IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-____

MICHAEL SEIBERT,

Petitioner,

v.

WALTER McNEIL, Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

This is Petitioner's first habeas corpus petition in this Court. This petition for habeas corpus relief is being filed in order to preserve Mr. Seibert's claims arising under recent United States Supreme Court decisions and to address substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; claims demonstrating that Mr. Seibert was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions and death sentences violated fundamental constitutional guarantees.

Citations to the record on the direct appeal shall be as "R. __" and to the transcript of the trial proceedings as "T. __." All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9), Florida Constitution. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Article I, Section 13, Florida Constitution. This petition presents issues

which directly concern the constitutionality of Mr. Seibert's convictions and sentences of death.

Jurisdiction in this action lies in this Court, *see e.g. Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Seibert's direct appeal. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction and its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Seibert requests oral argument on this petition.

STATEMENT OF CASE AND FACTS

On November 21, 2002, Mr. Seibert was found guilty of one count of first degree murder. (T. 3832). The penalty phase of Mr. Seibert's trial began on January 27, 2003. (T. 4090). On February 11, 2003, the jury rendered an advisory sentence, recommending the death penalty by a vote of nine (9) to three (3). (T. 5179). The circuit court sentenced Mr. Seibert to death on March 24, 2003. (R. 792-818).

This Court affirmed Mr. Seibert's conviction and sentence on direct appeal. *Seibert v. State*, 923 So. 2d 460 (Fla. 2006), *cert. denied*, 127 S. Ct. 198 (2006).

The Petitioner relies on the facts as presented in his initial brief. This Petition is being filed simultaneously with Mr. Seibert's initial brief following the denial of his motion for post-conviction relief.

CLAIM I

MR. SEIBERT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Mr. Seibert had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. *Strickland v. Washington*, 466 U.S. 668 (1984). "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The two-prong *Strickland* test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F. 2d 1508 (11th Cir. 1989). Appellate counsel's performance was deficient and Mr. Seibert was prejudiced because these deficiencies compromised the appellate process to such a degree as to undermine confidence in the correctness of the result of the direct appeal. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000).

Appellate counsel failed to present for review to this Court compelling

issues concerning Mr. Seibert's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellate counsel's brief was deficient and omitted meritorious issues, which had they been raised, would have entitled Mr. Seibert to relief.

In *Wilson v. Wainwright*, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

474 So. 2d 1162, 1165 (Fla. 1985). In Mr. Seibert's case appellate counsel failed to act as a "zealous advocate," and Mr. Seibert was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise a number of issues to this court.

As this Court stated in *Wilson*:

> The criteria for proving ineffective assistance of appellate counsel parallels the *Strickland* standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Id. at 1163, citing *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985).

This Court has "repeatedly held that appellate counsel cannot be considered ineffective for failing to raise issues which [were] procedurally barred . . . because they were not properly raised at trial." *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000). Where an issue is not preserved for review, it will warrant reversal if raised on appeal only if it constitutes fundamental error, which has been 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." *Urbin v. State*, 714 So. 2d 411, 418 n.8 (1998) (quoting *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996)); *see also Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997) (describing "fundamental error" as error "so prejudicial as to vitiate the entire trial"), *cert. denied*, 523 U.S. 1083 (1998).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases (ABA Guidelines).[1] "Given the gravity of the

[1] The ABA Guidelines were originally promulgated in 1989, and revised in 2003. The 2003 version of the guidelines spells out in more detail the reasonable professional norms that trial counsel should have utilized in the investigation of Mr. Seibert's case. However, notwithstanding the fact that Mr. Seibert's case was tried in 2002, there is no doubt as to the applicability of the 2003 Guidelines to his case. The United States Supreme Court has recently reaffirmed the applicability of the Guidelines to those cases tried before the Guidelines were promulgated. In *Rompilla v. Beard*, 545 U.S. 374 (2005) in which case the trial took place in 1989

punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003). Appellate counsel failed to raise a number of such grounds.

In light of the serious reversible error that appellate counsel failed to raise, there is more than a reasonable probability that the outcome of the appeal would have been different.

A. MR. SEIBERT'S DUE PROCESS RIGHTS WERE VIOLATED BY HIS ABSENCE FROM CRITICAL STAGES OF HIS CAPITAL TRIAL.

A criminal defendant has the constitutional right to be at the stages of his trial where fundamental fairness might be thwarted by his absence. *Faretta v. California*, 422 U.S. 806 (1975); *Francis v. State*, 413 So. 2d 1175, 1177 (Fla. 1982), citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934). Fla. R. Crim. P. 3.180(a) states in all prosecutions, the defendant shall be present at any pretrial conference, unless waived by the defendant in writing. The involuntary absence of a criminal defendant at certain stages of the proceeding constitutes error under Rule 3.180(a). Counsel's waiver of a defendant's presence at a crucial stage of a

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prior to the promulgation of either the 1989 or the 2003 Guidelines, the Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines to the case.

trial, without acquiescence or ratification by the defendant, is error. *Garcia v. State*, 492 So. 2d 360, 364 (Fla. 1986); *State v. Melendez*, 244 So. 2d 137 (Fla. 1971). When the defendant is involuntarily absent contrary to rule 3.180(a), the burden is on the state to show beyond a reasonable doubt that the error was not prejudicial. *Garcia v. State*, 492 So. 2d 360, 364 (Fla. 1986). A defendant may waive his right to be present through his counsel but the court must inquire as to whether that waiver was knowing, voluntary and intelligent. *Coney v. State*, 653 So. 2d 1009, 1013 (Fla. 1995). However, such a waiver by trial counsel must be later acquiesced or ratified by the defendant. *Id.*

A criminal defendant's right to be present at critical stages of his trial has been codified in Florida Rule of Criminal Procedure 3.180(a), which provides:

> a) *Presence of Defendant*. --In all prosecutions for crime the defendant shall be present:
>
> (1) at first appearance;
>
> (2) when a plea is made, unless a written plea of not guilty shall be made in writing under the provisions of rule 3.170(a);
>
> (3) at any pretrial conference, unless waived by the defendant in writing;
>
> (4) at the beginning of the trial during the examination, challenging, impaneling, and swearing of the jury;
>
> (5) at all proceedings before the court when the jury is present;

> (6) when evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury;
>
> (7) at any view by the jury;
>
> (8) at the rendition of the verdict; and
>
> (9) at the pronouncement of judgment and the imposition of sentence.
>
> (b) *Presence; Definition*. --A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding and has a meaningful opportunity to be heard through counsel on the issues being discussed.

