IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-708

MICHAEL SEIBERT,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Seibert's motion for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

"T."— trial transcript;

"R."— record on direct appeal to this Court;

"PC-R."— record on appeal to this Court following the rule 3.851 motion;

"PC-R. T."— postconviction transcript;

"Supp. PC-R." — supplemental record on appeal to this Court following the rule 3.851 motion;

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Seibert requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

PROCEDURAL HISTORY

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, finding that two (2) aggravating factors outweighed six (6) non-statutory mitigating factors. (R. 792-818). This Court affirmed Mr. Seibert's conviction and sentence on direct appeal.[1] *Seibert v. State*, 923 So. 2d 460 (Fla. 2006), *cert. denied*, 127 S. Ct. 198 (2006).

On September 11, 2007, Mr. Seibert filed a motion to vacate the judgment of conviction and sentence of death pursuant to Fla. R. Crim. P. 3.851, raising eleven claims. (PC-R. 67-613). The circuit court held a case management conference/*Huff* hearing on January 24, 2008. (PC-R. T. 281-330). On February 28, 2008, the circuit court entered an order summarily denying Mr. Seibert's rule 3.851 motion without an evidentiary hearing. (Supp. PC-R. 196-222). Mr. Seibert filed a motion for rehearing on March 6, 2008 (PC-R. 735-81), which was denied

[1] Mr. Seibert raised the following claims on direct appeal: (1) the trial court erred in denying his motion to suppress evidence discovered and statements made as a result of the nonconsensual, warrantless entry and search by the police of his apartment; (2) the trial court erred in denying his motion for a mistrial after the State improperly attempted to introduce evidence of his collateral criminal activity; (3) the trial court erred in denying his motion for mistrial after the State asked questions of a police detective that improperly bolstered the credibility of another suspect's alibi; (4) the death sentence is disproportionate; (5) the trial court erred in denying a mistrial following a prosecutorial comment concerning an irrelevant criminal activity; and (6) Florida's capital sentencing scheme violates *Ring v. Arizona*, 536 U.S. 584 (2002).

on March 17, 2008. (PC-R. 792). Mr. Seibert timely filed a notice of appeal thereafter on April 4, 2008. (PC-R. 793-94). This appeal follows.

STATEMENT OF FACTS

A. Pretrial and Guilt Phase

On March 17, 1998, Officer Bales and Sergeant Zeifman from the Miami Beach Police Department responded to Mr. Seibert's apartment based on a call from William Ace Green stating that Mr. Seibert had threatened to kill himself. (T. 2399-2401). The officers eventually forced their way into the apartment and found the body of Karolay Adrianza in the bathtub of the apartment's bathroom. (T. 2412, 2416). Mr. Seibert was immediately arrested and later charged with first degree murder. (T. 2419).

Attorneys Richard Houlihan and Kenneth White were appointed to represent Mr. Seibert. Prior to the start of the trial, defense counsel filed a Motion to Suppress All Evidence on October 28, 2002, arguing that the warrantless entry into Mr. Seibert's apartment and the subsequent search were conducted in violation of the Fourth Amendment to the U.S. Constitution and corresponding provision of the Florida Constitution. (R. 123). In support of the motion, defense counsel alleged the following:

> There was no question that the police did not have a warrant to search Mr. Seibert's apartment. Police justification for forceful entry into Mr. Seibert's home was that they were told he was going to/ might hurt

> himself. No specific facts so as to warrant a belief in this assertion were given. The officers knocked on the apartment door, and the door opened. The officers were told to go away. The officers were unable, at this point, to articulate facts that something was amiss. Without further support, the police continued to assault Mr. Seibert's door. Mr. Seibert again opened his door. He again asked the police to leave. This time the police forced their way into his apartment. Mr. Seibert was patted down revealing nothing. Mr. Seibert was unarmed. Mr. Seibert said no one else was in the apartment. Mr. Seibert gave no cause for concern but did as directed. At this point, Officer Bales began to search the other parts of his apartment, clearly out of Mr. Seibert's reach.

(R. 123). Trial counsel deposed Officer Bales on April 14, 1999. During the deposition, Officer Bales gave the following sworn testimony:

> **A I recall him sitting down. I remember the sergeant standing next to him.**
>
> **Q Okay.**
>
> **A I remember facing him and asking him, as I'm walking backward and facing him, "Is there anybody else in this apartment?" And the reason I do that is because a few years ago, somebody jumped out from behind me, and there was no weapon involved, but I jumped out of my shoes. So every time – and it's training. I mean, 20 years ago, I went through the academy, and they always tell you to make sure there's no one else in the apartment. As I'm talking to your client, I'm asking, "Is there anybody else in this apartment?"**
>
> Q When you saying "walking backward" –
>
> A Right.
>
> Q -- I'm trying to physically see where you were?
>
> A Right.
>
> Q He's in his chair?

A I can show you exactly.

Q You want to write it down?

A **No. I'm standing in front of your client – Michael Seibert.**

Q Sure. Where is your back towards? Is it towards the door?

A No. It's kind of toward the hallway, a little small hallway. The sergeant is here (indicating). Your client is sitting down.

Q "Here" is where Mr. White would be –

A Well –

Q --but standing up?

A Standing up. And I'm asking your client, is there anybody else, and as I'm talking to him, I'm backing up towards the back hallway, going down the hallway. I don't know what it looks like because I wasn't taking a look.

Q No guns out by anybody?

A No, no.

Q Okay.

A As I'm talking to your client, saying, "Hey, is there anybody else in this apartment," the bathroom is here (indicating), and I just started looking in the bathroom. And through the open door, I see a foot, with a bone sticking out of it, on the edge of the tub.

* * *

Q I'm trying to put myself in your shoes physically, geometrically in the place. You push in the door, and off to the left is going to be this couch, this futon?

A Not really to his extreme left. The front door is here. We pushed in, and the day couch is here (indicating).

Q Like three, four feet away?

A If that – three, four, five feet, maybe six feet.

Q And he's put down there?

A Have a seat.

Q And so I guess this is going to be the bathroom over there (indicating)?

A The bathroom is here (indicating).

Q So you're kind of rotating a little bit?

A Yeah. I'm walking backward, kind of like feeling your way in.

Q The front door being here (indicating)?

A About right here (indicating).

Q That door stayed open; right?

A I don't recall if it was open or not.

Q Your sergeant would be like you described?

