IN THE SUPREME COURT OF FLORIDA
CASE NO. SC07-1894

MAURICE LAMAR FLOYD,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee
_____/

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS TO THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY, FLORIDA

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Mr. Floyd relies on his original habeas petition and the contemporaneous pleadings in the 3.851 appeal, and herein responds to certain elements of the State's response.

CLAIM I

MR. FLOYD WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF HIS MENTAL HEALTH EXPERT AT TRIAL.

Mr. Floyd is inclined to agree with the State, that there was no support for a claim of ineffective assistance of a mental health expert in the original trial record. The problem is that the lower tribunal's order denying relief on the 3.851 motion expressly found the claim was procedurally barred, citing to this Court's decision in *Marshall v. State*, 854 So.2d 1235 (Fla. 2003), a case cited to the trial court by the State in its Written Summation After Evidentiary Hearing, ROA VI 1169. *Marshall* held:

> Marshall also alleges that he was deprived of his right to an evaluation by a competent mental health expert pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). This claim is procedurally barred because it could have been raised on direct appeal. *See Cherry v. State*, 781 So.2d 1040, 1047 (Fla.2000) ("[T]he claim of incompetent mental health evaluation is procedurally barred for failure to raise it on direct appeal.").

854 So.2d at 1248. However, the opinion's next two paragraphs explain why the issue could have been raised on direct appeal – trial counsel's efforts in the trial record in *Marshall* made a record sufficient to raise the incompetence of the mental health expert in the direct appeal:

> Following Dr. Klass's examination, however, trial counsel filed a motion for the appointment of an additional mental health expert. Trial counsel's motion indicated that Dr. Klass apparently spent no more than one hour with Marshall and that, aside from two short letters, he had failed to communicate with trial counsel or inform counsel what tests, if any, were administered and what evidence might be gathered in mitigation. . . .
> . . . . [W]e are not prepared to call trial counsel's performance deficient under the first prong of Strickland. . . . . After determining that Dr. Klass's evaluation was cursory, trial counsel filed a motion for an additional expert, which was denied by the trial court. Trial counsel cannot be deemed ineffective simply because he was unsuccessful in getting the trial court to appoint an additional expert. . . . . This issue was adequately documented in the record and could have been raised on appeal.

854 So.2d at 1248.

In the instant case, the record on appeal from the trial bore no evidence of the incompetent evaluation by Dr. Krop. The sparse correspondence and the last minute discovery of the failure of the mental health mitigation efforts were not in the record. The record does show that Dr. Krop was appointed as a confidential expert to report solely to defense counsel, ROA 2002 I 31, and reflects prisoner transport to his office for meetings with Dr. Krop, but the direct appeal record is devoid of any indication of the lack of competent assistance. Dr. Krop's lack of competent performance in this case was only revealed in the post-conviction evidentiary hearing, where he indicate he lost his records, he could not recall any details of his evaluation, and the correspondence discovered in the post conviction investigation showed that, after an initial report suggesting he would have mitigation evidence, he informed the defense of his failure to develop mental

health mitigation only at the time of the trial. None of this information was conceivably part of the original appellate record.

Regardless, if the lower tribunal's ruling is correct that the claim is procedurally barred for failure to raise the issue on direct appeal, then relief is only available through this habeas claim, based on appellate counsel's failure to raise the claim. The State's argument in its Reply to the Habeas Petition at p.16 makes clear the impossibility of compelling a defendant to raise a claim of incompetent mental health evaluation when the trial record is devoid of such indications.

When incompetent trial counsel fails to recognize the incompetence of the mental health evaluation provided by his expert, or fails to preserve the matter for the record as in *Marshall*, it is unjust to require the defendant to raise the issue in the direct appeal. Mr. Floyd could not possibly have waived his claim that his mental health evaluator was incompetent by failing to raise the issue on direct appeal – the evidence was not in the record. *Marshall* may stand for the principle that an *Ake* claim must be raised on direct appeal when the " issue was adequately documented in the record and could have been raised on appeal," but it defies logic, justice and federal due process to require the claim be raised when the record is not made.

