SUPREME COURT OF FLORIDA

HECTOR SANCHEZ-TORRES,

Appellant/Petitioner,

v.

Case Nos. SC19-211; SC19-836

STATE OF FLORIDA,

Appellee,

MARK S. INCH, etc.,

Respondent.
_____/

MOTION FOR REHEARING AND CLARIFICATION

Hector Sanchez-Torres, pursuant to Fla. R. App. P. 9.330 (a)(2)(A)-(B), respectfully moves for rehearing and clarification of this Court's March 12, 2020 opinion in this case. Sanchez-Torres respectfully submits that this Court overlooked or misapprehended evidence presented at the evidentiary hearing and evidence of record from the plea and sentencing proceedings below in denying postconviction relief on ineffective assistance of counsel claims raised and argued in the circuit court and briefed and argued before this Court.[1]

Specifically, Sanchez-Torres requests rehearing or clarification on four points. First, this Court referred to testimony from several witnesses at the

[1] Sanchez-Torres has filed separately a Motion to Permit Supplemental Briefing after Appeal on this date.

evidentiary hearing who did not actually testify at that hearing, and denied relief on one ineffective assistance counsel claim based upon that testimony. Second, this Court overlooked or misapprehended evidence of ineffective assistance of counsel as it related to trial counsel's misinformed advice to Sanchez-Torres to plead guilty and waive a jury for the penalty phase because they were unprepared for trial. Third, this Court misapprehended facts and law concerning whether Sanchez-Torres's admissions were involuntary due to detectives' threats to arrest his family members if he did not speak to detectives about the murder. Finally, Sanchez-Torres moves this Court to revisit its summary denials of his motions to remand his case to the circuit court because his postconviction counsel was not qualified to represent him on his postconviction claims. Each request for rehearing and clarification is discussed below.

I. THE COURT SHOULD GRANT REHEARING AND CLARIFICATION TO ADDRESS SEVERAL ERRORS OF FACT IN THE MARCH 12 OPINION REGARDING WITNESSES WHO NEVER ACTUALLY TESTIFIED AT THE EVIDENTIARY HEARING

The Court's March 12, 2020 opinion contains several factual errors that relate to Sanchez-Torres's claim of ineffective assistance of counsel based on trial counsel's failure to move to suppress his coerced confession. The Court should grant rehearing and clarification to address those material errors and reconsider Sanchez-Torres's claim.

In its analysis of Sanchez-Torres's ineffectiveness claim for trial counsel's failure to file a motion to suppress his admissions, this Court's March 12 opinion contains the following incorrect factual determinations:

> Sanchez-Torres's mother (Ms. Torres) testified at the evidentiary hearing that detectives showed her an unsigned arrest warrant for evidence tampering and threatened to arrest her if Sanchez-Torres did not talk to them. She testified that she spoke to Sanchez-Torres the next day and told him about the purported threat. She testified that Sanchez-Torres then asked to meet with the detectives and ultimately confessed to Mr. Colon's murder.
>
> Sanchez-Torres's sister (Ms. Sanchez) testified at the evidentiary hearing as well, stating that detectives questioned her about finding the victim's phone in Sanchez-Torres's room. But although Ms. Sanchez said she was shown unsigned arrest warrants, she testified that the detectives did *not* threaten to arrest her. The detectives also testified that Ms. Sanchez was never told she might be arrested.

Slip Op., at 11-12.

In fact, none of these witnesses (Ms. Torres, Ms. Sanchez, and any detectives) ever testified at the postconviction evidentiary hearing, or at a suppression hearing at or before trial in this case, because no such motion to suppress was ever filed. The only witnesses who testified at the evidentiary hearing held on September 20, 2018 and November 8, 2018 were four witnesses called by the defense: Dr. Julie Kessel, Dr. Steven Bloomfield, and trial attorneys Kate Bedell and Quinton Till. (PCR: 2539-2644, 2645-2748). The State called no witnesses. Because the Court's opinion does not include citations to the record, it is unclear what evidentiary hearing is being referenced. If this Court was actually referring to testimony during the penalty phase

at trial, that error should be corrected. However, this Court referred to testimony and proceedings at or regarding the "penalty phase" eleven times and never referred to it as an "evidentiary hearing." In addition, elsewhere in the opinion, this Court used the term "evidentiary hearing" in reference to the trial lawyers who did testify at that hearing. Slip Op., at 8. In any event, those statements in the March 12 opinion are belied by the facts and record and need to be corrected.

Based in part on those factual errors, the Court ultimately held that "the evidence presented at the evidentiary hearing does not demonstrate that Sanchez-Torres's confession was involuntary and therefore does not establish that the [trial] court would have suppressed the confession." Slip Op., at 9-10. Ironically, that was the crux of Sanchez-Torres's claim: because trial counsel never filed a motion to suppress the coerced confession, the trial court *never held* a hearing on a motion to consider whether the confession was inadmissible. In addition, as Sanchez-Torres explained to this Court in both his initial brief and separate motions to relinquish and supplement the record, attorney Francis Jerome Shea—who lacked the requisite qualifications under Florida law to represent Sanchez-Torres in postconviction proceedings in the first place—ineffectively failed to present the witnesses during the postconviction hearing on the ineffectiveness of trial counsel claims. The Court should grant rehearing and clarification to resolve these errors in the March 12 opinion.

II. THE COURT SHOULD GRANT REHEARING TO ADDRESS FACTUAL AND LEGAL MISTAKES REGARDING SANCHEZ-TORRES'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BASED ON HIS GUILTY PLEA AND PENALTY JURY WAIVER

This Court's March 12 opinion denied postconviction relief on the claim that trial counsel misadvised Sanchez-Torres to plead guilty and waive a jury for the penalty phase because they were unprepared for trial. Slip Op. 7-8. This Court found that "trial counsel testified at the evidentiary hearing that the defense team was prepared go to trial but believed a guilty plea was in their client's best interest" and added, "[a]s far as sentencing preparation, it can hardly be argued that counsel was unprepared for sentencing, considering counsel presented testimony from forty-four witnesses."[2] Slip Op., at 8. This Court concluded that because defense counsel failed to "show that counsel's advice was the result of misinformation or lack of preparation" the findings of the circuit court that the decision was a strategy decision would not be "second-guessed".[3] Slip Op. 9. However, the trial and postconviction records show that the opposite is true. Trial counsel's misinformed advice to Sanchez-Torres to plead guilty and waive a jury for his penalty phase

[2] There are no quotations or citations to the record supporting this assertion. Additionally, two members of the defense team, Kate Bedell and Quentin Till, testified during the evidentiary hearing and this Court did not indicate which of the two it was apparently quoting.

[3] The Court cited to *Brown v. State*, 846 So. 2d 1114, 1125 (Fla. 2003). The Court did not discuss the lack of preparation for the guilt phase.

was the direct result of counsel's failure to prepare for trial, and was not a well-reasoned, well-informed strategy decision that was made after conducting a full investigation of the facts and the law that applied to those facts.

A. The Court's opinion failed to recognize that trial counsel was not prepared for the guilt or penalty phase jury trial at the time Sanchez-Torres entered his guilty plea and waived a penalty jury

This Court stated in its opinion that Sanchez-Torres failed to show that trial counsel was not prepared for trial. This Court relied on two things in making this finding: (1) that trial counsel testified that the defense team was prepared to go to trial and (2) that "it can hardly be argued that counsel was unprepared for sentencing, considering counsel presented testimony from forty-four witnesses at the penalty phase hearing." Slip Op., at 8.

Sanchez-Torres submits that this Court overlooked substantial portions of the record and trial counsel's own admissions to being unprepared for trial at the final pre-trial conference on the eve of jury selection for the guilt and penalty trial and that most of the forty-four witnesses who testified at the penalty phase were found after the plea was entered. Because this is a claim of ineffective assistance of counsel regarding a guilty plea and jury waiver, this Court must view trial counsel's preparedness "at the time" of the plea and waiver. *Kimmelman v. Morrison,* 477 U.S. 365, 381 (1986); *see also Lee,* 137 S. Ct. at 1967 (noting that courts should look to

"contemporaneous" evidence when evaluating ineffective assistance of counsel regarding a plea).

Additionally, because trial counsel failed to conduct an adequate investigation *before* the plea and jury waiver, counsel's performance is only reasonable "to the extent that reasonable professional judgments support[ed] the limitations on investigation" at the time of the plea and waiver. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 690-91); *see also Rompilla v. Beard*, 545 U.S. 374 (2005). The Supreme Court has said explicitly that courts cannot use hindsight bias when evaluating trial counsel's actions and decisions. *Strickland*, at 489. The focus on counsel's conduct must be at the time of the plea.

i. In fact, trial counsel was not prepared for the guilt phase.

In its opinion, this Court did not address trial counsel's lack of preparation for the guilt phase. Instead, this Court only analyzed preparation for the penalty phase. Under Supreme Court precedent, the question is "whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right." *Lee*, 137 S. Ct. at 1965 (internal quotations omitted). This Court failed to address the proceeding Sanchez-Torres was denied his right to: the guilt phase. This Court should grant rehearing to address it.

Not a single member of Sanchez-Torres's defense team was prepared for or accepted responsibility for the guilt phase of the trial. During the evidentiary hearing, Kate Bedell testified that she had zero responsibility for the guilt phase:

> Shea: Going back to the -- the -- the initial review of this case did you have any type of a theory of defense knowing the facts of this case?
>
> Bedell: When I was asked to be involved in this case it was my understanding that **I was solely to work on mitigation, so in terms of a defense for the case that was not part of my responsibility.**

(PCR: 2652) (emphasis added). When asked about a potential motion to suppress the coerced confession, she replied, "Anything involving the actual facts and allegations against him in terms of the homicide would have been Mr. Till's responsibility." (PCR: 2661). When asked if she was prepared to go to trial if Sanchez-Torres did not enter a plea, she responded, "[y]ou'd have to ask Mr. Till that" because she was "not assigned any witnesses had the case gone to trial." (PCR: 2661-62). When asked what portion of the case she was responsible for handling, she responded, "only penalty phase." (PCR: 2662).

Quentin Till's testimony contradicted Bedell's. Till testified that Bedell was "lead counsel" in the case and the one responsible for "planning a defense" and "planning the discovery, coordinating the witnesses." (PCR: 2707, 2709). In fact, Till testified that he "did not go into the day-to-day proceedings and preparation." (PCR: 2709). Instead, Till trusted Bedell:

> I just had a – a lot of confidence in her that's – that going forward that she – that she would – that, you know, I had that much confidence in her that – that she would be prepared for trial.

