highest order," in large part because of the reciprocal nature of these obligations and the importance of these rights to United States citizens abroad. ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 161 (1973).

To the extent that any single department of government (other than the courts) can be said to be "charged" with "enforcement" of the Vienna Convention, it is the State Department. The State Department's *Consular Notification and Access* booklet contains instructions and guidance relating to the arrest and detention of foreign nationals and is aimed at federal, state, and local governmental officials.[15] It summarizes the basic requirements of consular notification and access in a format designed to be distributed or posted as readily accessible instructions or notices to all federal, state, or local officials who may, in the performance of their official functions, have contact with a foreign national in a situation triggering a requirement to notify consular officials. The importance of the Vienna Convention and the *Consular Notification and Access Booklet* lies not in the legal notification

[15] Available at http://travel.state.gov/pdf/CNA_book.pdf (last accessed January 27, 2006).

requirements set forth therein, but rather in the information contained therein that would have been readily available to counsel.

One of the most important functions of a consul is to serve as "a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system." *United States v. Chapparro-Alcantara*, 226 F.3d 616, 622 (7th Cir. 2000). Arrested foreign nationals in the U.S. are often isolated from family and friends, speak English only as a second language or not at all, and fail to understand their rights under the U.S. criminal justice system.

Consular assistance for detained nationals generally serves three basic purposes: providing protective assistance, by ensuring that foreign nationals are not mistreated in custody; humanitarian assistance, by providing detainees with access to the outside world and ensuring that they have the basic necessities of life; and legal assistance, by advising detainees on the basic procedures under the local legal system and providing them with lists of local lawyers to defend them. Even in capital cases where a foreign national is familiar with U.S. criminal justice procedures, or as here where there is substantial ties to foreign countries without initial to ensure that the national receives fair, equal and humane treatment, citizenship, the consulate still provides an indispensable function.

Consular assistance in a capital case may include: monitoring the performance of court-appointed attorneys; attending court hearings; contacting friends and family in the home country; ensuring that the detainee and the defense attorney are in close contact; funding expert witnesses and investigators, where the courts deny adequate defense funding; notarizing and conveying documents from the home country (e.g., medical, educational, military records); funding mitigation investigations in the home country; bringing mitigation witnesses to testify; submitting amicus briefs or motions based on any violations of international law; participating directly or indirectly in appellate review; petitioning for clemency; and any other assistance necessary both before trial and after sentencing.

In Mr. Hojan's case, trial counsel unreasonably failed to recognize Mr. Hojan's parentage and its significance in the assistance of his defense. Mr. Hojan's father is a German citizen. Mr. Hojan's mother is a Jamaican citizen. Additionally, Mr. Hojan spent time living in both Germany and Jamaica. Reasonable counsel would have understood that with parents born in foreign countries and being citizens thereof, Mr. Hojan was eligible to obtain citizenship in those countries and all the rights included with such citizenship. Germany is well known world-wide for its steadfast assistance to German nationals facing the death penalty. Germany has offered

significant resources to individuals, their legal teams and to courts in cases such as Mr. Hojan's. The German government would no doubt have offered such assistance to Mr. Hojan had counsel properly investigated this option. The support and assistance that the German government could have provided to Mr. Hojan and his legal team would have been invaluable at both the guilt and penalty phases of the trial. Had trial counsel been effective, this assistance would have been available to Mr. Hojan. Mr. Hojan is entitled to an evidentiary hearing and relief is proper.

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.

I. Standard of Review.

This issue, like all of the claims raised below by Mr. Hojan, was denied by the lower court without the benefit of an evidentiary hearing. The lower court summarily denied Mr. Hojan's numerous allegations of serious deficiencies which singularly and cumulatively undermined confidence in the outcome of his capital trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996).

Mr. Hojan sought an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851(e)(1)(D) and Fla. R. Crim. P. 3.851(f)(5)(A) for all claims requiring a factual determination. Pursuant to Fla. R. Crim. P. 3.851(f)(5)(A)(i), an evidentiary hearing must be held "on claims listed by the defendant as requiring a factual determination." *Accord Amendments to Fla. R. Crim. P. 3.851*, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions

which assert . . . legally cognizable claims which allege an ultimate factual basis."). *See also Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

"Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence (if raised by the State) 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). A court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

Mr. Hojan's rule 3.851 motion and the amendment thereto pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively and conclusively refute Mr. Hojan's claim and that an evidentiary hearing is

required.

II. Mr. Hojan's Allegations.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688 (citation omitted). Beyond the guilt-innocence stage, defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion). In *Gregg* and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." *Id*. at 206. *See also Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Mr. Hojan was convicted on October 17, 2003 (R. 2480-2486). The penalty phase took place on November 24, 2003, and the *Spencer*[16] hearing

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

was conducted on March 18, 2004. It is undisputed that Mr. Hojan "had a right -- indeed a constitutionally protected right -- to provide the jury with mitigating evidence." *Williams v. Taylor*, 529 U.S. 362 (2000). "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (*citing Lockett v. Ohio*, 438 U.S. 586 (1978)).

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). As explained below, the lower court was wrong in both its procedural ruling and in denying the merits of this claim without an evidentiary hearing.

1. Erroneous Finding of Procedural Bar.

The lower court imposed a procedural bar to Mr. Hojan's claim of ineffective assistance of counsel because, on direct appeal, this Court "addressed the waiver issue . . . and upheld this Court's determination that Defendant 'knowingly, intelligently, and voluntarily waived his right to mitigation'" (PCR. 780) (quoting *Hojan,* 3 So. 3d at 1213-15). In the lower court's view, Mr. Hojan was attempting to "relitigate the same issue under the guise of ineffective assistance of counsel" and thus found the claim procedurally barred (PCR. 870). In order to properly evaluate the lower court's procedural ruling, it is necessary to outline the precise claims raised on Mr. Hojan's direct appeal and the one raised in his Rule 3.851 motion below.

