IN THE SUPREME COURT OF FLORIDA

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

EDDIE LEE SEXTON

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is brief is filed on behalf of Eddie Lee Sexton in reply to the Answer Brief

of the appellee, the State of Florida. Any citations shall be as follows: the record on appeal concerning the 1998 retrial proceedings shall be referred to as cR ___c followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to as cPCR ____c followed by the appropriate volume and page numbers, and as APCR-A ____@ for those postconviction volumes marked as Aaddition.@ Citations to the appellant=s initial brief will be designated AIB _____@ and those to the Answer Brief of the State of Florida will be designated as AAB _____@ followed by the appropriate page number. All other references will be self-explanatory or otherwise explained. The appellant relies upon the arguments in his Initial Brief for Arguments II, III, V and VI.

STATEMENT OF THE CASE AND FACTS

The appellant does not contest the appellee=s own recitation of the evidentiary hearing facts but does note those of omission by the appellee. In particular, appellee

does not mention (at AB 12) that Dr. David McCraney recognized the post-1990-91 medical findings as consistent with multiple sclerosis (PCR V3 483); that Dr. Barbara Stein agreed with the post 1990-91 diagnosis of multiple sclerosis; (PCR V18 290) and that Dr. Stein also opined that appellant=s personality disorders were like those of others: the sources and influences are biological, genetic, psychological and psychosocial or environmental and not a function of free will. (PCR V18 290).

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.

The thrust of appellee=s argument is that trial counsel made sound strategic decisions regarding the presentation of the mitigation evidence. (AB 24). However, the appellee fails to explain how the decisions to limit the mitigation complied with the existing professional standards that Acounsel *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@ . . . including Afamily and social history@ and Aexpert testimony concerning [any of] the above and the resulting impact on the client...@. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Comment D, Guideline 11.8.2; 11.8.6(B)(5); 11.8.6(B)(8)

(1989)(emphasis added); Norton, *Capital Cases: Mitigation Investigations*, The Champion, NACDL, (May, 1992).

Counsel=s reliance on his own notions as to the Anon-persuasiveness@ of medical or other mitigation improperly inserted his personal views into that of the sentencing jury=s role - thereby making this an unreasonable and unsound strategy.

Similarly, the appellee relies on the error of the trial court in ignoring the jury=s role and the fact that the jury was not given significant mitigation. That trial court error is succinct in the following portion of the order denying relief:

> 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.
>
> (PCR V4 777-779).

As argued in the Initial Brief (IB 40-41), the retrial jury=s advisory verdict was not valid due to trial counsel=s ill-advised and unreasonable decisions to limit the presentation of non-statutory, thereby reflecting the error in the postconviction court=s ruling :

> 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 ... Ainfus[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.

Brownlee v. Haley, 306 F.3d 1043 (11th Cir. 2002).

The Brownlee court=s recognition of the role of the jury, before the judge takes its sentencing recommendation, was thoroughly emphasized in another 11th Circuit case:

> AThe Sixth Amendment guarantees a criminal defendant the right of effective assistance of counsel during a capital sentencing hearing.@ Harris v. Dugger, 874 F.2d 756, 762 (11th Cir.1989). The two-part Strickland test also applies in a capital sentencing proceeding because Acounsel's role in the proceeding is comparable to counsel's role at trial-to ensure that the adversarial testing process works to produce a just result under the standards governing decision.@ 466 U.S. at 687, 104 S.Ct. at 2064; Glock v. Moore, 195 F.3d 625, 634-35 (11th Cir.1999). ACircumstances which would warrant a presumption of prejudice from counsel's ineffectiveness are those where >the adversary process itself is [rendered] presumptively unreliable [by the circumstances].= @ Blanco v. Singletary, 943 F.2d 1477, 1496 (11th Cir.1991) (alterations in original) (citation omitted).
>
> When A >the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to

produce just results,= our confidence is undermined.@ Brownlee, 306 F.3d at 1069 (quoting Strickland, 466 U.S. at 696, 104 S.Ct. at 2069). AThe result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.@ Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. AActual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.@ Strickland, 466 U.S. at 692, 104 S.Ct. at 2067.