In violation of Mr. Seibert's constitutional rights, the court allowed Mr. Seibert's trial counsel to waive Mr. Seibert's presence at numerous pretrial conferences, thereby denying his rights under both the Florida Constitution and U.S. Constitution, as well as Rule 3.180(a). The record reflects that on at least eighteen (18) occasions, Mr. Seibert, without any record of having submitted a written waiver, was not present during pretrial conferences. Among the dates in pretrial hearings that Mr. Seibert was absent are: May 7, 1998 (T. 20); May 20, 1998 (T. 28); June 4, 1999 (T. 98); June 14, 1999 (T. 116); October 27, 2000 (T. 185); November 6, 2000 (T. 193); November 16, 2000 (T. 199); November 22, 2000 (T. 205-13); December 18, 2000 (T. 232-35); January 16, 2001 (T. 243); January 19, 2001 (T. 250-51; 261); February 28, 2001 (T. 285); April 26, 2001 (T.

292-299); May 29, 2001 (T. 307); October 12, 2001 (T. 335); March 26, 2002 (T. 619); October 3, 2002 (T. 733); and October 10, 2002 (T. 742).

Mr. Seibert submits that his absence at some of these proceedings, when considered on an individual basis, did not affect the overall fairness of the proceedings since they were merely scheduling discussions. *See conferences conducted on*: May 7, 1998 (T. 20); May 20, 1998 (T. 28); January 16, 2001 (T. 243); February 28, 2001 (T. 285); October 12, 2001 (T. 335); March 26, 2002 (T. 619); and October 10, 2002 (T. 742).[2] However, Mr. Seibert maintains his constitutional and statutory right to be present and therefore his absence without a written waiver constituted error. Furthermore, had it merely been one or two, or even five or six hearings that were conducted in Mr. Seibert's absence, then this violation may not rise to a constitutional magnitude, however, when the number of pre-trial hearings where Mr. Seibert's presence was waived, without a written waiver, amounts to such a staggering number, then the entire pre-trial process cannot be considered a fair and constitutionally valid process. Rule 3.180 and the constitutional rationale that it is based upon is placed on its head when a defendant is consistently denied his right to be present at his own trial. This is remarkably true when the State is seeking the ultimate punishment.

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[2] Mr. Seibert was not present to hear any of the arguments and discussions but was brought in at the end of this proceeding.

Notwithstanding some pre-trial dates in which Mr. Seibert was not present which consisted of scheduling matters, other hearings involved evidentiary matters that Mr. Seibert clearly needed to be present to assist his attorney. For example, on June 4, 1999, (T. 98), Mr. Seibert was not present for a motion regarding *ex parte* hearings to appoint experts. Mr. Seibert's presence was essential at this motion hearing. The court heard argument from the State and the defense pertaining to the need for an appointment of penalty phase experts. Mr. Seibert's absence from this critical hearing constituted error. *See Francis v. State,* 413 So. 2d 1175, 1177 (Fla. 1982); *Coney v. State,* 653 So. 2d 1009, 1013 (Fla. 1995); F1a. R. Crim. P. 3.180.

Mr. Seibert's presence was also essential for the June 14, 1999 (T. 116) *ex parte* hearing. During this proceeding, trial counsel verbally detailed for the court Mr. Seibert's childhood history of psychiatric episodes and treatment. Trial counsel also called to the witness stand Dr. Mossman, who provided specific factual testimony about Mr. Seibert's family background. Dr. Mossman was also cross examined by County Attorney Mr. Bloch. (T. 119-127). Mr. Seibert clearly had a right to be present during the presentation of this evidence. His absence was in error under Rule 3.180. Although trial counsel waived Mr. Seibert's appearance, there is nothing in the record suggesting Mr. Seibert later ratified or

acquiesced to this waiver. *See Coney*, *supra*. Mr. Seibert's absence from these pretrial conferences thwarted the fundamental fairness of the proceedings.

Additionally, Mr. Seibert was involuntarily absent from a series of hearings that dealt with personal correspondence he sent an acquaintance while in jail awaiting trial. At these hearings dated October 27, 2000 (T. 185), November 6, 2000 (T. 193), and continuing with the January 16, 2001 (T. 243) hearing, trial counsel verbally waived Mr. Seibert's presence. These hearings involved factual and legal matters in which Mr. Seibert had a right to actively participate with his counsel. These matters were similarly discussed at the November 16, 2000 (T. 199), and November 22, 2000 (T. 205), hearings but the record is silent as to Mr. Seibert's presence. Once again, Mr. Seibert's absence at these pretrial conferences thwarted the fundamental fairness of the proceedings.

Mr. Seibert wanted to be present at the January 19, 2001 (T. 250) hearing where not only were these letters discussed but also the perpetuation of testimony of a witness, who was imprisoned in Ecuador. Due to his involuntary absence, Mr. Seibert was denied his statutory and constitutional rights to be present. There is no mention of where Mr. Seibert was or any mention of a waiver of his presence during these proceedings except for the second to final page of the transcript for this hearing where the Court Officer notes Mr. Seibert was in the hospital. There is

also no mention if the Court later inquired on this waiver as required by *Coney, supra.*

At the May 29, 2001 hearing (T. 307), a correctional officer reported on Mr. Seibert's desire not to be present. The court had the obligation to later inquire with Mr. Seibert directly on whether this waiver was true; and whether it was knowing, voluntary and intelligent. *See Coney v. State*, 653 So. 2d 1009 (Fla. 1995). The Court simply took the officer at his word without any follow-up ratification. Mr. Seibert's absence at these pretrial conferences thwarted the fundamental fairness of the proceedings. During numerous hearings, Mr. Seibert was prejudiced by not being able to participate in his own trial. In some instances, trial counsel stated Mr. Seibert wants to appear yet the proceedings inexplicably continue without him. *See* December 18, 2000 (T. 232-35). In another hearing, the victim's father spoke in open court despite Mr. Seibert's absence (April 26, 2001, T. 292-94). At other times, Mr. Seibert was not present because of inexplicable reasons such as he is in a "safety cell" (February 28, 2001 hearing, T. 285), or his presence was waived by counsel because Mr. Seibert was "in custody." (June 4, 1998, T. 98; October 27, 2000, T. 185; and November 6, 2001, T. 193).

