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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-142

TAI A. PHAM,
Petitioner

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Pham was deprived of his rights to fair, reliable, and individualized trial and sentencing proceedings, and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Citations shall be as follows: The record on appeal from Mr. Pham's trial proceedings shall be referred to as "R" followed by the appropriate volume and page numbers. The post-conviction record on appeal shall be referred to as "P" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Pham has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. Mr. Pham, through counsel, requests the Court to permit oral argument.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). *See* Art. l, Sec. 13, *Fla. Const.* This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Pham's death sentence.

This Court has jurisdiction, *see, e.g., Smith v. State*, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Pham's direct appeal. *See Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So.2d 239, 243 (Fla. 1969); *cf. Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981).

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. *See Dallas v. Wainwright*, 175 So.2d 785 (Fla. 1965); *Palmes v. Wainwright*, 460 So.2d 362 (Fla. 1984). This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors is warranted in this action. As the petition shows, habeas corpus relief is proper on the basis of Mr. Pham's claims.

STATEMENT OF THE CASE

(I) Procedural history of the trial proceedings

A grand jury returned an indictment for Mr. Pham on November 8, 2005, for one [1] count of First Degree Murder in violation of Fla.Stat. §§§782.04(1)(a)(2005), for one [1] count of Attempted First Degree Murder in violation of Fla.Stat. §§§777.04(1)(4)(b),782.04(1)(a)1, and 775.087(1)(2005), for one [1] count of Armed Kidnapping in violation of Fla.Stat. §§787.01(1)(a)(2) and 775.087(1)(2005); and for one [1] count of Armed Burglary of a Dwelling in violation Fla.Stat. §§810.02(1)(b) and 2(b) and 810.07(2005). R1/21-23. (*See Exhibit I*). The victim as to count one [1] is Phi Amy Pham (hereinafter referred to as "the victim"). R1/21-23.

Mr. Pham was tried in the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County. The Office of the Public Defender in and for the Eighteenth Judicial Circuit was appointed to represent Mr. Pham, specifically Attorneys James Earl Figgatt and Timothy Dale Caudill.

Mr. Pham was found incompetent by the trial court in a written order dated August 29, 2007, and sent to the Florida State Hospital. The Florida State Hospital sent a competency evaluation report to the trial court dated October 30, 2007, indicating it was their opinion that Mr. Pham was competent to proceed and no longer met the criteria for continued involuntary commitment. The report indicated Axis I diagnoses for Mood Disorder, Cocaine Abuse, Intermittent Explosive Disorder; and an Axis II diagnoses for Personality Disorder. Thereafter, the trial court issued an order finding Mr. Pham competent to proceed dated December 6, 2007.

The guilt phase proceedings of the trial were conducted from March 3, 2008, to March 7, 2008. R4-11. On March 7, 2008 Mr. Pham was found guilty of all counts. R25/1469-70. Thereafter, the penalty phase of the trial proceedings was conducted from May 20, 2008, to May 22, 2008. R12-14. On May 22, 2008, the jury recommended a death sentence by a majority vote of ten [10] to two [2]. R3/501. A *Spencer* hearing was held on August 18, 2008. R18/1100-1272. The trial court entered a judgment and sentence on November 14, 2008 sentencing Mr. Pham to death on the murder count, to life on the attempted murder count, to life on the armed burglary of a dwelling count, and to life on the kidnapping count, all sentences to run concurrently. R18/1293-95, R3/569-75.

The trial court issued a written Sentencing Order orally pronounced at the sentencing hearing on November 14, 2008. R18/1273-96. The trial court found the following statutory aggravators and corresponding assigned weights:

> (1) Florida Statutes, Section 921.141(5)(b): The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person [great weight].
> (2) Florida Statutes, Section 921.141(5)(d): The capital felony was committed while the defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb [moderate weight].
> (3) Florida Statutes, Section 921.141(5)(h): The capital felony was especially heinous, atrocious, or cruel [great weight].
> (4) Florida Statutes, Section 921.141(5)(i): The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. This Court found that no evidence of any moral or legal justification was presented and argued.