A>The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant. By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice [s a petitioner's] ability to receive an individualized sentence.=@ Brownlee, 306 F.3d at 1074 (alterations in original) (quoting Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir.1991)); see Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir.1988) (same); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir.1986) (same). A[T]he Eleventh Circuit has enunciated the rule that effective representation, consistent with the sixth amendment, also involves >the independent duty to investigate and prepare.=@ House v. Balkcom, 725 F.2d 608, 618 (11th Cir.1984) (citations omitted); see Bolender, 16 F.3d at 1557 (AThe failure to conduct a reasonable investigation into possible mitigating circumstances may render counsel's assistance ineffective.@).

> [C]ounsel's duty of inquiry in the death penalty sentencing phase is somewhat unique. First, the preparation and investigation for the penalty phase are different from the guilt phase. The penalty phase focuses not on absolving the defendant from guilt, but rather on the production of evidence to make a case for life. The purpose of investigation is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense. A[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.@ Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.
> ....
> [E]ven where a client is recalcitrant, courts have been

> ambivalent in whether counsel is relieved of any further duty of investigation, particularly where the client exhibits signs of instability.

Marshall v. Hendricks, 307 F.3d 36, 103 (3d Cir.2002) (citing Johnston v. Singletary, 162 F.3d 630, 641-42 (11th Cir.1998)). Trial counsel performs deficiently by not providing readily available mitigating evidence to the jury at the penalty phase because he prejudices a convicted defendant's receiving an individualized sentence. Cunningham, 928 F.2d at 1019; see Armstrong, 833 F.2d at 1433, 1434 (concluding that Ainvestigation and preparation for the penalty phase of [petitioner's] trial was negligible@ and that the Ademonstrated availability of undiscovered mitigating evidence clearly met the prejudice requirement@); House, 725 F.2d at 618 (AWhile we do not require that a lawyer be a private investigator in order to discern every possible avenue which may hurt or help the client, we do require that the lawyer make an effort to investigate the obvious.@).

Concomitantly, a tactical or strategic decision is unreasonable if it is based on a failure to understand the law. Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir.1991). Whether counsel's decision is tactical is a question of fact, but Awhether this tactic was reasonable is a question of law, and we owe neither the district court nor the state court any deference on this point.@ Id. We have decided that failure to present mitigating evidence because of misunderstanding the state law as to presentation of mitigating evidence is unreasonable as a tactical decision: AMitigating evidence, when available, is appropriate in every case where the defendant is placed in jeopardy of receiving the death penalty. To fail to do any investigation because of the mistaken notion that mitigating evidence is inappropriate is indisputably below reasonable professional norms.@ Id. (emphasis added). Similarly, A[w]here defense counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims ..., we have held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar.@ Young v. Zant, 677 F.2d 792, 798 (11th Cir.1982).

. . .

Similarly, we have decided that failure to present mitigation evidence as to a defendant's family background or alcohol and drug abuse at the

penalty phase of a capital case constitutes ineffective assistance of counsel, particularly when defense counsel Awas aware of [petitioner's] past and knew that mitigation was his client's sole defense.@ (footnote omitted) Elledge, 823 F.2d at 1445 (emphasis added). Concluding that counsel rendered ineffective assistance for failing to present mitigating background information at the sentencing phase, we have explained: A[T]he sentencing jury knew much about the crime, having just convicted [the defendant] of a brutal murder, but little about the circumstances of the defendant.@ Harris, 874 F.2d at 763.

. . .