A The seat is here. You're sitting right here, and the sergeant is standing there, talking down to your client, sitting. And I'm in front of your client, maybe three or four feet, backing up. "Hey, is anybody else in this apartment?"

Q But he says to you no.

A I recall him saying no.

Q Well, okay, I understand.

A If that's what the report said.

Q Right.

A I remember your client saying no.

Q How far – and I know you didn't measure this. Don't misunderstand me – from where you're standing initially by this futon or day couch, how far away physically is the bathroom door?

A Gosh, I'm guessing.

Q I understand. Approximating?

A Six feet – five feet, six feet.

Q So as you're backing –

A I don't know, maybe more. It's fuzzy. I'm telling you, it's fuzzy.

Q I understand. Was there a light on inside the bathroom?

A It was light, but I can't tell you if it was caused by a window. I don't recall a window, but it was light. I saw a white tub.

Q This is actually the first—is this, from what you're saying, the first room that you're checking out?

A Yes. It just happened to be right there. As I'm backing up, the bathroom is right there.

Q And you were going to continue –
A Absolutely.
Q -- to go into the kitchen?
A Yes.
Q The bedrooms?
A Yes.

(PC-R. 89-90).

On October 31, 2002, a hearing was held on Mr. Seibert's pre-trial motion, and Officer Bales gave the following testimony:

> A As I recall we had Michael Seibert sit down on a couch or a bed. Sergeant Zeifman was standing to his right and I was standing in front of Michael, may be four or five feet away from Michael.
>
> * * *
>
> Q Okay. Now, as you stood there in the living room area of the apartment, did you have any additional conversation with Mr. Seibert?
>
> A I remember saying as I was backing up, asking Michael is there anybody else in this apartment.
>
> Q Is that also standard operating procedures in this situation, in this type of call?
>
> A That is what we called it in the academy many years as [sic] ago.
>
> Q You have been a police officer for how many years?
>
> A Twenty three years.
>
> Q Is that what you ask any time you are –
>
> A That and I also had people jump out behind me.
>
> Q Why is it important to know whether or not there are other people in the apartment?
>
> A So, they don't hurt us.
>
> Q So, when you ask Mr. Seibert whether or not there was anybody else in this apartment, did he respond to you?
>
> A I don't recall what the response was.

> Q Let me ask you this Officer Bales, at this point you seeing [sic] Mr. Seibert is not bleeding, he is not cut, why did you stay in the apartment?
>
> A We stayed in the apartment to make sure there is nobody else in the apartment and yes, you are right, we saw nothing on him.
>
> Q Did you know whether or not he had any weapons in the apartment?
>
> A No.
>
> Q So, what did you do at that point?
>
> A **As I said is there anybody else in this apartment, I turned to my right and I was standing right next to the bathroom. When I turned to the right, between the open door of the bathroom, the crack of the door and the doorjamb, I saw a severed foot with a big white bone coming out of it on the edge of the tub.**

(T. 1085, 1087-1089) (emphasis added). Trial counsel Richard Houlihan conducted a limited voir dire of Officer Bales regarding his distance from the bathroom door when he saw the severed foot on the edge of the bathtub:

> MR. HOULIHAN: You are saying you are right in here?
>
> THE WITNESS: Yes, exactly.
>
> MR. HOULIHAN: And you got to be pretty close to see, you are talking about a little space?
>
> THE WITNESS: From here to the door.
>
> MR. HOULIHAN: I am sorry?
>
> THE WITNESS: From here to you, to where the door is, three feet.
>
> THE COURT: Okay, I mean, a little bit, properly about six feet. It was probably about six feet. You were saying three feet, but that is okay voir dire is done.

(T. 1090).

The circuit court denied Mr. Seibert's Motion to Suppress All Evidence, and thereafter, Officer Bales testified in front of the jury regarding his discovery of the victim's body:

> Q Where was the defendant seated?
> A We had him sit right down here.
> Q Here being the corner of the bed that is covered by the maroon knit?
> A Yes.
> Q Where were you in connection with this picture.
> A Right here.
> Q Right here being the front of the photograph?
> A Yes.
> Q Which direction were you facing?
> A I was facing the bed. The defendant was sitting here and Sergeant Zeifman was standing next to him.
> Q Standing next to him. You are indicating in the area where this wall here, or by where you see a dining room table?
> A Yes.
> Q Were you facing the direction where Sergeant Zeifman was standing where the defendant is seated?
> A That is correct.
> Q Now, when you were standing there and Sergeant Zeifman was standing across from you on the other side of the room, what did you and Sergeant Zeifman do at that time?
> A **I started walking backwards and as I was walking backwards still facing them, I asked if there was anybody else in the apartment. In the past I have had people jump out behind me. So, like I learned in the academy class, I want to make sure nobody is jumping out, nobody else is in the room.**
> Q That is standard for officer's safety?

A Standard for me.
Q What happened as you were backing up?
A **As I started to back up, I started looking to my right, into an open bathroom.**

* * *

Q And what do you see?
A **Through this crack right here, not through here, but through this crack in this space here. I see a severed foot on the edge of the tub. There is a big white bone sticking out of it.**

(T. 2414-16) (emphasis added).

Throughout the pre-trial suppression hearing, the entire trial, and the direct appeal, the State maintained its position that Officer Bales did not search Mr. Seibert's apartment, arguing that Officer Bales "**barely moved** as he looked around himself" and that "as he looked around, [he] saw **in plain view** Ms. Adrianza's severed foot on the edge of the bathtub." (PC-R. 92-93, citing State's Answer Brief at 69 (emphasis added)). Ultimately, based on the testimony presented in the suppression hearing and during trial, the trial court found that Officer Bales barely moved, that he was "literally taking a step back" when he saw a foot on the edge of the bathtub. (T. 1312). In its sentencing order, the trial court found the following:

> The officers sat down with the defendant in the living room area to talk. One of the officers then turned his head to the side, and through the partially open door to the bathroom observed a severed foot on the side of the bathtub.

(R. 796).

On direct appeal, this Court, deferring to the trial court's fact-finding, agreed that "the officers' quick look around the apartment **was not an extensive search**…." *Seibert v. State*, 923 So. 2d 460, 471 (emphasis added). Based on these facts, this Court upheld the denial of the motion to suppress.