R3/558-58; *see also*, *Pham v. State*, 70 So.3d 485, 491 (Fla. 2011). The trial court made the following findings with regard to the statutory and non-statutory mitigators and corresponding assigned weights:

> (1) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. This Court did not find "extreme" mental or emotional disturbance and gave moderate weight to this mitigator as a non-statutory mitigator.
> (2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. This Court gave moderate weight to this mitigator as a non-statutory mitigator.
> (3) The existence of any other factor in the Defendant's background. This Court gave great weight to this mitigator.
> (4) The defendant had a stable employment history. This Court gave

this mitigator some weight.
(5) The defendant was a good father and caring husband. This Court found that this was not established.
(6) The defendant cared for his sister's children for two weeks while their parents recuperated from a car accident. This Court found it not to be a mitigator.

R3/558-68; *see also*, *Pham*, 70 So.3d at 491.

(II) Procedural history of the direct appeal proceedings

The issues raised by Mr. Pham in his direct appeal were as follows:

I. In violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 9, 16, 17, and 11 of the Florida Constitution, Appellant is entitled to a new trial because of improper comments by the prosecutor in his closing arguments.
II. In violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, sections 9 and 22 of the Florida Constitution, the trial court erred in denying the appellant's motion for mistrial and motion for new penalty phase where the evidence revealed that there was clear juror misconduct.
III. In violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, sections 9 and 22 of the Florida Constitution, the trial court erred in taking testimony regarding appellant's prior battery on a law enforcement office conviction and in relying on such conviction to support a finding of prior violent felony in aggravation.
IV. Appellant's death sentence is invalid under the State and Federal Constitutions because the facts that must be found to impose it were not alleged in the charging document nor were they unanimously found to exist beyond a reasonable doubt by a 12-person jury.
V. In violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the Florida Constitution, the trial court imposed the death penalty

upon an erroneous finding that the murder was committed in a heinous, atrocious, and cruel manner.

VI. In violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the Florida Constitution, the trial court imposed the death penalty upon an erroneous finding that the murder was committed in a cold, calculated and premeditated manner.

VII. In violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the Florida Constitution, the imposition of the death penalty is proportionately unwarranted in this case.

This Court denied all of the above claims on June 16, 2011. *Pham*, 70 So.3d 485. A Motion for Rehearing was denied on September 9, 2011. *Pham v. State*, 2011 Fla. LEXIS 2185 (Fla. Sept. 9, 2011). Thereafter, Mr. Pham filed a petition for writ of certiorari to the Supreme Court of the United States, which was denied on March 19, 2012. *Pham v. Florida*, 132 S.Ct. 1752, 182 L.Ed.2d 541 (2012).

(III) Procedural history of the post-conviction proceedings

The Law Office of the Capital Collateral Regional Counsel for the Middle Region of Florida was appointed to represent Mr. Pham in his post-conviction proceedings in an order dated Monday, September 26, 2011. P1/1. Mr. Pham timely filed his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, on February 25, 2013. P1/33-171. Mr. Pham also simultaneously filed a Motion to Interview Jurors. P1/180-85. The State filed a response to both motions. P1/197-206, 525-51.

Thereafter, a Case Management Conference was held on February 14, 2014. P17/990-1048. The post-conviction court orally denied Mr. Pham's Motion to Interview Jurors. P3/58-59. The post-conviction court granted an evidentiary hearing as to the claims numbered four, five, six, seven, nine, ten, eleven, twelve, thirteen, and fifteen of Mr. Pham's Motion to Vacate Judgment of Conviction and Sentence. P3/558-59). The post-conviction court reserved ruling on the legal claims numbered eight, sixteen, seventeen, nineteen, twenty, and twenty-one. P3/558. The post-conviction court orally announced its denial of an evidentiary hearing as to claims two, three, fourteen, and eighteen. P3/558.

The evidentiary hearing was conducted on October 8, 28, 29, 10, and 31, 2013. P12-16. On December 20, 2013, the post-conviction court entered an Order Denying Defendant's Motion to Vacate Judgment and Sentence of Death. P11/2060-74). A timely Notice of Appeal was filed electronically filed on January 17, 2014. P11/2075-2078.

GROUNDS FOR HABEAS CORPUS RELIEF

Significant errors which occurred at Mr. Pham's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Pham. "[E]xtant legal principles...provided a clear basis for . . . compelling appellate argument[s]." *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." *Wilson v. Wainwright*, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," *Barclay v. Wainwright*, 444 So.2d 956, 959 (Fla. 1984), the claims appellate counsel omitted establish that "*confidence* in the correctness and fairness of the result has been undermined." *Wilson*, 474 So.2d at 1165 (emphasis in original). As this petition demonstrates, Mr. Pham is entitled to habeas relief.