On direct appeal, Mr. Hojan's appellate counsel raised several arguments concerning the sentencing aspects of his case. As this Court described, Mr. Hojan's arguments consisted of the following: (1) that "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"; (2) that Florida's death penalty statute is unconstitutional; and (3) that 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). *Hojan v. State*, 3 So. 3d 1204, 1209 (Fla. 2009) Within the context of addressing the first of these issues (the only one relevant for purposes of this argument), this Court determined, based on the extant record, that Mr. Hojan had waived his right to present mitigating evidence and that the lower court "committed no error in permitting Hojan to withdraw the motions he withdrew." *Id*. at 1211. In the context of addressing the argument that *Koon* and *Muhammad* were violated, this Court rejected those arguments and found that the lower court had properly complied with the dictates of *Koon* and conducted the requisite colloquy with Mr. Hojan. *Id*. at 1214.

Although they share a common factual predicate, the arguments on direct appeal were decidedly different than the one raised in Mr. Hojan's Rule 3.851 motion and the amendment thereto. First, to the extent that this Court on direct appeal "upheld" the lower court's determination that Mr. Hojan's waiver of mitigation as knowing, voluntary, and intelligently made, this determination was made in the context of evaluating whether the requirements of *Koon* had been satisfied. This Court determined that the

lower court had complied with *Koon* –no more and no less. However, in his Rule 3.851 motion and the amendment thereto, Mr. Hojan challenged *trial counsel's ineffectiveness* in failing to adequately comport with their constitutional obligation to ensure that Mr. Hojan had a full and complete understanding of what he was, in fact, doing by waiving all mitigation. Although the factual underpinnings of the direct appeal claim and the claim raised in the 3.851 proceeding might overlap to an extent, this Court has made clear that they involve distinct legal theories, only one of which can be raised in a postconviction proceeding:

> 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). "[U]nless a direct appeal is affirmed with a written opinion that *expressly addresses the issue of ineffective assistance of counsel,* an affirmance on direct appeal should rarely, if ever, be treated as a procedural bar to a claim for ineffective

assistance of counsel on a postconviction motion." *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002). As in *Bruno*, the lower court here erred in concluding that Mr. Hojan's ineffective assistance of counsel claim, which alleged facts not in the record, was procedurally barred in light of this Court's direct appeal decision. *Accord Johnson v. State*, 3 So. 3d 412 (Fla. 3d DCA 2009) (relying on *Bruno* in determining that trial court had erroneously found an ineffective assistance of counsel claim procedurally barred).[17]

2. The Merits.

In his Rule 3.851 motion and the amendment thereto, Mr. Hojan set out extensive factual allegations and identified this claim as one requiring

[17] In finding the procedural bar in Mr. Hojan's case, the lower court relied on two opinions from this Court – *Franqui v. State*, 965 So. 2d 22 (Fla. 2007), and *Henry v. State*, 937 So. 2d 563 (Fla. 2006). Neither case supports a procedural bar in Mr. Hojan's case. In *Franqui*, the defendant's postconviction motion challenged the seating of two jurors, but the propriety of the seating of those jurors had been addressed on direct appeal. *Franqui*, 965 So. 2d at 33. Thus, the claim in the postconviction motion was determined to be the "same" as the one raised and rejected on direct appeal. *Id.* To the extent that the defendant had raised an ineffectiveness aspect to the claim, the Court found no error in the denial of relief because neither deficient performance nor prejudice had been established. *Id. Franqui* is inapposite because Mr. Hojan is not raising the "same" claim in his postconviction motion as was raised on direct appeal. And in *Henry*, this Court made it clear that the claim the defendant was attempting to raise in postconviction was the same claim that was raised on direct appeal. *Henry*, 613 So. 2d at 572. In Mr. Hojan's case, the reasoning of *Bruno* clearly controls.

factual development. The allegations in his claim were broken down into three distinct yet interrelated areas of concern: (1) counsel's failure to comply with the constitutional obligation to ensure that Mr. Hojan was provided with competent mental health assistance during the sentencing aspects of his case; (2) counsel's failure to comply with the constitutional obligation to ensure that Mr. Hojan fully understood about the stark realities of death row so that Mr. Hojan was aware of all available information before making a decision to waive or not waive mitigation; and (3) counsel's failure to comply with the constitutional obligation to ensure that Mr. Hojan knew of the risks associated with Florida's lethal injection process. Notwithstanding the express language of Fla. R. Crim. P. 3.851(f)(5)(A)(i), which mandates an evidentiary hearing "on claims listed by the defendant as requiring a factual determination," the lower court summarily denied this claim. The lower court must be reversed.

It is apparent from the record that Mr. Hojan agreed to allow his counsel to investigate mitigation. When Mr. Hojan announced his intent to waive presentation of mitigation, counsel informed the court that there were two areas of statutory mitigation that he would have presented. First, counsel stated that Mr. Hojan did not have any significant prior criminal

history (R. 2567).[18] Second, counsel stated that Mr. Hojan's character, record and background mitigated against the death penalty (R. 2567). Counsel also informed the court that he had subpoenaed Mr. Hojan's mother, father, family, friends, uncles and cousins (R. 2563). Additionally, counsel stated that there were non-statutory mitigators in favor of Mr. Hojan (R. 2568).

Counsel told the court that when it became known that Mr. Hojan did not want to present mitigation, he had Mr. Hojan evaluated by Dr. Trudy Block-Garfield to determine competency (R. 2503).[19] Dr. Block-Garfield did, indeed, conduct an evaluation of Mr. Hojan and he freely complied. Implicit in this is the notion that Mr. Hojan consented to and did not refuse the evaluation. In that evaluation, Dr. Block-Garfield covered a few issues beyond Mr. Hojan's competency for the waiver.[20] Mr. Hojan also previously assented to be evaluated by Dr. Ribbler on five separate

[18] Indeed, the State acknowledged in writing that "the statutory mitigator of no significant history of prior criminal activity is applicable to Mr. Hojan" (R. 795).

[19] On October 24, 2003, Mr. Hojan's defense counsel filed a motion for the appointment of Dr. Block-Garfield for purposes of a competency evaluation for penalty phase purposes (R. 566). By order dated October 28, 2003, Dr. Block-Garfield was officially appointed (R. 575).