B. Rule 3.851 Proceedings

In his rule 3.851 motion, Mr. Seibert alleged that trial counsel was ineffective for failing to present numerous axiomatic arguments demonstrating that the Officer Bales's actions constituted an unreasonable search. (PC-R. 93). Mr. Seibert alleged that a critical analysis of all the evidence that was available to trial counsel reveals that from where Officer Bales testified he was standing and talking to Mr. Seibert, he must have walked across the apartment, stepped through a doorway into hallway, and—since he maintained that he was walking backwards—craned his neck as far as he could to the right in order to see into the bathroom. Mr. Seibert alleged that trial counsel failed to effectively make a case that the police officers conducted an illegal search of his apartment, requiring the fruits of that search to be suppressed. (PC-R. 93).

Specifically, Mr. Seibert alleged that trial counsel failed to argue to the court that based on the physical dimensions of the apartment, Officer Bales could not have seen into the bathroom from where he repeatedly testified that he was standing. (PC-R. 93-94). Mr. Seibert alleged that the physical layout of the

apartment is such that the front door to the apartment opens into the main living room. (PC-R. 94). Mr. Seibert sought an evidentiary hearing in order to prove that Officer Bales could not have seen the edge of the bathtub from the main room, and would have had to walk across the room and down the hallway—considerably more than six feet[2] from where he stood talking to Mr. Seibert—in order to peer into the bathroom to see the victim's body. Furthermore, Mr. Seibert alleged that since Officer Bales testified that he was walking backwards when he looked to his right and saw a severed foot, he would have had to either walk past the bathroom or crane his neck in order to see the edge of the bathtub from the hallway.

Mr. Seibert also alleged in his rule 3.851 motion that trial counsel failed to file a motion requesting a walk-through of the crime scene with the court. (PC-R. 94-95). Furthermore, Mr. Seibert alleged that trial counsel failed to argue to the court the absurdity of Officer Bales's repeated testimony that he walked backwards down the hallway to the bathroom. (PC-R. 95). Officer Bales consistently testified that as he was asking Mr. Seibert whether there was anyone else in the apartment, he walked backwards, turned his head to the right, and saw a severed foot on the edge of the bathtub. (T. 1088-89; 2416). Throughout the proceedings, Officer Bales's articulated justification for walking towards the bathroom was to look for other people in the apartment:

[2] Deposition of Officer Bales at 53; T. 1090; (PC-R. 94).

> Q Let me ask you this Officer Bales, at this point you seeing [sic] Mr. Seibert is not bleeding, he is not cut, why did you stay in the apartment?
>
> A We stayed in the apartment to make sure there is nobody else in the apartment and yes, you are right, we saw nothing on him.

(T. 1088; 2415-16).[3] Officer Bales never testified that he was going to search the bathroom for weapons or pills that Mr. Seibert could use to harm himself. Rather, he consistently maintained that he did not search the apartment, but merely stepped backwards towards the bathroom to see if anyone else was in the apartment, turned his head, and saw a severed foot on the edge of the bathtub. Officer Bales and Sergeant Zeifman had patted down Mr. Seibert and concluded that he had no weapons on his person. (T. 1210). Sergeant Zeifman was standing to the left of Mr. Seibert while Officer Bales walked towards the bathroom. (T. 1100; 2414). Mr. Seibert alleged in his rule 3.851 motion that it defies common sense to think that Officer Bales walked backwards into potential harm and that trial counsel failed to make this argument. (PC-R. 96).

Finally, Mr. Seibert alleged that trial counsel failed to point out to the circuit court that despite Officer Bales's repeated testimony that the first thing he saw when he looked into the bathroom was a severed foot with a big white bone sticking out of it on the edge of the bathtub, none of the photographs taken at the

[3] Sergeant Zeifman also testified that Officer Bales's reason for walking towards the bathroom area was "to check to see if there were any additional subjects in that area." (T. 1199).

crime scene depict a severed foot on the edge of the bathtub. (PC-R. 96). Nor do any of the photographs taken at the crime scene depict a severed foot with a big white bone sticking out of it—on the edge of the bathtub or elsewhere. (Id.) Nor was there any testimony whatsoever during pre-trial proceedings or the trial itself that the foot moved or was moved at all in the short time between when Officer Bales claimed to have seen it on the edge of the bathtub and when the body was photographed in the bathtub. (Id.) In fact, the photographs of the body in the bathtub show that the right foot was not severed, and the severed left foot appeared to be wedged firmly under the victim's left lower leg bone. (Id.) The severed foot is not on the edge of the tub nor does it have a big white bone sticking out of it. (Id.) The only attempt at an explanation as to how the severed foot, which Officer Bales repeatedly testified to seeing on the edge of the bathtub, came to no longer be on the edge of the bathtub a short time later when the body was photographed was an offhand comment made by the prosecutor, Flora Seff, during a discussion as to the admission of crime scene photographs, unrelated to the Motion to Suppress:

> The shot which shows the entire body also shows he cut off the limbs, which caused the police officer to actually when they went into start this whole ball in motion. He sees the foot, the amputated foot sitting on the bathtub. You are going to hear from the officers during this case what they went through, what the officer went through and actions he took as a result of seeing the foot on the bathtub is important. If they don't see that the foot is off

> the limb. You know what, we are in a position now whenever we try cases that police officers are not the – the credibility of officers is constantly attacked. **The foot slid down into the bathtub.**

(PC-R. 97, citing T. 802) (emphasis added).

Mr. Seibert alleged that as a result of trial counsel's deficient performance in failing to present evidence and effectively argue the Motion to Suppress, the fruits of Officer Bales's illegal search of Mr. Seibert's apartment, including all evidence obtained from the bathroom and the photographs taken of the victim's body in the bathtub, were not suppressed. (PC-R. 101). Without hearing any additional evidence, the circuit court, in its order denying relief, made a new factual finding regarding the search: "All the officer had to do was enter the main room of small studio apartment, take a couple of small steps, and turn his head to see the bathroom." (Supp. PC-R. 208). The circuit court summarily denied Mr. Seibert's claim without an evidentiary hearing, concluding that it was procedurally barred and refuted by the record.

C. Penalty Phase

Prior to the penalty phase, the State notified the defense that it would seek to prove the aggravating circumstances that (1) Seibert was previously convicted of another felony involving the use or threat of violence and (2) the crime was especially heinous, atrocious, or cruel. (T. 3949). The State disclosed that it

planned to introduce evidence of Mr. Seibert's prior convictions to support the prior violent felony aggravating circumstance.

