IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-286
Lower Tribunal No. 94-1299

EDDIE LEE SEXTON

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Eddie Lee Sexton's motion for post-conviction relief which was brought pursuant to Fla.R.Crim.P. 3.851.

Citations shall be as follows: The record on appeal concerning the 1998 retrial proceedings shall be referred to as R ___ followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to as PCR ____ followed by the appropriate volume and page numbers, and as "PCR-A ____" for those postconviction volumes marked as "addition." All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida constitution. These claims demonstrate that appellant was deprived of his right to a fair and reliable retrial and that the proceedings, resulting in his conviction and death sentence, violated fundamental constitutional imperatives. Furthermore, as to the denial of appellant's motion for post-conviction relief, there has been an abuse of discretion and a lack of competent, substantial evidence to support certain of the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Eddie Lee Sexton, a death-sentenced inmate on Death Row at Union Correctional Institution, requests that this Court permit oral argument on the issues raised in his appeal.

STATEMENT OF THE CASE

On March 11, 2003, the postconviction court entered its Order Denying, in Part, and Granting Evidentiary Hearing on Motion to Vacate Judgment of Conviction and Sentence (As Amended). The court issued the order after reviewing the defendant's Fla.R.Crim.P. 3.851 motion filed on March 21, 2002; the State's response filed on June 19, 2002; the arguments of counsel presented at the February 21, 2003, case management conference; the defendant's witness list filed on February 21, 2003; the defendant's list and exhibits on Claims I and II filed on February 21, 2003, and the court record and file. (PCR Vol. 2 p. 201). By the order, the court granted an evidentiary hearing, pursuant to Fla.R.Crim.P. 3.851(f)(5)(A)(i), on Claims II and VIII. On March 13, 2003, the court entered its Order Amending Claim VIII of the Court's Order Denying, in Part, and Granting Evidentiary Hearing on Motion to Vacate Judgment of Conviction and Sentence and ruled that "to the extent that this claim references errors that allegedly occurred

at the guilt phase of Defendant's trial, no relief is warranted. To the extent that this claim references errors that allegedly occurred at the penalty phase of Defendant's trial, based on the Court's granting of an evidentiary hearing on claim II, the Court reserves ruling on claim VIII." (PCR Vol. 3 p. 410). In view of Fla.R.Crim.P. 3.851(f)(5)(D), both orders advised the defendant that "he may not appeal the partial denial of his Motion until such time as a final Order has been issued." (PCR Vol. 2, p. 231; PCR Vol. 3 p. 412).

The evidentiary hearing consisted of the following. Trial attorneys Rick Terrana and Robert Fraser testified on April 6, 2006. State expert Dr. Barbara Stein testified on May 12, 2006. Defense expert Jan Vogelsang testified on July 28, 2006. At the July 28, 2006, hearing, by stipulation of the parties or by previous order of the Court, deposition transcripts were filed as exhibits for the Court's consideration in lieu of hearing testimony for the following witnesses as indicated: the April 20, 2005, deposition of defense witness David Sexton; the June 8, 2005, deposition of defense expert Dr. David McCraney; and the June 13, 2006, deposition of State witness Otis Sexton. (PCR Vol. 4 p. 380; PCR-A Vol. 10 p. 1895). This appeal has properly come before this Court.

STATEMENT OF FACTS
1998 RE-TRIAL

On direct appeal, this Court summarized the facts of the re-trial as follows:

Upon retrial, Sexton was again convicted of first-degree murder and sentenced to death. Although much of the testimony introduced at the second trial was similar to the testimony introduced at the first trial, Willie testified. FN1. In exchange for his testimony against Sexton, Willie pled guilty to second-degree murder and was sentenced to twenty-five years imprisonment. The State's theory of prosecution was that Sexton so totally dominated, controlled and directed every facet of Willie's life that Willie killed Joel at Sexton's direction. On retrial, the State introduced the following evidence.

> (FN1. As noted in this Court's opinion in Sexton, 697 So.2d at 834-35, Willie was named a codefendant in Joel's death in the first trial but was later found incompetent to stand trial)

Sexton fled to Florida in 1993 with his family and the victim to avoid arrest and prevent the Ohio Department of Human Services ("DHS") from removing his children from the home. FN2. Sexton was the father of thirteen children, not counting the three children he allegedly fathered with his two daughters. After leaving Ohio, Sexton and his family moved to Oklahoma, Indiana, and eventually to Hillsborough River State Park in Florida. During this time, Sexton trained his children to use guns and a garrote, an apparatus used in strangulation, in case authorities came to return the children to foster care.

> (FN2. DHS had Sexton's six youngest children removed from the home in 1992. Several months later, three of the children were returned to Sexton's wife, Mrs. Sexton, but Sexton was ordered to have no contact with the children or with Mrs. Sexton. Following a hearing on the matter in November 1992, Sexton barricaded himself and his family in their home demanding the immediate return of his three children who remained in foster care. Sexton threatened to kill anyone from Child Protective Services

> or the police department who tried to take his children. Eventually, Sexton turned himself in to the authorities. A search of the Sexton residence revealed a .357 revolver, a 20-gauge shotgun, and seventy rounds of ammunition. After his release, the Sextons failed to appear at a scheduled court hearing. Arrest warrants were issued for Sexton and his wife in October 1993).

While residing in Hillsborough River State Park, Sexton's infant grandchild, Skipper Lee Good, the son of Pixie and Joel, died under suspicious circumstances. Several of the Sexton children, including Pixie, testified about the events surrounding the baby's death. Pixie testified that the baby had been ill for several weeks, but Sexton would not allow her to take the child to a doctor out of fear that authorities would find him and his family. One night, the baby would not stop crying. Sexton ordered Pixie to quiet the baby or else he would do it for her. Pixie put her hand over the baby's mouth until the child stopped crying. The next morning the baby was dead. Sexton instructed Willie and Joel to bury the baby in the woods inside the Hillsborough River State Park. Pixie was eventually arrested for the death of the baby and entered into a plea bargain with the State. FN3

> (FN3. In exchange for a plea to manslaughter and testimony against Sexton, Pixie was sentenced to twelve years imprisonment).

According to Pixie, Joel was very upset over the loss of his child and wanted to bring the child back to Ohio for a proper burial. Shortly before the death of his infant son, Joel had learned Sexton was the father of Pixie's two daughters. After Joel confronted Sexton with this information, Sexton and Joel got into a fight. Because Joel knew about the baby's death and the fact that Sexton fathered two children with his daughter, Pixie, Sexton would not allow Joel and Pixie to return to Ohio. Sexton feared Joel would provide authorities with information pertaining to the Sexton family's current whereabouts, the death of the baby, and ongoing child abuse.

Several of the Sexton children, including Willie, Pixie, Matthew and Charles testified that Sexton often referred to Joel as a “snitch” and stated that a “good snitch is a dead snitch.” According to their

testimony, Sexton often stated that Joel had to be disposed of because he “knew too much.” In addition to the testimony of the Sexton children, Gail Novak, a librarian at the University of South Florida, also testified about a statement Sexton made in which he indicated his desire to have Joel killed. Novak testified that Sexton, Pixie, Joel and Willie came into the library in November 1993 and that Pixie requested information about crib death. Novak stated that she had overheard Willie telling Sexton that Joel intended to go back to Ohio. Sexton replied that the only way that Joel would be returning to Ohio would be in a “body bag.”

At some point, the Sextons moved to Little Manatee State Park, the place where Joel was killed. Willie testified to the following course of events surrounding the murder. FN4. As Joel continued to express his interest in returning to Ohio, Sexton began telling his son, “Willie, I got a job for you to do,” and that he wanted Willie to “put Joel to sleep.” On the day of Joel's murder, Sexton told his wife that “today is the day that Willie is going” to kill Joel. Thereafter, Sexton, his wife, and a few of the younger Sexton children left the campsite for a picnic. Sexton's daughters Sherri Sexton, FN5. Pixie, and their respective children, along with Willie and Joel, stayed behind. Soon thereafter, Willie and Joel left the campsite and went into the woods. Both Pixie and Willie testified that Sexton returned from the picnic and joined Willie and Joel in the woods. According to Willie, Sexton told him to take the garrote out of his pocket and place it around Joel's neck. After placing the garrote around Joel's neck, Sexton told Willie to turn it “fast and hard.” Willie told Joel that he was “just trying to put you to sleep.” While Willie twisted the rope, Joel yelled “Eddie” (Sexton). After Willie saw blood coming out of Joel's ears, he asked Sexton what had happened. Sexton stated that Willie had just killed Joel. Sexton subsequently kicked the body and, upon seeing Joel's leg move, told Willie to “finish him off.”

> (FN4. On cross-examination, Willie admitted that he previously had told different versions of the events surrounding the murder of Joel. According to Willie, he told different versions of the murder because he feared Sexton and because he wanted to get back at Sexton for all of the bad things that Sexton did to him).

(FN5. Sherri testified for the defense in the first trial, see Sexton, 697 So.2d at 835, but did not testify in this trial).