In Harris, although family members were willing to testify that the defendant's life was meaningful to them, the defendant's attorney Aerroneously told the jury that [defendant's] family had >turned against him.= Thus, the jury did not assess >the information needed to properly focus on the particularized characteristics of this petitioner.= @ 874 F.2d at 763 (quoting Armstrong, 833 F.2d at 1433). A[I]njecting [defendant's] character as an issue during sentencing was fraught with danger@: petitioner Acommitted the murder while on parole,@ which would have permitted the prosecution to expose his Aother felony convictions as well as his dishonorable discharge from the Army.@ Id. at 764. ANevertheless,@ we determined, Aon this record, we cannot conclude that effective counsel would have made a strategic decision to forego testimony about [defendant's] good character merely because its use would have permitted the state to add some prior unlawful acts to the proof already in the case.@ Id. We noted that defense counsel Aconceded that he would have used the [background] evidence had he known about it.@ Id. Recognizing that the mitigating background evidence Aconstituted the only means of showing that [petitioner] was perhaps less reprehensible than the facts of the murder indicated,@ we concluded that Aa reasonable probability exist[ed] that a jury hearing this evidence would have recommended life,@ and that petitioner Asuffered prejudice from counsel's errors@ at the penalty phase. Id.

Of course, A[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing.@ Accordingly, counsel's general duty to investigate takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering

the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

Strickland, 466 U.S. at 706, 104 S.Ct. at 2074 (Brennan, J., concurring in part and dissenting in part) (alteration in original) (citations omitted) (emphasis added).

AFlorida is a weighing State; the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances.@ FN149 Parker v. Dugger, 498 U.S. 308, 318, 111 S.Ct. 731, 738, 112 L.Ed.2d 812 (1991) (citing Fla. Stat. ' 921.141(3) (1985)) (emphasis added). A[T]he Supreme Court and this Court ... have repeatedly emphasized the constitutional right of a defendant facing the death penalty to present any relevant evidence of mitigating circumstances.@ Brownlee, 306 F.3d at 1070. A[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court ... would have concluded that the balancing of aggravating and mitigating circumstances did not warrant death.@ FN150 Strickland, 466 U.S. at 695, 104 S.Ct. at 2069. AThe appropriate analysis of the prejudice prong of Strickland requires an evaluation of >the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-in reweighing it against the evidence in aggravation.:@ Bottoson v. Moore, 234 F.3d 526, 534 (11th Cir.2000) (quoting Williams, 529 U.S. at 397-98, 120 S.Ct. at 1515); see Clemons v. Mississippi, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990) (vacating state supreme court's upholding death sentence because it was not apparent that the appellate reweighing of the aggravating and mitigating factors accorded Adefendant[ ] the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances@ or Athat the [state appellate] court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence@ required in a weighing state).

> FN149. While AFlorida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute,@ Grossman, 525 So.2d at 842, the

> Florida Supreme Court Ahas repeatedly held that all mitigating evidence, found anywhere in the record, must be considered and weighed by the trial court in its determination of whether to impose a sentence of death,@ Walker v. State, 707 So.2d 300, 318 (Fla.1998) (per curiam) (citing cases) (second and third emphases added).
>
> FN150. The Florida Supreme Court has Arepeatedly stressed [that] a trial judge's weighing of statutory aggravating factors and statutory and nonstatutory mitigating circumstances is the essential ingredient in the constitutionality of our death penalty statute.@ Porter v. State, 723 So.2d 191, 196 (Fla.1998) (per curiam); see State v. Dixon, 283 So.2d 1, 8 (Fla.1973) (AThe most important safeguard presented in Fla. Stat. ' 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed.@).

The Supreme Court has been clear that both statutory and nonstatutory mitigating factors must be considered in a capital sentencing proceeding:

> A[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.@
> ....
> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.

Eddings v. Oklahoma, 455 U.S. 104, 110, 113-14, 102 S.Ct. 869, 874, 876-77, 71 L.Ed.2d 1 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion)) (alteration, first ellipsis, and emphasis in original).FN151 When a petitioner contends that the presentation of additional mitigating evidence would have changed the weighing process so that death is not warranted,

Awe look at the mitigating circumstance evidence that was not presented, along with that which was, and consider the totality of it against the aggravating circumstances that were found.@ FN152 Tompkins v. Moore, 193 F.3d 1327, 1336 (11th Cir.1999).