By his petition for a writ of habeas corpus, Mr. Pham asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution and the corresponding provisions of the Florida Constitution.

GROUND I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. PHAM'S CONVICTIONS AND SENTENCES.

A. Introduction

Appellate counsel has the "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that counsel was ineffective, *Strickland* requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. *Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla. 1985).

In order to grant habeas relief based on ineffectiveness of appellate counsel, this Court must determine "whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla. 1986).

This Court has explained that when a petitioner alleges ineffective assistance of appellate counsel for failing to raise a preserved evidentiary issue, a harmless error analysis will be conducted. *Jones v. Moore*, 774 So. 2d 637, 643 (Fla. 2000).

Appellate counsel's failure to raise the meritorious issues addressed in this petition prove his advocacy involved "serious and substantial deficiencies" which individually and "cumulatively" establish that "confidence in the outcome is undermined." *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla.1986); *Barclay v. Wainwright*, 444 So.2d 956, 959 (Fla. 1984); *Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985).

This Court had held that "constitutional errors, with rare exceptions, are subject to harmless error analysis." *State v. DiGuilio*, 491 So.2d 1129, 1134 (Fla. 1986). This Court had also held that harmless error analysis:

> requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the verdict.

Id. at 1135. Once error is found, it is presumed harmful unless the State can prove beyond a reasonable doubt that the error "did not contribute to the verdict or, alternatively stated, that there is no reasonable probability that the error contributed to the [verdict]." *DiGuilio*, 491 So.2d at 1138.

B. Mr. Pham received ineffective assistance of appellate counsel due to counsel's failure to raise a specific claim regarding the trial court's denial of Mr. Pham's motion to interview jurors.

On May 21, 2008, in the morning of the second day of the penalty phase trial, an alternate juror, Andrew Valenti, handed Deputy Kelty a letter for the court. R13/218. The letter indicated that Mr. Valenti overheard some of the other jurors discussing the case during a time when the court had instructed them not to speak about the case. R13/219-20. Defense counsel moved for a mistrial on the grounds that the jury would not give Mr. Pham a fair determination as to sentence and did not give him a fair determination as to guilt because they were not willing to follow the court's orders or the law. R13/221-22.

Mr. Valenti was brought before the court and questioned about the contents of his letter. R13/222-35. Mr. Valenti informed the court that he heard at least two other jurors make comments. One juror said something about "the sad story stuff." R13/222-35. The other juror made a comment about "all verdicts being emotional decisions." R13/223. He did not know the names of the two jurors, but he described their physical appearance and where they sat. R13/224-25. He heard other comments that were made in a group under the breath, but he could not tell who made those comments. R13/223. Regarding the guilt phase, he reported that "the general consensus was the Defendant committed the act", and the jurors were talking casually about intent and speculating about what evidence was and was not introduced. R13/226-27, 234. Following the inquiry of Mr. Valenti, the trial court asked counsel if they would like to individually inquire of each individual juror or try to identify the two individuals referred to by Mr. Valenti. R13/235-36. At that time, counsel opted for the latter approach.

The court next inquired of the two jurors Mr. Valenti seemed to be describing. Juror Kristen Appleman (the foreperson) informed the court that she heard another juror make the following comment:

> [E]veryone has a rough life in some case, but you are – this is the law, this is – there is right and wrong, and, you know, if you wanted to come to America, you have to live by American standards, American law.

R13/241. She could not remember who made the comment. R13/242. She also recalled comments about why the jurors were being taken in and out of the courtroom, speculation about the point of certain witnesses, and "everyone has a sob story." R13/243. Juror Peter Perkins stated that he heard "idle chitchat", and somebody said, "[I]t's too bad to hear those kind of stories, but, you know, a lot of people have tough luck." R13/247.

After speaking with the three jurors, the court asked whether either side wished to inquire further, and counsel declined the offer. R13/251-52. Defense counsel renewed the motion for mistrial, and the court reserved ruling. R13/255-56. Prior to jury deliberations in the penalty phase, defense counsel provided the court with case law in support of his motion for mistrial. R14/493. The court denied the motion for mistrial, stating that based on the inquiry of the three jurors, while there may have been a lack of compliance with the court's instructions, it did not inure to the verdict. R13/504-05.