(PCR: 2710). His role on the case was merely to "be of assistance to Ms. Bedell." (PCR: 2712). Till "was not involved in the preparation of this case." (PCR: 2714). During the preparation, Bedell kept Till "abreast as to her thoughts regarding what was best for Sanchez-Torres," but Till "was not in a position to say, no, no we're not going to go this way." (PCR: 2715). Till had nothing to do with the plea. (PCR: 2715-16). The reason he came onto the case as "second chair" as the trial date approached was solely to assist with an incomplete mitigation investigation. (PCR: 2718). Till testified that the "guilt phase…was ready, you know, *I would imagine*." (PCR: 2737) (emphasis added). Till noted it would have been his practice to begin the penalty phase investigation before the guilt phase was over, but it was Bedell's case. (PCR: 2719-20).

Till testified that it was Bedell, himself, and Michael Bateh preparing the penalty phase. PCR 2737. However, Till also testified that the "involvement" of Bateh, the third-chair attorney, "was minimal" and limited to "one issue." (PCR: 2742). The only other attorney who had worked on Sanchez-Torres's case, Michelle Taylor, had left the office months prior to trial.

The only conclusion that may be drawn from these facts is that at the time Sanchez-Torres pleaded guilty to first-degree capital murder and waived a penalty-

phase jury in a case in which he was facing the death penalty, not a single member of his defense was prepared for the guilt phase.

One of the primary duties defense counsel owes his client is the duty to adequately prepare himself prior to trial. Pretrial preparation is critical because it provides a basis for the defense's case at trial. *See Magill v. Dugger*, 824 F.2d 879, 886 (5th Cir. 2012). Trial counsel cannot be found to have made a strategic decision when he failed to fully investigate. *Strickland* 466 U.S. at 690-1; *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (holding that a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the unknown evidence would lead a reasonable attorney to investigate further); and *Henry v. State*, 862 So. 2d 679, 685 (Fla. 2003) ("A reasonable strategy decision is based on informed judgment.").

In *Lee*, the Supreme Court recognized that even if the defendant's case would have been a "Hail Mary," it is perfectly rational for a defendant to go to trial if there is some "special circumstance" outside of the guilt phase. 137 S. Ct. at 1968. The defendant in *Lee* was facing deportation if convicted. However, because of the poor advice of counsel, the defendant pleaded guilty to the crime and made himself eligible for deportation. The Supreme Court ruled, "The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea" and "when those consequences are, from the defendant's perspective,

similarly dire, even the smallest chance of success at trial may look attractive." *Id*. at 1964. Thus, the Supreme Court held that even if it would have been a longshot to win at trial, it was perfectly rational for the defendant to want to throw the Hail Mary. *Id*. Here, that special circumstance was the potential for a sentence of death. All the more reason to throw the Hail Mary.

It is hard to imagine anything more prejudicial to a defendant than having counsel entirely fail to prepare for the guilt phase of a capital murder trial, especially in this case when Sanchez-Torres had absolutely nothing to lose by forcing the State to prove its case beyond a reasonable doubt during the guilt phase. Sanchez-Torres had already been convicted of a prior murder and was facing a sentence of life in prison regardless of the result of this trial. So there was only one outcome of the guilt phase that mattered to Sanchez-Torres: if convicted he was death eligible; if he was acquitted of first degree murder or convicted of a lesser offense, he would not be death eligible. Advising Sanchez-Torres to plead guilty to first-degree murder and armed robbery conceded death-eligibility with no concession from the State. The only beneficiaries of the Sanchez-Torres's guilty pleas were trial counsel who were not forced to select a jury and try the guilt phase of a capital murder trial for which they were utterly and inexplicably unprepared.

Even worse is the fact that Sanchez-Torres's defense at trial would have been more than a mere "Hail Mary." In *Lee*, the Supreme Court said that "the possibility

of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking," but Sanchez-Torres would have had a plausible guilt phase case. *Id*. at 1968. At the end of the State's presentation in his codefendant's trial, Judge Skinner, who presided over both trials, accessed the strength of the case: "By the barest possible margin there is sufficient evidence to go before the jury." (MT R 6:1068).[4] Judge Skinner said this even after Sanchez-Torres testified in the other trial placing his codefendant at the scene. Sanchez-Torres had a plausible defense theory, especially if counsel had filed and prevailed upon a motion to suppress the coerced confession.

Even if Sanchez-Torres's guilt-phase defense did not succeed, in the unique context of a capital trial, there was an important reason to use the guilt phase to prepare for the penalty phase. The concept of "frontloading mitigation" is well established and was at the time of trial. *See* Jesse Cheng, *Frontloading Mitigation: The "Legal" and the "Human" in Death Penalty Defense*, 35 L. & SOC. INQUIRY 39 (2010). "Frontloading is a practice whereby defense advocates conduct wide-ranging sentencing investigations in search of information that can be strategically presented during the guilt-innocence phase in a way that validates, and ideally reinforces, arguments presented at the penalty hearing." *Id*. at 53. Reasonably competent

[4] The proceedings against Markeil Thomas were judicially noticed in this case upon motion of the State. (PCR 924-25). Mr. Sanchez-Torres-Torres refers to them herein in the format 'MT R [Volume]:[Page]'.

defense attorneys use the guilt phase of a capital trial to begin building the case for life before the penalty phase even begins.

It is an accepted strategy of which all reasonable competent attorneys are aware, but here, frontloading mitigation would have been particularly useful. One of the defense's main theories for life was that Sanchez-Torres was not the shooter. In the trial of Sanchez-Torres's codefendant, the lead prosecutor, Steve Nelson, laid bare what he believed was the best evidence regarding who the shooter was:

> The State has sought a first-degree murder on each of these individuals because they have been jointly involved in this episode, and granted that the better evidence is against Mr. Sanchez-Torres-Torres being the shooter solely because of what?
> Is it because of any unique scientific evidence in this case? No. It's because there is an extraneous fact to the case itself, and that is because Mr. Hector Sanchez-Torres had a prior homicide that occurred on July 21st of the same year.

(MT R 7:1310). During the guilt phase of Sanchez-Torres, this evidence—apparently the State's best and only evidence that Sanchez-Torres was the shooter—would have been inadmissible propensity evidence under Fla. Stat. §90.404(b). Additionally, a reasonably competent defense attorney could have used the admission by law enforcement that the shooting could have been an accident. (R 8:294). Even if neither of these theories were actually successful in getting Sanchez-Torres acquitted or convicted of a lesser offense, either could have helped build the case that Sanchez-Torres did not deserve to receive a death sentence. However, of course, no guilt phase strategy was ever even considered because no one on the

defense team was preparing for the guilt phase. Any reasonable competent trial attorney would have properly informed Sanchez-Torres of his options regarding the guilt phase after adequately preparing for that phase of the trial.

ii. Trial counsel was not prepared for the penalty phase at the time that Mr. Sanchez-Torres entered his guilty plea and waived a penalty-phase jury.

Bedell testified at the evidentiary hearing that she did not become involved in Sanchez-Torres's case until sometime in November 2011. (PCR: 1236). However, the record refutes that testimony. On January 22, 2010, Public Defender Matt Shirk filed a notice certifying that Bedell was qualified under Rule 3.112, Fla. R. of Crim. P., to handle Sanchez-Torres's case. (R 1: 17). On February 5 and 8, 2010, Bedell filed a series of motions attacking the constitutionality of the death penalty in the case. (R 1: 39-200, R 2: 201-376). The record is clear that Bedell was in the case for more than fifteen months before she convinced Sanchez-Torres to plead guilty to capital murder. It also casts doubt on her testimony at the evidentiary hearing that she had just joined the team. Her dismay that the case was not prepared for trial rings hollow, as she was responsible for penalty phase preparation by her own admission. (PCR: 2668). The late scramble to begin preparing for penalty phase was her fault. She and Till were not ready for either phase of the trial on April 29, 2011, and their conflicting stories about who was responsible for guilt phase preparation is uncontroverted proof that Sanchez-Torres did not receive the representation he

was entitled to under Strickland and its progeny. Till explicitly told the Court that "we are not going to be ready" for trial next week, and if there was going to be a penalty phase, "the Spencer hearing is what's going to be critical for us" because they would have time to investigate before that hearing. (PCR: 3193). Judge Skinner then gave counsel the option to prepare for penalty phase by having the State presenting its case on Monday and Tuesday and then recessing the penalty phase indefinitely so that trial counsel would have the "opportunity to finish your mitigation." (PCR: 3194).

Even after the State completed its penalty-phase case two weeks after the plea and waiver, trial counsel was still not prepared. Judge Skinner asked trial counsel what their plans were for "when you want to start your mitigation." (PCR: 3431). Till responded that the defense team was still not ready because Bedell and an investigator had to go to Puerto Rico and after that they could schedule a status hearing to determine when the defense would be ready to begin putting on its penalty-phase case. (PCR: 3431). The defense then put on mitigation on several intermittent dates over a period of months: June 24, June 29, July 8, July 14, and August 5. Trial counsel had to stagger out the presentation of mitigation because trial counsel was still conducting the penalty-phase investigation between each of these trial dates. Indeed trial counsel continued to file notices disclosing witnesses

months after the plea and waiver because the defense team was still conducting the investigation that should have been done before trial.[5] *See* (R 5:859).

It is entirely irrelevant that trial counsel eventually put on forty-four witnesses, particularly when trial counsel explicitly stated that on the day of the guilty plea, they were not prepared for trial. The vast majority of these witnesses were discovered only after Sanchez-Torres pleaded guilty and waived a penalty-phase jury, and after the State put on its penalty-phase case. Most of the witnesses simply testified to cumulative evidence. Quantity does not equal quality. It is patently clear from the record that defense counsel was not prepared for trial at the time of the plea and jury waiver. *Cf. Sears v. Upton*, 561 U.S. 945, 953-54 (2010) (reversing a lower court's decision ending the *Strickland* inquiry merely because trial counsel had put on "some" mitigation). There the Supreme Court explicitly rejected what this Court did here: "[W]e…have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Id*. at 954. This Court must look at trial counsel's preparation "at the time" of the plea and jury waiver.