> FN151. The Florida Supreme Court has been explicit that A[a]ll evidence of mitigating circumstances may be considered by the judge or jury.@ Dixon, 283 So.2d at 9 (emphasis added). A[T]he jury is not limited, in its evaluation of the question of sentencing, to consideration of the statutory mitigating circumstances. It is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment.@ Lewis, 398 So.2d at 439 (emphasis added). AWhile all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, death is different.@ Since the ultimate penalty of death cannot be remedied if erroneously imposed, trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to Aexpressly evaluate in [their] written order[s] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence.@This bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of.
>
> Walker, 707 So.2d at 319 (citations omitted) (emphasis and alterations in original). AIt is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators.@ Ferrell v. State, 653 So.2d 367, 371 (Fla.1995) (per curiam) (reaffirming Campbell v. State, 571 So.2d 415 (Fla.1990), which clarified evaluating and weighing mitigating evidence) (emphasis added).
>
> FN152. The Florida Supreme Court similarly has stressed the great significance of the sentencing-phase weighing process by the trial judge and jury in determining whether a

sentence is death or life imprisonment:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> Dixon, 283 So.2d at 10.

. . .

Yet, the most essential purpose of the sentencing proceeding was for defense counsel to present the jury with background mitigating information to enable the jurors to render an individualized sentence based on the particular circumstances of Hardwick's life and the murder. Brownlee, 306 F.3d at 1070.

. . .

The function of the sentencing phase is to provide the jury with all mitigating evidence concerning the convicted defendant and the crime so that it can render an individualized sentence. AUnder the facts of this case, we are compelled to conclude that counsel's failure to investigate, obtain, or present any mitigating evidence to the jury, let alone the powerful mitigating evidence,@ including Hardwick's deprived and abusive upbringing and his Ahistory of drug and alcohol abuse undermines our confidence in [Hardwick's] death sentence.@ Brownlee, 306 F.3d at 1070.

. . .

Given the seven/five jury vote with none of Hardwick's background and substance dependency revealed, there is a strong probability that presentation of a defense at sentencing that included this information, like that in Holladay approved by our court, would have resulted in a sentence of life instead of death. There was no need for Tassone to resort to religious sentiment in his closing argument at sentencing. He should have reviewed for the jury and judge the mitigating factors, which he should have established at the sentencing proceeding, to weigh against the aggravating factors, a defense that could have saved Hardwick's life. Consequently, the weighing process for the jury at the penalty phase was skewed because the jurors were not informed of facts applicable to the statutory and nonstatutory mitigating factors.

. . .
Confronted with forceful statutory aggravating circumstances concerning Pullum's death, the most basic defense that Tassone could have provided Hardwick at the sentencing phase of his capital case in Florida, a weighing state, would have been to present any statutory and nonstatutory mitigating factors, which necessarily would have involved investigation and preparation. In contrast to the guilt phase, where the Strickland performance-and-prejudice test was not proved, there is an obvious probability that the presentation of mitigating evidence in the sentencing phase could have changed the jury's recommended sentence from death to life imprisonment, which constitutes actual prejudice.FN217 While Tassone's trial strategy can substantiate his lack of a defense for Hardwick in the guilt phase, it should prove insufficient to justify his total lack of a defense at the penalty phase, when there was significant mitigation testimony available from experts and other witnesses, of whom Tassone was aware or should have discovered. Consequently, the jurors might have weighed the mitigating factors against the aggravating factors differently and decided on a life sentence instead of death.