Defense counsel filed a Motion for New Sentencing Hearing and for Interviews of Jurors on May 30, 2008, eight days after the jury returned a death recommendation. R3/507. The motion was filed within the ten days following the jury verdict, which is required by Florida Rule of Criminal Procedure 3.575. Defense counsel argued to the trial court that the jury's unusually short penalty phase deliberation, and well as the inappropriate demeanor of some of the jurors following the deliberation warranted further juror interviews. R17/1083-86. On June 18, 2008 the court denied the motion, stating:

> The Court has previously conducted an in depth inquiry in response to Mr. Valenti, who was an alternate juror, in response to his letter which was dated May the 20th. The inquiry was conducted on May the 21st. An inquiry was made by the Court.

> The Court allowed opportunity for the State to question Mr. Valenti and for the Defense to question Mr. Valenti. The two individuals that were identified as having made comments, and those individuals were Mr. Peter Perkins and Ms. Kristen Appleman, were brought in and questioned.
>
> The comments that Mr. Valenti indicated were made by those individuals were, it's a sad story and verdicts are emotional decisions. Again, both the State and the Defense made inquiries of these individuals.
>
> Once that – those inquiries were concluded, the Court offered the opportunity for individual inquiry to me made of each of the remaining jurors. That opportunity was declined.
>
> For the reasons previously stated on the record and based on the responses of Mr. Valenti in court, the response of Ms. Appleman and the response of Peter Perkins, the Court at that time found no basis to grant a mistrial as far as the penalty phase and finds no basis to grant a new penalty phase.
>
> Again, as to the opportunity for jury inquiry that Court had previously offered that opportunity. That opportunity was declined. There has been nothing new that has occurred since that time that would justify further inquiry.
>
> The Court would deny both motions.

R17/1097-98.

Mr. Pham has a Sixth Amendment right to be sentenced by jurors who are free from external influence and who render their verdict based solely on the evidence that was presented at trial. *See Ward v. Hall*, 592 F.3d 1144, 1175 (11th Cir. 2010) *citing Parker v. Gladden*, 385 U.S. 363, 363-66, 87 S.Ct. 468, 468-71 (1966); *see also*, *Coleman v. Zant*, 708 F.2d 541, 544 (11th Cir. 1983). It is clear from the three jurors who were interviewed that "one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial." *Coleman*, 708 F.2d at 544; *see also*, *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1960).

On direct appeal appellate counsel raised the denial of Mr. Pham's motion for mistrial and motion for new penalty phase, but not the denial of Mr. Pham's motion to interview jurors. The standard of review for an order denying a motion for juror interviews is abuse of discretion. *Marshall v. State*, 976 So. 2d 1071 (Fla. 2007). This Court denied Mr. Pham's claim regarding the denial of the motion for mistrial and the motion for new penalty phase "[b]ecause it is not apparent on the record that the comments affected the verdict or sentence recommendation in any way." *Pham*, 70 So. 2d at 492. However, given what we already know from the trial court's interviews of only three jurors, there was clearly cause for concern that Mr. Pham's jurors were not following the court's instructions or the law; enough so that the trial court initially offered to individually inquire of each of the jurors. R13/235. If the trial court had these concerns on May 21, 2008, there is no reason why the court would not have had those same concerns eight days later. Furthermore, because Mr. Pham was born in Vietnam, the comment from an unknown juror that "if you wanted to come to America, you have to live by

American standards, American law”, R13/241, is particularly troubling in light of the jurors’ racial biases and inability to consider mitigation, which would have affected their penalty phase verdict.

This is not a matter which inheres in the verdict. As the Second District Court of Appeals explained in *Sconyers v. State*, 513 So. 2d 1113, 1118 (Fla. 2d DCA 1987), a case in which it reversed the trial court’s denial of a post-judgment motion to interview jurors:

> When a motion to interview a juror or jurors sets forth allegations that the movant has reasonable grounds to believe that the verdict may be subject to legal challenge, such as a reasonable belief that a juror has been guilty of misconduct, then the trial court should conduct such an interview, limiting it as narrowly as possible, to determine if such grounds do exist.

Interviewing each of the jurors individually would have allowed trial counsel to develop the record in support of the motion for mistrial and motion for new penalty phase. Because there was a reasonable probability of juror misconduct that involved more than just the three jurors who were interviewed, the trial court abused its discretion when it denied defense counsel’s timely filed motion to interview jurors.