[20] Dr. Block-Garfield also evaluated Mr. Hojan for competency prior to trial and that evaluation likewise included, to some extent, issues beyond Mr. Hojan's competency.

occasions. These evaluations occurred in August and September 2003, prior to trial. Thus, contrary to his protestations in court, Mr. Hojan was a ready and willing participant in evaluations to develop mitigation on his behalf. Of course, this only changed upon his conviction. *See Blanco v. Singletary,* 943 F.2d 1477 (11th Cir. 1991) (counsel found ineffective where they waited until after conviction to begin investigation of penalty phase).

Mr. Hojan's trial counsel failed to utilize the mental health experts he had hired to counsel Mr. Hojan regarding his desire to waive the presentation of mitigation. Two separate experts had evaluated Mr. Hojan: Dr. Ribbler and Dr. Block-Garfield. It is well understood that mental health experts are part of the defense team.

Unfortunately, Dr. Ribbler was not qualified to provide the necessary mental health assistance in a capital penalty case. When Mr. Hojan announced that he wanted to waive presentation of mitigating evidence, the Court appointed independent counsel who hired Dr. Michael Brannon. Dr. Brannon reviewed the sole report of Dr. Ribbler and determined that Dr. Ribbler lacked training and experience as a forensic psychologist, having never testified in a capital case and never testifying in front of a jury in a criminal case (R. 802-08). According to Dr. Brannon, Dr. Ribbler was unprepared to follow-up on the information he obtained from Mr. Hojan, he

was unaware of the specific legal questions he was supposed to address, Dr. Ribbler utilized inappropriate test instruments (*Id*.). Significantly, Dr. Brannon pointed out that Dr. Ribbler failed to access collateral sources of information and did not conduct neuropsychological testing despite indications of head injury (*Id*.). Thus, aside from failing to utilize a competent expert to assist in counseling Mr. Hojan against the waiver of presentation of mitigation, Mr. Hojan's waiver was not knowing where counsel failed to provide their client with "a competent psychiatrist...[t]o conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68 (1985).

As Dr. Brannon wrote in his report, Dr. Ribbler's evaluation was nothing more than "an unstructured, general psychological assessment" (R. 807). There was certainly nothing in Dr. Ribbler's report that demonstrates Mr. Hojan was aware of potential mental health mitigation, or any mitigation at all; in fact, Dr. Ribber possessed an "acknowledged lack of training and experience as a forensic psychologist" (R. 807). And despite the fact that Dr. Block-Garfield's evaluations revealed some information beyond whether Mr. Hojan was competent to stand trial or competent to waive presentation of mitigation, her evaluations likewise were similarly lacking as a comprehensive evaluation for statutory and non-statutory mitigation. Given

the limited nature of Dr. Block-Garfield's appointment, coupled with the short period of time she had to render a report to the court,[21] it is hardly surprising that her report was not a comprehensive mitigation evaluation. This simply was not Dr. Block-Garfield's purpose.

When a client indicates he wishes to forgo presentation of mitigation, counsel's obligations must necessarily include advising the client of the very real consequences of that decision. The client's competency should not be the only consideration, nor is it reasonable to not further attempt to persuade the client to present mitigation. Therefore, in addition to investigating what is often termed "traditional mitigation," counsel should comprise efforts to investigate and explain to his client the realities of death row.

Florida's death row is a maximum custody facility located at Florida State Prison in Starke, Florida or Union Correctional Institution in Raiford, Florida. Death row can only be described as a prison within a prison. Inmates are housed in one man cells measuring 6 feet by 9 feet. In addition to the bars covering the front of the cell, the bars are covered by tight wire mesh which restricts air flow. There is one opening or small slot for sliding food trays through and to place handcuffs on an inmate before being moved

[21] Dr. Block-Garfield was appointed on October 28, 2003 (R. 575), and her report was dated November 4, 2003 (R. 980). A reliable comprehensive mental health mitigation evaluation cannot be performed in a week.

from the cell. However, this slot remains closed at all other times. Cells are not air conditioned in the summer nor are the heated in the winter.

An inmate's daily routine includes breakfast at 5:00 a.m.; lunch at 10:30 a.m.; dinner at 4:00 p.m. An inmate is only allowed a plate and a spoon at mealtime. The Department of Corrections currently feeds inmates on a budget of approximately $2.25 per day, per inmate. The Department of Corrections is therefore feeding inmates **three meals** for less than what a "Big Mac" at McDonald's cost.

Headcount is conducted every hour and inmates are in lockdown all the time. There is no common room. Inmates are not allowed phone access. A full strip search is conducted of the inmate upon every entry and exit from the cell and the inmate remains in cuffs and shackles whenever moved. No hobbies are permitted on death row and there are no educational or vocational programs offered for death row inmates.

In comparison, inmates in general population are housed at institutions throughout the state providing greater potential to be located near family. Being housed at an institution other than death row would allow better visitation and phone access. Additionally, these institutions offer various programs to inmates including academic, vocational and

personal betterment programs. There is more freedom of movement and outside time for inmates in general population.

In addition to a lack of understanding the conditions on death row, inmates facing the death penalty have a misconception of lethal injection. Therefore, counsel has an obligation to explain the process of lethal injection and the problems inherent in that process. At the time of Mr. Hojan's trial, Florida's lethal injection protocol called for three drugs to be administered in succession through an IV tube attached to the inmate: 5 grams of pentobarbital, a short-acting barbiturate which is used to render the inmate unconscious; 100 mg of pancuronium bromide, a paralyzing agent; and finally 240 mg of potassium chloride, which stops the heart. That protocol has since changed. However, what has not changed is that Florida's use of a cocktail of lethal drugs creates a risk that defendants like Mr. Hojan will experience excruciating pain during the execution process. At the time of his waiver, Mr. Hojan was never made aware of these risks.

Under *Strickland*, a court reviewing an ineffective assistance of counsel claim must determine whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Here, where the jury heard no evidence in mitigation due to Mr. Hojan's uncounseled waiver, the jury knew a great deal about the

crime, but next to nothing about the man they had convicted of that crime. If Mr. Hojan had been advised of the consequences of his decision, he would not have waived presentation of mitigation at the penalty phase. *See State v. Lewis*, 838 So. 2d 1102 (Fla. 2002); *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993).