Mr. Seibert's absence from these numerous pretrial conferences is apparent on the face of the record. The circuit court found this claim, as raised in Mr. Seibert's rule 3.851 motion, procedurally barred because it "could have and should

have been raised on direct appeal," citing *Morris v. State*, 931 So. 2d 821, 832 n. 12 (Fla. 2006), *Phillips v. State*, 894 So. 2d 28, 35 & n.6 (Fla. 2004), and *Vining v. State*, 827 So. 2d 201, 217 (Fla. 2002). (Supp. PC-R. 202). Appellate counsel was ineffective for failing to assert fundamental error with respect to Mr. Seibert's involuntary absence from critical stages of his trial.

B. FLORIDA'S RULE PROHIBITING COUNSEL FROM INTERVIEWING JURORS VIOLATES EQUAL PROTECTION AND DUE PROCESS RIGHTS, AND THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial after the dismissal of the jury. This ethical rule, one which prevents Mr. Seibert from investigating any claims of jury misconduct or bias that may be inherent in the jury's verdict, is unconstitutional on its face and as applied to Mr. Seibert in postconviction.[3] Appellate counsel was ineffective for failing to argue this issue on direct appeal.

Under the Sixth, Eighth, and Fourteenth Amendments, Mr. Seibert is entitled to a fair trial and sentencing. Mr. Seibert's inability to fully explore possible misconduct and biases of the jury prevents him from fully detailing the unfairness

[3] Mr. Seibert raised this claim in his rule 3.851 motion and the circuit court denied it as procedurally barred, finding that it should have been raised on direct appeal.

of the trial. Misconduct may have occurred that Mr. Seibert can only discover by juror interviews. *Cf. Turner v. Louisiana*, 379 U.S. 466 (1965) (finding a showing of prejudice and violation of Due Process when an intimate relationship is established between jurors and witnesses); *Russ v. State*, 95 So. 2d 594 (Fla. 1957) (finding "where a juror on deliberation [relies on or] relates to the other jurors material facts claimed to be within his personal knowledge, but which are not adduced in evidence, it is misconduct which may vitiate the verdict").

In the present case, Mr. Seibert believes that circumstances exist that indicate bias and a lack of impartiality on the part of his jury. During the penalty phase of the trial, during its cross examination of William Ace Green, the State asked whether Mr. Seibert "would frequent or he would go to gay clubs to hustle money from gay guys." (T. 4220). The circuit court sustained the defense counsel's objection on relevance grounds, but denied the motion for mistrial. (T. 4223).

The very next day, Richard Levine, one of the alternate jurors asked to be excused because several of the other jurors had made homophobic and anti-gay comments that made him very uncomfortable because he was homosexual. (T. 4578). The court questioned juror Levine about whether he had heard any other disturbing remarks prior to that morning, and juror Levine responded that he had not, but that

> …**from the beginning I felt kind of an undertone**. That is why I stayed to myself. I never said anything, but I have never from day one, back from October through November until now, have heard nobody mention anything about gay people. …**I just felt there was a lot of homophobic people in the jury**.

(T. 4592) (emphasis added).

The court conducted individual voir dire of the entire jury to inquire about the comments that were made. (T. 4584-4698). Six jurors testified under oath that they heard the comments. Four jurors testified that the comments were made by juror Floyd Glinton to juror Steve Lennen. Three jurors testified that the comments were directed at the clerk. Jurors Glinton and Lennen admitted to having the conversation with the inappropriate comments, but denied under oath that they were directed towards the clerk. Of juror Lennen's denial of the comments referencing the clerk, the Court commented, "I don't necessarily think he was totally honest." (T. 4649).

Juror Levine was excused on account of his discomfort at serving on the jury after hearing the homophobic comments. Jurors Glinton and Lennen were also excused because of their inappropriate comments. These were jurors who sat through the guilt/innocence phase of Mr. Seibert's trial, deliberated with the rest of the jury, and ultimately found Mr. Seibert guilty of first degree murder. Mr. Seibert is highly prejudiced by his counsel's inability to interview the jurors from

his trial to discover to what extent the homophobic and anti-gay attitude of the jury impacted his conviction and sentence of death.

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is unconstitutional because it is in conflict with the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights, including Mr. Seibert's rights to due process, *see Smith v. Phillips*, 455 U.S. 209, 217 (1982) (finding "due process means a jury capable and willing to decide the case solely on the evidence before it"); *Turner v. Louisiana*, 379 U.S. 466 (1965) (finding "[t]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors") and access to the courts of this State under Article I, § 21 of the Florida Constitution. Appellate counsel failed to argue this issue on direct appeal and relief should therefore issue.

C. MR. SEIBERT WAS CONVICTED AND SENTENCED TO DEATH BY A BIASED AND IMPARTIAL JURY.

Mr. Seibert believes that circumstances exist that indicate bias and a lack of impartiality on the part of his jury. During the penalty phase of the trial, during its cross examination of William Ace Green, the State asked whether Mr. Seibert "would frequent or he would go to gay clubs to hustle money from gay guys." (T. 4220). The circuit court sustained the defense counsel's objection on relevance grounds, but denied the motion for mistrial. (T. 4223).

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After the individual voir dire, trial counsel moved to strike the entire jury panel on the grounds that some of the answers given were "obviously misleading." (T. 4656). In other words, on top of the fact that inappropriate comments were made, trial counsel was concerned that some of the jurors were misleading the court as to what actually occurred. (*Id.*) The court denied trial counsel's motion to strike the entire panel, but excused juror Levine on account of his discomfort at serving on the jury after hearing the homophobic comments. (T. 4666). Jurors Glinton and Lennen were also excused because of their inappropriate comments. (T. 4666). These were jurors who sat through the guilt/innocence phase of Mr. Seibert's trial, deliberated with the rest of the jury, and ultimately found Mr. Seibert guilty of first degree murder.

Appellate counsel's failure to argue this issue on appeal constitutes serious error that prejudiced Mr. Seibert by compromising his appellate process to such a degree as to undermine confidence in the correctness of the result. The homophobic and anti-gay attitude of the jury and the misleading manner in which some of the jurors answered the circuit court's questions regarding the inappropriate comments that were made established at least a prima facie case of potential prejudice, and had appellate counsel raised the issue on direct appeal, the burden would have shifted to the State to rebut the presumption of prejudice. *Johnson v. State*, 696 So. 2d 317, 323 (Fla. 1997); *Amazon v. State*, 487 So. 2d 8,

11 (Fla. 1986). It cannot be said that the "adversarial testing process worked in [Mr. Seibert's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th Cir. 1987). Appellate counsel's deficient performance worked to Mr. Seibert's actual prejudice. Relief is warranted.