> "[A]ppellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object." *Johnson v. Singletary*, 695 So.2d 263, 266 (Fla.1997). A timely objection allows the trial court an opportunity to give a curative instruction or admonish counsel for making an improper argument.

Power v. State, 886 So.2d 952, 963 (Fla. 2004); *Medina v. Dugger*, 586 So.2d 317, 318 (Fla. 1991); *Roberts v. State*, 568 So.2d 1255 (Fla.1990).

Why was the record not made? Because trial counsel was ineffective, as raised and argued in the 3.851 motion and the appeal therefrom to this Court. But, because of the trial court's reliance on the State's erroneous and overly broad application of *Marshall*, Mr. Floyd is compelled to make the claim in this habeas petition.

CLAIM III

MR. FLOYD'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS SHACKLED IN FRONT OF THE JURY AT TRIAL

Duest Inapplicable The state argues that Mr. Floyd's reference in the habeas petition to the 3.851 appeal is insufficient to preserve issues, citing to *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990). However, a review of the *Duest* decision reveals that the fault this Court found was the defendant's attempt to incorporate the arguments he made to the trial court in his brief to the Florida Supreme Court.

> Duest also seeks to raise eleven other claims by simply referring to arguments presented in his motion for post-conviction relief. The purpose of an appellate brief is to present arguments in support of the points on appeal. **Merely making reference to arguments below without further elucidation** does not suffice to preserve issues, and these claims are deemed to have been waived.

555 So.2d at 851-52 (emphasis added).

State's Inconsistent Arguments

The State further argues that because Mr. Floyd argues the shackling issue in his 3.851 motion and in his appeal from that motion, this apparently establishes the issue as one which may only be raised in the post-conviction motion.

The State's argument is inconsistent with its position in the 3.851 appeal, and it misses the mark. The shackling issue is a critical, fundamental issue which deserves relief by whatever means this Court deems appropriate. The State's apparent concession that the shackling issue is properly raised in the 3.851 motion and the appeal therefrom cannot in any way bind this Court as to the proper theory for review.

Strikingly, the state's argument that the issue cannot be raised in the habeas petition because it is raised in the 3.851 appeal is diametrically opposite to the State's argument in the answer brief in the 3.851 appeal that the 3.851 claim is procedurally barred because it should have been raised in the direct appeal. *Floyd v. State*, No. SC07-330, Answer Brief at 85-86. The trial court agreed with the state and found the issue procedurally barred because it should have been raised in the direct appeal from trial.

The shackling issue was never available for the direct appeal. While the naked trial record showed that Mr. Floyd wore a leg brace during the guilt phase of trial, his trial counsel agreed to the continued use of the brace. The issue of whether the leg brace was appropriate regardless of its visibility was, therefore, not preserved due to trial counsel's ineffectiveness in failing to object and preserve the issue for direct appeal.

Shackling a defendant in view of the jury is an "inherently prejudicial practice," *Bello v. State*, 547 So.2d 914, 918 (Fla. 1989), *see Holbrook v. Flynn*, 475 U.S. 560 (1986), in violation of state and federal constitutional protections. The prohibition on penalty phase shackling was recognized in Florida even earlier: "Since at least 1987, the law in Florida has been that shackling a defendant during the penalty phase without ensuring that his due process rights are protected is a sufficient ground for reversing a death sentence. *See Elledge v. Dugger*, 823 F.2d 1439, 1450-51 (11th Cir.1987)." *Hill v. State*, 921 So.2d 579, 585 (Fla. 2006) (rejecting a shackling claim as untimely despite *Deck v. Missouri*, 544 U.S. 622, 633 (2005)). And the constitutional protection against shackling has always been considered by this Court to apply the guilt phase. *State v. Diaz*, 513 So.2d 1045 (Fla. 1987) (the defendant apparently wore a leg brace the trial court had advised the defendant to try to conceal by keeping his pants legs pulled down or placing a

box in front of his feet – the shackling was deemed appropriate because of the defendant's demonstrated history as a security risk).