[5] Bedell signed the defendant's initial reciprocal discovery disclosure to the State on April 19, 2011, 10 days before the plea, in which she named all the State's Category A witnesses it disclosed on May 5, 2009. (R 3: 408-410). She also named thirteen people as mitigation witnesses, including Dr. Steven Bloomfield. *Id.* Bedell filed a second discovery disclosure on April 26, 2011, the week before the scheduled trial, and a third disclosure the week of trial. (R 3: 426-27, 430).

Kimmelman, 477 U.S. at 381. Trial preparation was critical in this capital murder case.

Trial counsel's preparation relating to the use of an expert witness was no better. The defense retained Dr. Bloomfield before the plea and waiver, but because he was hired so late in the process, he was only able to do preliminary work based upon incomplete information and data provided by the defense. It is clear that counsel was unprepared for trial, particularly as it relates to potential mitigation that could have come in through an expert witness.

An entire month after the plea and waiver, on May 25, 2011, the defense filed a notice of expert testimony of mental health professionals stating "although the exact nature of the testimony of these witnesses is unknown at the present time, it is expected that Dr. Bloomfield will testify as to the Defendant's mental health relating to psycho-social behavior which might include but are not limited to general personality functions, age, maturity, decision making processes and overall general mental health." (R 4: 498). Defense disclosure of its mental health experts and the bases for their opinions for mitigation for the penalty phase was due twenty days before trial, or April 15, 2011, under Rule 3.202, Fla. R. of Crim. P. In the meantime, the State presented its entire penalty-phase case over three days between May 2, 3, and 17. Proper, competent pre-trial preparation was vital to challenge the State's case and counsel was wholly unprepared to challenge the State's case.

The defense was still collecting and sending the information Dr. Bloomfield would have needed for a report in June and July. (R 3: 524). On June 3, the defense filed a motion to videotape the examination conducted of Sanchez-Torres by the State's expert, Dr. Riebsame. (R 3:527-28). It was during this examination that Sanchez-Torres made a statement that he did not have remorse for killing Levi Rollins, an adult who preyed upon him for several years and threatened to murder his unborn child, girlfriend, his family, and his girlfriend's family. As a result, the defense and the State entered into the joint stipulation on August 5. (R 5: 862).

Dr. Bloomfield was never asked to prepare a report and because of the stipulation did not testify at trial. (PCR: 2601). Bloomfield had a conversation with trial counsel about his preliminary findings but was told that there was no need for his testimony and that he should stop work on the case because of the joint-stipulation not to present expert testimony. (PCR: 2602).

Trial counsel did not provide Dr. Bloomfield with "full access to Dr. Riebsame and Krop's data and reports." (PCR: 2609). So not only was Bloomfield given the information *after* the guilty plea and jury waiver, he never received a report that Dr. Krop had completed in 2009 finding that Sanchez-Torres likely acted under extreme emotional distress when he murdered Levi Rollins weeks before this case.[6]

[6] Dr. Krop's finding that Mr. Sanchez-Torres-Torres acted under extremely emotional distress during murder that happened weeks prior to this, should have been a blaring "red flag" for trial counsel to seek an expert opinion regarding this

(PCR: 2609-10). In fact, counsel gave Bloomfield "minimal information" and Bloomfield was "in the process…of what I consider developing…a full comprehensive assessment of Mr. Hector's developmental issues." (PCR: 2612). Bloomfield testified that he would have done a full analysis and conclusion that would have been available for trial counsel if he had been allowed to continue working on the case. (PCR: 2612). Bloomfield added that the assessment he provided during the postconviction proceedings was "retrospective" because "it could have been contemporaneous, but it wasn't." (PCR: 2613). Dr. Bloomfield might have helped ameliorate the "lack of remorse" comments by Dr. Reibsame.

This Court did not address this evidence and counsel respectfully requests reconsideration of these issues, in light of the dictates of the Supreme Court in *Porter v. McCollum*, 558 U. S. 30 (2009). In *Porter*, the Supreme Court reversed and remanded this Court's findings that mitigation evidence presented for the first time in postconviction related to Porter's mental health, heroic military service, and other mitigating evidence did not support a finding of *Strickland* prejudice. *Id.* at 455-56. *See also Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011) (the Eleventh Circuit found trial counsel's performance deficient because they failed to obtain from a mental health expert a "comprehensive mental health investigation" after had constraining

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case before trial began. *See Porter v. McCollum*, 558 U.S. 30 (2009); *Wiggins v. Smith*, 539 U.S. 510 (2003).

and limiting the expert's inquiry, despite obvious red flags. *Id*. at 1227-28. Here, trial counsel did the same thing.) There were several obvious red flags—some even found by a psychologist in a different case in which Sanchez-Torres was represented by the same trial counsel—but because trial counsel so limited Dr. Bloomfield's ability to ever assess Sanchez-Torres, trial counsel was never able to properly rely on a complete mental health examination. Not only was Dr. Bloomfield not given enough time to complete his assessment of Sanchez-Torres, he was never given the report from Dr. Krop from Sanchez-Torres's previous case that raised several red flags relating to his mental health at the time of that crime and could have ameliorated any lack of remorse that the State's expert would offer. In addition, because of the late retention of Dr. Bloomfield, trial counsel was not able to rely on any advice from Dr. Bloomfield at the time of the plea and waiver.

iii. Sanchez-Torres's guilty plea and waiver of a penalty phase jury were the direct result of trial counsel's lack of preparation.

Trial counsel needed Sanchez-Torres to waive his rights in order to buy time to conduct the mitigation investigation and preparation. Trial was set for May 2, 2011 and trial counsel was wholly unprepared. Trial counsel also believed that they did not have the ability to ask for a motion to continue the trial. During the plea colloquy, Judge Skinner made that perfectly clear:

> Court: If he doesn't waive the jury on Monday for an advisory, then we'll pick a jury and go forward with the penalty phase next week. We've known this thing has been set for trial for some time. The

> Spencer issues, you would still have the opportunity to present after Thomas' case was over, and we would finish – we need to finish the penalty phase next week.

(PCR: 3201). After Sanchez-Torres pleaded guilty, Judge Skinner informed him that if he wanted a penalty phase jury, it would have to be on Monday and that he would "keep 50 jurors around in the event you decide you would like an advisory jury verdict" on Monday. (PCR: 3191). When Sanchez-Torres waived the penalty-phase jury, Judge Skinner asked him, "Do you want to have that jury empaneled this morning?" (PCR: 3209). But once Sanchez-Torres bought trial counsel time by sacrificing his right to a jury trial, suddenly there was no rush:

> Court: Because there is no advisory jury, this is going to be a long, drawn out process. There is going to be mitigation sometime other than this week. (PCR: 3213).

Bedell testified that when she got on the case "very little had been done." (PCR: 2668). Because she was under the belief that they could not ask for a motion for continuance, Bedell believed that the only option was to have Sanchez-Torres plead guilty and waive a jury so that they could buy time to actually conduct a mitigation investigation. (PCR: 871). Bedell confirmed that this was the explicit strategy to pleading guilty and waiving a penalty-phase jury:

> Shea: I guess as -- as a general question, being a defense lawyer and knowing that Mr. Sanchez-Torres-Torres was facing death, well, why did you have him enter a plea before you completed your investigation on mitigation?

> Bedell: That is a very good question. I think that our thought process was that we would ask for as much time as we needed, and, fortunately, Judge Skinner gave us a substantial amount of time in which we were able to do a large amount. So I don't know if there had been some discussion before doing that that we would be able to have that much time. I don't -- I don't recall that.

(PCR: 2668). This Court's March 12 opinion overlooked or disregarded the clear evidence in the record that trial counsel was not prepared for trial by simply stating "counsel's advice was not the result of…lack of preparation." Slip Op., at 12. But without the "distorting effects of hindsight," *Strickland*, 466 U.S. at 689, the record makes clear that "at the time" of the guilty plea and jury waiver on April 29, 2011, with the jury selection scheduled for the next business day, trial counsel was wholly unprepared for trial. *See also* *Kimmelman*, 477 U.S. at 38, and *Deaton v. Dugger*, 635 So. 2d 4, 8 (Fla. 1994) (circuit court's grant of new penalty phase because of trial counsel's failure to investigate mitigation and present witnesses affirmed on state's cross-appeal).

This Court should grant rehearing to consider the substantial portions of the record that the March 12 opinion overlooked or misapprehended that clearly show that Mr. Sanchez-Torres's guilty plea and penalty-phase jury waiver were each the direct result of both trial counsel's misinformation and lack of preparation.

B. The Court's opinion failed to correctly analyze whether Sanchez-Torres's guilty plea and penalty-phase jury waiver were the result of incorrect advice

A guilty plea that is entered into because of incorrect advice provided by counsel is not knowing, intelligent, and voluntary. *See Lee v. United States*, 137 S. Ct. 1958, 1964 (2017). Yet this Court excused counsel's incorrect advice by wrongly stating that "Sanchez-Torres did not show counsel's advice was the result of misinformation." Slip Op., at 9. But nowhere in the opinion did this Court wrestle with Bedell's self-admittedly erroneous advice or Mr. Sanchez-Torres's sworn statement explaining how, if given correct advice, would not have pleaded guilty or waived a penalty-phase jury. This Court should grant rehearing to consider in the first instance the several erroneous statements of fact and law that trial counsel, by her own admission, related to Sanchez-Torres. This incorrect advice should have invalidated Sanchez-Torres's plea and jury waiver.

Specifically, Sanchez-Torres was led to believe that he would not receive a sentence of death if his attorneys could prove that he was not the shooter. Trial counsel made this clear at the very start of the plea colloquy: "We've discussed the fact that he was not the shooter, and—and we believe that we could present evidence of that." (PCR: 3172). The Court then informed Sanchez-Torres that the purpose of conducting his codefendant's trial in the middle of Sanchez-Torres's penalty phase was to aid in the determination of who shot the victim: "[I]t would be my intention that you would be able to view all the proceedings within that trial so that you could…have the opportunity to rebut or challenge whatever statements or evidence

that's come in indicating that you were the shooter versus he was the shooter." (PCR: 3178). Sanchez-Torres was operating with the understanding that he was pleading guilty because he committed felony murder, but would not get a death sentence because he was not the shooter. Because trial counsel misunderstood the law and thus misinformed him, Sanchez-Torres did not know that by conceding guilt to felony murder, he gave the State all it needed for a death sentence. His status as the shooter or non-shooter was not material to whether he could receive the death penalty. Trial counsel chose an entirely unreasonable strategy, which was the result of its failure to conduct a reasonable investigation of the facts of the case and the law that applied to those facts.