Counsel's failure to advise Mr. Hojan of the consequences of his decision was exacerbated by difficulties he was experiencing in the jail, including ongoing back and neck pain and frustration over inadequate treatment. This adjustment would have been particularly difficult given that he had no prior criminal history. Mr. Hojan also had no meaningful support system upon which to rely due to the fact that his parents historically had abandoned and neglected him throughout his life.

The timing of his decision to waive the presentation of mitigation is also quite telling as to his mental state in reaching that decision. Mr. Hojan only expressed a desire to forgo presentation of mitigation after he was convicted (R. 2502), telling Dr. Block-Garfield that he could not "live the remainder of his life behind bars" (Report of Dr. Trudy Block-Garfield, November 4, 2003). Instead, he threw in the towel acknowledging he may as well get the death penalty. Mr. Hojan's desire to waive was born out of defeat, rather than a well reasoned and thoughtful reflection of the

consequences of waiving mitigation after counseling with qualified members of the defense team.

Additionally, there is record support for Mr. Hojan's equivocation about the waiver and his reliance on counsels' advice and decision-making. When discussing the waiver of mitigation the court asked Mr. Hojan how he intended to ask the jury for the death penalty (R. 2569). Mr. Hojan responded by stating "By not giving any mitigators. I don't know I can ask them for it" (R. 2569). The court then informed Mr. Hojan he had the right to testify and tell the jury he wanted the death penalty (R. 2569). Tellingly, Mr. Hojan responded, "I guess that's up to the attorneys" (R. 2569). Thus, while Mr. Hojan seemed to be waiving all mitigation and thereby captaining his own ship, he was simultaneously ceding the decision of whether to testify at the penalty phase to his lawyers. This demonstrates a lack of complete understanding on Mr. Hojan's part regarding what his rights were and who is responsible for making the decision. It is also manifest that counsel was inadequate in advising Mr. Hojan about the precise consequences of his "decision" to waive mitigation and the realities of being sent to death row.

Because available mitigation was not presented to the sentencer, the resulting death sentence is unreliable and there is a reasonable probability

that the result would have been different. For example, in his amended Rule 3.851 motion, Mr. Hojan alleged the existence of extensive mitigation that was available for presentation to the judge and jury:

> Gerhard Shafter Ernst Thomas Hojan was born in Teaneck, New Jersey to unwed parents who were visiting friends in the area. He is the only child born to Gerhard Ernst Thomas Hojan, of Duesseldorf, Germany and Pauline Alona Holgate, of Port Antonio, Jamaica. His half sisters Kerry Ann Hojan and Niquette-Ann Michelle Dennis were born during Ms. Holgate's first marriage.
>
> Mr. Hojan and Ms. Holgate returned to Jamaica after the birth of their son but only remained for a short time due to political unrest in the country. Gerhard's early years were spent with a babysitter in Marathon, Florida where his parent's owned a hotel and restaurant and spent most of their time running the business. Mr. Hojan and Ms. Holgate married while living in Marathon.
>
> At the age of four (4) Gerhard sustained a head injury when he fell out of the rear of his father's truck. He was hospitalized due to the injury and a loss of consciousness. A few years later he sustained another head injury while being thrown within a vehicle. This injury, which caused perfuse bleeding and severe swelling to his head and face, also caused a loss in consciousness and required hospitalization. Gerhard suffered through dizzy spells throughout his childhood and teenage years.
>
> In 1980, Gerhard attended Sue Moore Elementary school in Marathon. It was an agonizing time for him as he had to be pried from his mother, believing each time his mother left him at school she would not return. Being apart from his family so much was very traumatizing to Gerhard and caused him to suffer a sad and painful childhood.

Mr. Hojan was jealous of his son and when Gerhard was old enough he sent him off to boarding school so Mr. Hojan did not have to compete for Mrs. Hojan's attention. Gerhard would call his parents from the schools and would ask to come home but Mr. Hojan would not allow his return. Gerhard was therefore deprived of the close nurturing relationship a child requires from their parents.

At the age of eight (8), Gerhard attended a Catholic school in Mandeville, Jamaica and boarded with the secretary of the head master. Gerhard was doing well at this school until he learned his sisters had returned home and were being allowed to live there. Gerhard's grades began to fall at this point and he was taken home to Lucea, Jamaica.

Back in Lucea, Gerhard did not fit into his parent's busy lifestyle. He was sent to Russeas School where he was "boarded" with a woman named Lillian Green who had numerous other children in her care. Gerhard was given material items from his parents while he was away but he only needed their love and attention. As a child he only wished he had parents like other children.

Although Gerhard spent very little time with his father, his father was abusive toward him and other members of the family. His father would beat him when he was home, punching him in the face and making his nose bleed and beating him with a bamboo rod that would leave "razor cut" wounds. On one occasion he was beaten so hard the bamboo broke. Mr. Hojan was also verbally abusive to his son, calling him names and belittling him.

In Lucea, Gerhard's parents continued to run their hotel but also opened up a meat processing plant. The parts for the plant and the workers came to Jamaica from Germany. Mr. and Mrs. Hojan developed good friendships with the Germans and decided Gerhard would accompany his parent's friends back to Germany and attend school there.

Gerhard was sent to Germany to live at the age of eleven (11). After a little over a year Gerhard began getting into trouble at school and causing problems in the home. As Gerhard's parent's did not want him to return home, they placed him in another boarding school in the Black Forest area of Germany. Less than a month later Gerhard was expelled and returned to Jamaica to live with his uncle and aunt, Vincent and Daphne Holgate, in Port Antonio. He attended Titchfield School for a short time but began getting into trouble as a way to return home to his parents.

Even in his teenage years Gerhard was still not wanted at home and he was sent off to Admiral Farragut Academy, a boarding school in Saint Petersburg, Florida. He attended this school for less than a year when he was expelled for carrying a dive knife to class. At the age of fifteen (15), Gerhard was sent to Arch Bishop Curley High School in Miami, Florida. His parent's rented a house for Gerhard and his uncle, Patrick Holgate to live, however, Mr. Holgate was rarely at the residence and did not provide any parental supervision. While attending school it was recommended by the Guidance department that Gerhard obtain counseling as he was having difficulties adjusting. Mr. and Mrs. Hojan hired a psychiatrist from the phonebook and attended one session with Gerhard. Although additional sessions were deemed necessary, no further sessions were attended due to associated costs. Gerhard remained at this school until the age of sixteen (16) when he dropped out. Gerhard never returned to school. Mr. and Mrs. Hojan purchased the Waterways Apartments in Hollywood, Florida at this time and provided Gerhard with his own apartment.