Trial counsel filed a Motion in Limine Re Prior Violent Felony prior to the start of the penalty phase, asking the Court to exclude gory photographs of the victim Katherine Jones's injuries as well as any hearsay testimony relating to involuntary sexual battery, including testimony concerning rape kits, the test results of those kits, and/ or any venereal diseases found in examining the victim. The motion in limine was based on the arguments that 1) testimony relating to involuntary sexual battery would be hearsay which Mr. Seibert could not rebut; 2) the prejudicial effect of the photographs would outweigh any probative value; and 3) it would be error to use prejudicial evidence which is not necessary to establish the prior violent felony conviction.

During a hearing on the motion in limine, the State recited some of the facts of Mr. Seibert's 1986 conviction for kidnapping and attempted murder in the first degree that the State planned to present:

> MS. SEFF: Yes. He dragged her into his car and then drove away. Within fifteen minutes of abducting her, he stops and asks a young girl, twelve years old for directions to I-95. When the girl came close to the car she looked inside and the victim was totally naked. He had her head down in his lap. His pants were open. His penis was exposed. The defendant pulled her up by the hair and said "She gives good head." The victim was crying at the time. Then, the defendant sped off and tried to grab the twelve year old breast.

(T. 4021-22). The prosecutor went on to describe how the victim was found in the woods a day and a half later.

The court asked the State whether it was trying to bring in evidence of a sexual battery, to which the prosecutor responded that the sexual battery was when the victim was giving the defendant oral sex. (T. 4023). The court pointed out that Mr. Seibert never pled guilty to sexual battery. (T. 4023). Defense counsel agreed that "the jury is entitled to know some of the facts so that they can give the appropriate and proper weight to an aggravating circumstance." (T. 4024-25). Defense counsel objected, however, to the testimony alleging a sexual battery:

> MR. WHITE: I object to when he stops and asks her, a young girl, her name is Andrea Henderson, she is not twelve, I believe she is in high school… There was some allegation that there was some sexual display, he lifted her head up and said she gives good head and then some grabbing at the witness' breast. I don't believe the State has listed Andrea Henderson as a witness. …The State could have and perhaps should have charged him with involuntary sexual battery and/ or maybe two or three counts on it and may be a battery on Andrea Henderson. It's not a prior felony that this jury should know about because he didn't plead guilty to it and they are not entitle [sic] to know evidence of a crime that the defendant committed, unless we open the door in our mitigation on rebuttal.

(T. 4026). Further, defense counsel pointed out that:

> MR. WHITE: I believe those facts are not in this venue for what we are doing here in the penalty phase. It is far more prejudicial than probative to the prior felony.

> If they want to have their officer testify that he had information from a witness that she saw Michael Seibert in the car with the victim, who she identified in order to make sure he plead and that there was evidence supporting that plea, and then they drove away, that is not objected to. But the details of him picking the head up and saying she gives good head, there is no charge of sexual battery.

(T. 4026-27). The court ruled that testimony regarding the way the victim was kidnapped, the way Mr. Seibert was holding the victim, and the fact that she was naked would be admissible as it shows all the facts of the kidnapping. (T. 4080).

During the penalty phase, the State called Miami Beach Police Department Sergeant Robert Hundevadt to testify about the facts of Mr. Seibert's 1986 convictions of kidnapping and attempted murder in the first degree. (T. 4127-39). Sergeant Hundevadt testified that in 1986, he was a detective assigned to the criminal investigation unit of the Miami Beach Police Department and that he was one of the lead investigators on the case involving the kidnapping of a British tourist. (T. 4127-28). Sergeant Hundevadt told the jury that fifteen to twenty minutes after the victim was kidnapped, the victim and the defendant were seen by two school children at a bus stop, and that the defendant stopped to speak to one of the children. (T. 4129). Sergeant Hundevadt then related Andrea Henderson's statements to investigators:

> Q Was the statement taken from Andrea Henderson fifteen years back, in 1986?
>
> A Yes.

Q Have you reviewed that statement?

A Yes.

Q Did Andrea Henderson say whether or not she had the opportunity to look inside the car?

A Yes, she did.

Q What did she see?

A She saw the defendant and a nude white female in the front seat of the vehicle. The nude white female, her head was in the defendant's lap.

Q Did he have his hand on her?

A Andrea testified that she was being held, the victim was being held against her will in a hold similar to what she described as being a head lock with her head in his lap.

Q Was there anything about his clothes that she noticed?

A Well, there came a point in that confrontation where he lifted the head down and said don't say anything. Could you repeat the question?

Q Is there anything Andrea Henderson notice [sic] about his pants?

A His pants were undone and penis exposed.

Q Where was the face of the mouth of this British nurse?

MR. WHITE: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: She is in his lap.

BY MS. SEFF:

Q At some point did she have the opportunity to see the face of this young woman?

A Yes, ma'am, she did.

Q What was the woman doing?

A She was crying, according to Andrea's testimony.

(T. 4130-31). At no point prior to or during Detective Hundevadt's testimony did defense counsel ever object to the admission of Andrea Henderson's statement

based on hearsay grounds or on the ground that it violated Mr. Seibert's right to confrontation.

Prior to the penalty phase, the State also notified the defense that it would be introducing evidence of Mr. Seibert's burglary and attempted kidnapping convictions to support the prior violent felony aggravating circumstance. (T. 3982). Defense counsel stipulated to the statements of victims of the burglary and attempted kidnapping being read to the jury by the prosecutor. (T. 4081). At no point did defense counsel ever object to the admission of Leon Golden's and Michelle Kendricks's statements based on hearsay grounds or on the ground that it violated Mr. Seibert's right to confrontation.

Also 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 Court sustained the defense counsel's objection, 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. The remaining jurors 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, finding that two (2) aggravating factors[4] outweighed six (6) non-statutory mitigating factors. (R. 792-818).

SUMMARY OF THE ARGUMENTS

ARGUMENT I: The circuit court erred in summarily denying Mr. Seibert's claim that he was denied his right to the effective assistance of counsel pretrial and during the guilt phase of his capital trial due to trial counsel's failure to present available evidence and effectively argue that the police officers' search of his apartment violated the Fourth Amendment to the U.S. Constitution.