In addition to Willie, several other Sexton children testified to the events surrounding the murder of Joel and provided testimony that differed from Willie's recollections of the homicide. For instance, according to Pixie, on the day of Joel's murder, Sexton and Willie had gone for a walk. Approximately thirty minutes later, Sexton and Willie returned. After Sexton and several family members left for the family picnic, Pixie and Sherri went into the camper to prepare lunch, while Joel and Willie watched television together. Thereafter, Pixie saw Willie and Joel go into the woods. She followed them and found them smoking cigarettes. Upon her return to the campsite, she heard Joel yelling, "Ed." Pixie and Sherri ran into the woods and found Willie holding a rope around Joel's neck. Thus, Pixie and Sherri ran back to the campsite and told Sexton, who had returned from the picnic, that Willie was hurting Joel. After leading Sexton into the woods to find Joel and Willie, Pixie observed Willie holding Joel in his lap. According to Pixie, Sexton proceeded to kick Joel's leg and, when Joel's leg moved, ordered Pixie to return to campsite and told Willie to "finish him off."

Another one of Sexton's children, Charles Sexton, who did not testify at the first trial, also testified that he witnessed Joel's murder. His version of the murder differed from both Pixie and Willie's version. In particular, Charles testified that he witnessed the murder and that Sexton actually committed the final act that led to Joel's death. Charles claimed that although he initially went along on the family picnic, he returned from the picnic sooner than the rest of the family. After finding the campsite empty upon his return, Charles walked into the woods and observed both Sexton and Willie killing Joel. Charles claimed that while Joel was fighting for his life, he overhead Sexton telling Willie, "It's either Joel or the both of you." Charles also testified that although Willie initially had placed the choking device around Joel's neck, Sexton actually "finished Joel off" by pulling on the choking device.

As to the post-murder events, Pixie testified that when Sexton returned from the woods, he instructed her to get rid of Joel's belongings and told her that if she ever talked about Joel's murder that

she “would be next.” She also testified that Sexton ordered her and Charles to go and purchase a shovel. Willie stated that before placing Joel's body in the grave, Sexton ordered him to chop Joel's hands off with a machete so that there would be no fingerprint evidence to identify the body. FN6. Willie, however, was unable to complete this task.

> (FN6. The State's medical examiner, Doctor Marie Hermann, confirmed portions of Willie's testimony. According to Dr. Hermann, who assisted in the recovery of Joel's body and performed the autopsy, she observed a deep wound on the victim's right hand that was caused by a sharp instrument with great amount of force. The wound was consistent with an attempted dismemberment of the right hand. Dr. Hermann also observed that, upon recovery of Joel's body, there was a ligature device around Joel's neck. Dr. Hermann opined that the cause of death was asphyxiation as a result of ligature strangulation)

Later that evening, Pixie overheard Sexton discussing the killing with Mrs. Sexton, at which time, Sexton stated that he had Willie murder Joel. According to all of the Sexton children who testified, they were instructed by their father to tell anyone, if asked, that Joel had taken the baby and had returned to Ohio. Matthew Sexton also testified that his father told him not to say anything about Joel's death because Sexton and Willie “could get the electric chair.”

The State presented evidence that Willie had killed Joel because he was ordered to do so by Sexton and because he was afraid of his father. Doctor Eldra Solomon, a clinical psychologist with extensive training in the treatment of child abuse and post-traumatic stress disorder, testified that Willie was controlled by his father, whom Willie “was very eager to please.” After reviewing Willie's school records and having Willie conduct the Wechsler Intelligence Test, Dr. Solomon concluded that Willie was developmentally behind and that he had problems with language, speech, memory and motor coordination. The I.Q. test revealed that Willie functioned at the level of a seven or eight-year-old and that ninety-nine percent of the people in his age group would have performed better on the test. Dr. Solomon

opined that Willie could not comprehend the concept of death, suffered from post-traumatic stress disorder, and was incapable of planning a homicide.

When Willie talked about Sexton, Dr. Solomon noticed that Willie's demeanor changed dramatically. She observed that Willie began to shake, stammer and stutter, which Dr. Solomon believed were physical manifestations of his fears of his father. Both Dr. Solomon and many of the Sexton children, including Willie himself, testified regarding how Sexton had physically and mentally abused Willie. According to Willie, Sexton began having anal intercourse with him at age nine. This activity continued during the Sextons' stay in Florida. Sexton physically beat Willie with his fists, a belt, a baseball bat, and an electric belt. In addition, Sexton mentally abused Willie by calling him “retarded” and a “stutter bug.” Sexton often told Willie, “I brought you into this world, I can take you out of it.”

In contrast to the first trial, at the conclusion of the State's case, Sexton presented no defense during the guilt phase of the trial. The jury convicted Sexton and recommended death by a vote of eight to four. The trial court found the following aggravating circumstances: (1) Sexton was previously convicted of a prior violent felony (robbery) (little weight); (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest (great weight); and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP) (great weight). In mitigation, the trial court found one statutory mitigator, that Sexton was under an extreme mental or emotional disturbance at the time the murder was committed and gave this mitigator great weight. This mitigator was established based upon the testimony of two psychologists, Doctors Irving Weiner and Frank Wood, who observed Sexton. Dr. Weiner's testing of Sexton revealed that Sexton has an I.Q. in the low 80s, suffers from brain dysfunction, has limited tolerance to stress, and has diminished self-control. Additionally, testing by Dr. Wood revealed that Sexton's brain was diseased, causing him to be non-responsive to emotional situations.

In addition, the trial court found and gave some weight to several nonstatutory mitigators: (1) Sexton was capable of kindness to children and would even act as Santa Claus at Christmas; (2) Sexton

> was the pastor of a church attended by family and friends; (3) Sexton often helped his mother and sisters with household chores and repairs; (4) Sexton's father died when the defendant was ten years old, depriving him of a male role model; and (5) the codefendant, Willie, received a lesser sentence of twenty-five years' imprisonment. Finding that the aggravators outweighed the mitigators, the trial court sentenced Sexton to death.
>
> Sexton v. State, 775 So.2d 923, 926-929 (Fla. 2000).[1]

More specifically and as to the Penalty Phase of the re-trial, the State presented the following evidence in support of a death sentence:

A 1963 certified conviction for robbery by Mr. Sexton was entered into evidence. (R Vol. XI, 889). Teresa Boron testified that Joel Good was her nephew. (R Vol. XI, 890). She had prepared a written statement, which she read to the jury. (R Vol . XI, 891). Joel had lost both his parents by age thirteen. (R Vol. XI, 891). Joel and his brother were then taken care of by their grandparents and aunts. (R Vol. XI, 891). Joel lived with Mrs. Boron from his junior year in high school until he was age 20 and got his first apartment. (R Vol. XI, 891). He was treated like her son. (R Vol. XI, 891).

Joel suffered from learning disabilities and was termed "slow." (R Vol. XI, 891). Although Joel had difficulty in school and with social skills, he was kind and

[1]The defendant notes that this Court listed only five nonstatutory mitigators as being considered and found by the trial court, having failed, in error, to list the sixth nonstatutory mitigator of "at times had a normal, loving relationship with his children." Sexton v. State, 775 So.2d 923, 929 (Fla. 2000); PCR Vol. 1 p. 42.

had goodness of heart. (R Vol. XI, 891). Joel was kind and gentle. (R Vol. XI, 893). Joel was head over heels in love with Pixie. (R Vol. XI, 892). He married her when she was pregnant to do the right thing. (R Vol. XI, 892). Joel couldn't wait for the birth of the child. (R Vol. XI, 8 92). Mrs. Boron saw the baby once, when he was only a couple of weeks old and Joel was on cloud nine. (R Vol. XI, 893). Joel kissed Mrs. Boron goodbye and said that he would always love her when he left. (R Vol. XI, 893). That was the last time Mrs. Boron saw Joel or the baby alive. (R Vol. XI, 893). According to Mrs. Boron, Joel loved his family very much and would have been a good father to his child. (R Vol . XI, 893). Instead, a year after his disappearance, he returned to Ohio in a sealed vault with his baby son in his arms. (R Vol. XI, 893).

The family grieves for Joel. (R Vol. XI, 894). His disappearance made his grandfather's emphysema worse. (R Vol. XI, 894). Since his death his brother has had trouble keeping jobs and with alcohol abuse. (R Vol. XI, 894). Joel's death was like a wound that won't heal, just when it gets better, something like this new trial come along and it's fresh all over. (R Vol. XI, 895).

Following this testimony, the defense moved for a mistrial, noting that the witness was weeping during her testimony. (R Vol. XI, 895). Two jurors were also weeping and several more looked about ready to cry. (R Vol. XI, 895). The motion was denied. (R Vol. XI, 896).

Asby Barrick testified that he was Joel's uncle. (R Vol. XI, 896). Joel's death affected his brother Daniel deeply. (R Vol. XI, 897).