In 1994 Gerhard married Barbara Holgate, his first cousin from Jamaica whom he had known most of his life. One year later his son, Corey Arthur Shafter Hojan was born and the next year his autistic daughter Brandi Alexis Sofie Hojan was born. Neither child was cared for by their parents and both became the wards of Mr. and Mrs. Hojan.

> Gerhard Hojan soon moved to Pennsylvania where he resided for a year without his family. He later moved to Orlando, Florida and was employed at Subway and Walmart. Gerhard was involved in an accident while living in Orlando in which he was hit by a car and sustained a back injury. Mr. and Mrs. Hojan also moved to Orlando so Gerhard would be able to see his children. In 1999 he moved to Ft. Lauderdale, Florida with Mrs. Hojan and the children. Gerhard lived with his parents until August of 2000 when he rented a trailer with his friend and co-defendant, Jimmy Mickel, and Jimmy's girlfriend Shannon Murphy.
>
> Gerhard worked as a bouncer at several clubs over the next couple of years and received several head injuries during his employment. His parents moved to Lehigh Acres, Florida with his children and he would travel there on occasion to visit them. He did not maintain any lasting friendships as the continuous moves during his childhood taught him not to become attached to anyone.

(PCR. 537-541).

Had the attorneys in this case reasonably counseled Mr. Hojan, there is a reasonable probability that he would have presented evidence establishing numerous, unrebuttable mitigating factors. Evidence establishes a history of parental abandonment and neglect, which had serious effects on Mr. Hojan's adult life and ability to form lasting meaningful relationships, as well as evidence of childhood abuse and head trauma. These mitigating factors "might well have influenced the jury's appraisal of [Mr. Hojan's] moral culpability" or "may [have] alter[ed] the jury's selection of penalty." *Williams v. Taylor*, 529 U.S. at 398. The evidence likely would have

affected the "factual findings" regarding mitigating factors. *Strickland*, 466 U.S. at 695-96.

Had counsel properly advised Mr. Hojan of the realities of his waiver, the mitigation evidence collected would have been presented to the jury. Had the jury been able to consider the mitigation evidence, there is a reasonable probability that it would have likely returned a life recommendation. Regardless of the consideration by the judge of three mitigating factors, the importance of the effect of the unpresented mitigation on the jury cannot be overstated. *See Porter v. McCollum,* 130 S. Ct. 447 (2009). A life recommendation in this case would have been significant because the court informed Mr. Hojan that if there was a life recommendation he would not override and would sentence Mr. Hojan to life. Therefore, counsels' failure to properly, adequately and fully explain to Mr. Hojan the precise and lasting implications of his waiver severely prejudiced him and violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and relief is proper.

On direct appeal, this Court concluded "[b]ased on th[e] facts within the record, we find no error in the trial court's determination that the defendant knowingly, intelligently, and voluntarily waived his right to mitigation." *Hojan,* 3 So. 3d at 1215. However, the Court did not have the

benefit of the non-record evidence of counsel's ineffectiveness for failing to detail the serious consequences of his waiver. Due to counsel's errors, the trial court failed to take into account that Mr. Hojan's decision was made without consideration of the harsh realities of death row and without the benefit of competent mental health assistance. Such a waiver can hardly be considered knowing, intelligent, or voluntary.

Had the jury heard the mitigating evidence available, there is a reasonable probability that the jury would have recommended life and the judge would have given that recommendation great weight. A reasonable probability exists that Gerhard Hojan would have received a life sentence, particularly given that in the absence of any presentation of mitigating circumstances the jury recommended death by a vote of 9-3 for both victims. As such, Mr. Hojan was prejudiced by counsel's failure to reasonably investigate, inform him and present mitigation. "(T)he [sentencer] must be able to consider and give effect to *any mitigating evidence* relevant to a defendant's background, character, or the circumstances of the crime." *Penry v. Lynaugh*, 109 S. Ct. 2934, 2952 (1989) (emphasis added). The prejudice to Mr. Hojan resulting from counsel's deficient performance is clear. Mr. Hojan is entitled to an evidentiary hearing and relief thereafter.

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 must obtain all public records in existence which may bear on the issues in this case or risk issues being procedurally barred. *Porter v. State*, 653 So. 2d 375 (Fla. 1995). Mr. Dennis is entitled to the public records. *Muehleman v. Dugger*, 623 So. 2d 480 (Fla. 1993); *Walton v. Dugger*, 643 So. 2d 1059 (Fla. 1993); *State v. Kokal*, 562 So. 2d 324 (Fla. 1990). The delay and/or denial of access to crucial public records in his case results in Mr. Hojan being denied his rights to due process and equal protection of the law. This Court applies the "abuse of discretion" standard when reviewing appeals from denials of requests for public records. *Hill v. State*, 921 So. 2d 579 (Fla. 2006). An obligation rests with the State to furnish requested materials. *Ventura v. State*, 673 So. 2d 479 (Fla. 1996). The lower court abused its discretion in denying Mr. Hojan access to the records to which he is entitled.

On February 26, 2010, Mr. Hojan filed numerous supplemental public records demands pursuant to Fla. R. Crim. P. 3.852(g) and (i) from state agencies including the Florida Department of Law Enforcement (FDLE)

(PCR. 60-69),[22] and the Broward County Sheriff's Office (BSO) (PCR. 118-23).[23] These agencies filed written objections to the production of the requested records. *See* PCR. 152-58 (BSO objections);[24] PCR. 190-92 (FDLE objections).[25] A hearing was held on Mr. Hojan's public records requests on August 23, 2010 (Supp. PCR. Vol. 1), after which the trial court entered an order sustaining the agencies' objections (PCR. 460).

Specifically as to the request to BSO for information regarding analyst Haemmerle, the court rejected the argument that information from his personnel file could have impacted his credibility or be used as impeachment at trial, and further faulted Mr. Hojan for not "indicat[ing] the time frame

---

[22] Mr. Hojan' request to FDLE included, *inter alia*, records regarding the jurors who sat on the jury in this case (PCR 66).