ARGUMENT II: Mr. Seibert was denied his right to the effective assistance of counsel during the penalty phase of his capital trial due to trial counsel's failure to object that hearsay statements of witnesses regarding his prior violent felony conviction should have been excluded based on Mr. Seibert's right of confrontation.

ARGUMENT III: The circuit court erred in summarily denying Mr. Seibert's claim that Florida's method of lethal injection is unconstitutional as it will subject him to cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.

ARGUMENT IV: Mr. Seibert was denied access to public records.

[4] In his sentencing order, the court found two aggravating circumstances: the defendant had previously been convicted of a violent felony, and the murder was committed in an especially heinous, atrocious or cruel manner. (R. 799, 801). The court assigned great weight to both aggravating circumstances. (R. 801, 803).

ARGUMENT V: The circuit court erred in summarily denying the remainder of Mr. Seibert's claims raised in his rule 3.851 motion.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. *See Ornelas v. U.S.*, 517 U.S. 690 (1996); *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). Since no evidentiary development was permitted, Mr. Seibert's factual allegations must be accepted as true. *Borland v. State*, 848 So. 2d 1288, 1290 (Fla. 2003); *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

ARGUMENT I

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING AS REQUIRED BY FLA. R. CRIM. P. 3.851(5)(B) ON MR. SEIBERT'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND DURING THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

A. Introduction.

In his rule 3.851 motion, Mr. Seibert alleged that that he was denied his Sixth Amendment right to the effective assistance of counsel due to his trial counsel's failure to present available evidence and effectively argue that the police

conducted an illegal search of his apartment and that therefore, the result of Mr. Seibert's trial is unreliable. A warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Seibert v. Florida*, 923 So. 2d 460, 470 (2006), *citing Mincey v. Arizona*, 437 U.S. 385, 393 (1978). Further, "if the police enter a home under exigent circumstances and, prior to making a determination that the exigency no longer exists, find contraband in plain view, they may lawfully seize the illegal items." *Id., citing Davis v. State*, 834 So. 2d 322, 327 (Fla. 5th DCA 2003). "However, if the police determine the exigency that initially allowed their entry into the residence no longer exists, any subsequent search is illegal and any contraband discovered pursuant to the illegal search is inadmissible." *Id*.

The U.S. Supreme Court has explained that "A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*. Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the results of the proceeding are rendered unreliable. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 384-88

(1986); *Henderson v. Sargent*, 926 F. 2d 706 (8th Cir. 1991). The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 477 U.S. 625 (1980). The U.S. Supreme Court noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

Mr. Seibert alleged that a critical analysis of all the evidence that was available to trial counsel reveals that Officer Bales's search was more extensive than simply "literally taking a step back" (T. 1311-12) or turning one's head to the side (R. 796). An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *Owen v. State*, 33 Fla. L. Weekly S 569 (Fla. May 8, 2008); *Amendments to Fla. Rules of Crim. Pro. 3.851, 3.852, & 3.993*, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"). "Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be

accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

B. Mr. Seibert alleged that he was deprived of his Sixth Amendment right to the effective assistance of counsel pretrial and during the guilt phase of his capital trial.

On March 17, 1998, Officer Bales and Sergeant Zeifman from the Miami Beach Police Department responded to Mr. Seibert's apartment based on a call from William Ace Green stating that Mr. Seibert had threatened to kill himself. (T. 2399-2401). The officers eventually forced their way into the apartment and found the body of Karolay Adrianza in the bathtub of the apartment's bathroom. (T. 2412, 2416). Mr. Seibert was immediately arrested and later charged with first degree murder. (T. 2419).

Attorneys Richard Houlihan and Kenneth White were appointed to represent Mr. Seibert. Prior to the start of the trial, defense counsel filed a Motion to Suppress All Evidence on October 28, 2002, arguing that the warrantless entry into Mr. Seibert's apartment and the subsequent search were conducted in violation of the Fourth Amendment to the U.S. Constitution and corresponding provision of the Florida Constitution. (R. 123). In support of the motion, defense counsel alleged the following:

> There was no question that the police did not have a warrant to search Mr. Seibert's apartment. Police justification for forceful entry into Mr. Seibert's home was that they were told he was going to/ might hurt

> himself. No specific facts so as to warrant a belief in this assertion were given. The officers knocked on the apartment door, and the door opened. The officers were told to go away. The officers were unable, at this point, to articulate facts that something was amiss. Without further support, the police continued to assault Mr. Seibert's door. Mr. Seibert again opened his door. He again asked the police to leave. This time the police forced their way into his apartment. Mr. Seibert was patted down revealing nothing. Mr. Seibert was unarmed. Mr. Seibert said no one else was in the apartment. Mr. Seibert gave no cause for concern but did as directed. At this point, Officer Bales began to search the other parts of his apartment, clearly out of Mr. Seibert's reach.

(R. 123).

Trial counsel deposed Officer Bales on April 14, 1999. During the deposition, Officer Bales stated that they sat Mr. Seibert down and Sergeant Zeifman stood next to him. (PC-R. 88-89). As Officer Bales was facing Mr. Seibert and walking backwards, he asked Mr. Seibert if there was anyone else in the apartment. (Id.). He learned in the police academy to always make sure there is no one else in the apartment who could jump out and harm him. (PC-R. 88). As he was walking backwards down a hallway, he looked through the open bathroom door and saw "a foot, with a bone sticking out of it, on the edge of the bathtub." (PC-R. 89). He estimated that the bathroom door was five or six feet from where he was initially standing in front of Mr. Seibert. (PC-R. 89).

On October 31, 2002, a hearing was held on Mr. Seibert's pre-trial motion, and Officer Bales testified that he and Sergeant Zeifman had Mr. Seibert sit down on a couch or bed. (PC-R. 90; T. 1085). Sergeant Zeifman was standing to Mr. Seibert's right and Officer Bales was standing in front of Mr. Seibert. (Id.). He testified that standard operating procedure is to determine whether there is anyone else in the apartment on this type of call so that no one can jump out and hurt the officers. (PC-R. 90; T. 1087). Officer Bales asked Mr. Seibert if anybody else was in the apartment, and as he asked, he turned to his right and was standing next to the bathroom. (PC-R. 91; T. 1088). The bathroom door was open and he looked between the door and the doorjamb and saw "a severed foot with a big white bone coming out of it on the edge of the tub." (Id.). Trial counsel Richard Houlihan conducted a limited voir dire of Officer Bales regarding his distance from the bathroom door when he saw the severed foot on the edge of the bathtub:

> MR. HOULIHAN: You are saying you are right in here?
>
> THE WITNESS: Yes, exactly.
>
> MR. HOULIHAN: And you got to be pretty close to see, you are talking about a little space?
>
> THE WITNESS: From here to the door.
>
> MR. HOULIHAN: I am sorry?
>
> THE WITNESS: From here to you, to where the door is, three feet.
>
> THE COURT: Okay, I mean, a little bit, properly about six feet. It was probably about six feet. You were saying three feet, but that is okay voir dire is done.