> FN217. Although the trial judge Aindependently weighs the aggravating and mitigating circumstances and renders the final determination as to life and death,@ the judge Ais required to place >great weight= upon the recommendation by the jury.@ Glock, 195 F.3d at 627 n. 1 (quoting Tedder v. State, 322 So.2d 908, 910 (Fla.1975)); see Lewis, 398 So.2d at 438 (AUnder the Florida capital felony sentencing law, the recommendation of the jury is entitled to great weight, and should not be overruled unless, based on the aggravating circumstances and the lack of mitigating circumstances, a sentence of death is clearly appropriate.@). The Florida Supreme Court has explained the significance of the jury's participation in the sentencing phase of a capital case through its advisory sentence:

In the penalty phase of a capital proceeding, the jury is instructed, in pertinent part, that although the final responsibility for sentencing is with the judge, that it should not act hastily or without due regard to the gravity of the proceedings, that it should carefully weigh, sift, and consider evidence of mitigation and statutory aggravation, realizing that human life

> is at stake, and bring to bear its best judgment in reaching the advisory sentence.
>
> Grossman, 525 So.2d at 840 (emphasis added).
>
> Hardwick v. Crosby 320 F.3d 1127, 1162 -1163; 1164-1167; 1180; 1189-1190 (11th Cir. 2003).

With the 8 to 4 vote for death, it is impossible to understand how counsel thought he was insuring an individualized sentencing for the jury (Brownlee, 306 F.3d at 1074) or was avoiding Aa lot of extraneous clutter@ (PCR V18 166) by omitting the appellant=s multiple sclerosis as a mitigator. Counsel did see persuasive value in appellant being capable of kindness to children and acting as Santa Claus at Christmas. It is incomprehensible how counsel felt providing the readily available evidence of appellant=s family history of mental illness, retardation and learning disabilities (Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991) had no Apersuasive value.@ (PCR V18 166). But counsel did see persuasive value in appellant being a former pastor of a church. While the postconviction court was able to find the mitigation of disadvantaged or deprived childhood in impoverished conditions that led to a limited education, counsel argued for recognition that the appellant was ten years old when his father died. With the postconviction court finding the history of alcohol and narcotic dependence a mitigator, one is left to assume that trial counsel felt this was Aextraneous garbage.@ Instead he argued that appellant at times had a normal, loving relationship with his children and would help his mother and sisters around the house.

Since counsel did not understand the duty to present all available mitigation with his self-described and now abandoned Arifle@ approach, counsel failed to understand the law at the time of the retrial. Consequently, counsel=s strategic decisions to limit the mitigation presented to the jury were unreasonable. Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991). Akin to the Hardwick case, given the eight to four jury vote and with none of the additional background and medical evidence revealed, there is a strong probability that presentation of a defense at sentencing that included this information would have resulted in a sentence of life instead of death. Trial counsel should have been using the Ashotgun@ approach at the retrial. He should have reviewed for the jury and judge the additional mitigating factors, which he should have established at the sentencing proceeding, to weigh against the aggravating factors, a defense that could have saved appellant=s life. Consequently, the weighing process for the jury at the penalty phase was skewed because the jurors were not informed of all the available facts applicable to the nonstatutory mitigating factors. Relief in the form of a new sentencing proceeding should issue from this appeal.

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 appellee refers to the crux of the claim by noting that AAppellant further asserts that the rule . . . is unconstitutional because it violates his constitutional rights of equal protection and due process.@ (AB 48). Without discussing, refuting or addressing in any way the issues of equal protection and due process, appellee simply draws attention to this Court=s recent ruling on the same claim in Barnhill v. State, 971 So.2d 106, 116-117 (Fla. 2007). The Barnhill ruling, however, does not discuss, refute or address why 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, and which 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). The Barnhill ruling

does not discuss, refute or address why 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 (http://www.sptimes. com /advancedsearch.html), where the jury foreman of a murder trial is interviewed about the jury's deliberations. The Barnhill ruling does not discuss, refute or address why lawyers not connected with a case are treated differently because the rule does not apply to them. Because academic researchers, journalists and lawyers not connected with the case are treated differently than appellant=s postconviction counsel, 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, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).

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 Reply 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 _____ day of February, 2008.

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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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