[23] Mr. Hojan's request to BSO included, *inter alia*, documentation related to proficiency tests and competency practice casework of the BSO as well as the credentials and personnel file of BSO employee Carl Haemmerle, who testified at Mr. Hojan's trial (PCR. 121-22). *See* Argument I, *supra*. Further, Mr. Hojan requested documentation relating to laboratory protocols, validations studies, accreditation studies, laboratory error rates, and audits of the toolmark and firearms section of the BSO crime lab from January 1, 2000, through March 31, 2004 (PCR. 122).

[24]BSO did not object to providing the records requested in subsection (2)(m) of Mr. Hojan's request regarding documentation from the crime lab (PCR. 122), but did object to providing the requested records relating to Haemmerle (PCR. 156).

[25] FDLE filed a *pro forma* objection that raised only generic objections not related to the demand actually filed by Mr. Hojan (PCR. 190-92).

requested for Carl Haemmerle's proficiency tests and credentials regarding tookmark and pattern analysis (PCR. 461).[26] As to the request for juror criminal history background made to the FDLE, the lower court sustained the generic objection made by FDLE, ruling that Mr. Hojan "must first determine whether the individuals listed have criminal histories"[27] and if so, then he "may request records for that person, if the information is not available locally and if relevant to this case" (PCR. 464).

Mr. Hojan's collateral counsel met the requirements of Rule 3.852 to obtain the requested additional public records. The records sought are relevant to Mr. Hojan's postconviction claims. The circuit court abused its discretion in denying the requests. Mr. Hojan was denied his rights to due

---

[26] At the hearing below, BSO counsel acknowledged that it had the records requested by Mr. Hojan, but BSO simply did not want to turn them over because, in its view, there was "quite a bit of documentation" that had "no relevance in post-conviction proceeding" (Supp. PCR., Vol. 1 at 56). In response, Mr. Hojan contended that Haemmerle's work and testimony at trial was "extremely critical in this case" and therefore "I think we should be entitled to all of his proficiency testing, in all of toolmark examination" (*Id*. at 57-58). Thus, it was not that Mr. Hojan had failed to provide a time frame; he was simply requesting all of the documentation that BSO admitted it had without regard to time frame prior to Mr. Hojan's trial to determine if any impeachment evidence was available. *See* Argument I, *supra*.

[27] At the hearing below, Mr. Hojan's counsel did just that; as counsel explained, "[w]e have done the investigation to the extent that we're able to as non law enforcement officers and have come up with at least one member of the jury, Mark [Fravel] who was charged in 2002 with battery and domestic violence." (Supp. PCR., Vol. 1 at 10).

process and equal protection of the law. The trial court's denial of public records denied Mr. Hojan the full panoply of armaments with which to challenge his conviction and sentence. *Easter v. Endell*, 37 F. 3d 1343 (8th Cir. 1994); *see also Holland v. State*, 503 So. 2d 1250 (Fla. 1987). Mr. Hojan is entitled to effective representation in his capital collateral appeals. *See Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988).

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.

In his Rule 3.851 motion, Mr. Hojan alleged that his convictions and sentences were unreliable due to newly discovered evidence that the forensic science used to convict and sentence him was neither reliable, nor valid (PCR. 321-33). In 2006, the National Academy of Sciences formed The Committee on Identifying the Needs of the Forensic Science Community (Committee) to study issues regarding the varied disciplines that form the field of "forensic science." SCIENCE, STATE, JUSTICE, COMMERCE, AND RELATED AGENCIES APPROPRIATIONS ACT OF 2006, P.L. No. 1-9-108, 119 Stat. 2290 (2005). The end product of the Committee's exhaustive work was a comprehensive report, a prepublication copy of which was made available on February 18, 2009. Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009) (Pre-publication copy) (hereinafter "the NAS Report"). The Committee's final report constitutes

newly discovered evidence that the "scientific" evidence used to convict Mr. Hojan was the result of methods with questionable and untested underlying scientific principles, in violation of Mr. Hojan's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[28]

Because of the variability that exists across forensic science disciplines (NAS Report at S-5) , the Committee suggests two important questions that should underlie the admission of, and reliance upon, forensic evidence in criminal trials: 1) the reliability of the scientific methodology; and 2) the reliance on human interpretation that can be tainted by error and bias. Id. at S-7. The Committee specifically notes that it "matters a great deal whether an expert is qualified to testify about forensic evidence and whether the evidence is sufficiently reliable to merit a fact finder's reliance on the truth that it purports to support." Id. at S-7.

The Committee detailed many of the problems inherent in various forensic sciences, some of which were evident in the investigation of and presentation of evidence in Mr. Hojan's case. In an effort to remedy the

[28] This Court has recognized that "reports" issued by governmental or other bodies that affect the integrity of a defendant's trial or penalty phase can constitute newly discovered evidence. See *Trepal v. State*, 846 So. 2d 405, 409-10 (Fla. 2003).

many flaws, the Committee made a number of specific recommendations for improving the many deficiencies within the forensic science community as a whole.[29]

The Committee recommended that the establishment of standard terminology to be used when reporting and testifying about a particular forensic science and establish model laboratory reports for the different disciplines, indicating the minimum information to be included. NAS Report at S-15, 16. The Committee pointed out that many terms are used to describe the degrees of association between evidentiary material and particular people or objects, e.g., "match," "consistent with," "identical," "similar in all respects tested," and "cannot be excluded as the source of." *Id.* at S-15. The Committee concluded that "[t]he use of such terms can and does have a profound effect on how the trier of fact in a criminal or civil matter perceives and evaluates scientific evidence." *Id.* Essentially, the use of varying degrees of terms results in the difference between being convicted or not, as occurred in the instant case.