D. THE ADMISSION OF GRUESOME PHOTOGRAPHS OF THE VICTIM'S BODY AT THE CRIME SCENE WAS ERROR.

Pre-trial, trial counsel filed a motion in limine to exclude admission of gory photos. (R. 189-192). Trial counsel argued that the photographs of the deceased were excessively gory in that they depict the victim "with her lower torso eviscerated, with her left foot cut completed [sic] off and her legs literally carved to the point where they are only bones." (R. 189). Trial counsel argued that the photographs would be highly prejudicial and inflammatory if they were shown to the jury. (Id.). Trial counsel offered to stipulate as to the cause of death of the victim and the identification of the victim. (R. 190). Trial counsel argued that it had been established, within a reasonable degree of medical certainty, that the cause of death was mechanical asphyxiation, or strangulation with a shoelace and that the knife wounds inflicted on the deceased were all done post-mortem, and therefore the photographs were not relevant to the cause of death. (Id.). Furthermore, trial counsel argued that if the defendant was convicted of first degree murder and the case went to a penalty phase, the aggravating circumstance of heinous, atrocious, or cruel ("HAC") would be at issue because of the

strangulation. (Id.). The post-mortem knife wounds would not be relevant to HAC, but if the photographs were admitted, the prejudice to the defendant would "spill over" to the penalty phase. (Id.). The circuit court denied trial counsel's motion and concluded that the photographs would be relevant to the medical examiner's testimony, and also relevant to consciousness of guilt. (T. 1052).

At trial, the State introduced photographs depicting the victim's almost completely eviscerated torso, severed foot, and legs carved to the bones. *See, e.g.*, State's Exhibit 37. The medical examiner referred to the photographs in her guilt/ innocence phase testimony when describing how she found the victim's body when she arrived at the crime scene. (T. 3539). During a break in the medical examiner's testimony, outside the presence of the jury, trial counsel asked to Court to order the State to take down State's Exhibit 37, which had been displayed in front of the jury for an hour and fifteen minutes. (T. 3588). Trial counsel pointed out that it was "the major crime scene photographed" that was litigated extensively pre-trial. (Id.). The court ordered the State to remove the photograph at the end of the direct examination. (T. 3590). At that point, trial counsel state that:

> My previous statement, for the record, for purposes of appeal, that the state was not making that gruesome and horrific picture a cornerstone of their case is now withdrawn, because of their highlighting it in this portion of the case.

(T. 3590).

This Court has consistently held that photographs which have the potential for unduly influencing a jury should be admitted only if they have some relevancy to the facts in issue. *Reddish v. State*, 167 So. 2d 858, 863 (Fla. 1964). This Court has also stated that autopsy photographs may be admissible when used to "illustrate the medical examiner's testimony and the [victim's] injuries," *Pope v. State*, 679 So. 2d 710, 714 (Fla. 1996), or when "relevant to the medical examiner's determination as to the manner of the victim's death," *Mansfield v. State*, 758 So. 2d 636, 648 (Fla. 2000). Moreover, "[t]o be relevant, a photo of a deceased victim must be probative of an issue that is in dispute." *Looney v. State*, 803 So. 2d 656, 670-71 (Fla. 2001); *Almeida v. State*, 748 So. 2d 922, 929 (Fla. 1999).

In the instant case, there was no dispute as to the cause of death—the medical examiner testified that to a reasonable degree of medical certainty, the cause of death was mechanical asphyxiation. (T. 3560). The photographs depicting the knife wounds are not relevant to the cause of death. Furthermore, since the medical examiner could not say whether the knife wounds were inflicted before or after the victim's death, the photographs depicting the knife wounds are not probative of any fact in dispute. The only reason for the admission of the photo was to inflame the jury. The prejudice to Mr. Seibert is that these horrific photographs were in the minds of the jurors during their deliberations prior to

returning a guilty verdict. Additionally, the prejudice spilled over into the penalty phase because the photos were in the minds of the jurors when they decided to recommend a death sentence for Mr. Seibert.

The issue was preserved and appellate counsel's failure to raise the issue on direct appeal was deficient performance under the ABA Guidelines. Mr. Seibert was prejudiced by appellate counsel's failure to raise the issue because this Court has found this issue to be harmful error on direct appeal in identical cases. *Czubak v. State*, 570 So. 2d 925 (Fla. 1990) ("where the probative value of the photographs was at best extremely limited and where the gruesome nature of the photographs was due to circumstances above and beyond the killing, the relevance of the photographs is outweighed by their shocking and inflammatory nature"); *Reddish v. State*, 167 So. 2d 858 (Fla. 1964); *Hoffert v. State*, 559 So. 2d 1246, 1249 (Fla. 4th DCA 1990).

E. THE JURY WAS IMPROPERLY INSTRUCTED AND THE SENTENCING COURT IMPROPERLY CONSIDERED INVALID AGGRAVATING CIRCUMSTANCES IN VIOLATION OF MR. SEIBERT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The heinous, atrocious, and cruel aggravator, section 921.141(5)(h), Florida Statutes, is facially unconstitutionally vague and overbroad. As applied in Mr. Seibert's case, the jury was improperly instructed on this aggravator in violation of Mr. Seibert's due process rights.

Pre-trial, trial counsel filed a motion to declare §921.141 unconstitutional because, *inter alia*, it provides no guidance as to how the jury should determine the existence of aggravating factors. (R. 328-331). Trial counsel argued that the constitutional defects could only be remedied by revised jury instructions and a requirement that the jury make specific findings in support of its verdict. (R. 330). Trial counsel separately requested instructions regarding the heinous, atrocious, or cruel aggravating circumstance, section 921.141(5)(h). (R. 376-380). Specifically, trial counsel asked for the following instruction:

> To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.

(R. 376). Trial counsel's motion to declare section 921.141 unconstitutional or for special penalty phase verdict form and instructions was denied on January 15, 2003. (T. 3942).

At penalty phase, the court gave the following instruction on the heinous, atrocious, or cruel aggravator:

> The kind of crime intended to be included as heinous, atrocious, and cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(T. 5165-66). The jury was not instructed that the State must prove the defendant's specific intent beyond a reasonable doubt. The jury should have been instructed that the State must prove beyond a reasonable doubt that the defendant knew or intended the murder to be especially wicked, evil, atrocious or cruel. *Omelus v. State*, 584 So. 2d 563, 566 (Fla. 1991); *Stein v. State*, 632 So. 2d 1361, 1367 (Fla. 1994); *Kearse v. State*, 662 So. 2d 677 (Fla. 1995).