Joel had a hard time growing up because he was slow. (R Vol. XI, 897). Joel was determined to graduate from high school and did. (R Vol. XI, 897). Joel loved Pixie and his baby, Skipper. He finally had what he always wanted, a family of his own. (R Vol. XI, 897).

The defense presented the following testimony in support of a life sentence:

Teresa Boron was called as a witness. (R Vol. XI, 898). She testified that she met Mr. Sexton when he was planning to move out of state and wanted Joel to go with them. (R Vol . XI, 898). Mr. Sexton was going to Montana to live on a ranch that he had purchased for 1.9 million dollars. (R Vol. XI, 900). Mr. Sexton said the ranch had a mansion and a helicopter pad. (R Vol. XI, 900). Mr. Sexton wanted Joel to work at the guard station to make sure no one got to the mansion. (R Vol. XI, 900).

Mr. Sexton told Mrs. Boron that he was an American Indian. (R Vol. XI, 900). Mr. Sexton also showed her his palm, telling her that he and his daughter Lana were the only two people with a special mark. (R Vol . XI, 901). She had to be quiet about this or cult members would come and kill them for their special powers. (R Vol. XI, 901).

Mr. Sexton showed Mrs. Boron a picture of something he called "Futuretrons." (R Vol. XI, 902). Mr. Sexton said that Burger King wanted to sell these little toys and have him go around the United States in a vehicle that looked like them. (R Vol. XI, 902). This whole thing had something to do with the marks he and Lana had on their palms. (R Vol. XI, 902). Mr. Sexton told her that his daughter Kimberly had a mark on her leg shaped like a Christmas tree. (R Vol . XI, 903). When Mrs. Sexton had been pregnant with Kimberly, a Christmas tree had fallen over and the baby had jumped. (R Vol. XI, 903). Mr. Sexton was an odd person. (R Vol. XI, 903).

Joel and Pixie lived together in Ohio for two years after their prom. (R Vol. XI, 903). Mrs. Boron had heard that members of the family were violent to Joel during that period, but she never heard anything to the effect that Mr. Sexton was ever violent toward Joel. (R Vol. XI, 904).

Over objection, on cross-examination, Mrs. Boron stated that at her initial meeting with Mr. Sexton he asked how Joel's parents had taken care of things for him when they had died. (R Vol . XI, 907). Mr. Sexton asked if they had insurance. (R Vol . XI, 908). Mrs. Boron also said that the boys got Social Security, but did not tell him how much. (R Vol. XI, 908).

Dr. Irving Weiner is a clinical psychologist. (R Vol. XI, 910-912). He met with Mr. Sexton, evaluated him, and administered a battery of tests to him. (R

Vol. XI, 913). Dr. Wiener also reviewed Mr. Sexton's medical records, depositions, and statements given by Mr. Sexton. (R Vol. XI, 914).

Mr. Sexton's IQ was in the low 80's, which is low average level. (R Vol. XI, 916). On other measures he tested into the 25th percentile rank. (R Vol. XI, 916). On tests designed to measure the ability to concentrate, pay attention, and remember, Mr. Sexton fell into a range between 16% and 2%. (R Vol. XI, 916). Dr. Weiner's conclusion was that Mr. Sexton suffered from some type of neurological impairment relating to attention, memory, and concentration. (R Vol. XI, 917). There did not appear to be malingering. (R Vol. XI, 918).

According to Dr. Weiner, memory dysfunction such as Mr. Sexton's is ordinarily related to brain damage. (R Vol. XI, 919). Other testing showed no schizophrenia, paranoia, or other mental illness. (R Vol. XI, 924). Mr. Sexton did show a tendency toward hypochondria. (R Vol. XI, 923). Mr. Sexton appeared to be a guarded person who did not want to reveal much about himself. (R Vol . XI, 926). Dr. Weiner found that to a reasonable degree of forensic psychological certainty, Mr. Sexton suffered from brain dysfunction. (R Vol. XI, 927). People with this problem have limited tolerance for stress and diminished self-control. (R Vol. XI, 927). Dr. Weiner referred Mr. Sexton for a PET scan. (R Vol. XI, 927). Dr. Weiner acknowledged that there was no history of mental illness in the Sexton

family. (R Vol. XI, 930). Mr. Sexton's problems would not prevent him from planning a murder. (R Vol. XI, 930).

Dr. Frank Wood, a neuropsychologist, performed a PET scan on Mr. Sexton. (R Vol. XI, 967). He also reviewed an MRI scan taken of Mr. Sexton's head in 1991 following a motor vehicle accident. (R Vol. XI, 968). PET scans measure brain activity; MRI and CT scans measure brain structure. (R Vol. XI, 972). The PET scan showed that Mr. Sexton has lower activity in the right, lower section of his brain. (R Vol. XI, 975). These low areas are in the limbic section of the brain. (R Vol. XI, 975). The limbic area includes the temporal lobes, the basal ganglia, the cutaneum, and caudate nucleus and related structures. (R Vol. XI, 976-977). These areas register emotional responses for memory. (R Vol. XI, 977). Mr. Sexton's limbic system was dysfunctional and not normal. (R Vol. XI, 978). The impact on a person with a dysfunctional limbic portion of their brain is that they do not have normal emotional responses to events. (R Vol. XI, 978).

The PET scan also confirmed an earlier abnormality that had appeared in an MRI done in 1991. (R Vol. XI, 979). The MRI had shown a disease in the top half of Mr. Sexton's brain. (R Vol . XI, 979). The PET scan showed that there is damage and disease in the brain – structurally on the top half and functionally on the bottom half. (R Vol. XI, 979). Dr. Wood's opinion to a reasonable degree of certainty as recognized in the field of neuropsychology was that Mr. Sexton had a

diseased brain. (R Vol. XI, 983). Because of his dysfunction Mr. Sexton is not normally responsive to emotional situations, his emotional responsiveness is outside normal limits, and is what would be considered bizarre and strange. (R Vol. XI, 983). On a day to day basis, he would have trouble with memory. (R Vol. XI, 983). Mr. Sexton functions in the present and doesn't have the continuity of information from the recent past that most people do. (R Vol. XI, 984). Mr. Sexton's ability to plan would be impaired. (R Vol. XI, 985). Persons with this dysfunction will also tend to get stuck on a theme and repeat it constantly, even if it is not advantageous to them. (R Vol. XI, 986).

On cross, Dr. Wood explained that there are two portions of the brain which control or affect homicidal ideation or thought processes. (R Vol. XI, 988). These two portions are the frontal lobes and the limbus system. (R Vol. XI, 988). According to Dr. Wood, Mr. Sexton's limbic dysfunction made him more at risk to committing a homicide and made his ability to resist doing it less strong. (R Vol. XI, 990). Mr. Sexton's ability to appreciate the criminality of what he did was impaired. (R Vol. XI, 990).

Nellie Hanft is Mr. Sexton's sister. (R Vol. XI, 939). Mrs. Hanft testified that her and Mr. Sexton's father was a coal miner and neither parent was an Indian. (R Vol. XI, 939). Mr. Sexton's father died when he was nine. (R Vol. XI, 940).

Nellie would spend time with Mr. Sexton's family. (R Vol. XI, 942). She never observed signs of sexual abuse. (R Vol. XI, 942). She did not think the children were afraid. (R Vol. XI, 942).

Mr. Sextons' mother was disabled. (R Vol. XI, 943). Mr. Sexton helped her a lot. (R Vol. XI, 943). Mr. Sexton also helped Mrs. Hanft with her disabled husband and in helping her around her house. (R Vol. XI, 944). Mr. Sexton was a minister; he often preached to poor people. (R Vol. XI, 945). Mr. Sexton played Santa Claus. (R Vol. XI, 946). Mr. Sexton was kind to his sister, who was slow. (R Vol. XI, 946).

Caroline Rohrer is Mr. Sexton's niece. (R Vol. XI, 952). Her child would visit the Sexton home and play with the Sexton children. (R Vol. XI, 953). Mr. Sexton would do work for her. (R Vol. XI, 953). Mr. Sexton was kind to her and helped her. (R Vol. XI, 956).

A hearing regarding allocution was held on October 5, 1998. The following summarizes the argument made at that hearing:

Defense counsel argued that a sentence of death would not be proportional in this case. (R Vol. XI, 1038). Defense counsel submitted that although Willie Sexton was retarded, there was not a great deal of difference between Willie's functioning ability and that of Mr. Sexton. (R Vol. XI, 1039). Counsel directed the court's attention to the memorandum of law that had been filed in support of a life

sentence, and pointed out the psychological testimony regarding Mr. Sexton's brain injury, the stress of losing his children, all rising to the level of the statutory mental mitigator. (R Vol. XI, 1041).