The testimony regarding forensic science evidence at Mr. Hojan's trial

[29] It is important to note, that the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team similarly criticized Florida's crime laboratories and medical examiner system. *See* AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN THE STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT, September 17, 2006 at 83.

was fraught with subjective terms, varying in degree of conclusiveness. Often the terms were overly conclusive with no limitations of the analyses explained. For example, Carl Haemmerle, a firearms and tool mark analyst with Broward Sheriff's Office, testified at Mr. Hojan's trial with respect to comparisons he made with bolt cutters that were found in Mr. Hojan's truck (R. 2020) and the 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). With respect to both padlocks DS2 and DS5, Haemmerle testified that they **could not be excluded** as having been cut by the bolt cutters found in Mr. Hojan's truck (R. 2087-88).

Haemmerle also testified regarding several bullets and bullet fragments retrieved from the victims or from the crime scene. With respect to State's exhibit 53, containing bullet fragments from victim Absolu's neck, Haemmerle testified that the lead was "consistent with core material from the bullet" (R. 2077). Haemmerle testified, again overly conclusively, 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). Again, Haemmerle testifies 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). 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).

With respect to classifying all the projectiles as a whole, Haemmerle testified that "[a]ll the metal pieces **are consistent with** Federal Hydro-shock bullets, all of the cartridge casings that I was given with Federal Hydro-shock show that those **are consistent with** the same manufacturer" (R. 2081) (emphasis added). Finally, Haemmerle concluded that the casings contained in State's Exhibit 36, identified as having been found in the freezer at the Waffle House, "were fired from that particular firearm to the exclusion of all other firearms" (R. 2082).

The use of the terms "match," "cannot be excluded," "consistent with," "to the exclusion of" and other similar phrases which are criticized in the Forensic Science Committee's report prejudiced the trial court and the jury against Mr. Hojan during the guilt phase of the trial. The variation in

language used by the experts and other police witnesses affected the trial judge and jury's perception of the reliability of the science presented.

The Committee urged that "research is needed to address issues of accuracy, reliability, and validity in the forensic science disciplines." NAS Report at S-16. According to the NAS report, sufficient studies have not been done to understand the reliability and repeatability of the methods, and the "scientific knowledge base for toolmark and firearms analysis is fairly limited." *Id*. at 5-21. Furthermore, toolmark and firearms analysis lacks "a precisely defined process." *Id*. at 5-21. Not enough is known about the variability among individual tools and guns to specify how many points of similarity are necessary for a given level of confidence in the result. *Id*. at 5-21. The accuracy, reliability and validity of the methods used by the State to analyze crime scene evidence were never challenged at Mr. Hojan's trial.

The Committee recommended that all forensic laboratories and facilities be removed from the administrative control of law enforcement agencies and prosecutor's offices "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency. NAS Report at S-17. Independence is essential so that the laboratory would be able to "set its own

priorities with respect to cases, expenditures and other issues" *Id*. at 6-1. Such independence was absent in Mr. Hojan's case as the Broward Sheriff's Office was responsible for all the forensic testing.

Next, the Committee recommends that NIFS encourage "research programs on human observer bias and sources of human error in forensic examinations." *Id*. at S-18. An example of such research would be "studies to determine whether and to what extent the results of forensic analyses are influenced by knowledge regarding the background of the suspect and the investigator's theory of the case." *Id*. at S-18.

Mr. Hojan's counsel failed in his duty to attack the questionable testimony that was presented to the jury under the guise of "science" and failed to effectively cross-examine them. *See* Argument I. Trial counsel should have known that a *Frye* hearing is required before scientific evidence can be admitted. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also Stokes v. State*, 548 So. 2d 188 (Fla. 1989) (applying *Frye* standard in Florida case); *see also*, *Ramirez v. State*, 651 So. 2d 1164, 1166-7 (Fla. 1995) (laying out four step test). The NAS Report further supports the necessity of a *Frye* hearing in regard to the forensic science presented in Mr. Hojan's trial and makes clear that the science was unreliable. The NAS Report, as newly discovered evidence, establishes that the State's evidence

was insufficient to meet its burden under *Frye*.

The use of questionable "scientific" evidence, coupled with the lack of standardized reporting and terminology in forensic disciplines, renders both Mr. Hojan's convictions and death sentences unreliable. Under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (per curiam). The use of "scientific" evidence produced by methods of questionable and untested underlying scientific principles cannot "assure consistency, fairness, and rationality" and it cannot "assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976). Mr. Hojan is entitled to relief from both the conviction and death sentence. At a minimum, because he set forth very detailed allegations with respect to the questionable forensic science used to convict and sentence him, and because the files and records do not conclusively refute his allegations, Mr. Hojan is entitled to an evidentiary hearing on this issue.

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.

In his Rule 3.851 motion, Mr. Hojan alleged that he was being denied his rights under the First, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution because of rules of professional responsibility that prohibit his lawyers from interviewing jurors to determine if constitutional error was present (PCR. 318-20). The circuit court rejected the claim on three grounds. First, the court asserted that "'this claim is procedurally barred because it should have been raised on direct appeal'" (PCR. 785) (citing cases). Secondly, the court went on to state that "this claim has been repeatedly analyzed and rejected by the Supreme Court of Florida" (*Id*.). Third, the court concluded that stated that Mr. Hojan's claim "appears to be an attempt to investigate possible grounds for finding juror misconduct" and such "'fishing expeditions'" are meritless (*Id.*). Mr. Hojan acknowledges, as the lower court found, that this Court has rejected similar claims in other cases. *See*

Troy v. State, 57 So. 3d 828, 841 (Fla. 2011); *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001). However, the allegations in Mr. Hojan's pleading below establish circumstances not present in other cases and thus this claim is being presented to the Court at this time notwithstanding the more generic claim has been rejected in prior cases.

As the Court is aware, Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial after the dismissal of the jury. This ethical rule, which prevents Mr. Hojan from investigating any claims of jury misconduct or bias that may be inherent in the jury's verdict, is unconstitutional on its face and as applied to Mr. Hojan in postconviction litigation because his inability to fully explore possible misconduct and biases of the jury prevents him from fully detailing the unfairness of the trial. Misconduct may have occurred that Mr. Hojan can only discover by juror interviews. *Cf. Turner v. Louisiana*, 379 U.S. 466 (1965) (finding a showing of prejudice and violation of Due Process when an intimate relationship is established between jurors and witnesses); *Russ v. State*, 95 So. 2d 594 (Fla. 1957) (finding "where a juror on deliberation [relies on or] relates to the other jurors material facts claimed to be within

his personal knowledge, but which are not adduced in evidence, it is misconduct which may vitiate the verdict.").