The United States Supreme Court explained in *Espinosa v. Florida*:

> [A]n aggravating circumstance is invalid…if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor.

Id. at 505 U.S. 1079, 1081 (1992). The Court clarified that under Florida's bifurcated sentencing procedure, the sentence is invalid if the jury received a vague instruction because the sentencing court indirectly weighs the invalid aggravator when it gives great weight to the jury's recommendation. *Id*. at 1082. *See also Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (finding the heinous, atrocious, or cruel aggravator unconstitutional for failing to impose any restraint on the arbitrary and capricious imposition of the death sentence).

In *Maynard v. Cartwright*, 486 U.S. 356 (1988) the United States Supreme Court held that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Id*. at

362. The Court in *Maynard* found Oklahoma's HAC aggravator unconstitutionally vague and reversed the death sentence despite the fact that the jury found two other aggravating circumstances that were unchallenged. Here, the court's instruction did not cure the vagueness of the aggravating circumstance because it did not properly instruct on the burden of proof for specific intent. The jury's discretion was not limited as required by the Eighth Amendment. This failure also relieved the State of its burden to establish this specific intent beyond a reasonable doubt, in violation of the due process clauses of the Fifth and Fourteenth Amendments.

The issue was preserved and appellate counsel's failure to raise the issue on direct appeal was deficient performance under the ABA Guidelines. Mr. Seibert was prejudiced by appellate counsel's failure to raise the issue because this Court has granted relief on direct appeal in identical cases. *Omelus v. State*, 584 So. 2d 563 (Fla. 1991). In *Omelus*, the Court vacated defendant's death sentence on direct appeal where the jury instruction on HAC was improper because there was no evidence that the defendant intended the death to be torturous. Relief was granted although the sentencing court did not find HAC:

> We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor and had recommended a life sentence.

Id. at 566.

F. MR. SEIBERT'S CONVICTION AND SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Pre-trial, Mr. Seibert filed a motion to preclude the imposition of capital punishment on the ground that the death penalty, as presently administered, is *per se* cruel and unusual punishment. (R. 348-58). Mr. Seibert argued that the inefficacy of the current capital punishment system, the continuing problem of systemic racial discrimination, and the paradox of the U.S. Supreme Court's post-*Furman* capital sentencing jurisprudence demonstrates that capital punishment as presently administered violates the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 17 of the Florida Constitution. (Id.). The motion was denied.

Mr. Seibert also raised this claim in his rule 3.851 motion, and argued that a comprehensive report of Florida's death penalty system, published by the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team in September 2006, made clear that Florida's death penalty system is so seriously flawed and broken that it does not meet the constitutional requisite of being fair, reliable or accurate. (PC-R. 110-125). *See* American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006 (hereinafter "ABA Report on Florida"). (PC-R. 149-610).

The circuit court denied the claim on the ground that this Court has repeatedly held that the ABA Report does not constitute newly discovered evidence, citing *Diaz v. State*, 945 So. 2d 1136, 1146 (Fla. 2006), *Rolling v. State*, 944 So. 2d 176, 181 (Fla. 2006), and *Rutherford v. State*, 940 So. 2d 1112, 1117-1118 (Fla. 2006). In each case, this Court has concluded that the Report "is not newly discovered evidence because it 'is a compilation of previously available information related to Florida's death penalty system and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches.'" *Diaz v. State*, 945 So. 2d 1136, 1146 (Fla. 2006).

Over 30 years ago, the U.S. Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (per curiam). In *Furman*, the petitioners, relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning.[4] As a

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[4]*Furman*, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under

result, *Furman* stands for the proposition most succinctly explained by Justice Stewart in his concurring opinion: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be wantonly and freakishly imposed" on a "capriciously selected random handful" of individuals. *Id.* at 310.[5]

The ABA Report on Florida makes clear that who in fact gets executed in Florida does not depend upon the facts of the crime or the character of the defendant, but upon the flaws and defects of the capital sentencing process.[6] Thus, "the

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these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); *Id.* at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); *Id.* at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); *Id.* at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); *Id.* at 365-66 (Marshall, J., concurring)("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.")(footnote omitted).

[5]It is important to recognize that the decision in *Furman* did not turn upon proof of arbitrariness as to one individual claimant. Instead, the court looked at the systemic arbitrariness.

[6] Who gets executed in Florida turns upon such factors as who represented the condemned; what objections he did or did not make; what investigation he did or did

imposition and carrying out of the death penalty in [Mr. Seibert's] case[] constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman*, 408 U.S. at 239-40. A review of the areas identified in the report as falling short makes apparent that in Florida's death penalty scheme is deficient for the many of the same reasons the schemes at issue in *Furman* were found to be unconstitutional.

I. FLORIDA – AN ARBITRARY AND CAPRICIOUS DEATH PENALTY SYSTEMS

a. The Number of Executions

The ABA Report on Florida demonstrates that Florida's death penalty scheme has failed to satisfy the *Furman* mandate. Florida's capital sentencing is still arbitrary and capricious. Since 1972, Florida has carried out a total of 61 executions. Between 1972 and 1999, there were 857 defendants sentenced to death. ABA Report on Florida at 7. Statistics of the number of individuals who committed murder during that time have not been recorded. Nevertheless, it is clear that of the death sentences imposed, few are actually carried out. The percentage of murderers in Florida actually executed since 1972 is minuscule.

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not undertake; whether counsel was diligent in finding evidence demonstrating that the condemned was innocent; at what point did this Court review the case; did the condemned get the benefit of new law identifying constitutional or statutory error in his case; did the State preserve the physical evidence containing DNA material that would prove innocence; what procedural bars were applied by the courts to preclude consideration of meritorious claims; etc.

b. The Exonerated[7]

In Florida, since 1972, 22 people have been exonerated and another individual has been exonerated posthumously, while 61 people have been executed. ABA Report on Florida at iv. "Since the reinstatement of the death penalty in 1972, Florida has led the nation in death row exonerations." *Id*. at 45. The staggering rate of exonerations certainly suggests that Florida's death penalty system is broken and violates the *Furman* promise.