The first problem with counsel's advice is legal: that belief about avoiding a death sentence, imparted upon him by trial counsel, was entirely incorrect. Under Supreme Court precedent, it does not matter, under the theory of felony murder, if a participant was the actual shooter. *See Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982). The determinative question is whether or not the defendant was a major or minor participant. Sanchez-Torres pleaded guilty to felony murder and robbery. He admitted in his plea colloquy that he was part of the robbery because he discussed it with his codefendant in the car prior to the murder.

The second problem was strategic: trial counsel never filed a motion to suppress the coerced confession in which Sanchez-Torres admitted that he was the shooter. Instead, trial counsel hinged their strategy on using a favorable polygraph findings that Sanchez-Torres was not the shooter, which they knew or should have known was inadmissible under Florida law. Because counsel was unprepared to present its defense in the penalty-phase, the trial court postponed the defense presentation in the Sanchez-Torres' penalty phase until after he could hear Markeil Thomas's trial. Thomas's jury found that he (Thomas) did not possess a firearm, so Judge Skinner became aware of that fact and could have been influenced by it. Trial counsel led Sanchez-Torres to believe that they could prove he was not the shooter, but the steps they took undermined that strategy, or in regards to moving to suppress the confession, they took no steps at all.

By pleading guilty, Sanchez-Torres became a potential witness against his co-defendant, a fact he was not made aware of at the time of his plea by the State, the court, or his counsel. Counsel certainly did not inform him that he would have to make a choice regarding whether he believed it was in his best interest to testify or not against his co-defendant. Bedell testified during the evidentiary hearing that she, in fact, did not advise Sanchez-Torres of this possibility:

> Shea: before you had him enter the plea of guilty and waive the jury trial did you discuss with him that he would have to testify in the Markeil Thomas trial?

> Bedell: **He was not listed until after his plea, so, no, I did not.** I did not know that Mr. Nelson would do that….

(PCR: 2674-75) (emphasis added). Sanchez-Torres was thus forced to testify at his codefendant's trial, a proceeding at which he was afforded no constitutional protections. Moreover, in his sworn statement, Sanchez-Torres made clear that if he had ever been informed that this was a consequence of his pleading guilty, he would not have done so. (PCR: 873). Counsel's advice was thus erroneous in two respects: (1) Counsel did not inform Sanchez-Torres that he could be subpoenaed at his co-defendant's trial and (2) Counsel did not inform Sanchez-Torres that he had a right to refuse to testify under the Fifth Amendment, *see Estelle v. Smith,* 451 U. S. 454, 462 (1981). This is particularly troubling because Judge Skinner conducted both trials. Any information he learned during the Thomas trial could infect his thoughts regarding Sanchez-Torres's death eligibility, for after the guilty pleas, that was all that was left to decide. There was simply no way to unring the bell from the evidence and the jury findings at the Thomas trial.

Most disturbing, Sanchez-Torres's trial attorney, through erroneous and misleading advice, gave him the understanding that a jury vote would be binding and that the only way he could avoid a sentence of death from the judge was by waiving the jury:

> I always told him that the judge could give him life or death and that there was no guarantee that he would give him life or that he would give him death, and it was my belief that if he was in front of a jury not

> only would he have been convicted of first degree murder but that a Clay County jury would absolutely sentence him to death; whether it was 12-0 or 11-1 or 10-2, I believed that a Clay County jury would absolutely without a doubt give him death.

(PCR: 2701). Sanchez-Torres stated in his sworn statement that Bedell advised him that Judge Skinner "would only give me death if he had no other choice." (PCR: 871). The result of this advice is clear: Sanchez-Torres was led to believe, erroneously, that the jury vote would be binding on the judge. But it was not. Under the sentencing scheme in place at the time of his trial, Sanchez-Torres would, and could, have had two bites at the apple: he could have attempted to convince a penalty-phase jury he did not deserve death during the penalty phase and he could have attempted to convince the judge he did not deserve death during a *Spencer* hearing. But because of counsel's erroneous and misleading advice, he thought that his only chance for a life sentence was to waive a penalty-phase jury.

Additionally, Sanchez-Torres's trial attorney did not inform him of the very public blowback that Judge Skinner was facing for overriding a penalty-phase jury's vote for death with a life sentence in a capital trial *two weeks* before Sanchez-Torres's plea and jury waiver. Two weeks before Sanchez-Torres's plea, a penalty-phase jury voted to recommend death for Kenneth McBride. Judge Skinner, who presided over the case, overrode the jury's recommendation and imposed a life sentence. Bedell testified that she informed Sanchez-Torres of this and that it made Judge Skinner seem weak on the death penalty. (PCR: 2671). However, she also

testified that she never informed him of the public blowback Judge Skinner faced during the two weeks leading up to Sanchez-Torres's plea and jury waiver. (PCR: 2671). This was the worst time to ask a judge to be lenient to a defendant facing a death sentence, especially one convicted of a prior murder. There was no reason for Bedell, who was trial counsel in the McBride case, not to inform Sanchez-Torres of the public outcry and its potential impact on Judge Skinner, a publicly elected judge. *See Estes v. Texas,* 381 U. S. 532, 548-49 (1965) ([I]t is difficult to remain oblivious to the pressures that the news media can bring to bear on [judges] both directly and through the shaping of public opinion . . . . Especially is this true where the judge is selected at the ballot box."). Again, Sanchez-Torres made clear in the proceedings below that if he had been made aware of this, he would not have pleaded guilty, waived a penalty jury, and placed his life in the hands of a judge facing such public scrutiny. (PCR: 872).

All of this erroneous advice needs to be put into further context. This Court did not address the expert testimony presented by the defense at the evidentiary hearing concerning Sanchez-Torres's mental health and developmental issues. According to Drs. Kessel and Bloomfield, he suffered from multiple "chronic" and "severe cognitive problems," (PCR: 2551, 2579) and had a personality marked by submissiveness and dependency. (PCR: 2557, 2610). As a result, he lacked the capacity to internalize information and act in his own best interest. (PCR: 2570).

This Court did not address this evidence and counsel respectfully requests reconsideration of these issues, in light of the dictates of the Supreme Court in *Porter v. McCollum*, 558 U. S. 30 (2009). In *Porter*, the Supreme Court reversed and remanded this Court's findings that mitigation evidence presented for the first time in postconviction related to Porter's mental health, heroic military service, and other mitigating evidence did not support a finding of *Strickland* prejudice. *Id.* at 455-56.

These were not minor points of the law that trial counsel could be forgiven for overlooking. Bedell admitted during the evidentiary hearing that she failed to properly inform Sanchez-Torres regarding several highly material facts and legal concepts. Yet this Court found no error because "counsel's advice was [not] the result of misinformation." Slip Op., at 9. The irony of this is that on direct appeal, this Court refused to consider parts of Sanchez-Torres's claim that his plea was not knowing, intelligent, or voluntary based on the misadvise of counsel, because "such claims should be addressed in postconviction proceedings, where an evidentiary hearing could be held on the allegations." Slip Op., at 6 (quoting *Sanchez-Torres*, 130 So. 3d 661, 671, 673 (Fla. 2013).

III. THIS COURT SHOULD GRANT REHEARING TO ADDRESS FACTUAL AND LEGAL MISTAKES REGARDING SANCHEZ-TORRES'S CLAIM OF INEFFECTIVE ASSISTANCE BASED ON THE FAILURE TO SEEK SUPPRESSION OF THE COERCED CONFESSION

Sanchez-Torres respectfully requests this Court to reconsider factual and legal errors related to trial counsel's failure to file a motion to suppress his statements made under the threat that his sister and mother would be arrested unless he spoke to detectives. This Court affirmed the denial of this ineffective assistance of counsel claim. Slip Op., at 9-10.

In order for a confession to be voluntary, it must be "the product of free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The inquiry into voluntariness of a confession asks "whether a defendant's will was overborne in a particular case." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Courts must assess "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id*. Courts are then to "weigh...the circumstances of pressure against the power of resistance of the person confessing." *Stein v. New York,* 346 U.S. 156, 185 (1953). The inquiry does not turn "on the presence or absence of a single controlling criterion," instead the inquiry must reflect "a careful scrutiny of all the surrounding circumstances." *Id*. *Schneckloth*, 412 U.S. at 226.

The Supreme Court explicitly rejected the analysis used by this Court in this case in *Reck v. Pate*, 367 U.S. 433, 442 (1961). There, the Supreme Court held that a confession could be involuntary despite a lack of "police brutality," particularly when the characteristics of the defendant make him more susceptible to police

pressure. For example, in *Reck*, the Supreme Court noted that the defendant's "youth, his subnormal intelligence, and his lack of previous experience with the police make it impossible to equate his powers of resistance to overbearing police tactics" with other defendants. *Id*. While Supreme Court jurisprudence requires "some sort of state action" to cause an involuntary confession, the "mental condition" of the individual being interrogated "is surely relevant" to that individual's "susceptibility to police coercion." *Colorado v. Connelly*, 479 U.S. 157, 165 (1986). Over time, "as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." *Id*. at 164.

In *Mincey v. Arizona*, 437 U.S. 385 (1978), the Supreme Court held a confession to be involuntary despite a lack of police conduct that would be considered improper if wielded against the average person. In *Mincey*, the police conduct was itself not coercive: law enforcement simply asked the defendant questions. 437 U.S. 399–401. The Supreme Court rejected the State's argument that a confession could only be involuntary if there was not present "some of the gross abuses that have led the Court in other cases to find confessions involuntary, such as beatings or truth serums." *Id* at 401 (internal quotations omitted). Rather, under "careful evaluation of all the circumstances," the interrogation was involuntary

because the defendant's "will was simply overborne" by mere questioning when he was in a weakened state in the hospital. *Id*.

The equation articulated by the Supreme Court is clear: a court must determine "the factual circumstances surrounding the confession," assess "the psychological impact on the accused," and evaluate "the legal significance of how the accused reacted" *See Schneckloth*, 412 U.S. at 226.

In this fact, this Court has long held that the most important consideration in weighing the voluntariness of a confession is whether coercion was used. In *Traylor v. State*, 596 So. 2d 957, 964 (Fla. 1992), this Court held,

> The basic contours of Florida confession law were defined by this Court long ago under our common law. We recognized the important role that confessions play in the crime-solving process and the great benefit they provide; however, because of the tremendous weight accorded confessions by our courts and the significant potential for compulsion—both psychological and physical—in obtaining such statements, a main focus of Florida. . . . confession law has always been on guarding against one thing—coercion.