(T. 1090).

The circuit court denied Mr. Seibert's Motion to Suppress All Evidence, and thereafter, Officer Bales testified in front of the jury regarding his discovery of the victim's body. (T. 2398-2430). He testified that he and Sergeant Zeifman had Mr. Seibert sit down on the bed. (T. 2414). Officer Bales was facing Mr. Seibert and Sergeant Zeifman stood next to Mr. Seibert. (T. 2415). Officer Bales started walking backwards, still facing Mr. Seibert, and asked if there was anybody else in the apartment, as he learned in the academy. (Id.). As he started to back up, he looked to his right into an open bathroom and saw through the crack in the door "a severed foot on the edge of the tub" with a "big white bone sticking out of it." (T. 2416).

Throughout the pre-trial suppression hearing, the entire trial, and the direct appeal, the State maintained its position that Officer Bales did not search Mr. Seibert's apartment, arguing that Officer Bales "**barely moved** as he looked around himself" and that "as he looked around, [he] saw **in plain view** Ms. Adrianza's severed foot on the edge of the bathtub." (PC-R. 92-93, citing State's Answer Brief at 69 (emphasis added)). Ultimately, based on the testimony presented in the suppression hearing and during trial, the trial court found that Officer Bales barely moved, that he was "literally taking a step back" when he saw

a foot on the edge of the bathtub. (T. 1312). In its sentencing order, the trial court found the following:

> The officers sat down with the defendant in the living room area to talk. One of the officers then turned his head to the side, and through the partially open door to the bathroom observed a severed foot on the side of the bathtub.

(R. 796). This Court, deferring to the trial court's fact-finding, agreed that "the officers' quick look around the apartment **was not an extensive search**…." *Seibert v. State*, 923 So. 2d 460, 471 (emphasis added).

Based on the foregoing, Mr. Seibert alleged in his rule 3.851 motion that trial counsel was ineffective in failing to present numerous axiomatic arguments demonstrating that the Officer Bales's actions constituted an unreasonable search. (PC-R. 93). At the most crucial stage in Mr. Seibert's trial, trial counsel failed to provide a constitutionally adequate adversarial testing of the evidence. A critical analysis of all the evidence that was available to trial counsel reveals that from where Officer Bales testified he was standing and talking to Mr. Seibert, he must have walked across the apartment, stepped through a doorway into hallway, and—since he maintained that he was walking backwards—craned his neck as far as he could to the right in order to see into the bathroom. Mr. Seibert alleged that trial counsel failed to effectively make a case that the police officers conducted an

illegal search of his apartment, requiring the fruits of that search to be suppressed. (Id.).

Specifically, Mr. Seibert alleged that trial counsel failed to argue to the court that based on the physical dimensions of the apartment, Officer Bales could not have seen into the bathroom from where he repeatedly testified that he was standing. (PC-R. 93-94). Mr. Seibert alleged that the physical layout of the apartment is such that the front door to the apartment opens into the main living room. (PC-R. 94). Mr. Seibert's day-bed was located in the southeast corner of the main living room. On the west wall of the main living room, there is a doorway with a pocket door that leads to a hallway. On the north side of the hallway is a storage area or closet. On the south side of the hallway is the door to the bathroom. The edge of the bathtub is not visible until one walks through the doorway from the main room into the hallway and either enters the bathroom or walks to the far west side of the door and looks through the space between the doorframe and the hinged side of the door. Officer Bales could not have seen the edge of the bathtub from the main room, and would have had to walk across the room and down the hallway—considerably more than six feet[5] from where he stood talking to Mr. Seibert—in order to peer into the bathroom to see the victim's body. Furthermore, since Officer Bales testified that he was walking backwards

[5] Deposition of Officer Bales at 53; T. 1090; PC-R. 94.

when he looked to his right and saw a severed foot, he would have had to either walk past the bathroom or crane his neck in order to see the edge of the bathtub from the hallway. (Id.).

Mr. Seibert also alleged that trial counsel failed to file a motion requesting a walk-through of the crime scene with the court. (PC-R. 94). Seeing is indeed believing and only by means of a walk-through could the court obtain a true understanding and envision the search that must have been conducted in order for the police officers to find the victim's body in the bathroom. In terms of understanding how the police officers must have searched to find the victim's body in the bathroom, there is simply no substitute for retracing the officers' steps in Mr. Seibert's apartment. The fictitious notion that Officer Bales "barely moved" or that he was "literally taking a step back" could not have been accepted by the circuit court or this Court on appeal had trial counsel effectively laid bare the incredible nature of Officer Bales's testimony.

Furthermore, Mr. Seibert alleged that trial counsel failed to argue to the court the absurdity of Officer Bales's repeated testimony that he walked backwards down the hallway to the bathroom. (PC-R. 95). Officer Bales consistently testified that as he was asking Mr. Seibert whether there was anyone else in the apartment, he walked backwards, turned his head to the right, and saw a severed foot on the edge of the bathtub. (T. 1088-89; 2416). Throughout the proceedings, Officer

Bales's articulated justification for walking towards the bathroom was to look for other people in the apartment:

> Q Let me ask you this Officer Bales, at this point you seeing [sic] Mr. Seibert is not bleeding, he is not cut, why did you stay in the apartment?
>
> A We stayed in the apartment to make sure there is nobody else in the apartment and yes, you are right, we saw nothing on him.

(T. 1088; 2415-16).[6] Officer Bales never testified that he was going to search the bathroom for weapons or pills that Mr. Seibert could use to harm himself. Rather, he consistently maintained that he did not search the apartment, but merely stepped backwards towards the bathroom to see if anyone else was in the apartment, turned his head, and saw a severed foot on the edge of the bathtub. Trial counsel failed to argue to the court that it is objectively unreasonable for a police officer to walk backwards towards an area to ensure that no one is behind him who could jump out and harm him.