To establish ineffective assistance of trial counsel, it was necessary in the 3.851 proceeding to put on the evidence which proves that the leg brace was clearly apparent to the jury because it was openly visible and its operation and hobbling effect was readily apparent, and because the jurors had a clear view of the ankle shackle securing the brace during the entire trial. That evidence was not apparent on the face of the record on appeal in the direct appeal, and appellate counsel should not be faulted for failing to raise the unpreserved issue.

However, to the extent that the trial court's erroneous ruling that the issue was available and should have been raised on direct appeal could be determined to have merit, Mr. Floyd raises the claim in the habeas petition as well.

To the extent that the shackling claim raised in the contemporaneously filed appeal from the post-conviction proceeding could in any way be construed to have been required to have been raised on direct appeal, Mr. Floyd adopts and incorporates all elements of the claim made on this issue in the contemporaneous appeal and urges that relief is appropriate under any possible procedural approach.

The state's reliance on *Duest* is unfounded. It is clear from the face of the *Duest* opinion that appellate counsel attempted to raise all remaining issues from the 3.851 proceeding in the trial court by incorporation into the 3.851 appeal. He

was referencing back to arguments made in another court, the trial court. While Mr. Floyd does not agree that this is a constitutionally sound rule, it is clear that the *Duest* Court's concern is limited to attempts to incorporate the pleading filed in a lower court, as demonstrated by a subsequent opinion from this Court:

> Initially, we note that Griffin attempts to incorporate all of the claims, facts, and arguments from his post-conviction motion at the circuit court into his brief to this Court. However, "[m]erely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." *Duest v. Dugger*, 555 So.2d 849, 852 (Fla.1990). Thus, in those instances where Griffin does not elaborate on his claims on appeal, this Court will not look to his post-conviction motion for explanation.

Griffin v. State, 866 So.2d 1, 7 (Fla. 2003).

In the instant case, Mr. Floyd is merely referring to the arguments made in the 3.851 appeal in this Court, arguments which are properly before this Court in the companion case. The fact that the claim here is raised in the alternative in a habeas petition is because the Court has bifurcated habeas corpus protections into a 3.851 motion in the trial court and the ensuing appeal proceeding, and an original habeas proceeding in this Court.

Identity of 3.851 and Remaining Habeas Protections

Florida's Rule 3.851 proceeding, and the requirement that claims of ineffectiveness of counsel on direct appeal be raised by habeas petition, arise out of

the original Rule One adopted by this Court in response to *Gideon v. Wainwright*, 372 U.S. 335 (1963). In the decision on remand from the United States Supreme Court, this Court explained it adopted a special rule, Rule One, to provide for proper review of post-conviction claims (necessitated by the expected flurry of claims raised by prisoners who had been denied the right to counsel at trial):

> Under the rule which we have announced, post-conviction relief can be obtained where there is a claimed denial of some fundamental or organic right in the course of the trial. **The relief available is coextensive with that which would be available in habeas corpus. The rule, however, minimizes the defficulties [sic] encountered in habeas corpus hearings and affords the same rights in a more convenient forum and one best prepared to consider the claims of a prisoner convicted in that very forum.**

Gideon v. Wainwright, 153 So.2d 299, 300 (Fla. 1963) (emphasis added).

The mere fact that this Court has bifurcated the habeas proceeding, with trial court matters subject to 3.851 review, and appellate matters subject to direct habeas review by this court in a proceeding contemporaneous to and traveling with the 3.851 appeal, should not erect such an artificial barrier that the habeas petition must stand alone without any reference to the contemporaneous 3.851 appeal. The simple fact that this Court routinely hears the appeal and petition in a single oral argument and issues its opinions on capital post conviction cases in a single opinion encompassing both 3.851 and habeas claims clearly shows the identity of the two proceedings is so intertwined as to permit simultaneous consideration of matters raised in one or the other.