Id. at 964.

This Court should grant rehearing to conduct "a careful scrutiny of all the surrounding circumstances" of the confession in this case, which includes not only the conduct by law enforcement, which was coercive "as applied to the unique characteristics" of Sanchez-Torres, but also the "unique characteristics" of Sanchez-Torres that made him particularly susceptible to such conduct. *Connelly*, 479 U.S. at 163.

A. The Court's March 12 opinion disregarded the coercive conduct by law enforcement in this case.

Rehearing is necessary on this claim as it relates to the conduct of law enforcement in this case, both because this Court conducted an unconstitutional analysis and because this Court misconstrued key facts and overlooked others. This Court stated that Sanchez-Torres "has not demonstrated that detectives' conduct was *improperly* coercive, Slip Op., at 11 (emphasis added), nor did it consider the unique charactertics of Sanchez-Torres at the time of his statements. However, this test is clearly contrary to well-established Supreme Court precedent. The initial question is whether there was any police conduct—i.e. state action—at all. *See Connelly*, 479 U.S. at 165. Once that is established, then this Court must review the totality of the circumstances surrounding how coercive the conduct by law enforcement was. There is no requirement that the conduct must be improper or illegal and to hold that it is a requirement contravenes clearly established Supreme Court precedent. *See*, *e.g.*, *Mincey*, 437 U.S. at 401 (finding a confession was involuntary despite the police conduct in question merely consisted of questioning the defendant).

Detectives discovered that the phone belonging to the victim, Eric Colon, was being used when his mother received a call from it on September 30, 2008. (R 7: 192). Detectives used records of calls made from the phone to trace the phone to Maria Torres. After speaking with Torres a few days later, detectives discovered that an associate of hers, Hector Figueroa-Ramon, put the phone in a burn barrel and

scattered the remains in a field, in a deliberate attempt to hide the evidence from law enforcement. (R 8: 257, 288).

Carlos Torres found a phone in his nephew's car and put it in his room. (R: 8: 246). Joann Sanchez, Sanchez-Torres's sister, found that phone and dialed the contact listed as 'mom.' (R 8: 247). The person who picked up told Sanchez that the phone belonged to her murdered son. (R 7: 194). Sanchez then called her own mother, Maria Torres, and asked her what to do with the phone. (R 8: 250). Additionally, Sanchez asked Markeil Thomas what to do with the phone and he told her "to turn off the phone and take the battery out." (R 8: 250). Torres took possession of the phone and Thomas told her to get rid of it. (MT R 6:1005). Torres took the phone to her boyfriend's house, Jose Lopez. Ultimately, Lopez and Figueroa put the phone in a burn barrel and scattered the remains in a field. (R 8: 257).

Initially, Torres lied to law enforcement. She first told detectives that she had thrown the phone in a garbage can at her work. R 8:233. The truth was that she had given it to Figueroa while at her boyfriend's house. However, after law enforcement searched trashcans, Torres told detectives the truth. (R 8: 233-34). Despite this, detectives never threatened her with arrest or made any indication to her that she could face legal trouble until five months later.

The first time Clay County detectives interviewed Sanchez-Torres regarding the cell phone occurred that same day, October 2, 2008. (R 7: 197). Detective Sharman, who interviewed Sanchez-Torres, told him that law enforcement was able to trace the victim's phone to his family. (R 8: 228). However, Detective Sharman stated that his mother and sister were not facing legal trouble:

> We're trying to keep your mother out of this here and your sister out of this here because we think she just got tied up in it because your sister found – your uncle found the phone and then Joanne used the phone. Then your mother got rid of the phone and we tracked all that down.

(R 8: 220). Detective Sharman asked Sanchez-Torres if he knew where the phone came from and if he or Markeil Thomas were involved in the murder of Eric Colon. (R 8: 230). When Detective Sharman stepped out of the room, Sanchez-Torres said:

> They – damn, they trying to pull my family apart. They trying to fuck my family up. Duval County. (R 8: 223).

The case went unsolved for the next five months.[7] On March 5, 2009, detectives confronted Torres at her home. (R 8: 286). Detectives confronted her with an arrest warrant that had been partially filled out before the interview and an affidavit supporting the warrant. (R 8: 288).[8] The arrest warrant was for "tampering

[7] Detectives never again visited or spoke with Jose Lopez or Hector Figueroa-Ramon regarding the phone, despite their admitting to putting the phone in a burn barrel and scattering the remains in a field and giving a deposition in this case in which Figueroa-Ramon again admitted those facts. Thomas was never charged with or threatened with charges for telling Sanchez and Torres to get rid of the phone.

[8] Detective West testified that the arrest warrant had only been "partially filled out" and not yet presented to a magistrate because police were "in the preliminary stages

with evidence." (R 8: 288). Torres "cried and she was so upset" that Detective West felt the need to give her a hug. (R 8: 288). Torres told Detective West that she had no more information about the phone and according to Torres, the detectives "said that if Hector didn't talk to them, they were going to arrest me and Joann and they showed me the [arrest warrant]." (R Supp 1:190). Torres thought that she was going to be arrested. (R Supp 1:192). Detective West testified that he did not recall whether he made a direct threat to arrest her and that he showed Torres the arrest warrant "to make sure she was telling me the truth." (R 2:288, 2:290).

After presenting Torres with the arrest warrant, Detective West asked her permission to speak with her fifteen-year-old daughter, Joann Sanchez. (R 8: 297). The detectives then went to her school and removed her from her class. (R 8: 297). Sanchez was questioned inside an office by the detectives with no other adults present. (R Supp 2: 204). The detectives told her that they were there to "talk about a phone and your brother." (R Supp 2: 205). They had Sanchez describe how she came into possession of the phone and what happened with it. (R Supp 2: 207). Detectives "kept pressuring" Torres to tell them more information and eventually "they pulled out the arrest warrants" and "pointed out" "where it said my mom's

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of deciding whether or not to go forward with a case of tampering with evidence against Torres" five months after the phone was destroyed, the parts were recovered and every party involved confessed their involvement. (R 8: 296-97).

name, my name, and my uncle's name." (R Supp 2: 208). The questioning lasted for 45 minutes to an hour. The detectives began threatening Sanchez:

> If you don't tell us what you know, your mom could be arrested, you and your uncle, you know. How would your life be like then? You will lose everything that you worked up to.

(R Supp 2: 209). Sanchez began crying. (R Supp 2:209). Sanchez felt that she could be arrested "because of the way they made me feel." (R Supp 2: 210). Additionally, she did not feel free to leave. (R Supp 2:210). After speaking with detectives, Ms. Sanchez told her mother about the questioning. (R Supp 2: 211).

After the confrontations by the detectives, Torres spoke with Mr. Sanchez-Torres on the phone. (R Supp 1: 192). Because the Duval County Jail only allows calls out from inmates, not calls in, Torres had to wait for Sanchez-Torres to call her, which he did nearly every day. (R Supp 1: 192). Ms. Torres told him about the detectives' threats to arrest her, Sanchez-Torres's uncle and fifteen- year-old sister. Ms. Torres told him that detectives "want him to talk to them about the case." Sanchez-Torres told his mother "to let them know that they could come and talk to him." (R 1: 192).

Detective West received a call from "Hector's mother advising me he wanted to speak to us." (R 8: 270). Detective West "knew Mr. Sanchez-Torres had already spoken to his mother after his visit." (R 8: 290). Yet, despite knowing this and despite threatening Sanchez-Torres's mother and sister with arrest, Detective West

was apparently "very shocked" that Sanchez-Torres wanted to speak with him. (R 8: 290).

Detective West interviewed Sanchez-Torres the next day. (R 8: 269). Detective West knew that Sanchez-Torres had been previously interviewed regarding this case and was thus aware that Sanchez-Torres was scared that his family was at risk of being been torn apart. (R 8: 269, 8:223). According to Detective West, "Mr. Sanchez-Torres made it clear that he did not want his mother to get in trouble." (R 8: 291).

Unquestionably, Sanchez-Torres was in custody at the time of the interrogation. This Court overlooked the coercive effect that has on an individual. In a case determining factors to consider in weighing the voluntariness of a confession, the Supreme Court held in *J. D. B. v. North Carolina,* 564 U. S. 261, 269 (2011), "By its very nature, custodial police interrogation entails inherently compelling pressures. Even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (internal citations and quotations omitted). This risk is "all the more troubling" and "more acute" the younger the subject of the custodial interrogation is. *Id*. Even more than just facing the "inherently compelling pressures" of a custodial interrogation, Sanchez-Torres was a nineteen-year-old with limited

exposure to the criminal justice system facing that crippling pressure while under the belief that he had to confess or his mother, uncle, and younger sister would go to jail.

The statement from the interviewing detective that "he did not know if Sanchez-Torres even knew about the unsigned arrest warrants at the time he confessed to Mr. Colon's murder," Slip Op., at 12, lacks any credibility.[9] But even more than that, the apparent subjective beliefs of the interviewing detective, even if credible, are irrelevant to the voluntariness analysis. *See Stansbury v. California*, 511 U.S. 318, 325 (1994). The question is whether the will of Sanchez-Torres was overborne by police conduct, not whether law enforcement believed that Sanchez-Torres was confessing voluntarily. Sanchez-Torres clearly knew about the arrest warrants and that was exactly why he told detectives to speak with him as soon as possible. He was under the reasonable belief, given the circumstances, that the only way to prevent the arrest of his mother, uncle, and fifteen-year-old sister was to confess to the murder.

For the inquiry as to whether the detectives used improper coercion to get Sanchez-Torres to confess, it does not matter that the detectives could have lawfully

[9] Detective West made this statement immediately after confirming that Sanchez-Torres told him that he did not want his mother getting into trouble. (R 8: 291). Further, Detective West knew that Sanchez-Torres had spoken to his mother after Detective West threatened her and Torres with arrest warrants and before Torres told Detective West that Sanchez-Torres wanted to speak with him.

arrested his mother and sister. The fact that the detectives may have had the requisite legal authority to arrest Sanchez-Torres's mother and sister *increased* the coercive pressure placed on Sanchez-Torres. Sanchez-Torres believed that if he did not confess, his mother, uncle, and fifteen year-old sister would be arrested. Sanchez-Torres had "no reason not to believe that the police had ample power to carry out their threats." *Hayes*, 373 U.S. at 534.