Officer Bales and Sergeant Zeifman had patted down Mr. Seibert and concluded that he had no weapons on his person. (T. 1210). Sergeant Zeifman was standing to the left of Mr. Seibert while Officer Bales walked towards the bathroom. (T. 1100; 2414). If Officer Bales was concerned that there might be

[6] Sergeant Zeifman also testified that Officer Bales's reason for walking towards the bathroom area was "to check to see if there were any additional subjects in that area." (T. 1199).

another person in another part of the apartment, there is no reason why he would walk backwards into potential harm, when Mr. Seibert, who was unarmed, was seated next to Sergeant Zeifman. It defies common sense to think that Officer Bales walked backwards into potential harm. Mr. Seibert alleged that trial counsel failed to make this argument.

Finally, Mr. Seibert alleged that trial counsel failed to point out to the circuit court that despite Officer Bales's repeated testimony that the first thing he saw when he looked into the bathroom was a severed foot with a big white bone sticking out of it on the edge of the bathtub, none of the photographs taken at the crime scene depict a severed foot on the edge of the bathtub.[7] (PC-R. 96). Nor do any of the photographs taken at the crime scene depict a severed foot with a big white bone sticking out of it—on the edge of the bathtub or elsewhere. (Id.) Nor was there any testimony whatsoever during pre-trial proceedings or the trial itself that the foot moved or was moved at all in the short time between when Officer Bales claimed to have seen it on the edge of the bathtub and when the body was photographed in the bathtub. (Id.) In fact, the photographs of the body in the bathtub show that the right foot was not severed, and the severed left foot appeared

[7] Undersigned counsel received crime scene photographs from the State Attorney's Office and the Medical Examiner's Office, and none of these photographs depict a severed foot with a big white bone sticking out of it on the edge of the bathtub. If other photographs exist that show the severed foot on the edge of the tub, then these pictures have been withheld from undersigned counsel.

to be wedged firmly under the victim's left lower leg bone. (Id.) The severed foot is not on the edge of the tub nor does it have a big white bone sticking out of it. (Id.) Viewed in the light of the actual physical evidence, Officer Bales's testimony about seeing a severed foot with a big white bone sticking out of it on the edge of the bathtub is not credible and should have been effectively challenged.

Yet trial counsel failed entirely to question Officer Bales about where he saw the foot at any time during deposition, the suppression hearing, or the trial, and failed to make this argument to the court. The only attempt at an explanation as to how the severed foot, which Officer Bales allegedly saw on the edge of the bathtub, came to no longer be on the edge of the bathtub a short time later when the body was photographed was an offhand comment made by the prosecutor, Flora Seff, during a discussion as to the admission of crime scene photographs, unrelated to the Motion to Suppress:

> The shot which shows the entire body also shows he cut off the limbs, which caused the police officer to actually when they went into start this whole ball in motion. He sees the foot, the amputated foot sitting on the bathtub. You are going to hear from the officers during this case what they went through, what the officer went through and actions he took as a result of seeing the foot on the bathtub is important. If they don't see that the foot is off the limb. You know what, we are in a position now whenever we try cases that police officers are not the – the credibility of officers is constantly attacked. **The foot slid down into the bathtub.**

(T. 802) (emphasis added). Ms. Seff's comments also underscore that it was Officer Bales's observation of the severed foot on the edge of the bathtub that "start[ed] this whole ball in motion," alluding to the point that if Officer Bales had not seen the severed foot on the edge of the bathtub, the officers would not have found the victim's body. It is telling that Ms. Seff was concerned about Officer Bales's credibility regarding what he saw in the bathroom in the context of a discussion on which photographs should be admitted. This particular pre-trial hearing did not directly relate to Officer Bales's credibility, yet Ms. Seff's inexplicable protestation exposes her concern. Despite the prosecutor's emphasis of the importance of Officer Bales seeing the severed foot on the edge of the bathtub, and despite Ms. Seff's unprovoked outcry about the constant attacks on police officers' credibility, trial counsel failed to pick up on the glaring inconsistency between Officer Bales's testimony and the crime scene photographs.

To believe Officer Bales's testimony is to believe that an experienced police officer, fearing that someone might jump him from behind, would attempt to alleviate this concern by walking backwards into a part of an apartment where he thinks someone could be hiding. To believe Officer Bales's testimony is to believe that someone in the process of disposing a body in a bathroom would leave the bathroom door open when he knows the police are knocking on his door and attempting to enter his apartment. To believe Officer Bales's testimony is to

believe that an officer would walk backwards down a hallway and past an open door, only to look through the crack between the doorjamb and the hinges instead of simply looking through the open door. Mr. Seibert alleged that trial counsel's failure to make these points clear prevented the trial court from grasping the truth about Officer Bales's search which led to the discovery of the victim's body. No adversarial testing occurred and the trial court thus accepted the State's description of the facts and based its ruling thereon.

Mr. Seibert alleged that he was prejudiced by this lack of adversarial testing. (PC-R. 101). As a result of trial counsel's deficient performance in failing to present evidence and effectively argue the Motion to Suppress, the fruits of Officer Bales's illegal search of Mr. Seibert's apartment, including all evidence obtained from the bathroom and the photographs taken of the victim's body in the bathtub, were not suppressed. Had trial counsel effectively argued the suppression issue based on the totality of the true facts regarding the search of Mr. Seibert's apartment, the prejudicial evidence obtained from the unconstitutional search would not have been admissible in Mr. Seibert's trial. But for trial counsel's deficient performance with regard to the Motion to Suppress, there is a reasonable probability that the result of the proceeding would have been different.