This Court had occasion to review the history of Rule One and habeas relief in *Baker v. State*, 878 So.2d 1236 (Fla. 2004). Justice Anstead then had cause to amplify on the principles recognized in *Baker* in his concurring opinion in *Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005):

> **Our post-conviction rules, of course, are merely procedural devices adopted to facilitate and simplify the effective and efficient processing of claims cognizable under the Great Writ.** . . .
>
> . . . .
>
> As we noted in a recent decision, **this Court adopted our first post-conviction rule in response to the "impending post-conviction crisis" wrought by *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)**, in which the United States Supreme Court determined in a habeas corpus proceeding that indigent defendants were entitled to counsel provided by the State in state criminal proceedings. *Baker v. State*, 878 So.2d 1236, 1239 (Fla.2004). . . .
>
> Subsequently, in anticipation of a flood of habeas petitions seeking relief under Gideon even though neither this Court nor the United States Supreme Court had explicitly held it was to be applied retroactively, this Court promulgated the first post-conviction rule of criminal procedure, rule 1. *See Baker*, 878 So.2d at 1239. Habeas petitions, of course, are traditionally filed in the geographic location where it is alleged that a person is being illegally detained. However, in order to prevent a flood of habeas petitions invoking Gideon from overwhelming the limited judicial resources available in the geographic region where most prisoners were located, this Court

chose a more viable and efficient scheme by requiring the filings to be in the original courts of conviction throughout Florida. As we stated in *Baker*, the rule

> was **intended to provide a procedural mechanism for raising those collateral post-conviction challenges to the legality of criminal judgments that were traditionally cognizable in petitions for writs of habeas corpus. Thus, this rule essentially transferred consideration of these traditional habeas claims from the court having territorial jurisdiction over the prison where the prisoner is detained to the jurisdiction of the sentencing court.**

Id. (footnote omitted). Since our adoption of rule 1 and its successor, rule 3.850, we have recognized that **our post-conviction rules are merely "a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus.**" *State v. Bolyea*, 520 So.2d 562, 563 (Fla.1988); see also Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853, 807 So.2d 633, 636 (Fla.2001) (Anstead, J., concurring in part and dissenting in part) (noting that **rule 3.850 and other rules "were enacted to simplify and facilitate the fair and orderly processing of habeas corpus claims by any defendant**").

. . . .

916 So.2d at 736-37 (Anstead, J., joined by Pariente, J., concurring).

The *Baker* opinion offers a glimpse of the way habeas relief used to be sought, wherein the prisoner was free to seek relief from any court with jurisdiction, including the Florida Supreme Court:

> [A]t least one commentator noted soon after the adoption of the rule that, absent its adoption, “thousands of prisoners in Raiford could [have been] expected to seek relief in the Florida Supreme Court, the First District Court of Appeal, and the Circuit Court of the Eighth Circuit.” Gene D. Brown, Collateral Post Conviction Remedies in Florida, 20 U. Fla. L.Rev. 306, 306 (1968). Those courts, at the time the *Gideon* decision was handed down, had territorial jurisdiction over most, if not all, prisoners in the State of Florida. This commentator correctly noted:

> This would have constituted an almost unbearable judicial responsibility, to the detriment of other litigants in those three courts. It would have required the supreme court and the First District Court of Appeal to appoint a commissioner in each case requiring factual determinations, and the circuit judges of the Eighth Circuit would have been overburdened with habeas corpus hearings.
>
> Id. at 306-07. . . .
>
> . . . .
>
> As recognized in this Court's decision in *Roy [Roy v. Wainwright,* 151 So.2d 825, 826-28 (Fla.1963)], rule 1"was promulgated to establish an effective procedure in the courts best equipped to adjudicate the rights of those originally tried in those courts." *Roy,* 151 So.2d at 828. It was further "intended to provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack." *Id*. In *State v. Bolyea,* 520 So.2d 562, 563 (Fla.1988), this Court explained that the rule "is a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus," and "was designed to simplify the process of collateral review and prescribe both a fact-finding function in the lower courts and a uniform method of appellate review."

Baker v. State, 878 So.2d at 1240.