But even if it was relevant, this Court never inquired into the detectives' legal authority to arrest every person for which they filled out arrest warrants. This Court stated in its opinion that detectives had probable cause to arrest Maria Torres because they learned she "had made efforts to destroy the victim's cell phone." Slip Op., at 12. But detectives also filled out arrest warrants for Sanchez-Torres's sister and uncle. Detectives did not have probable cause to arrest Carlos Torres, who simply found the phone and gave it to Sanchez without any knowledge of the underlying circumstances.[10] As to Sanchez, this Court apparently foreclosed its analysis after "detectives…testified that Sanchez was never told she might be arrested." Rehearing is warranted because this Court did not place due emphasis on the fact that detectives

[10] The "person" who "alter[s], destroy[s], conceal[s], or remove[s] any record, document, or thing" does so (1) "knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted and (2) with "the purpose to impair its verity or availability in such proceeding or investigation." Sec. 918.13, Fla Stat. (2019).

hauled a fifteen-year old child out of class into a confined room with no other adults or guardians present and interrogated here over an hour long period, which included showing her an arrested warrant naming her.[11] Additionally, it is clear the detectives did not have probable cause to arrest her. Torres testified that once Markeil Thomas told them to get rid of the phone, it was already in her possession, not Sanchez's. In saying it is not coercive to threaten to arrest someone law enforcement have probable cause to arrest, this Court ignored whether or not law enforcement even had probable cause to arrest Sanchez and Carlos Torres and whether it was coercive to threaten to arrest them, with or without probable cause.

Additionally, this Court stated that "detectives did not threaten or mistreat Sanchez-Torres during his requested interview, and…the detectives made no offers or promises in exchange for his confession." Slip Op., at 11-12. This analysis, however, is also entirely irrelevant to the consideration of the circumstances. It is notable that this Court concedes that Sanchez-Torres explicitly told detectives the purpose for his confession was that "he did not want his mother getting into trouble."

[11] Sanchez testified that she did not feel free to leave, meaning that she was in custody. The detectives knew she was a child and were threatening her with arrest by showing her an arrested warrant with her name. This Court should grant rehearing to consider the coercive impact of conducting an interrogation of a juvenile as a means to coerce a suspect. *Cf. J.D.B. v. North Carolina*, 564 U.S. 261 (2011). It is one thing to threaten the family members of a suspect during the interrogation of that suspect, it's categorically different to interrogate the family members of a suspect in order to get to a suspect.

Slip Op., at 11. But this Court discounted that evidence because the coercion applied by detectives against Mr. Sanchez-Torres happened indirectly and outside of the interrogation room. The Supreme Court has never required that coercion be direct and inside the interrogation and to require otherwise contravenes clearly established Supreme Court precedent. *See Schneckloth*, 412 U.S. at 228 (it does not matter if the coercion is "by explicit or implicit means, by implied threat or covert force").

That being said, there was a clear offer made in exchange Sanchez-Torres's confession, which was made indirectly. Detectives threatened to arrest Sanchez-Torres's mother, uncle, and sister if he did not confess. Ms. Torres testified that they made this threat directly to her and she relayed the threat to Sanchez-Torres, who in turn requested to speak with the detectives. Sanchez-Torres then confessed and law enforcement never arrested anyone for evidence tampering in this case. Therefore, it does in fact appear that detectives got the benefit of their strong-armed bargain, and in turn, never prosecuted the case against Sanchez-Torres's family.

The detectives made the coercion clear by only filling out arrest warrants for Sanchez-Torres's mother, uncle, and fifteen-year-old sister. There were two other parties involved: Markeil Thomas and Hector Figueroa-Ramon. Thomas is the one who instructed Torres and her daughter to "get rid of the phone" and Figueroa-Ramon is the one who actually destroyed the phone and scattered the remains. If police were actually targeting the crime of tampering with evidence, there would

have been warrants made out for them as well. However, because these individuals were not members of Sanchez-Torres's family, their arrests would not pull his family apart, and thus would not contribute to coercing Sanchez-Torres.

It is clear that this coercion was the only reason Sanchez-Torres spoke to detectives and confessed to the murder of Eric Colon. Detectives threatened his mother, uncle, and fifteen year-old sister five months after first learning about the destruction of the phone. Detectives made both so visibly upset that they each cried under questioning. His mother told him about the threats the first opportunity she had and he immediately told her in response to call the detectives to speak with him instead because "he did not want his mother getting into trouble." Slip Op., at 11. Sanchez-Torres had not called law enforcement or requested to speak with detectives at any point during the previous five months. Detective West might have claimed that he was "shocked" to hear that Sanchez-Torres wanted to speak with him, but this Court is required to view the circumstances surrounding the confession as they actually were. Sanchez-Torres said during his first interview that they were tearing his family apart. Because the investigation was dragging on without any leads, detectives took advantage of this weakness.

The United States Supreme Court has held confessions involuntary under circumstances similar to those present in this case. In *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), the confession could not "be deemed the product of a rational

intellect and a free will," after "the police had told [the defendant] that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.'" It was irrelevant that in actuality the local prosecutor would make these determinations, not the law enforcement officers questioning her. Rather, the Supreme Court's inquiry focused on the impact that those threats on the specific defendant, who had little previous experience with the criminal justice system and "had no reason not to believe that the police had ample power to carry out their threats." *Id*. This Court is bound to do the same here.

This Court's analysis in the March 12 opinion overlooked or misconstrued the facts and law discussed above. Rehearing should be granted to allow for proper consideration the "totality of the circumstances," which also include the characteristics of Sanchez-Torres that made him susceptible to the coercion applied by detectives.

B. The Court's March 12 opinion overlooked or disregarded the specific characteristics of Sanchez-Torres that made him susceptible to coercion

The second variable in the calculus that this Court must consider is "the unique characteristics of Sanchez-Torres. *Connelly*, 479 U.S. at 163. These include anything relevant that may have impaired his will to resist the pressure placed upon him by law enforcement. Rehearing is necessary because this Court failed to consider the characteristics of the defendant contrary to Supreme Court precedent. It is particularly troubling that this Court overlooked and made no reference to the

testimony of Dr. Julie Kessel and Dr. Stephen Bloomfield, the two expert witnesses tendered by Mr. Sanchez-Torres during the 3.851 proceeding. *Cf. Porter v. McCollum*, 558 U.S. 30 (2009) (finding this Court's IAC analysis unreasonable for failing to properly consider the postconviction testimony of expert witnesses).

Sanchez-Torres was a 19-year-old with limited experience with the criminal justice system at the time of the interrogation. This Court cannot ignore his young age, especially under a totality of the circumstances test that explicitly calls for consideration of the characteristics of the defendant. Because juveniles are "most susceptible to outside influence and outside pressures," the already heightened coerce effects of custodial interrogation "become all the more acute." *J.D.B.*, 564 U.S. at 269, 275 (internal quotations omitted). The age of 18 is not a bright line that suddenly turns juveniles into adults. Sanchez-Torres was still far from completing cognitive development. Additionally, Sanchez-Torres suffered from "severe cognitive problems" and an "underdeveloped brain" that delayed the development of his cognitive abilities such that he faced the exact same risks that the Supreme Court recognized in *J. D. B*.

Sanchez-Torres had an "underdeveloped brain" according to Dr. Kessel. (PCR 2551). Underdeveloped brain is a "phenomenon" in which the development of an adolescent's "frontal cortex" is impaired because the development of the brain has been slowed:

> [T]he part that is responsible for executive decisions, judgment, logic, reasoning, continues to develop well into someone's 20's. It's evident that he had impairments in those areas. And Attention Deficit Disorder and learning disability would certainly aggravate or delay somebody's brain development, in his case delay his brain development. So even though he was a late adolescent very young adult, he continued to have underdeveloped brain problem.

(PCR: 2551). Even if this Court wanted to treat Sanchez-Torres as an adult because he was 19, he still had the brain functioning and executive functioning of a juvenile at the time of the interrogation. This makes it particularly imperative to use the same protections that the Supreme Court has mandated for juveniles.

Sanchez-Torres has multiple "severe cognitive problems" that impaired his ability to withstand coercion. (PCR: 2579). Both experts testified that Mr. Sanchez-Torres has a learning disorder and difficulty with comprehension in arts and language and reading and verbal comprehension. (PCR: 2550). It is abundantly clear from Sanchez-Torres's school records in which he failed a number of classes and was "just barely passing at other times." (PCR: 2550). Sanchez-Torres was not able to graduate high school because he failed the Florida Comprehensive Assessment Test (FCAT) multiple times within the year prior to the interrogation. (PCR: 1070).

Sanchez-Torres suffers from chronic cognitive problems. (PCR: 2551). He suffers from severe Attention Deficit Disorder (ADD). (PCR: 2549). ADD is "a disorder of executive dysfunction" which limits one's ability to control "impulses, their judgment, their flexibility of thought, their decision-making capacity." (PCR:

2549). ADD limits "working memory," "which is the ability to hold information and use that information while you are deliberating." (PCR: 2550). His learning disorder and ADD are "very significant impairments" and are "chronic aspects of his brain function." (PCR: 2551). Sanchez-Torres suffers from a major depressive disorder. (PCR: 2560). This also severely restricted his cognitive abilities. Major depression is "associated with reduced cognitive function." (PCR: 2561). The more severe the major depression, "people tend to respond more slowly, they don't internalize things in the same way, and they also don't care in the same way. They have less of a concern about themselves." (PCR: 2561). These conditions heightened the already substantial risks of being a teenager facing overwhelming pressure from law enforcement.

Additionally, as a result of the severe trauma he faced during his childhood, Sanchez-Torres self-medicated daily with marijuana. Sanchez-Torres faced multiple periods in which he was forced to feed and take after himself, his father died when he was thirteen, he was kicked out of the house by his mother's abusive boyfriend and forced into homelessness for several months, he was subjected to severe bullying, and he experienced very significant sexual and gender identity issues. As a result of the impact of this, Sanchez-Torres used marijuana excessively to deal with his emotional and psychological distress and pain. This self-medication had an additional impact which impaired his "brain functioning," "executive

functioning," and "functional brain development." (PCR: 2606, 2611). The use of marijuana "delays the development, the full mature development, of the adolescent brain" and Sanchez-Torres was using marijuana "daily" to self-medicate. (PCR: 2552).