Defense counsel argued that two of the aggravators could be blended together – witness elimination and CCP. (R Vol. XI, 1041). Counsel conceded that witness elimination applied, but argued CCP did not. (R Vol. XI, 1042). Also in preparation for sentencing, a Memorandum in Support of a Life sentence was filed on November 17, 1998. (R Vol. Ill, 359-370). The State Sentencing Memorandum was filed on November 18, 1998. (R Vol. III, 370-383). Mr. Sexton appeared for sentencing on November 18, 1998. Mr. Sexton was sentenced to death on November 18, 1998. No additional argument or testimony was held at the sentencing hearing.

POST-CONVICTION PROCEEDING AND 2006 EVIDENTIARY HEARING

During the April 6, 2006 evidentiary hearing, penalty phase counsel Robert Fraser testified that during the sentencing phase of the retrial, his theory of defense was to focus on Defendants possible brain damage. He stated that "[t]he theory of defense is that the PET scan conclusively showed that several portions of his brain were not functioning. (PCR Vol. 18 pp. 180-181).

He further said that he thought Theresa Boron's anecdotal evidence was that the way he acted, it was pretty clear that he had parts of his brain that weren't functioning. Counsel was told his client "had this idea that he was trying to sell to Burger King about some line in his palm, and one of his daughters had the same thing, and you sit there and listen to it and you shake your head and think, okay, I don't think anybody could listen to that evidence and not see that there's something seriously wrong with Eddie Lee Sexton. I think that was abundantly clear in the trial, given his actions and given his PET scan and give this anecdotal evidence." (PCR Vol. 18 pp. 181). Earlier, counsel explained that "[b]ack then we thought that brain injury was a pretty good mitigator. And if you could demonstrate it graphically, which the PET scan could, then that would be pretty heavy evidence in terms of mitigation, and so I did it." (PCR Vol. 18 p. 158).

Mr. Fraser testified that he decided not to present certain mental health mitigation during the new penalty phase where Dr. Michael Maher, M.D., a forensic psychiatrist who was retained for the first penalty phase, previously found that Defendant was a "sadistic sexual psychopath" and Mr. Fraser believed that information "would be tantamount to stipulating to death." (PCR Vol. 18 pp. 216-217). Mr. Fraser's testimony was supported by a letter, dated November 18, 1994, from Dr. Maher to Mr. Fraser, wherein Dr. Maher wrote that he "examined Mr. Sexton thoroughly with regard to possible mental health defenses and found none

that would be even remotely possible." (PCR Vol. 13 pp. 2504-2505). Mr. Fraser also testified that based upon his investigation into Defendant's childhood and background, there was no indication Defendant had anything but a normal childhood and no other information of "persuasive value." (PCR Vol. 18 p. 165). As to mitigation concerning the appellant's childhood years, Fraser testified that the only ones he thought had any persuasive value were the facts that his father died at age 10 and that his mother became a partial invalid. He didn't have any reason that he could recall to believe that his client lived in any particular "squaller" [sic], that he didn't eat well, he didn't wear clothes – he didn't remember any deprivation at all from his childhood – it certainly wasn't deprived. (PCR Vol. 18 p. 167).

Mr. Fraser also testified that he attempted to interview Defendant's family and friends, but they were extremely reticent, stating: "[h]is family was kind of a study in shifting alliance. One day his brother might love him; the next day or the next month or the next year he would probably hate him. And then, of course, so many people - - so many members of his family, particularly his children testified repeatedly that they suffered at his hands sexual batteries. He doesn't seem to have many friends or he didn't seem to have many friends. He was just - - it was just very difficult. For example, my memo of the interview with his wife said all of the

information in the memo had to be drawn out. is volunteered. This goes back to what I was telling Mr. Strain how in some families they just close the door and they don't let you into the closet. They don't let you see the skeletons. This is probably the worst case of this type I had ever seen. It was the most impenetrable." (PCR Vol. 18 p. 196).

The testimony of defense expert, Janet Vogelsang, was similar to Mr. Fraser's testimony as to what he discovered about Defendant's childhood as well as his friends' and family's lack of disclosure, and she testified that such lack of disclosure was not unusual. (PCR Vol. 19 pp. 351-352). David McCraney, M.D., Defendant's forensic neurologist, similarly testified during his June 8,2005 deposition that he "frame[d] this as a deficiency of the experts rather than trial counsel" in responding to a question about what trial counsel did not do that he could have done as far as either discovering Mr. Sexton's medical condition or presenting it to the jury. (PCR Vol. 3 p. 511).

After conducting a biopsychosocial assessment of appellant, Ms. Vogelsang further opined to the following:

> [Defendant] was born into a family and a family history that was economically and culturally extremely limited. Mr. Sexton was also born to a mother who was in very poor health. She was sick at the time of his birth and she was bedridden for the first year of his life, and also to a father who was largely absent, not only at his birth but during the next 10 years.

> My third conclusion was that in terms of child development, there was no adult present in the home on a consistent who could support, guide or assist Mr. Sexton in mastering child developmental stages. And that left him guessing at a lot of the behaviors in terms of what's normal and what is not normal. And finally, that was a home environment where there was some extreme neglect and that neglect placed him at a high risk to end up in some sort of very serious trouble, possible incarcerations at some point in his life.

(PCR Vol. 19 p. 321). Ms. Vogelsang testified that her conversations with Defendant's family members revealed that Defendant may have suffered some physical abuse at the hands of his brother, Otis Sexton, who was jealous of Defendant and may have repeatedly locked him in a closet, hit him with fists and sticks, and once buried him in a hole. (PCR Vol. 19 p. 331). However, none of that physical abuse is documented, but based entirely on family member reporting. (PCR Vol. 19 p. 343-344). Defendant himself advised Ms. Vogelsang only that Otis was "rough" on him, but did not discuss repeated physical abuse by Otis Sexton. (PCR Vol. 19 p. 341). As to the credibility of Defendant's family members, Ms. Vogelsang noted that she questioned "all of the members of this family in terms of the information that I gathered from them because this is certainly a family where there is a pattern of accuse and deny" and accounted for that in her opinion. (PCR Vol. 19 pb343-344).

Appellant also provided the deposition testimony of David McCraney, M.D., a forensic neurologist. Dr. McCraney criticized Dr. Weiner's evaluation, but also

stated that Dr. Weiner "lucked out" and "wound up stumbling onto the correct conclusion." Dr. McCraney stated that Defendant's brain damage was a "no-brainer" and Dr. Weiner's evaluation should have focused more on intent formulation or Defendant's lack of control over his behavior, as opposed to the PET scan. (PCR Vol. 3 pp. 471-518).

The State's expert, Barbara Stein, M.D., agreed with Dr. McCraney that Defendant had a family history of mental disorders, possible mental retardation, and possible learning disabilities, as well as a limited education and multiple sclerosis. Dr. Stein also testified that she evaluated Defendant and found that, at the time of the instant crimes, he suffered from paraphelia not otherwise specified, a sexually deviant disorder, as well as an antisocial personality disorder with histrionic personality traits. (PCR Vol. 18 pp. 251-254; 257-260). Dr. Stein further testified that neither disorder is a major psychiatric condition and opined that neither disorder rose to the level of an extreme mental or emotional disturbance that influenced Defendant's conduct at the time of the crimes, substantially impaired his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law at the time of the crimes, prevented him from knowing right or wrong at the time of the crimes, prevented him from engaging in goal-directed behavior, nor prevented him from being able to organize his thoughts or to reason. (PCR Vol. 18 pp. 253-259). Dr. Stein also

testified that her opinions as to Defendant's mental health issues were unchanged even in light of the additional potential mitigation evidence presented by Ms. Vogelsang. Dr. Stein testified that Defendant had a past history of alcohol and prescription medication dependence, but he had stopped using both prior to arriving in Florida and prior to the date of the offenses. That past history did not prevent Defendant from knowing right or wrong at the time of the crime, prevent him from engaging in goal-directed behavior or from being able to organize his thoughts or to reason, substantially impair his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law at the time of the crimes, produce an extreme mental or emotional disturbance that influenced his conduct at the time of the crimes, and did not adversely affect his conduct at the time of the crimes. Dr. Stein testified that Defendant's multiple sclerosis did not affect or influence his conduct on the date of the crimes, did not influence or affect his judgment or ability to carry out goal-directed behavior at the time of the crimes, did not produce an extreme mental or emotional disturbance that influenced his conduct at the time of the crimes and did not substantially impair his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law at the time of the crimes. (PCR Vol. 3 pp. 285-286).

SUMMARY OF ARGUMENT

1. Penalty phase counsel was obligated to present to the sentencing jury all reasonably available evidence in mitigation unless there was a strong strategic reasons to forego some portion of such evidence. There was no competent, substantial evidence showing that counsel's "rifle" approach (with the evidence of neurological damage) was such a strong strategic reason to ignore other mitigation evidence. The court ignored the role of the sentencing phase jury, and its eight to four vote for death, when it simply, and without explanation, found that the penalty phase was not unreliable when considering the potential mitigation presented during the evidentiary hearings, including evidence of Defendant's early childhood background in impoverished conditions, his disadvantaged or deprived childhood, the possible physical abuse inflicted by Otis Sexton, his limited education, family history of mental illness, retardation and learning disabilities, history of alcohol and narcotic dependence, and multiple sclerosis.