As noted by the commentator cited in *Baker*, the habeas remedy that existed before Rule One permitted the defendant to file his petition in any court with territorial jurisdiction. Therefore, prior to Rule One, Mr. Floyd would have had the right to file a habeas petition in this Court seeking relief for ineffective assistance of counsel at both the trial and appellate levels. The practice of appointing commissioners to address factual issues arose from the conclusion that under its constitutional habeas authority "this Court has the power, where the determination of factual questions are necessary to final decision and judgment, to refer the

matter to a circuit judge, as a commissioner of this Court, to make findings and recommendations on the issues tendered by the pleadings." *Sneed v. Mayo*, 66 So.2d 865, 874 (Fla. 1953).

By assigning certain issues to be reviewed pursuant to Rule One and its progeny, adopted to implement habeas protections, the underlying principle must not be lost that the rules were created only to improve the manner by which certain post conviction claims were addressed, i.e. by the trial court most familiar with the trial issues, and can never be utilized to limit a defendant's right to the relief of the Great Writ, whether it be through the procedural "advantages" promulgated by Rule One, or by habeas petition to address issues which do not fit within the purview of Rule One review.

> Although our post-conviction rules were "intended to provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack," *Roy v. Wainwright*, 151 So.2d 825, 828 (Fla.1963), **we have never held that rule 3.850--or any procedural rule-- can exhaust the circumstances in which the writ of habeas corpus as guaranteed in article I, section 13 would be available to test the legality of an individual's conviction or sentence. Indeed, we could never do so constitutionally or practically since only human experience itself can provide the endless possibility of circumstances that may provide a proper basis for the invocation of the writ to protect a fundamental right or correct a fundamental injustice.**

Chandler, 916 So.2d at 740 (Anstead, J., joined by Pariente, J., concurring) (emphasis added).

Given, therefore, that this Court originally would have had complete jurisdiction over Mr. Floyd's post-conviction claims, the assignment of certain claims to the trial court by Rule 3.851 should not deprive Mr. Floyd of relief merely because he erroneously sought such relief in the trial court proceeding rather than in the instant habeas proceeding, which sweeps in all possible habeas claims not assigned to the 3.851 rule.

If Mr. Floyd had followed the principles now argued by the state, he would have foregone raising the shackling claim in the 3.851 proceeding, and now would be confronted by the State arguing in opposition to the habeas petition that there was no evidence to show Mr. Floyd suffered any prejudice for appellate counsel's failure to raise the naked issue of a leg brace shackle – no evidence that the shiny shackle lock at the ankle was visible at all times to jurors who had a clear view of the shackle every moment they sat in the courtroom.

Actually, the habeas claim should stand as a separate ground for relief. The mere fact that Mr. Floyd was shackled with the leg brace throughout the guilt and penalty phases, without any hearing establishing the necessity for restraints, is alone grounds for reversal and a new trial. *Deck v. Missouri*, 544 U.S. 622 (2005); *Holbrook v. Flynn*, 475 U.S. 560 (1986); *Bello v. State*, 547 So.2d 914, 918 (Fla. 1989); *State v. Diaz*, 513 So.2d 1045 (Fla. 1987). However, should this constitutional violation not be sufficient to compel relief, then the evidence in the

evidentiary hearing establishes a violation of the right to a fair trial and due process beyond any level of imperfection justice should be willing to accept.

Court Obligated to Grant Appropriate Remedy

This Court is further obliged to provide the remedy appropriate to the claim, regardless of the remedy sought by the defendant. Florida Rule of Appellate Procedure 9.040(c) requires that "If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy." Judge Padovano rationalizes the rule thus: "The most logical interpretation of these two statements is that the appellate court must apply the correct remedy when that is possible, and that the court is excused from the duty of applying the correct remedy when that is not possible." Padovano, P., Florida Appellate Practice § 10.2 at p. 154 (2005 ed.).