While the State of Florida has recently passed legislation to allow capital defendants the opportunity to seek DNA testing,[8] most of the exonerated defendants' cases had no connection to favorable post-verdict DNA results.[9] Yet, the State of

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[7] A plethora of factors contribute to an innocent individual being convicted of a capital crime. Given the number of exonerations so far, undoubtedly a risk that an innocent has been or will be executed in Florida is great. Certainly, such an occurrence would be itself violative of the Eighth Amendment. However also important under *Furman* are the systemic safeguards in place and their likely effectiveness in rescuing the innocent. This section focuses on the problems in Florida's rules and procedures that inhibit a condemned's ability to bring claims of newly discovered evidence of actual innocence, and inhibit his chances of being able to establish his innocence.

[8]While the ABA Report on Florida notes the progress in DNA testing, it is equally clear that the other burdens and requirements will certainly cause arbitrariness in determining who is granted the opportunity to test evidence and show proof of innocence. *See* ABA Report on Florida at 51-3.

[9] DNA testing established Frank Lee Smith's innocence posthumously. DNA testing did produce evidence in Rudolph Holton's case that while assisting in establishing his innocence, was not dispositive.

Florida has not made any substantive or procedural improvements for those who have no DNA evidence in their case, but could show innocence through the use of other evidence. Indeed, while the State of Florida has now removed the time limitation for bringing a motion seeking DNA testing, *see* Fla. Stat. § 925.11 (1)(b) (2006); Fla. R. Crim. P. 3.853, capital postconviction defendants must prove due diligence in bringing their claims of innocence. A system that precludes the presentation of evidence of innocence in a form other that the results of DNA testing injects arbitrariness and randomness into the process in violation of *Furman*.

II. REPRESENTATION

a. Trial level representation.

The ABA assessment team found that there was inadequate compensation for trial counsel in death penalty proceedings and that the administration of the funding and timing of counsel's ability to seek payment severely hamper obtaining qualified counsel who has adequate funding for a death penalty case. ABA Report on Florida at iv. With the ABA Guidelines in mind, the team recommended that steps be taken to ensure the appointment of "qualified and properly compensated counsel." *Id*. at 174. This and the other recommendations made in the ABA Report reflect that Florida has not lived up to its obligation to minimize, if not remove, arbitrary factors from the capital sentencing process.

b. Postconviction representation

The quality of Florida's capital postconviction representation system has steadily declined over the past ten years when the federal funding for resource centers was eliminated.[10] The state-funded agency responsible for representing postconviction defendants was overwhelmed with cases and was eventually separated into three regional offices with the creation of the Registry system to handle conflict and overflow cases. The Florida Legislature then eliminated one of the regional offices and sent the Registry more than 60 cases. Under the current system, at the part of the capital process at which errors are sought to be caught and corrected,[11] qualifications to be appointed as Registry counsel are minimal, oversight is non-existent, and funding is inadequate. *Id.* at v. Compensation is capped. Though this Court has recognized that the cap may be breached in extraordinary circumstances, the determination of whether the cap was properly breached is made after the fact. *Fla. Dept. of Financial Services v. Freeman*, 921 So. 2d 598 (Fla. 2006). Within the Registry system, funding is only available for 840 attorney hours, although research suggests that 3,300 attorney hours are required to represent a capital postconviction defendant. ABA Report on Florida at v. Funds for investigative, expert, travel and

[10]For a more complete history of Florida's capital collateral system, see ABA Report on Florida p. 195-6.

[11]"Very significant percentages of capital convictions and death sentences have been set aside in such proceedings . . . " ABA Report on Florida at 214.

other costs are also limited and there is no provision for compensation for successor proceedings.

While Registry counsel are restricted in funding, the Capital Collateral Regional Counsel (CCRC) offices are not. Undoubtedly, this disparity in funding will impact the representation and arbitrarily affect the ultimate success of capital postconviction defendants in challenging their convictions and death sentences.

In 1988, this Court recognized that the creation of CCRC extended to all Florida capital defendants the right to have effective representation in all collateral proceedings in both state and federal court. *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988). Having recognized the statutorily created right, this Court has generally found that no remedy exists for a breach of the statutorily created right to effective collateral counsel. *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996).

Because a capital defendant has no remedy when state-provided counsel either through negligence or a lack of diligence fails to provide effective representation, Florida's capital sentencing process fails to live up to the *Furman* promise. As noted in the ABA Report, the performance of Registry counsel has been openly criticized, even by members of this Court.[12] Thus, while it is well recognized by state officials

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[12]ABA Report on Florida at 183-84.

> Performance like this has led two Florida Supreme Court Justices to publicly comment on the quality, or lack

in the legislative and judicial branches of government that a number of the post-conviction attorneys provided by the State are incompetent, *i.e.*, some of the worst lawyering ever seen, capital defendants must accept the incompetent representation without recourse.

A system that knowingly provides capital defendants with "some of the worst lawyers" that a Justice of this Court has ever seen, and strips the capital defendant of the right to complain and seek redress, simply does not comport with the *Furman* promise that states with capital sentencing schemes must affirmatively take steps to eliminate the risk that an execution will be as random as a bolt of lightning. The

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> thereof, of registry attorneys. Justice Cantero stated that the representation provided by some registry attorneys is "[s]ome of the worst lawyering" he has ever seen. Specifically, "some of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven't raised the right ones." Chief Justice Barbara Pariente reiterated the concerns of Justice Cantero by stating that "[a]s for registry counsel, we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimal levels of competence." The questionable performance of these attorneys, as well as the lack of requisite qualifications, is particularly troublesome in light of the fact that death-sentenced inmates do not have a state of federal constitutional right to assert a claim of ineffective assistance of post-conviction counsel.

outcome of the post conviction process, directly linked to whether state-appointed counsel is incompetent, is a purely arbitrary.

III. ISSUES RELATED TO THE JURY'S ROLE IN SENTENCING

a. Jury Instructions.

The ABA assessment team found that capital jurors do not understand "their role or responsibilities when deciding whether to impose a death sentence." ABA Report on Florida at vi.[13] The team recommended that Florida redraft its capital jury instructions to prevent common misconceptions that inject arbitrariness to the process, in violation of *Furman*. *Id.* at x.

b. Unanimity.