2. When the postconviction trial court denied the guilt phase claims in appellant's Rule 3.851 motion without an evidentiary hearing and without opportunity for argument or appeal, it wrongfully ignored this Court's case law and rules of procedure.

3. With the court below limiting the evidentiary hearing to the one claim involving the penalty phase of the retrial, the appellant was not able to establish a guilt phase record of trial counsels' shortcomings or their legal consequences. Consequently, it was in error that the court denied the cumulative effects claim.

4. Florida's restrictions on post-trial juror interviews are an equal protection violation because criminal defense counsel in Florida are treated differently, unfairly and unequally compared to academics, journalists and those lawyers not connected with a particular case. Consequently, it was in error that the court denied the jury interview claim.

5. While appellant recognizes such rulings as Johnson v. State and Diaz v. State, execution by lethal injection is arguably cruel and unusual punishment when based on certain eyewitness accounts and available scientific evidence regarding the hazards of lethal injection.

6. Presented to preserve the claim for federal review, appellant argues that his Eighth Amendment right against cruel and unusual punishment will be violated as he may be incompetent at time of his execution.

ARGUMENT I

THE POSTCONVICTION COURT ERRED IN DENYING THE CLAIM THAT TRIAL COUNSEL WERE PREJUDICIALLY INEFFECTIVE IN THE PENALTY PHASE BECAUSE THEY FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE, FAILED TO PROVIDE THE MENTAL HEALTH EXPERTS WITH THIS MITIGATION, AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE.

Especially where the changed votes of only two of the jurors would have made the sentencing recommendation for life instead of death, the question this Court must answer is whether defense counsel were prejudicially ineffective for presenting such an obviously sparse record of nonstatutory mitigation at trial.

This Court applies a mixed standard of review to ineffective assistance of counsel claims, deferring to the trial court for findings of fact, but reviewing questions of law *de novo*. Occhicone v. State, 768 So.2d 1037, 1045 (Fla. 2000). The Court will not substitute its judgment for that of the postconviction trial court on questions of fact if that court's findings are supported by competent, substantial evidence. Walls v. State, 926 So.2d 1156, 1165 (Fla. 2006).

The contrast between the efforts defense counsel made in developing and presenting statutory and nonstatutory mitigation is simply unfathomable. The trial court found one statutory mitigator, that Sexton was under an extreme mental or emotional disturbance at the time the murder was committed, and gave this mitigator great weight. To be a criminal defense pioneer in the use of a PET scan

for successfully presenting neurological evidence for the statutory mitigator found by the Court is just incongruous with the slight and unreasonable effort made to present defendant's nonstatutory mitigation under F.S. 921.142(7)(h).

The trial court found and gave some weight to the "several" nonstatutory mitigators presented by defense counsel: (1) Sexton was capable of kindness to children and would even act as Santa Claus at Christmas; (2) Sexton was the pastor of a church attended by family and friends; (3) Sexton at times had a normal, loving relationship with his children; (4) Sexton often helped his mother and sisters with household chores and repairs; (5) Sexton's father died when the defendant was ten years old, depriving him of a male role model; and (6) the codefendant, Willie, received a lesser sentence of twenty-five years' imprisonment. (PCR Vol. 1 p. 42).[1]

Trial counsel addressed his 1998 tactical and strategic reasoning for presenting such a sparse record and argument at the evidentiary hearing:

[1]In the defendant's first trial in 1994, the trial court found the same aggravating factors and, in mitigation, that defendant was under emotional strain due to the efforts of Ohio officials to take custody of his children; that he acted in a peculiar fashion at times; that he demonstrated some human qualities; that he played Santa Claus on at least one occasion and appeared to some as normal; and that letters from family members described defendant as kind, respectful, and helpful. The court found that the evidence did not support the claim that Sexton was disabled and dependent on pain medication. Sexton v. State, 697 So.2d 833, 835-836 (Fla. 1997).

> "[G]enerally, back then I was much more conservative in what I would serve up to a jury than I am now. I have come to the conclusion over the last several of these that you just throw everything into the pot. Back then I was trying to use a rifle as opposed to a shotgun, more so than now..." (PCR Vol. 18 pp. 228-229).
>
> "The theory of defense is that the PET scan conclusively showed that several portions of his brain were not functioning." (PCR Vol. 18 pp. 180-181).
>
> "I remember thinking there isn't much in terms of his childhood for a couple of reasons, and I think I got the idea from Nellie Hampf, that his childhood was normal, happy, all of that, that was at least one person I got the information from, and then the fact that Eddie was older seemed to strain the connection between childhood trauma, problems and so forth and his behavior 40 odd years later. So I hope that answered the question." (PCR Vol. 18 p. 165).
>
> "If I don't think a factor has a persuasive value, then I'm not going to clutter up the record. I'm not going to clutter up the jury's perception throwing in a lot of extraneous garbage that doesn't have any probative value." (PCR Vol. 18 p. 166).
>
> "Absolutely meaningless." (answering a question on cross as to his view of whether evidence of the defendant's blindness in one eye and diabetes may have been persuasive in light of the abusive conduct evidence admitted at trial). (PCR Vol. 18 p. 227).

The reality is that counsel's "rifle" approach missed the mark of proper, and therefore, reasonable, handling of penalty phases in capital cases – in 1998 if not also in 1994. "[T]he obligation to investigate and prepare for the penalty phase portion of a capital case cannot be overstated–this is an integral part of a capital case." Henry v. State, 937 So.2d 563, 570 (Fla. 2006), quoting State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002). Additionally, counsel's notions as to the potential

"persuasiveness" of medical or other mitigation improperly inserted his personal views into that of the sentencing jury's role.

Long before the time of the defendant's 1998 retrial, capital litigation attorneys and experts were well aware of and used complete social histories when presenting mitigation to capital juries. Professor Haney wrote in 1995 that:

> The social history of the defendant has become the primary vehicle with which to correct the misinformed and badly skewed vision of the capital jury ... mitigation evidence is not intended to excuse, justify or diminish the significance of what they [i.e., capital defendants] have done, but to help explain it, and explain it in a way that has some relevance to the decision capital jurors must make about sentencing ... no jury can render justice in the absence of an explanation. In each case, the goal is to place the defendant's life in a larger social context and, in the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically-important events has been shaped and influenced by them.
>
> Craig Haney, "The Social Context of Capital Murder: Social Histories and the Logic of Mitigation." 35 Santa Clara L.Rev. 547, 559-61 (1995).

A decade before this trial, the 1989 ABA Guidelines provided that "counsel should present to the sentencing entity or entities *all reasonably available* evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." 11.8.6(A)(emphasis added). Among the topics counsel should consider presenting are the ... "family and social history" [11.8.6(B)(5) ... [and] "expert testimony concerning [any of] the above and the resulting impact on the

client..." 11.8.6(B)(8). American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Comment D, Guideline 11.8.2 (1989). See also Lee Norton, *Capital Cases: Mitigation Investigations*, The Champion, National Association of Criminal Defense Lawyers (May, 1992).

With the "rifle" approach, Mr. Fraser never made any reasonable tactical or strategic choices in 1998 about what to give to the jury or about limiting the type or amount of nonstatutory mitigation. By his own explanation, he never "threw everything into the pot" until making "the conclusion [to do so] over the last several of these [death penalty cases as a defense lawyer]." His approach went against prevailing standards and provided unreasonable and ineffective assistance of counsel. As Justice O'Connor wrote in Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003):

> In this case, as in Strickland, petitioner's claims stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence. (Citation omitted). Here, as in Strickland, counsel attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue alternate strategy instead. In rejecting Strickland's claim, we defined the deference owed such strategic judgments in terms of the adequacy of the investigations supporting those judgments:
>
> > "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Citation omitted).

Wiggins at 2535.

If counsel had used the "shotgun" approach in 1998, additional and compelling mitigation could have been presented to the jury charged with the responsibility of recommending whether Mr. Sexton would be sentenced to life or death. For example, at the evidentiary hearing, Dr. Stein, the State's expert, agreed with Dr. McCraney that Sexton had:

1. a family history of mental disorders;

2. a family history of possible mental retardation;

3. a limited education; (PCR Vol. 18 pp. 288);

4. a family history of possible learning disabilities;

5. multiple sclerosis[2] (PCR Vol. 18 p. 289).