Appellate counsel provided prejudicial ineffective assistance in violation of the Sixth Amendment when they failed to raise the issue of the denial of Mr. Pham’s motion to interview jurors on direct appeal. This issue was properly preserved below and appellate counsel's failure to raise it on appeal constitutes ineffective assistance of appellate counsel.[1] This error is not harmless. Confidence in the outcome of the appellate process is undermined because had appellate counsel raised this issue on appeal, there is a reasonable probability that Mr. Pham's convictions would have been reversed and he would have been granted a new trial.

C. Mr. Pham received ineffective assistance of appellate counsel due to counsel's failure to raise a claim regarding Doctor Predrag Bulic testifying in both the guilt phase and penalty phase of Mr. Pham's trial in lieu of Doctor Thomas Parsons, the Attending Medical Examiner.

Mr. Pham's trial counsel had an out-of-court agreement with the prosecution that Dr. Predrag Bulic could testify about the contents of the files and deposition of Dr. Thomas Parsons, the attending medical examiner who performed the autopsy of the victim. R9/1171-73. Apparently, the State was having difficulty securing Dr. Parsons' presence for the guilt phase proceedings, and they were unable to arrange video testimony. R9/1171-72. Defense counsel agreed to allow Dr. Bulic to "review Dr. Parson's file, testify to cause of death, the injuries, [and] type of injuries . . . and nothing beyond that." R9/1171.

[1] In a case management conference regarding Mr. Pham's motion for post-conviction relief, which was held on June 11, 2013, The Honorable Marlene Alva, who was also the trial judge, stated that the court's denial of Mr. Pham's motion to interview jurors could have been raised on direct appeal and is a state habeas issue. P6/990.

Defense counsel objected when Dr. Bulic testified that "[w]hat is interesting with this wound is that the right side of the wound - -" because Dr. Bulic's testimony went beyond what was agreed upon by the parties. R9/1171. The court directed the State to confine Dr. Bulic's testimony to the agreement. R9/1173. Dr. Bulic's testimony continued, and the following exchange took place:

> Assistant State Attorney Stone: Doctor, with respect to number two injury, you were about to say something with – Well, is there anything of note that you observed on that particular wound number two?
>
> Dr. Bulic: Yes, there was. This wound has a contusion on one end, more specifically on the right side of the wound there's a contusion which is usually in stab wounds is made by a hand guard or so-called hilt. It's the handle with the little hand guard at the end where the blade begins. When the force is applied –
>
> Defense Attorney Caudill: Objection, Your Honor. May we approach?
>
> The Court: Yes.
>
> (Whereupon, a discussion was had out of the hearing of the jury.)
>
> Mr. Caudill: Judge, this is getting into – now we're into issues of amount of force.
>
> Mr. Stone: That's not – he – he's saying enough force was applied to cause a contusion. He's not going to try to quantify the force.
>
> Mr. Caudill: Well, I don't know. I thought we were going to stick to – that was our understanding, we were going to stick to these injuries that Dr. Parsons noted in the autopsy.
>
> Mr. Stone: That's what he – Excuse me. He noted that in the autopsy

> report.
>
> The Court: Obviously the Court's not privy to your agreement. Assuming that that is the agreement as you represented, if it's described in the autopsy, he's not going beyond that into his opinions or extrapolations or trying to comment on opinions that Dr. Parsons would have made, then obviously that's not an agreement then.
>
> Mr. Caudill: It starts to get into issues that go to aggravation.
>
> Mr. Stone: It also goes to premeditation.
>
> The Court: I mean, I understand what you're saying, but almost anything regarding the autopsy could, I theory, go to aggravation.
>
> Assistant State Attorney Feliciani: Judge, my intent when I spoke to Mr. Caudill was obviously he may have an opinion as to the resulting pain this injury caused this victim, and we weren't going to go into that because that's inappropriate.
>
> The Court: Those kind of things.
>
> Mr. Caudill: As long as their witness understands that if he starts talking about interesting things and amount of force.
>
> Mr. Stone: Why can't he talk about interesting things?
>
> The Court: He can preface his speech. No one can control his manner of speech as long as the content is confined to your agreement.

R9/1174-76.

Dr. Bulic again testified in place of Dr. Parsons during the penalty phase trial. R12/56-66. Dr. Bulic testified that the victim would have been conscious for a period after the wounds were inflicted and prior to losing consciousness, and that she experienced extreme pain. R12/57-59. The State used Dr. Bulic's testimony to support the heinous, atrocious, and cruel aggravator, which was found by the trial court and given great weight. R12/36.