"Florida is now the only state in the country that allows a jury to find that aggravators exist **and** to recommend a sentence of death by a mere majority vote." *State v. Steele*, 921 So. 2d 538, 548-49 (Fla. 2005) (emphasis in original). The ABA Report on Florida cites a study which concluded that permitting capital sentencing recommendations by a majority vote reduces the jury's deliberation time and may

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[13]Indeed, "[i]n one study, over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt." *Id*. The same study found that over 36 percent "believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be 'heinous, vile or depraved'" beyond a reasonable doubt. *Id*. (emphasis in original). Over 25 percent considered future dangerousness, even though such a factor is not a legitimate sentencing factor under Florida law. *Id*.

diminish the thoroughness of the deliberation. ABA Report on Florida at vi-vii. Florida precludes sentencing juries from considering residual or lingering doubt as to guilt as a mitigating factor that may warrant a life sentence. ABA Report on Florida at 311. The coupling of a simple majority verdict with the preclusion of consideration of lingering doubt certainly adds to the risk that an innocent will be sentenced to death. The fact that Florida is the only state to have coupled these things together and also leads the nation in capital exoneration certainly provides a basis for arguing the synergistic effect of the choices made in structuring Florida's capital scheme has produced a system that "smacks of little more than a lottery system." *Furman*, 408 U.S. at 293 (Brennan, J., concurring).

Because Florida law does not require all jurors agree that the State has proved any aggravating circumstance beyond a reasonable doubt or to agree on the same aggravating circumstances beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them.

c. Judicial Overrides.

In Florida, the judge who presides over a capital sentencing proceedings has the ability to override a jury's sentencing recommendation. ABA Report on Florida at 31. This Court adopted the standard to be employed when reviewing a judicial override in

Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). However, the *Tedder* standard has been the source of great debate over the years. Justice Shaw opined in 1988 that the *Tedder* standard had created *Furman* error. *Combs v. State*, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring). In 1989, a majority of the Court held that the vigorousness of the *Tedder* standard had waxed and waned over the years. *Cochran v. State*, 547 So. 2d 928, 933 (Fla. 1989). A clearer confession that arbitrariness had infected the decision making process is hard to imagine.[14] The sporadic use of the judicial override and erratic application of the *Tedder* standard has again injected arbitrariness into Florida's capital sentencing scheme. Layer upon layer of arbitrary sentencing factors entirely divorced from the facts of the crime or character of the

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[14]But not just members of this Court have been troubled by the jury override and the Court's erratic treatment of the *Tedder* standard. In *Parker v. Dugger*, 498 U.S. 308 (1991), the U.S. Supreme Court reviewed this Court's application of the *Tedder* standard and its resulting affirmance of a judicial override of a life recommendation. The U.S. Supreme Court found: "What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings." *Parker*, 498 U.S. at 320. In reversing, the U.S. Supreme Court explained:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. * * * The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all.

Parker, 498 U.S. at 321.

defendant have accumulated and render Florida's sentencing scheme in violation of *Furman.*

IV. RACIAL AND GEORGRAPHIC DISPARITIES

The ABA Report relied on 3 previous studies concerning race and the death penalty as well as an analysis of current statistical discrepancies concerning race and the death penalty. In 1991, a criminal defendant in a capital case was 3.4 times more likely to receive the death penalty if the victim is white that if the victim is African American. *Id.* 7-8. This statistic has not changed.[15] The statistics relied on in the ABA Report on Florida make clear that race is a factor in Florida's death penalty scheme. Such a factor causes the death penalty to be arbitrary and capricious. *Furman*, 408 U.S. at 364-66.

Geographic disparities also contribute to the arbitrariness of Florida's death penalty scheme. In 2000, 20 percent of the death sentences imposed that year came from the panhandle, while in 2001, 30 percent of the death sentences imposed that year came from the panhandle. ABA Report on Florida at 9. Thus, death sentences are

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[15] *Id.* at viii ("[A]s of December 10, 1999, of the 386 inmates on Florida's death row, 'only five were whites condemned for killing blacks. Six were condemned for the serial killings of whites and blacks. And three other whites were sentenced to death for killing Hispanics.' Additionally, since Florida reinstated the death penalty there have been no executions of white defendants for killing African American victims.").

significantly influenced by the county where a crime occurred.[16] Geographic disparities clearly show that a factor unrelated to the circumstances of the crime or the character of the defendant are at work in the decision to seek and impose a death sentence, in violation of *Furman*.

V. PROSECUTORIAL MISCONDUCT

"The prosecutor plays a critical role in the criminal justice system." ABA Report on Florida at 107. This is especially true in capital cases, where the prosecutor had "enormous discretion" in determining whether to seek the death penalty. *Id*. Yet, this Court regularly orders new trials in capital cases because of prosecutorial misconduct.[17] On occasion, the Court has found the prosecutorial misconduct was only sufficiently prejudicial at the penalty phase to warrant the grant of penalty phase relief. *Young v. State*, 739 So. 2d 553 (Fla. 1999); *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993). Additionally, on a number of occasions, the Court has determined that the prosecutor acted improperly, but prejudice was insufficiently established to

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[16]Recognizing that the geographic disparity is problematic, the ABA Report recommends that the State "sponsor a study to determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in its death penalty system." ABA Report on Florida at xi.

[17]*Floyd v. State*, 902 So. 2d 775 (Fla. 2005); *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004); *Cardona v. State*, 826 So. 2d 968 (Fla. 2002); *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *State v. Huggins*, 788 So. 2d 238 (Fla. 2001); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Gorham v. State*, 597 So. 2d 782 (Fla. 1992); *Roman v. State*, 528 So. 2d 1169 (Fla. 1988); *Arango v. State*, 497 So. 2d 1161 (Fla. 1986).

warrant relief from either the conviction or the death sentence.[18] Florida's willingness to tolerate prosecutorial misconduct violates the promise of *Furman*. The ABA Report recommends that each prosecutor's office have written polices governing the exercise of prosecutorial discretion. *Id*. at 125. Without such policies or guidelines, Florida's death penalty scheme "smacks of little more than a lottery system." *Furman*, 408 U.S. at 293 (Brennan, J., concurring).

VI. THE DIRECT APPEAL PROCESS

This Court reviews all cases in which a death sentence is imposed to determine whether death is a proportionate penalty. However, because the Court only reviews cases "where the death penalty was not imposed in cases involving multiple co-defendants," the proportionality is skewed. ABA Report on Florida at xxii. But in addition to this, the ABA assessment team noted a disturbing trend in this Court's proportionality review: "Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." ABA Report on Florida at 212. The ABA Report noted "that this drop-off resulted

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[18] *Guzman v. State*, 2006 Fla. LEXIS 1398 (Fla. June 29, 2006); *Smith v. State*, 931 So. 2d 790 (Fla. 2006); *Ventura v. State*, 794 So. 2d 553 (Fla. 2001); *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990). The cases cited herein as examples of instances were prosecutorial misconduct was present are not an exhaustive listing. The listing of the cases is meant to demonstrate the prevalence of prosecutorial misconduct in capital cases in Florida.

from the Florida Supreme Court's failure to undertake comparative proportionality review in the 'meaningful and vigorous manner' it did between 1989 and 1999." ABA Report at 213. The shift in the affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends in part upon what year the appellate review was or is conducted. It is not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" *Furman*, 408 U.S. at 313 (White, J., concurring).