[2]As described by the National Institute of Neurological Disorders and Stroke (an institute of the National Institutes of Health):

> Multiple sclerosis is an unpredictable disease of the central nervous system. It can range from relatively benign to somewhat disabling to devastating, as communication between the brain and other parts of the body is disrupted.... Most people experience their first symptoms of MS between the ages of 20 and 40; the initial symptom of MS is often blurred or double vision, red-green color distortion, or even blindness in one eye. Most MS patients experience muscle weakness in their extremities and difficulty with coordination and balance. These symptoms may be severe enough to impair walking or even standing. In the worst cases, MS can produce partial or complete paralysis. Most people with MS also exhibit paresthesias, transitory abnormal sensory feelings such as numbness, prickling, or 'pins and needles' sensations. Some may also experience pain. Speech

She also testified that the neuropsychological testing done at trial was not adequate. (PCR Vol. 18 pp. 289-290). She similarly stated that she diagnosed antisocial personality disorder but explained that ASPD is something that develops in late adolescence and early adulthood; while the exact causes are unknown, psychiatrists believe from research that there are biological, genetic, psychological and psychosocial or environmental type influences and she agreed that no one chooses to be antisocial or to acquire those traits – that the traits of ASPD are something that someone has whether they want them or not. (PCR Vol. 18 p. 290).

If counsel had used the "shotgun" approach in 1998, he could also have told the jury about his client's early childhood background in impoverished conditions (Morgan v. State, 537 So.2d 973 (Fla. 1989)); his client's disadvantaged or deprived childhood (DuBoise v. State, 520 So.2d 260 (Fla. 1988)); his client's educational difficulties (Neary v. State, 384 So.2d 881 (Fla. 1980)); his client's utilization of alcohol and drugs (Buford v. State, 570 So.2d 923 (Fla. 1990)); and his client's good behavior during trial (Parker v. State, 476 So.2d 134 (Fla. 1985)).

> impediments, tremors, and dizziness are other frequent complaints. Occasionally, people with MS have hearing loss. Approximately half of all people with MS experience cognitive impairments such as difficulties with concentration, attention, memory, and poor judgment, but such symptoms are usually mild and are frequently overlooked. Depression is another common feature of MS. ... There is no cure for MS.
>
> http://www.ninds.nih.gov/disorders/multiple_sclerosis.htm

The details for the pre-trial mitigation listed here were provided and confirmed by Otis Sexton (PCR Vol. 3 pp. 532-535) as well as Jan Vogelsang's descriptions of the effect of the risk factors appellant faced as a child (PCR Vol. 19 pp. 337-338).

In the context of what was missing from trial counsels' work and the retrial, Professor Slobogin's observations are applicable. He references the fact that:

> "[a] number of studies indicate that genes, organic processes, and early childhood experiences play a very influential role in criminal behavior ..." and there is extensive research literature indicating that "most character formation occurs in the developmental years leading up to the age 14, when the person can hardly be held responsible for how he or she turns out."
>
> Christopher Slobogin, Stephen C. O'Connell Professor of Law, University of Florida Levin College of Law, "The Civilization of the Criminal Law," pp. 33-35, Current Working Papers, http://www.law.ufl.edu/faculty/publications/workingpers.html (July 14, 2005).

In a lengthy, structured order, the postconviction court's findings included the following:

> The Court finds the testimony of Mr. Fraser to be highly credible and the evidence to be persuasive. Consequently, after considering Defendant's Motion, the State's Response, the testimony and evidence presented during the April 6, 2006, May 12, 2006 and July 28, 2006 evidentiary hearings, as well as the closing and rebuttal statements of counsel, the Court finds Mr. Fraser performed a reasonable investigation into Defendant's childhood and background in order to discover and present potential mitigation to the jury and the Court as well as to provide that information to defense experts. The Court further notes that a deficiency in the results of that investigation is attributable to unavailable records and reticent witnesses. Counsel's investigation is not deemed deficient simply because family members

are now -12 years after the murder and 8-10 years after the penalty phases - providing potential mitigation information. Additionally, the Court finds counsel was aware of other potential mitigation, such as Defendant's military service, mental health issues and physical conditions such as multiple sclerosis, but made the strategic decision to focus on Defendant's brain damage instead; that was an informed decision based on a reasonable investigation of the available mitigating evidence. Similarly, counsel's decision to focus on brain damage during the second penalty phase was a reasonable tactical decision in light of the negative mental health evaluation received during the first penalty phase. See Ragsdale v. State, 798 So. 2d 713 (Fla. 2001) ("In [Asav v. State, 769So. 2d 974, 988 (Fla.2000)], we [the Florida Supreme Court] also found that defendant's attorney was not deficient where after receiving an initial unfavorable report from the examining psychologist the attorney decided to discontinue his investigation for mental mitigation evidence."). Consequently, the Court finds Defendant has failed to show that counsel performed deficiently under Strickland.

Additionally, the Court finds Defendant has failed to show that counsel's allegedly deficient performance prejudiced the outcome of the proceedings. After reviewing the evidence in aggravation against the totality of available mitigating evidence the Court finds the penalty phase was not rendered unreliable.

(PCR Vol. 4 pp. 773-774).

. . .

Most of the information regarding Otis Sexton's abuse of Defendant came from their brother, David L. Sexton. However, the Court doubts the credibility of his April 20, 2005 deposition testimony, especially in light of his prior testimony during the August 9,1994 deposition.

(PCR Vol. 4 pp. 776).

. . .

[T]he Court further notes that it [gave] great weight to the statutory mitigator that Defendant was under the influence of extreme mental or emotional distress at the time the capital felony was committed and in its Sentencing Order found that "the anecdotal evidence of exceedingly bizarre episodes and incidents too numerous to include herein, considered together with the evidence of brain dysfunction

show a man with low-normal intelligence and inability to cope placed under the stress of losing his children to the Ohio authorities and turning desperate." (See Sentencing Order, attached).

Additionally, the State's expert, Barbara Stein, M.D., agreed with Dr. McCraney that Defendant had a family history of mental disorders, possible mental retardation, and possible learning disabilities, as well as a limited education and multiple sclerosis. However, Dr. Stein also testified that she evaluated Defendant and found that, at the time of the instant crimes, he suffered from paraphelia [sic] not otherwise specified, a sexually deviant disorder, as well as an antisocial personality disorder with histrionic personality traits. (See May 12,2006 transcript, pp. 13-16,19-22, attached). Dr. Stein further testified that neither disorder is a major psychiatric condition and opined that neither disorder rose to the level of an extreme mental or emotional disturbance that influenced Defendant's conduct at the time of the crimes, substantially impaired his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law at the time of the crimes, prevented him from knowing right or wrong at the time of the crimes, prevented him from engaging in goal-directed behavior, nor prevented him from being able to organize his thoughts or to reason. (See May 12,2006 transcript, pp. 15-24, attached). Dr. Stein also testified that her opinions as to Defendant's mental health issues were unchanged even in light of the additional potential mitigation evidence presented by Ms. Vogelsang. (See May 12, 2006 transcript, pp. 53-55, attached).

Dr. Stein testified that Defendant had a past history of alcohol and prescription medication dependence, but he had stopped using both prior to arriving in Florida and prior to the date of the offenses. (See May 12,2006 transcript, p. 18, attached). That past history did not prevent Defendant from knowing right or wrong at the time of the crime, prevent him from engaging in goal-directed behavior or from being able to organize his thoughts or to reason, substantially impair his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law at the time of the crimes, produce an extreme mental or emotional disturbance that influenced his conduct at the time of the crimes, and did not adversely affect his conduct at the time of the crimes. (See May 12, 2006 transcript, pp.

17-19, attached). Finally, Dr. Stein testified that Defendant's multiple sclerosis did not affect or influence his conduct on the date of the crimes, did not influence or affect his judgment or ability to carry out goal-directed behavior at the time of the crimes, did not produce an extreme mental or emotional disturbance that influenced his conduct at the time of the crimes and did not substantially impair his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law at the time of the crimes. (See May 12, 2006 transcript, pp. 47-48, attached).

The Court finds the testimony of Dr. Stein to be highly credible. Although the Court agrees with Defendant's argument that the additional mitigation evidence - i.e., Defendant's early childhood background in impoverished conditions, his disadvantaged or deprived childhood, the possible physical abuse inflicted by Otis Sexton, his limited education, family history of mental illness, retardation and learning disabilities, history of alcohol and narcotic dependence, and multiple sclerosis - in the instant matter does not require a nexus to the crime in order to be considered mitigating, the Court notes that it was unlikely to have been given much weight otherwise. Such mitigation evidence would likely have been assigned some, little or no weight.

Consequently, after considering the potential mitigation presented during the evidentiary hearings, including evidence of Defendant's early childhood background in impoverished conditions, his disadvantaged or deprived childhood, the possible physical abuse inflicted by Otis Sexton, his limited education, family history of mental illness, retardation and learning disabilities, history of alcohol and narcotic dependence, and multiple sclerosis, as well as the mitigators and aggravators previously considered and found by this Court, the Court finds that the penalty phase was not unreliable.1 There is no reasonable probability that such additional mitigation evidence would have outweighed the aggravating circumstances and resulted in the imposition of a life sentence. As such, no relief is warranted on Claim II.

> (FN1 Although Defendant claims in his Motion that counsel could have told the jury of his potential and ability to be rehabilitated, his positive jail record after

> arrest and through trial, and his good record in prison, Defendant has failed to provide any evidence of those potential mitigators. However, even if such evidence were presented and considered, the Court still finds the penalty phase was not unreliable.)