In the present case, Mr. Hojan believes that circumstances exist that indicate bias and a lack of impartiality on the part of his jury. There was a tremendous amount of media coverage surrounding Mr. Hojan's trial of which several potential jurors admitted knowledge (R. 89, 509, 990, 1136, 1151). While these jurors did not ultimately sit on Mr. Hojan's jury, the extent of media exposure of those jurors who were selected as panel members is unknown. Media coverage was not addressed in length with jurors due to trial counsel's ineffectiveness. Counsel was ineffective in the jury selection process where counsel came to an agreement with the state outside the presence of the court and Mr. Hojan regarding the twelve jurors and alternates without engaging in formal jury selection utilizing strikes for cause and peremptory challenges. *See* Argument *I,* supra. Indeed, counsel's lack of questioning caused him not to be aware, until opening statements, that 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). The extent of Juror Fravel's criminal history is unknown, as is whether his battery case contains any information indicating

bias on his part. Trial counsel failed to ask any follow-up questions of Juror Fravel.

Mr. Hojan has sought public records regarding each of the jurors who served on his panel which would indicate whether or not any juror appears in any civil or criminal matter or whether a juror appears as a defendant, witness, suspect and/or victim. The State objected to his demands. The court below sustained the State's objection finding "that the records sought by the Defendant are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The requests are unduly burdensome, overly broad and appear to be a speculative fishing expedition" (PCR. 465).

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is unconstitutional because it is in conflict with the First, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights, including Mr. Hojan's rights to due process and access to the courts of this State under Article I, § 21 of the Florida Constitution. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Turner v. Louisiana*, 379 U.S. 466 (1965). Accordingly, Mr. Hojan requests that the Court find this rule unconstitutional and permit his counsel to conduct interviews with the jurors in this case.

ARGUMENT VI

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

In his Rule 3.851 motion and amendment thereto, Mr. Hojan challenged Florida's method of execution n and the then-existing lethal injection protocol as violative of the Eighth Amendment and requested an evidentiary hearing (PCR334-44; 543-54). The circuit court denied Mr. Hojan an evidentiary hearing, relying in part on this Court's decisions in *Valle v. State*, 70 So. 3d 530 (Fla. 2011), and *Lightbourne v. McCollum,* 969 So. 2d 326 (Fla. 2007) (PCR. 789-91).

Mr. Hojan acknowledges that, since his claim was presented and adjudicated in the lower court and since this instant appeal was filed, there has been yet another substantial change to Florida's lethal injection protocol. *See generally Muhammad v. State*, No. SC13-2105.[30] Mr. Hojan continues to investigate the present constitutionality of Florida's new lethal injection protocol. At this time, he raises this argument in this Brief for purposes of preservation. *Sireci v. State*, 773 So. 2d 34, 40 n.14 (Fla. 2000).

[30] The protocol was changed effective September 9, 2013.

ARGUMENT VII

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

In *Sireci v. State*, 773 So. 2d 34, 40 n.14 (Fla. 2000), the Court wrote that, for those claims which are being raised on appeal for preservation purposes in the event of a change of law, a capital defendant can group them together under an appropriate heading and set forth the substance of those claim being raised for preservation purposes. In accordance with *Sireci*, Mr. Hojan submits the following claims for preservation purposes:

1. In his Rule 3.851 motion, Mr. Hojan challenged the constitutionality of §119, Fla. Stat., as well as Fla. R. Crim. P. 3.852 as unconstitutionally applied to him and on their face. The lower court rejected this claim, noting that this Court has previously rejected identical challenges in other cases (PCR. 760) (citing *Wyatt v. State*, 71 So. 3d 86 (Fla. 2011). Mr. Hojan raises this issue on appeal for preservation purposes.

2. In his Rule 3.851 motion, Mr. Hojan alleged that the time frames set forth in Fla. R. Crim. P. 3.851 violate due

process and equal protection under the Florida and United States Constitutions. The lower court rejected this claim because it has been "repeatedly addressed and rejected by the Supreme Court of Florida and, therefore, Defendant is not entitled to any relief" (PCR. 764) (citing *Gonzales v. State*, 990 So. 2d 1017, 1034 (Fla. 2008). Mr. Hojan raises this issue on appeal for preservation purposes.

3. In his Rule 3.851 motion, Mr. Hojan alleged that the Florida death penalty scheme violated the United States Constitution under the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). The lower court rejected this claim (PCR. 791-93). Mr. Hojan raises this issue on appeal for preservation purposes.

For the foregoing reasons, Mr. Hojan submits the above-referenced claims for the Court's consideration in light of the procedure set forth in *Sireci*.

CONCLUSION

For the reasons set forth in this Initial Brief, Appellant, Gerhard Hojan, submits that he should be granted a new trial and/or a new sentencing proceeding. At a minimum, he submits that this case is due to be reversed and remanded for an evidentiary hearing, or that any relief as deemed appropriate by the Court be granted at this time.

Respectfully submitted,

/s/ Todd G. Scher
TODD G. SCHER
Assistant CCRC-South
Florida Bar No. 899641
ScherT@ccsr.state.fl.us
TScher@msn.com

/s/ Jessica Houston
JESSICA HOUSTON
Staff Attorney
Florida Bar No. 0098568
HoustonJ@ccsr.state.fl.us

Law Office of the Capital Collateral
Regional Counsel - South
1 East Broward Blvd., Suite 444
Ft. Lauderdale, FL 33301
Telephone: 954-713-1284

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 brief is typed in Times New Roman 14-point font.

/s/ Todd G. Scher
TODD G. SCHER
Assistant CCRC-South
Florida Bar No. 899641
ScherT@ccsr.state.fl.us
TScher@msn.com

/s/ Jessica Houston
JESSICA HOUSTON
Staff Attorney
Florida Bar No. 0098568
HoustonJ@ccsr.state.fl.us

Law Office of the Capital Collateral
Regional Counsel - South
1 East Broward Blvd., Suite 444
Ft. Lauderdale, FL 33301
Telephone: 954-713-1284