All of these chronic and severe problems combined "very significantly impacted his ability to take in information, manipulate it in a meaningful way, and deliberate." (PCR: 2552-53). Because of the number of relevant diagnoses, which included ADD, major depressive disorder, the learning disability, the difficulty with comprehension in arts and language and reading and verbal comprehension, marijuana abuse, all of these "aggravate[d] his executive function problem." (PCR: 2569). As a result, Dr. Kessel testified that "I do not believe that Hector had the innate capacity to internalize the information that he was given" and that Mr. Sanchez-Torres "didn't understand consequences of actions." (PCR: 2570). And thus, he did not have "the capacity at that time to make the decisions in his own best interest." (PCR: 2570).

Sanchez-Torres had developed a personality that was dependent and submissive, which made him especially susceptible to coercion. Sanchez-Torres faced a childhood filled with the trauma, which resulted in "a kid with a significant amount of anxiety." He faced severe bullying. "Some people respond to being bullied by becoming frightened. And some people respond by becoming frightened

and dependent on other people. And he responded in that way. He became frightened." (PCR: 2554-55). Additionally, Sanchez-Torres "exhibited submissive" behavior. (PCR: 2610). As a result of this trauma, Sanchez-Torres "developed a personality that was characterized by anxiety, a sense of loss, a sense of needing others, needing others' approval, but also a sense of wanting to take care of those that were important in his life." (PCR: 2557). These personality traits and his dependency are factors that led Sanchez-Torres to feel he had no choice but to protect his mother, uncle, and sister from legal action.

These "unique characteristics" of Sanchez-Torres created the perfect stew of someone susceptible to coercion from law enforcement. He was 19, had little experience with law enforcement, and the development of his brain was delayed. He suffered from ADD and a learning disability, both of which severely hampered his executive functioning. He suffered from major depressive disorder, which further impaired his brain's functioning. In order to self-medicate away the trauma he had faced, Mr. Sanchez-Torres was using marijuana daily which even further limited his cognitive abilities and delayed the development of his brain. On top of all of this, he was submissive and dependent, and particularly, dependent on his family. All of this resulted in a lack of capacity to internalize information and act in his own best interest. This Court's March 12 opinion, while purporting to consider the totality of circumstances, considered none of this. Rehearing should be granted.

IV. THE COURT SHOULD GRANT REHEARING TO ADDRESS THE ILLEGAL APPOINTMENT OF UNQUALIFIED COUNSEL DURING SANCHEZ-TORRES'S RULE 3.851 PROCEEDING IN CIRCUIT COURT, ESPECIALLY IN LIGHT OF THIS COURT'S SUMMARY DENIALS OF SANCHEZ-TORRES'S MOTION AND RENEWED MOTION TO RELINQUISH JURISDICTION

Sanchez-Torres, through both actions and inactions of the State, was denied a full and fair hearing in the circuit court during this Rule 3.851 proceeding because, among other things, his appointed counsel was not legally qualified to represent him in those proceeding. This Court should grant rehearing because the March 12 opinion failed to acknowledge the existence of this miscarriage of justice, which is particularly alarming in light of the renewed motion to relinquish jurisdiction, in which Sanchez-Torres alerted this Court that the circuit court judge below denied any and all attorney fees for the attorney, Francis Jerome Shea, equating his representation of Sanchez-Torres to "practicing law without a license."

It is particularly concerning that this Court did not address the representation of Shea because of the design of the Florida statutes governing capital collateral counsel. The statutory framework regarding capital collateral representation "does not create any right on behalf of any person, provided counsel pursuant to any provision of this chapter, to challenge in any form or manner the adequacy of the collateral representation provided." 27.7002(1), Florida Statutes (2019). The "sole method of assuring adequacy of representation provided" is through the court under 27.711(12). 27.002(2), Florida Statutes (2019). Under the framework:

> The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Justice Administrative Commission, the Department of Legal Affairs, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.

Section 27.711(12), Fla. Stat. (2019). Thus, courts are tasked with monitoring "performance of assigned counsel" and taking advice of "any circumstance that could affect the quality of representation," but the statutory scheme is silent regarding what action a court can take regarding the situation Sanchez-Torres faces.[12]

This is particularly troubling because under Florida law, claims of ineffective assistance of capital collateral counsel are not cognizable. *See Kokal v. State*, 901 So. 2d 766, 778 (Fla. 2005), despite the fact that defendants are entitled to due process and effective representation in postconviction proceedings. *See Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988). This flaw in Florida's scheme is badly damaging for a death-sentenced inmate like Sanchez-Torres who, through the appointment of

[12] A court "may impose appropriate sanctions if it finds that an attorney has shown bad faith with respect to continuing to represent a defendant in a postconviction capital collateral proceeding." Sec. 27.710(4), Fla. Stat. (2019). But attorney sanctions are no reprieve for a death-sentenced individual who lost their statutory right to competent collateral representation.

unqualified counsel, was denied a full and fair hearing in the circuit court below but has no recourse or state forum to vindicate his constitutional rights.

Shea was appointed to represent Sanchez-Torres during this Rule 3.851 proceeding after his original collateral counsel was conflicted off the case. (PCR: 677). After Sanchez-Torres's first collateral counsel left the case, the circuit court appointed W. Charles Fletcher as counsel from the Registry List for the Fourth Judicial Circuit. (PCR: 676). In the order, Judge Skinner stated that Fletcher "is available, qualified to handle death penalty cases and has agreed to represent the Defendant in this case" and has "executed a contract with the Justice Administrative Commission (JAC)." *Id*. Fletcher filed a notice of appearance two weeks later. (PCR: 680). The State filed a Motion to Strike Notice of Appearance three days later. (PCR: 681). The State asked for the court to require a new notice of appearance to be filed because:

> Mr. Fletcher's notice of appearance did not contain a statement that Mr. Fletcher was death-qualified. Nor did the notice of appearance state whether Mr. Fletcher intends to be lead postconviction counsel or appear as co-counsel. The notice of appearance did not contain a statement that counsel has a current contract as a registry attorney or a statement acknowledging that as registry counsel he understands that he may not withdraw from a capital case without a showing of good cause under the registry statute.

(PCR at 681). The State noted that the requirement that counsel be death qualified to be lead postconviction counsel is mandated by Florida law. *See* Fla. R. Crim. Pro. 3.112. Thus, "the State has no knowledge that Mr. Fletcher is not qualified or is not

on JAC's registry list," and "[w]ithout this information, this Court cannot ensure that the statutes and rules of court are being complied with." (PCR: 684). Additionally, the State noted that the court could not comply with its "statutory obligation to ensure quality representation in postconviction proceedings" with the notice of appearance. (PCR: 684).

The circuit court, without ruling on the motion to strike or asking Fletcher to file a proper NOA, appointed Francis Jerome Shea as counsel on February 28, 2017. (PCR: 687). Judge Skinner used the same order stating Shea "is available, qualified to handle death penalty cases and has agreed to represent the Defendant in this case" and has "executed a contract with the Justice Administrative Commission (JAC)." (PCR: 687). Shea never filed a notice of appearance. The State, despite objecting to an insufficient notice of appearance less than two weeks earlier did not raise any concern over Shea's appearance in the case for over two years and Judge Skinner never required Shea to file an notice of appearance.

Two years later, after the circuit court held an evidentiary hearing pursuant to Rule 3.851, Judge Skinner entered an order denying Mr. Sanchez-Torres's motion for relief. (PCR: 2518). Sanchez-Torres was represented by Shea during this entire time. Nine days after the order was entered into the docket, the State, for the first time, raised concern over Shea's appearance in the case. (PCR: 2524). The State moved to have Capital Collateral Regional Counsel North appointed for the appeal

and for Shea to be removed because "it appears that Mr. Shea did not file a notice of appearance, and thus there is no certification that he meets the requirements of the rule." (PCR: 2526). The State noted that "it is unclear if [Shea] had previously conducted post-conviction evidentiary hearings in any other cases." *Id*. The State laid out the following concern:

> Mr. Shea lacks the requisite qualifications to handle post-conviction cases. This concern is especially highlighted in his lack of appellate experience. Initial post-conviction appellate litigation is extremely complex and has a significant body of caselaw attached to it, unlike successive post-conviction appellate litigation, which often involves a single claim.

(PCR: 2527). However, despite acknowledging the grave concern regarding Shea conducting the evidentiary hearing, the State noted that it waited until after both the evidentiary hearing and the order in the circuit court because "as this case will shortly be appealed to the Florida Supreme Court, this is the most appropriate juncture at which to appoint CCRC-North." (PCR: 2524).

Four days later, Shea filed a notice of appeal to the First District Court of Appeal. (PCR: 2533). Shea withdrew that notice the following day (PCR: 4084) and filed a notice of appeal to this Court. (PCR: 4085). The circuit court was thus divested of jurisdiction to remedy the grave problems caused by Shea's representation of Sanchez-Torres. However, while Sanchez-Torres was in front of this Court, the fallout regarding Shea's appearance in the case occurred in the circuit court below.

First, Shea filed a motion to strike the State's motion. *See* Motion to Remand to the Circuit Court (April 23, 2019), Exhibit H. In this motion, Shea laid out his apparent qualifications to represent a capital defendant in a Rule 3.851 proceeding. Among these qualifications, Shea listed two "Post Conviction Evidentiary Hearings" that he believed satisfied Fla. R. Crim. P. 3.112(k)(3)(c)(B): his representation of Leo Kazmar [sic] and Michael Shellito. Shea represented both of these defendants in sentencing proceedings, not postconviction evidentiary hearings. Additionally, Shea represented a "Post-Conviction appeal" in which he represented Gary Eugene Doughton. However, Shea represented Doughton at trial, not on appeal. Shea then concluded by stating that

> It is my understanding that my representation of Hector Sanchez-Torres for his Rule 3,851 motion for Post-Conviction Relief will be concluded upon my filing the appropriate Notice and Designations for Appeal, that my office is in the process of preparing within the 3-day filing date.

Shea then filed a motion to withdraw again representing his belief that "Counsel for Defendant completed his Post-Conviction Trial representation." *See* Motion to Remand to the Circuit Court, Exhibit J.

The State filed a response. *See* Motion to Remand to the Circuit Court, Exhibit I. The State first noted that under Florida law counsel is not "automatically relieved as post-conviction counsel" upon filing the notice of appeal because 27.710(3) "clearly states that post-conviction counsel shall continue representation 'until the sentence is reversed, reduced, or carried out.'" The State next noted that in neither

of the cases in which Shea claimed to have represented a client during a Rule 3.851 proceeding did he actually do so. Rather, he represented defendants during resentencing hearings, which are specifically exempted by statute. Judge Lester, who replaced Judge Skinner, granted Shea's motion to withdraw and CCRC-N was appointed. *See* Order on Motion for Court Appointed Attorney to Withdraw, 2009-CF-000671 Doc #539.