(PC R Vol. 4, pp. 777-779).

The postconviction court's findings are not supported by competent, substantial evidence. The court did not explain or otherwise describe the basis for finding that counsel made a strategic decision to focus on Defendant's brain damage instead of other potential mitigation, such as Defendant's military service, mental health issues and physical conditions such as multiple sclerosis.

The court did not explain or otherwise describe the basis for finding that counsel made an informed decision based on a reasonable investigation of the available mitigating evidence.

The court ignored the role of the sentencing phase jury, and its eight to four vote for death, when it simply, and without explanation, found that the penalty phase was not unreliable when considering the potential mitigation presented during the evidentiary hearings, including evidence of Defendant's early childhood background in impoverished conditions, his disadvantaged or deprived childhood, the possible physical abuse inflicted by Otis Sexton, his limited education, family

history of mental illness, retardation and learning disabilities, history of alcohol and narcotic dependence, and multiple sclerosis.

In sum, while the court was not persuaded, it failed to explain why the votes of two additional jurors for a life sentence was not a reasonable probability if the jury had heard the evidence of Defendant's early childhood background in impoverished conditions, his disadvantaged or deprived childhood, the possible physical abuse inflicted by Otis Sexton, his limited education, his family history of mental illness, retardation and learning disabilities, his history of alcohol and narcotic dependence, and his blindness and multiple sclerosis.

The role of the jury was emphasized in Johnson v. State, 921 So.2d 490 (Fla. 2005) when this Court quoted the standard provided by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> . . . [that] there is a reasonable probability that, had [the] testimony been presented, *the jury* "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." [Strickland] at 695, 104 S.Ct. 2052 (emphasis added).
>
> Johnson, 921 So.2d at 501.

See also Brownlee v. Haley, 306 F.3d 1043 (11th Cir. 2002)(holding that counsel's failure to present adequate mitigating evidence to the jury was deemed prejudicial under Strickland):

> It is evident that ... a prejudicial error in the jury phase of a bifurcated sentencing proceeding, such as the Sixth Amendment violation in this case, prevents the jury from issuing a valid advisory verdict. Without

> such a verdict, the trial judge is unable to perform his statutorily-mandated task of considering the jury's opinion and building upon that opinion to fashion an appropriate sentence for the defendant. As a result, a prejudicial error in the jury phase, such as a violation of the Sixth Amendment's right to counsel, taints the entire sentencing proceeding. Allowing a judge to cure this taint in this case of an individual defendant could limit the significance of the jury participation required by statute and would risk ... "infus[ing] an unacceptable level of arbitrariness into the administration of the death penalty." (quoting Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987). This is especially true in Alabama as it is in Florida. Because the Alabama legislature has given the jury an essential role in the sentencing process, that role cannot be readily abrogated.

Justice Souter also emphasized the role of the jury when he summarized the holding in Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456 (2005) as follows:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy *actually put before the jury*, and although we suppose it is possible that *a jury* could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced *the jury's* appraisal' of [Rompilla's] culpability," Wiggins, (citation omitted)(quoting Williams v. Taylor, citation omitted) and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, Strickland (citation omitted)(emphasis added).
>
> Rompilla, 125 S.Ct. at 2469.

The same conclusions can be reached about the basis and effect of trial counsel's limited investigation and presentation of the family, social and medical history in the appellant's case. Where the changed votes of two jurors could have

meant a life sentence, to focus solely on brain damage under the "rifle" approach was unreasonable. The prejudice to Mr. Sexton resulting from his failures is clear. The sentencing jury never received a full picture of Mr. Sexton's past, present or future lives. Confidence in the outcome of the trial is undermined and the results of the penalty phase are therefore unreliable. Ragsdale v. State, 798 So.2d 713 (Fla. 2001); Asay v. State, 769 So.2d 974 (Fla. 2000); Rutherford v. State, 727 So.2d 216 (Fla. 1998).

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING GUILT PHASE CLAIMS WITHOUT AN EVIDENTIARY HEARING.

In the proceeding below, the postconviction trial court wrongfully denied the guilt phase claims in appellant's Rule 3.851 motion without an evidentiary hearing and without opportunity for argument or appeal. As stated in 2002:

> This Court encourages circuit courts to conduct evidentiary hearings on initial postconviction motions in capital cases when appropriate. Currently, our rules of procedure provide that such a hearing "shall" be held in capital cases on initial postconviction motions filed after October 1, 2001 on claims listed by the defendant as requiring a factual determination.
>
> Finney v. State, 831 So.2d 651, 656 (Fla. 2002)(footnotes omitted).

The appellant's initial postconviction motion was filed on January 18, 2002. (PCR Vol. 1 pp. 82-111). It was amended on March 21, 2002. (PCR Vol. 1 pp. 45-98). Claim 1, which contained the guilt phase ineffective assistance of counsel claims,

was identified by the appellant, pursuant to Fla.R.Crim.P. 3.851(f)(5)(A)(i), as appropriate for an evidentiary hearing. (PCR Vol. 1 p. 53). The court conducted the Case Management Conference on February 21, 2003. (PCR Vol. 17 pp. T30-T59). At that conference, the appellant repeatedly referred the court to the motion and to his request for an evidentiary hearing for Claim 1. (PCR Vol. 17 pp. 33; 43; 47; 49; 53; 56).

The State itself agreed with the appellant and informed the court that the legal claims, requiring no hearing, were claims 3 through 9 with the exception of the cumulative error claim. (PCR Vol. 17 pp. 37). The State later verbally summarized its written responses to claims 1 and 2 for the court. (PCR Vol. 17 pp. 38-40). At the hearing, the court summarily denied claims 3 through 9 with the exception of 8 and took under advisement claims 1, 2 and 8. (PCR Vol. 17 p. 57).

Without further hearing and without allowing appeal, the court's order of March 11, 2003, included a denial of claim 1 guilt phases issues. That order, and the order issued on March 13, 2003, granted an evidentiary hearing for penalty phase issues contained in claims 2 and 8 of the motion. (PCR Vol. 2 pp. 201-231; PCR Vol. 3 pp. 410-411).

On direct appeal, this Court noted that the appellant presented no defense during the guilt phase of the trial at the conclusion of the State's case – in contrast

to the conduct of the first trial. Sexton, 775 So.2d at 929. As quoted by the postconviction court in its March 11, 2003, order, defense counsel told the jury during opening statements:

> You're going to learn very quickly in this trial, if you haven't already, that Eddie Sexton is a far cry from the all American father. You're going to hear evidence that he engaged in conduct before he was arrested in this case with his children that could be considered reprehensible. You're going to learn that he took liberties with his children that may ask you - - or may cause you to ask yourselves and wonder, can this kind of thing really happen; does this really go on. I'm here to tell you that the evidence will show that in the Sexton family this did go on. (record citation omitted).
>
> (PCR Vol. 2, p.207).

The ABA Guidelines provide, in part, that "counsel should take steps where appropriate to preserve, on all applicable state and Federal grounds, any given question for review . . . counsel should not refrain from objecting to or otherwise bringing to the attention of the court a perceived injustice not addressed by existing law. Counsel should not hesitate to try and change the law, or at least its application in the client's case." American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Commentary, Guideline 117.3 (1989).

Within this context, appellant sought an evidentiary hearing for the guilt phase of the trial to determine the material facts, at minimum, concerning what possible defense theory or tactical reasons caused counsel to:

1. fail to object to the State's reference to his "able" investigator thereby advancing the State's own opinion as to that witnesses credibility;

2. fail to object about certain venire members walking in and out of the courtroom during jury selection;

3. fail to object when the State introduced a religious reference by thanking God that the lawyers were not on trial;

4. fail to request individual voir dire after four venire members indicated they had heard details of the case;

5. fail to object to the State referencing the expected testimony regarding sexual abuse by the defendant towards and his son, Willie;

6. concede to the sexual abuse and unusual family relationships in the Sexton family, thereby bolstering that competent of the State's case instead of challenging it;

7. fail to object or require the State to make a foundation in the State's introduction of testimony from the Ohio social worker about the defendant fathering two of his daughter's children;

8. fail to object to the speculation requested of how Willie felt, and fail to object to numerous hearsay statements regarding a variety of third party conversations;

9. fail to object to a statement from daughter Pixie about a threat from the defendant that was covered by the previous motion in limine;

10. fail to object to the State's introduction of the video tape addressed to President Clinton; and

11. fail to object to the State's disparaging remarks about counsel during the State's closing.

(PCR Vol. 1 pp. 51-53).

The court, again without hearing or argument, separately denied each of the subclaims for failure to meet, as pled, one prong or the other of Strickland v. Washington. (PCR Vol. 2, pp. 201-221). Yet, the motion presented facially sufficient subclaims of unreasonable and ineffective representation which required a factual determination of counsel's strategy in order to allow or disallow a prejudice argument or finding for each subclaim. Therefore, this court, while accepting the factual allegations as true in its *de novo* review, should remand for an evidentiary hearing on the guilt phase claims of this trial. State v. Coney, 845 So.2d 120, 137 (Fla. 2003); Henry v. State, 937 So.2d 563, 575 (Fla. 2006).