This Court would devolve to honoring form over substance if it were to reject Mr. Floyd's claim that he was wrongfully shackled in full view of the jury throughout his trial merely because he raised the claim in the 3.851 motion when it should have been raised in the direct appeal and the habeas petition. And the form so wrongfully honored would be the form this Court created to ensure defendants received full and appropriate habeas relief. The form of habeas relief in Florida cannot be utilized to narrow the scope of the relief of the Great Writ, a protection

guaranteed by Article I, section 13, of the Florida Constitution, *Chandler*, and by the Fourteenth Amendment to the United States Constitution, a guarantee which must be honored by providing the defendant with the due process necessary to protect the right to habeas relief.

This Court has not hesitated to ignore the formalities of a direct appeal and turn to the remedy of the habeas writ when justice required.

> Ordinarily this court considers on appeal only those questions tendered by the record and argued by the parties in their briefs on the basis of errors properly assigned. However, historically, habeas corpus is a high prerogative writ. It is as old as the common law itself and is an integral part of our own democratic process. The procedure for the granting of this particular writ it [sic] not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes. **If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.** So it is in the case at bar that this court felt justified in raising on its own initiative the question of law hereafter discussed.

Anglin v. Mayo, 88 So.2d 918, 919-20 (Fla. 1956) (emphasis added).

In the case of capital post-conviction appeals and petitions, the fact that the defendant may have erroneously sought relief under one or the other mechanism, 3.851 or habeas, should not operate to constitute a waiver. The entire corpus of the post-conviction claims are properly before the court in a dual pleading, appeal and habeas, arising from the Court's 1963 bifurcation of remedies by Rule One.

Viewed another way, as both the 3.851 proceeding and the habeas petition arise out of the single provision for the Great Writ, the defendant is seeking the legally equivalent remedy whether he assigns it to the 3.851 proceeding or the habeas petition.[1] However, to the extent that the Court would enforce some distinction between the two, Rule 9.040(c) and the principles of *Anglin* should operate to cure any confusion and compel the appropriate relief.

Unlike the procedural problems referencing a pleading in a lower tribunal found in *Duest*, in the instant case Mr. Floyd references the claims made in the 3.851 appeal and urges that they also be considered in this vestigial habeas pleading which incorporates all habeas protections not assigned to the 3.851 procedure. The habeas scheme resulting from the bifurcation of the Great Writ created with Rule One does not segregate the 3.851 claims from the habeas claims so profoundly as to prevent such cross-referencing. Otherwise, the habeas petition filed contemporaneously with the Initial Brief in the 3.851 appeal would have to

[1] The trial court's order on the 3.851 motion is the functional equivalent of the commissioner's report in the pre-Rule One habeas scheme. Before 1963, the Florida Supreme Court, not the commissioner, had the authority to grant relief. *See, e.g., Anglin; Hyatt v. Mayo*, 117 So.2d 476 (Fla. 1960) (granting the relief recommended by the commissioner). The ultimate authority for the enforcement of all habeas rights raised to this Court remains with this Court.

restate every element of the Initial Brief necessary to support the alternative argument that habeas relief, if not appropriately assigned to the 3.851 proceeding, must still be granted. Such redundancy does not appear to have been either the intent or the logical outcome of the Court's "effort to balance the needs of the state courts system against the necessary right to habeas corpus relief in Florida." *Baker*, 878 So.2d at 1244. Such unnecessarily redundant pleading would only further burden the Court when the purpose of Rule One and its progeny has been to ease that burden.

CLAIM IV

APPELLATE COUNSEL FAILED TO ATTACK THE FACIALLY INADEQUATE QUALIFICATION OF THE CHILD WITNESS.

The state argues that the this issue could not have been raised on direct appeal because trial counsel failed to object. However, the issue is raised in this habeas petition as ineffective assistance of appellate counsel in an abundance of caution, should this Court find that this claim can only be raised on direct appeal. *See, e.g.*, *Spencer v. State*, 842 So.2d 52 (Fla. 2003) (3.851 relief denied because improper prosecutorial conduct was apparent on the face of the record and should have been raised in direct appeal, while habeas claim of ineffective assistance of

appellate counsel for failure to raise similar claims was denied because they were not preserved by trial counsel and did not rise to fundamental error).