Shea filed a motion for attorney fees, costs, or expenses in April 2019. *See* Motion for Attorney Fees, Costs, or Expenses, 2009-CF-000671 Doc #541. Judge Lester set a hearing, which was held over two days. *See* Order Setting Hearing, 2009-CF-00671 Doc #544. During this hearing, Shea, and his expert witness, attorney Christopher Anderson, argued that "participation" in a capital collateral proceeding is not limited to "counsel of record," but also includes being called to testify as a trial attorney who has been alleged to have rendered ineffective assistance of counsel in the case, and being called over the phone by the counsel of record to informally provide advice regarding whether "certain action of an attorney might rise to the level of ineffective representation of counsel." Doc #556; Transcript at 17-19. Thus, according to Anderson, because Shea has been "contacted by other postconviction counsel asking what he thinks" regarding a claim of IAC in at least six cases, "arguably that's a form of participation." Transcript at 19. However, Anderson did concede that Shea was "vulnerable to being challenged" because Shea "doesn't have

a memory" and "doesn't keep records" of all his cases. Transcript at 21-22. Finally, Anderson mentioned "the issue of waiver," and that "a defendant cannot, under the law, sit and wait till the representation is completed and then object or complain about the representation." Transcript at 25.

Judge Lester denied Shea all attorney fees. *See* Order Denying Motion for Attorney Fees in Excess of Florida Statute 27.11 for Extraordinary and Unusual Representation and Motion for Discharge with JAC Response, 2009-CF-000671 Doc. #550. Judge Lester found that because Shea "has not participated in any capital postconviction evidentiary hearings, capital collateral postconviction appeals, or capital federal habeas proceedings," Shea was "unqualified to represent Mr. Sanchez-Torres-Torres for his capital postconviction case." *Id*. at 4. Looking to cases regarding the unlicensed practice of law, Judge Lester noted that "it is well settled that attorneys who are not licensed to practice law cannot collect attorney fees." *Id*. at 2-3. "In the same way that membership in the Florida Bar helps ensure the public is served by qualified attorneys, Rule 3.112 helps ensure that capital defendants are represented by attorneys qualified in the highly specialized area of defending individuals whose lives, not just their liberties are at stake." Judge Lester cited *Cartenuto v. Justice Admin. Comm'n*, 260 So. 3d 908 (Fla. 2018), which held that attorney fees could not be denied unless there was competent substantial evidence of an attorney's lack of qualifications. Judge Lester thus found that "employing the

reasoning of *Cartenuto*, and considering the critical concerns underscoring public policy in this State to provide qualified representation to capital defendants, the Court finds Mr. Shea is not entitled to attorney fees." *Id*. at 4-5.

Shea did not seek co-counsel or a second-chair attorney in this case. He did not hire an investigator or mitigation specialist.[13] And a review of his billing records shows that Shea did not investigate or make contact with a single potential nonexpert witness, despite the fact that there were several witnesses listed in the Third Amended 3.851 Motion who were listed as willing to testify at the evidentiary hearing and that the State had conceded an evidentiary hearing on the IAC claim for failure by trial counsel to present nonexpert mitigation.

Shea was not prepared for the postconviction evidentiary hearing. Despite the State conceding an evidentiary hearing on an IAC claim for failure to present nonexpert mitigation witnesses, Shea, who never contacted a single nonexpert

[13] It is a pattern and practice of Shea's to not hire investigators in capital proceedings. *See*, *e.g.*, *Martin v. State*, Slip Op., 12-18, No. SC18-1696 (Fla. Jan. 16, 2020), *reh'g denied*, No. SC18-1696 (Fla. Feb. 26, 2020). In *Martin*, Shea refused to hire an investigator despite being the first chair attorney for a defendant in a capital murder trial responsible for the guilt phase. Shea was held deficient for failing to investigate an eyewitness to the crime because "Shea's investigation with respect to [the eyewitness] consisted of reviewing the statements to police and the outcome of the photographic identification." That was despite the fact that the eyewitness stated they looked the suspect in the eye but later failed to identify the defendant from photospreads. *Id*. at 15. Shea was thus deficient for never even speaking to the witness. The fact that Sanchez-Torres's case was in front of this Court while it was also considering *Martin* makes the silence regarding Shea all the more disconcerting.

witness, put on zero testimony from any lay witnesses. His entire presentation consisted of the testimony of two expert witnesses and two members of Sanchez-Torres's trial team. The first day of the hearing consisted of the testimony from the expert witnesses. On that day, Shea said that he intended to call all of the attorneys from Sanchez-Torres's defense team and the attorney who represented the codefendant. (PCR: 2639). With the exception of Bedell and Till, none of these witnesses were ever presented and Shea never gave an explanation as to why. Shea put on no evidence or testimony regarding multiple other claims on which the State had conceded an evidentiary hearing. And, after the circuit court issued the order denying Sanchez-Torres's claims, Shea filed an NOA to the First District Court of Appeal, (PCR: 2533), despite the fact that all capital cases are directly appealed from the circuit court to this Court. Finally, Shea withdrew from the case saying it was his "understanding that my representation of Hector Sanchez-Torres for his Rule 3.851 motion for Post-Conviction Relief will be concluded upon my filing the appropriate Notice and Designations for Appeal," (PCR 4077) despite the clear instruction of the statute.

It is clear that Shea was unqualified to represent Sanchez-Torres and should never have been appointed to represent him as capital collateral counsel.[14] The State

[14] The trial court failed in its responsibility. "Appointment of appellate counsel for indigent defendants is the responsibility of the trial court. We strongly urge trial judges not to take this responsibility lightly or to appoint appellate counsel without

agrees that Sanchez-Torres had unqualified counsel. It is particularly troubling that not only was Shea appointed, but that the State waited until after the evidentiary hearing to raise its concerns regarding his failure to file the statutorily required notice of appearance. Under Florida's statutory framework, Sanchez-Torres has no vehicle through which to vindicate his rights to a full and fair hearing during his Rule 3.851 proceeding. The framework provides no mechanism for courts to act on his behalf and claims of ineffective assistance of collateral counsel are not cognizable, despite Shea's utter failure to provide Sanchez-Torres with competent representation.

Sanchez-Torres diligently sought a remand for a full and fair hearing from this Court after Shea's ineligibility was discovered. Sanchez-Torres filed a motion to remand to the circuit court, which was summarily denied by this Court. *See* Order Denying Motion to Remand (July 8, 2019). Sanchez-Torres additionally raised the same concerns in his briefing before this Court. *See* Initial Brief of Appellant at 10-17, 29-30. This Court did not say a word about Shea in its opinion. After Judge Lester denied Shea attorney fees for his representation, Sanchez-Torres filed a

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due recognition of the skills and attitudes necessary for effective appellate representation. A perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly, and zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated. The gravity of the charge, the attorney's skill and experience and counsel's positive appreciation of his role and its significance are all factors which must be in the court's mind when an appointment is made." *Wilson v. Wainwright,* 474 So. 2d 1162, 1164 (Fla. 1985).

renewed motion to relinquish jurisdiction based on this new information. *See* Renewed Motion to Remand to Circuit Court (December 3, 2019). This motion was also summarily denied. *See* Order Denying Renewed Motion to Remand (March 12, 2020). Rehearing should be granted to address the grave concerns regarding Sanchez-Torres's inability to get a full and fair hearing during this Rule 3.851 proceeding.

Sanchez-Torres requests rehearing for two additional reasons. First, this Court, in this case, is silently retreating from its own precedent in failing to enforce, without a single word, the standards of capital collateral representation. In *Arbelaez v. Butterworth*, 738 So. 2d 326, 326 (Fla. 1999), this Court stated that courts have "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner." And yet, it is impossible to ensure that capital punishment is not imposed in an arbitrary and capricious manner and that no one who is innocent or who has been unconstitutionally convicted or sentenced to death is executed without that which this Court has called the "very foundation of justice," the zealous representation of death-sentenced individuals at every level in the process. *Id*. at 331, n. 12 (Anstead, J., concurring); *Wilson*, 474 So. 2d at 1164. And while this is Court is silent today, this Court in a prior case, upon remanding the case back to the circuit court, felt "constrained to comment on the representation afforded Peede in [his postconviction] proceedings," which included criticism of the length,

lack of thoroughness, and conclusory nature of the initial brief, and reminded counsel of "the ethical obligation to provide coherent and competent representation, especially in death penalty cases, and we urge the trial court, upon remand, to be certain that Peede receives effective representation." *Peede v. State*, 748 So. 2d 253, 256 n. 5 (Fla. 1999). In addition to this Court's constitutional duty to intervene, this Court is also failing its statutory duty. *Id* (noting that 27.711(12) requires courts to "monitor" capital collateral counsel to "ensure" death-sentenced inmates receive "quality representation"). There is no reason this Court should not again do the same for Mr. Sanchez.

Second, this Court, despite its best efforts, will not be able to remain silent. Shea, through an error-filled and circuitous route,[15] has appealed the denial of attorney fees to this Court, which will soon receive merits briefing. *See Shea v. Justice Administration Commission*, SC20-406. So this Court will soon address this exact issue, but with no regard to the person whose life actually depends on it: Mr. Sanchez. This Court should grant rehearing in order to properly address on the representation of Shea in this case through the actual lens of this case—rather than through an ancillary appeal regarding attorney fees—and fulfill this Court's

[15] In his attempt to appeal the denial of attorney fees, Shea filed a petition for writ of certiorari in the First District Court of Appeal. That petition was transferred to this Court, which has exclusive jurisdiction over capital collateral matters, and refiled as a 3.851 appeal, which is the exclusive vehicle for appealing attorney fees.

"constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner." *Arbelaez*, 738 So. 2d at 326.

CONCLUSION

Based upon the foregoing, counsel respectfully requests clarification and rehearing in this matter.

Respectfully submitted this 23th day of April 2020.

s/ Karin L. Moore
KARIN L. MOORE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this day, April 23, 2020, via electronic service to Michael Kennett, Assistant Attorney General, at Michael.kennett@myfloridalegal.com and capapp@myfloridalegal.com, and by U. S. mail to Hector Sanchez-Torres, J40507, Union Correctional Institution, P. O. Box 1000, Raiford, FL 32083.

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