The Confrontation Clause of the Sixth Amendment of the United States Constitution provides: "In all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Testimonial statements of witnesses absent from trial are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). Autopsy reports are testimonial evidence subject to the Confrontation Clause. *United States v. Ignasiak*, 667 F.3d 1217, 1229 (11th Cir. 2012); *See also*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed. 2d 314 (2009) (holding that a forensic laboratory report stating that an unknown substance was cocaine constitutes testimonial evidence, which is subject to the Confrontation Clause). In *Bullcoming v. New Mexico*, the United States Supreme Court rejected the use of "surrogate testimony", holding that, when introducing testimonial forensic evidence, the Sixth Amendment requires the prosecution to present testimony from a scientist who was actually involved in the testing. *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed. 2d 610 (2011). In *United States v.*

Ignasiak, the Eleventh Circuit Court of Appeals, relying on *Crawford*, *Melendez-Diaz,* and *Bullcoming,* reversed the Defendant's convictions "because the admission of autopsy reports and testimony about those reports, without live in-court testimony from the medical examiners who actually performed the autopsies (and where no evidence was presented to show that the coroners who performed the autopsies were unavailable and the accused had a prior opportunity to cross examine the witness) violated the Confrontation Clause." *Ignasiak*, 667 F.3d at 1220.

Mr. Pham was denied his Sixth Amendment right to confront witnesses against him when Dr. Bulic was permitted to testify as a "surrogate" for Dr. Parsons. The medical examiner files and deposition of Dr. Parsons constitute inadmissible hearsay that is testimonial in nature. Dr. Bulic testified about the contents of Dr. Parsons' files (including the autopsy report) and the deposition of Dr. Parsons, but the State did not establish that Dr. Parsons was unavailable, and the Defense was not afforded the opportunity to cross examine Dr. Parsons. This violated the Confrontation Clause of the Sixth Amendment. The error was not harmless, as the testimony prejudiced Mr. Pham in the guilt phase as well as the penalty phase, where the testimony was introduced to support the heinous, atrocious, and cruel aggravating factor.

In Claim III of Mr. Pham's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Fla. R. Crim. P. 3.851, Mr. Pham argued that trial counsel provided prejudicial ineffective assistance when he agreed to allow Dr. Bulic to testify in the guilt phase of Mr. Pham's trial in lieu of Doctor Parsons. Similarly, in Claim XIV of Mr. Pham's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Fla. R. Crim. P. 3.851, he argued that trial counsel provided prejudicial ineffective assistance when he allowed Dr. Bulic to testify in lieu of Dr. Parsons. The State argued at the post-conviction case management conference that these claims were procedurally barred because they could have but were not raised on direct appeal. P6/1017-18. The circuit court agreed with the State, summarily denying these claims and finding that this issue "could have been raised on appeal but was not." P6/1018. This issue has been raised in Mr. Pham's appeal of the circuit court's denial of his 3.851 motion. Mr. Pham maintains that trial counsel provided prejudicial ineffective assistance by allowing Dr. Bulic to testify in lieu of Dr. Parsons. However, in such case as this Court finds that the issue was preserved and could have been raised on direct appeal, appellate counsel provided prejudicial ineffective assistance in violation of the Sixth Amendment when they failed to raise this issue on direct appeal. This error is not harmless. Confidence in the outcome of the appellate process is undermined because had appellate counsel raised this issue on appeal, there is a reasonable probability that Mr. Pham's convictions would have been reversed and he would have been granted a new trial.

CONCLUSION AND RELIEF SOUGHT

To the extent that further fact finding is necessary to determine the issues raised herein or to the extent that an objection is raised to the effect that the allegations asserted herein must be based only on the record as it stands and that additional facts should not be considered, Petitioner moves that jurisdiction be relinquished to the trial court to hear and decide the facts at issue. Otherwise, Petitioner moves that he be afforded a new trial, a new direct appeal, or for such relief as this Court may deem proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail to Tai A. Pham, DOC# 953712, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 26th day of June, 2014.

I HEREBY FURTHER CERTIFY that a PDF copy of the foregoing was served via electronic mail to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com on this 26th day of June, 2014.

I HEREBY CERTIFY that, in compliance with this Honorable Court's Administrative Order *In re: Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal*, dated February 18, 2013, a copy of the PDF document of the foregoing brief has been transmitted to this Court through the Florida Courts E-Filing Portal on this 26th day of June, 2014.

Respectfully submitted,

/s/ Raheela Ahmed

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14 point font.

Respectfully submitted,

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