A capital defendant in post conviction proceedings is caught between a rock and a hard place – unpreserved errors may be deemed waived because they were apparent in the record and should have been raised in the direct appeal, yet the defendant does not know whether this basis for rejecting a 3.851 claim will be sustained by this Court. Thus, the alternative claim must be made in the habeas petition contemporaneously filed with the 3.851 appeal that the unpreserved error was fundamental and should have been raised in the direct appeal. Of course, the argument as to the essential unity and identity of the 3.851 appeal and the habeas petition argued herein in the Reply to Claim III, should obviate the possibility of losing a meritorious claim should the defendant raise it only in the context of either 3.851 ineffective assistance of failure to preserve, or in the context of a habeas claim of ineffective assistance for failure to raise in the direct appeal.

Regardless, the state's attempt to pigeonhole this claim as being only appropriate as a 3.851 issue ignores the nature of the habeas claim, that if the errors in qualifying the child witnesses should have been raised in the direct appeal, then appellate counsel was, indeed, ineffective for failing to do so.

The State's reliance on the standard for ineffective appellate counsel as exemplified by the quote from *Floyd v. State,* 808 So.2d 175 (Fla. 2002), omits the necessary corollary to the standard:

> [After quoting the standard quoted from *Floyd*, albeit from another case, the Court holds–] Under this analysis, appellate counsel will not be deemed ineffective for failing to raise issues not preserved for appeal. *See Medina v. Dugger*, 586 So.2d 317, 318 (Fla.1991). However, an exception may be made where appellate counsel fails to raise a claim which, although not preserved at trial, presents a fundamental error. *See Roberts v. State*, 568 So.2d 1255, 1261 (Fla.1990). A fundamental error is defined as an error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Kilgore v. State*, 688 So.2d 895, 898 (Fla.1996).

Spencer, 842 So.2d 52,73 (Fla. 2003).

In the instant case, Mr. Floyd urges that the failure to properly qualify the child witnesses is such fundamental error. The young girl's testimony collapsed because of her tender years and lack of competence to testify. The older brother testified without the prerequisite specific factual findings of competence, and the face of the record shows an insufficient voir dire. The prejudice is profound – the only purported eyewitness the State can reasonably rely upon for identification was never qualified to testify. The fact that the younger sister fell apart on the stand after a similar voir dire (and, for her, unlike her brother, at least a perfunctory ruling on competence was made) facially establishes that the voir dire and qualification of the two child witnesses was fundamentally flawed.

Of course, Mr. Floyd continues to maintain that the error was not so fundamental as to constitute waiver for failure to raise the issue on appeal, but, should that be the basis for rejecting his 3.851 claim, then the natural conclusion is that appellate counsel was ineffective for raising such fundamental error.

CLAIM V

ANY CLAIMS RAISED IN THE 3.851 MOTION WHICH SHOULD HAVE BEEN RAISED BY A PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE CONSIDERED IN THIS PROCEEDING, CONTEMPORANEOUS AND COLLATERAL TO THE APPEAL FROM THE 3.851 PROCEEDING.

In the reply on Claim III, supra, Mr. Floyd has amplified upon his argument that the protection Great Writ, no matter how it is splintered by rule and practice, remains a fundamental source of post conviction relief, and the assignment of a claim to the 3.851 motion or the habeas petition should not prevent relief when required. *Duest*, of course, does not address cross-referencing contemporaneously filed pleadings traveling together in the same court, seeking relief based on a single constitutionally guaranteed protection. Further, by pleading in the alternative to prevent a waiver from the failure to accurately predict which theory the Court may accept or reject in its unitary consideration of the two pleadings, Mr. Floyd is not seeking an "additional appeal." This proceeding is the single

chance Mr. Floyd has to seek relief from errors which occurred during the trial and direct appeal protected by his right to seek a writ of habeas corpus guaranteed by the state and federal constitutions. Again:

> If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Anglin v. Mayo, 88 So.2d 918, 919-20 (Fla. 1956).

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Maurice Floyd, respectfully urges this Honorable Court to grant habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been furnished to the Barbara Davis as designated below by mail on February 21, 2008.

_____
David R. Gemmer

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
David R. Gemmer

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