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING THE CLAIM THAT APPELLANT'S CONVICTION IS MATERIALLY UNRELIABLE DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND IMPROPER RULINGS OF THE TRIAL COURT.

The claim below that appellant's conviction is materially unreliable because no adversarial testing occurred due to the cumulative effects of ineffective assistance of counsel and improper rulings of the trial court, in violation of appellant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments, was denied because the court had denied relief in all the other claims in the postconviction motion. (PCR Vol. 4 p. 786). Under different circumstances, the cumulative effects claim can make for an appropriate

summation of all the errors presented in a trial record and postconviction proceeding. However, with the court below limiting the evidentiary hearing to the one claim involving the penalty phase of the retrial, the appellant has not been able to establish a guilt phase record of trial counsels' shortcomings or their legal consequences.

However, this Court's opinion on direct appeal noted two separate deficiencies of trial counsel that are part of the record of this case and which are not affected by the limited evidentiary hearing. Those deficiencies were recognized as the Court addressed the issues raised by the defendant's direct appeal counsel. First, the Court found procedurally barred the claim of error of admitting into evidence testimony relating to the death of the infant, Skipper Lee Good, because counsel did not object to the admission of this testimony. The Court, however, further reviewed the claim, even though it was not preserved, and rejected it on the merits. Sexton, 775 So.2d at 929-930.

Secondly, the Court found procedurally barred the claim of error to admit victim impact testimony that erroneously focused on the death of Joel Good's deceased infant and the witnesses' opinions of the killings because trial counsel failed to make a contemporaneous objection. The Court subsequently found that this was not fundamental error. Sexton, 775 So.2d at 931-932. Combined with the

shortcomings of counsel and prejudice to defendant as outlined above in Argument I, these deficiencies should cumulatively lead to relief for the appellant because, even if not one single act or omission is deemed sufficient to warrant relief, the cumulative effect of two or more of them may do so. Cherry v. State, 659 So.2d 1069 (Fla. 1995); Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995); Jackson v. State, 498 So.2d 906, 910 (Fla. 1986); Friedman v. United States, 588 F.2d 1010 (5th Cir. 1979); Griffin v. Wainwright, 760 F.2d 1505 (11th Cir.1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir.1982), cert. denied, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed..2d 364 (1983).

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING HIS CLAIM THAT APPELLANT IS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING APPELLANT'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

The court below denied the claim based on a procedural bar for failure to raise it on direct appeal and, alternatively, on this court's case law prohibiting such interviews. (PCR Vol. 4 pp. 783-784; PCR Vol. 2 pp. 228-229). Appellant argued that he is denied his rights under the First, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution and is denied effective assistance of counsel in pursuing his postconviction remedies because of the rules prohibiting appellant's lawyers from interviewing jurors to determine if constitutional error was present.

A new procedural rule regarding juror interviews was established since the time of filing this claim in the court below. Effective on January 1, 2005, Fla.R.Crim.P. 3.575 provides as follows:

> A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview. COURT COMMENTARY: This rule does not abrogate Rule Regulating the Florida Bar 4-3.5(d)(4), which allows an attorney to interview a juror to determine whether the verdict may be subject to legal challenge after filing a notice of intention to interview.

The thrust of the appellant's argument is that Florida's restrictions on post-trial juror interviews are an equal protection violation as enunciated, importantly, in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). Criminal

defense counsel in Florida are treated differently, unfairly and unequally compared to academics, journalists and those lawyers not connected with a particular case.

Florida lawyers, including defense trial and postconviction counsel, cannot interview jurors on behalf of their clients outside the constraints created by Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4). Yet, academics are allowed to and, in fact, do interview capital jurors, post-trial, about a wide range of matters, not just those factors which may be "grounds for legal challenge" under the rules. See the Capital Jury Project website at http://www.cjp.neu.edu which discusses, in part, the completed 1,198 interviews with jurors from 353 capital trials in 14 states, including Florida, (as of August 15, 2005). The CJP website also lists a number of doctoral dissertations based on Capital Jury Project data including Julie Goetz, "The Decision-Making of Capital Jurors in Florida: The Role of Extralegal Factors." Unpublished dissertation (1995), School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida.

Additionally, journalists are permitted without restriction to interview jurors post-trial. See, e.g., Chris Tisch, "Defense Fears Comments Affect Verdict;" St. Petersburg *Times*, Oct. 25, 2004 (available at http://www.sptimes.com/advancedsearch.html), where the jury foreman of a murder trial is interviewed about the jury's deliberations.

Lastly, Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4) only apply to cases "with which the lawyer is connected." Hence, lawyers not connected with a case are treated differently because the rule does not apply to them.

Because questions could come from an academic researcher, a journalist or a lawyer not connected with the case , the Florida rules infringe upon the appellant's rights to due process, access to the courts, and the equal protection concepts enunciated in Bush v. Gore, supra. The reliability and integrity of appellant's capital sentence is thereby questionable.

ARGUMENT V

EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER OF THE FLORIDA CONSTITUTION.

The appellant relied on the following pleadings in his motion below (PCR Vol 1 pp. 66-68); the claim was denied as procedurally barred and meritless. (PCR Vol. 4 p. 784-785; PCR Vol. 2 p. 229). The appellant recognizes such rulings on this claim as found in Johnson v. State, 904 So.2d 400, 412 (Fla. 2005), and Diaz v. State, 945 So.2d 1135 (Fla.), cert. denied, 127 S.Ct 850 (2006). Also

acknowledged is that the disposition of similar claims may be affected by the outcome of Lightbourne v. McCollum, No. SC06-2391 (Fla. petition filed Dec. 14, 2006).

The Eighth Amendment prohibits governmental imposition of "cruel and unusual punishments," and bars "infliction of unnecessary pain in the execution of the death sentence," Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 67 S.Ct. 374 (1947) (plurality opinion). "Punishments are deemed cruel when they involve torture or a lingering death ..." In re Kemmler, 136 U.S. 436, 447, 10 S.Ct. 930 (1890).

Despite the perception that lethal injection is a painless and swift death, negligent or intentional errors have caused persons executed intense suffering. Even when persons executed by lethal injection are first paralyzed, no evidence clearly demonstrates that they become unconscious to their pain and impending death. Indeed, a significant number of the persons executed by lethal injection in other states have suffered extremely painful and prolonged deaths resulting in wanton and unnecessary pain. Accounts of botched executions have been widely reported. See, e.g., Joe Farmer "Rector, 40, Executed for Officer's Slaying," Arkansas *Democrat-Gazette*, January 25, 1995; Sonya Clinesmith, "Moans Pierced Silence During Wait," Arkansas *Democrat-Gazette*, January 26, 1992.

Based on eyewitness accounts of such executions and available scientific evidence regarding the hazards, lethal injection is clearly unreliable as a "humane" method of execution. See also, Mears, "Lethal Injection and the Georgia Supreme Court's New Millennium," *The Champion*, Jan.-Feb. 2004, pp. 33-38 and Radelet, "Post-Furman Botched Executions," http://deathpenalty info.org/article.php. Accordingly, execution by lethal injection constitutes cruel and unusual punishment.

ARGUMENT VI

APPELLANT'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS APPELLANT MAY BE INCOMPETENT AT TIME OF EXECUTION.

The argument that appellant's Eighth Amendment right against cruel and unusual punishment will be violated as appellant may be incompetent at time of execution is presented to preserve the claim for federal review. The court below denied the claim as premature, citing Hall v. Moore, 792 So.2d 447 (Fla. 2001) and P.A. Brown v. Moore, 800 So.2d 223, 224 (Fla. 2001). (PCR Vol. 4 p. 786; PCR Vol. 2 p. 231). In accordance with Fla.R.Crim.P. 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact

of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The appellant acknowledges that, under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the appellant acknowledges that before a judicial review may be held in Florida, the appellant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)("If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes").

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 523 U.S. 637, 118 S. Ct. 1618, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390,

113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, in In Re Provenzano, 215 F.3d 1233 (11th Cir. 2000), the Eleventh Circuit Court of Appeals has stated:

> Realizing that our decision in In Re Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, see United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]

Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision. Id. at pages 2-3 of opinion.

Federal law in this circuit, therefore, requires that a competency to be executed claim be raised in the initial federal petition for habeas corpus. In order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court. Hence, the filing of this claim.

The appellant has been incarcerated since 1994. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. Inasmuch as the appellant may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Rule 3.851 relief. This Court is respectfully urged to order that appellant's convictions and sentences be vacated, that the case remanded for an evidentiary hearing on guilt phase issues, and remanded for a new penalty phase trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished to Stephen D. Ake, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607-7013 by U.S. Mail, postage prepaid, on this 20th day of September, 2007.

_____

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CERTIFICATE OF COMPLIANCE

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

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