VII. RETROACTIVITY

The U.S. Supreme Court has explained that its decisions finding ineffective assistance in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), were all dictated by its decision in *Strickland* and therefore each of those decisions, while issuing between 2000 and 2005, actually date back to *Strickland*. Between 1984 and 2000, this Court addressed ineffective assistance of counsel claims under *Strickland* in virtually every capital post conviction case that it heard. It is clear from analyzing those opinions that the Court did not read *Strickland* the way it was read and applied in *Rompilla, Wiggins*, and *Taylor*.[19] Yet, this Court has refused to re-examine its decisions predicated upon its

[19]Of course, the lower courts in each of those cases had also not read *Strickland* in the fashion that the United States Supreme Court said it was meant to

understanding of the meaning of *Strickland*. In essence, the Court has stripped those death row inmates of their Sixth Amendment rights as defined by the U.S. Supreme Court. Certainly, the manner in which the retroactivity rules currently operate has as at least as much to do with who gets executed and who does not as do the facts of the crime and the character of the defendant. This Court's application of its retroactivity rules is arbitrary and violates *Furman*.

VIII. PROCEDURAL DEFAULT

This Court frequently relies upon procedural defaults to create procedural bars that preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. *See Swafford v. State*, 828 So. 2d 966, 977-78 (Fla. 2002). Certainly, the refusal to consider issues that go towards the reliability of the conviction and/or the sentence of death increase the risk that the innocent or the legally undeserving will be executed. It decreases a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." *Furman*, at 313 (White, J., concurring).

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be read. For example in *Williams*, the issue addressed by the United States Supreme Court was the failure of the Virginia Supreme Court to properly read and apply the standards enunciated in *Strickland*. Thus, the ruling in *Williams* was quite simply that *Strickland* meant what the United States Supreme Court said in *Williams* it meant, and any court who not read and applied *Strickland* in the fashion explained *Williams* had erroneously applied the constitutional principle at stake.

IX. CLEMENCY

Clemency is a critical stage of the death penalty scheme. It is the only stage at which factors like lingering doubt of innocence, remorse, rehabilitation, racial and geographic influences and factors that the legal system does not correct can be considered. *See Herrera v. Collins*, 506 U.S. 390, 412 (1993). However, the assessment team found Florida's clemency process to be severely lacking and entirely arbitrary because there are no rules or guidelines delineating factors for the Board to consider regarding clemency. ABA Report on Florida at vii.

X. POLITICS

Undoubtedly politics is a factor that causes arbitrariness in Florida's death penalty scheme. In fact, the state assessment team noted that judicial elections and appointments are influenced by consideration of judicial nominees' or candidates' views on the death penalty. ABA Report at xxxi. The team also cited this Court's recent quantitative approach to proportionality review, which has been caused by political pressures and the change of composition of the Court. *Id.* at 213. Florida's death penalty scheme is infected by politics and decisions made for political gain rather than in fairness.

XI. MENTAL DISABILITIES

While Florida has recently excluded individuals suffering from mental retardation from the death penalty, it has not extended its logic to those suffering from

severe mental disabilities. *Id*. at xi. The distinction between the mentally retarded and the mentally ill and corresponding culpability of those inflicted with each condition is arbitrary. Furthermore, the legislation and rule governing mental retardation procedures makes an arbitrary distinction between those individuals whose cases are final and those who are not. *See* Fla. Stat. § 921.137; Fla. R. Crim. P. 3.203. The team also criticized the burden of proof imposed on capital defendants and recommended that the State be required to disprove a defendant's substantial showing that he is mentally retarded. ABA Report on Florida at xxxviii. The imposition of the burden of proof on the defendant will undoubtedly cause the decision as to who gets executed to turn on arbitrary factors, such as whether records demonstrating onset before age 18 exist, etc.

XII. CRIME LABORATORIES AND MEDICAL EXAMINER'S OFFICES

The ABA assessment team found that: "The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to the lack of proper training and supervision, the lack of testing procedures and the failures to follow such procedures, and inadequate funding." *Id.* at 83. The result of these problems is errors that go unchallenged and uncorrected before the jury, yet another factor unrelated to the circumstances of the crime or character of the defendant that injects arbitrariness into Florida's death penalty scheme in violation of *Furman*.

XIII. CONCLUSION

When all of the arbitrary factors identified herein and more fully in the ABA Report on Florida (incorporated herein by specific reference) that are present in the Florida death penalty scheme are considered together in analyzing the system's ability to deliver and/or produce a reliable result, the conclusion is inescapable: "it smacks of little more than a lottery system." *Furman*, 408 U.S. at 293 (Brennan, J., concurring). Florida's process cannot "assure consistency, fairness, and rationality" and it "cannot assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." *Proffitt v. Florida*, 428 U.S. 242, 259-60 (U.S. 1976). Accordingly, Florida's death penalty scheme stands in violation of the Eighth Amendment. Defense counsel preserved this claim pre-trial. Since this Court has found that the information contained in the ABA Report on Florida is not newly discovered evidence, but rather simply "a compilation of previously available information related to Florida's death penalty system," appellate counsel should have raised this argument on direct appeal.

G. DUE TO APPELLATE COUNSEL'S DEFICIENT PERFORMANCE, MR. SEIBERT WAS PREJUDICED IN HIS DIRECT APPEAL.

Because the constitutional violations which occurred during Mr. Seibert's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said that the "adversarial testing process worked in [Mr. Seibert's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th

Cir. 1987). The lack of appellate advocacy on Mr. Seibert's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in his petition demonstrates that the representation of Mr. Seibert involved serious and substantial deficiencies. *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). Individually and cumulatively, *Barclay v. Wainwright*, 477 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." *Wilson*, 474 So. 2d at 1165. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors—including those already recognized on direct appeal—did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967). In light of the serious reversible error that appellate counsel never raised, a new direct appeal should be ordered.

CONCLUSION

For the foregoing reasons and in the interest of justice, Mr. Seibert respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail, first class postage prepaid, Penny H. Brill, Assistant State Attorney, 1350 N.W. 12th Street, Miami, FL 33136; and Sandra S. Jaggard, Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131 this ___ day of August, 2008.

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