C. **The circuit court's summary denial of this claim was error.**

The circuit court summarily denied Mr. Seibert's claim without an evidentiary hearing:

> Defendant contends that trial counsel should have filed a motion requesting a walk-through of the crime scene. Defendant strongly argued at the *Huff* Hearing that if a walk-through was done, the jurors would have determined that Officer Bales' testimony was not truthful as there was a pocket door blocking his access to the bathroom. If there was a pocket door, it would have been visible in State's Exhibit 3. It is not. This court viewed every photograph that was introduced into evidence at trial prior to preparing this order. Not a single photograph indicated that there was a pocket door. To the contrary, the photographs indicate that there was a hinged door, which is consistent with the testimony of Officer Bales.
>
> A blow up of the layout of the apartment was introduced into evidence as State's Exhibit 48 during the trial on November 15, 2002. A picture is worth a thousand words. The layout clearly shows that the bathroom is in close proximity to the front door. All the officer had to do was enter the main room of small studio apartment, take a couple of small steps, and turn his head to see the bathroom.
>
> Also, Exhibit 3, a copy of which is attached hereto, shows the view of the small studio apartment from the bathroom. The front door is clearly visible and close to the bathroom. Exhibit 10, a copy of which is attached, clearly shows that the bathroom had a hinged door. There is no pocket door. While is may not appear as clear without the color, this court, when viewing the color photograph that was introduced into evidence, can clearly see the tile, where the tile ends, the caulking of the tub, and the side of the tub while looking through the space between the door and the wall, on the side where the door hinges to the wall. What the court can see in the

> Exhibit 10 is consistent with the testimony of Office Bales. T. 2415, attached hereto.
>
> Additionally, Crime Scene Investigator Marsha Knowles also testified about the layout of the apartment.
>
> Q: Now, does this apartment have more than one room?
>
> A. Yes.
>
> Q. Are there doors separating on room from another? Let me show you what has been marked as State's Exhibit 32, can you tell us by looking at that photograph?
>
> A. From my recollection and from the photographs, I think there was only one interior door that led to the bathroom area.
>
> TR 3018, a copy of which is attached.
>
> It is clear to this court that the photographs do not depict a pocket door. The testimony and the pictures refute that there is a pocket door. To the contrary, there is a hinged door.

(Supp. PC-R. 207-208). The circuit court concluded that the claim was procedurally barred and refuted by the record. (Id.).

The circuit court's denial of this claim is error on two grounds: first, the claim is not procedurally barred and second, the circuit court failed to grant an evidentiary hearing on the claim, as required by rule 3.851 and this Court's precedent. The claim is not procedurally barred because it was not raised on direct appeal, and could not have been raised on direct appeal. The mere incantation of the phrase "procedurally barred" does not make it so. Indeed, this was a straight forward ineffective assistance of counsel claim that was pled in the Rule 3.851 motion with great specificity demonstrating instances of trial counsel's

deficiencies. The issue raised on direct appeal was that the circuit court erred in denying Mr. Seibert's motion to suppress evidence discovered and statements made as a result of the officers' entry and search of Mr. Seibert's apartment in violation of the Fourth Amendment. This Court concluded that the officers' entry into the apartment was justified by exigent circumstances, and deferring to the trial court's finding of facts regarding the extent of the officers' search, concluded that the officers were not conducting a search "in the traditional sense of the word" because "they did not open any containers or even enter any other rooms." *Seibert v. State*, 923 So. 2d 460, 471 (Fla. 2006). The instant claim that Mr. Seibert was denied the effective assistance of counsel, in violation of the Sixth Amendment, due to trial counsel's failure to argue and present the available evidence to effectively make a case that the officers conducted an illegal search of his apartment. Further, because this claim is based on facts outside of the record on direct appeal, the claim could not have been raised on direct appeal.

The circuit court's second ground for denying the claim is also in error. An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *Owen v. State*, 33 Fla. L. Weekly S 569 (Fla. May 8, 2008); *Amendments to Fla. Rules of Crim. Pro. 3.851, 3.852, & 3.993*, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims

which allege an ultimate factual basis"). To the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual determination, the court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007); *see also Gaskin v. State*, 737 So. 2d 509, 517, n. 17 (Fla. 1999) ("We agree with that portion of Justice Wells' concurring opinion calling for a presumption in favor of evidentiary hearings in initial 3.850 motions asserting claims for ineffective assistance of counsel, *Brady*, and other newly discovered evidence claims in capital cases and more stringent review of subsequent motions.").

"Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). A court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003). Mr. Seibert's rule 3.851 motion pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are

accepted as true, it is clear that the record does not positively refute Mr. Seibert's claim and that an evidentiary hearing is required.

In its order, the circuit court attempted to demonstrate that Mr. Seibert's claim is refuted by the record by relying on (1) photographs introduced at trial that show that the bathroom door is a hinged door, not a sliding pocket door (Supp. PC-R. 208, 212-13), and (2) a diagram showing the layout of the apartment that was also introduced at trial (Supp. PC-R. 208, 216). The circuit court's heavy reliance on the fact that photographs introduced into evidence show that the bathroom door is a hinged door rather than a pocket door evinces a profound and troubling misunderstanding of Mr. Seibert's argument underscoring the need for evidentiary development of this issue. (Supp. PC-R. 208). Given Mr. Seibert's argument in his rule 3.851 motion and his argument at the case management conference/*Huff* hearing, it is difficult to conceive how the circuit court misunderstood Mr. Seibert's allegation to be that the bathroom door was a pocket door. Mr. Seibert alleged that on the west wall of the main living room of the apartment, there is a doorway with a sliding pocket door that leads to a hallway. (PC-R. 94). On the north side of the hallway is a storage area or closet. (Id.). On the south side of the hallway is the door to the bathroom. (Id.). Of course, Mr. Seibert does not dispute that the bathroom door is a hinged door. The photographs showing that the bathroom door is a hinged door rather than a sliding pocket door do not

conclusively refute Mr. Seibert's claim. They do, however, demonstrate that the circuit court's analysis about why this claim is refuted by the record is based on an utter misunderstanding of Mr. Seibert's allegation.

The significance of the pocket door is that it demonstrates that when Officer Bales stepped from the living room into the hallway, he passed through a doorway into another room. On direct appeal, this Court reasoned that the officers' "quick look around the apartment was not an extensive search because they did not open any containers **or even enter any other rooms**." *Seibert v. State*, 923 So. 2d 460, 471 (Fla. 2006) (emphasis added). The pocket door is an example of how trial counsel could have and should have used the physical layout of the apartment to attack the credibility of the officer's testimony regarding his search of the apartment, *i.e.*, it demonstrates that rather than simply looking from the main room into the bathroom, the officer must have walked from the living room, through the doorway with the pocket door, into the hallway, and then looked through the crack between the bathroom door and doorway in order to see into the bathroom. Mr. Seibert alleged in his rule 3.851 motion that there is a pocket door separating the living room from the hallway. This allegation is not conclusively refuted by the record, and the circuit court should have—as this Court must—accepted Mr. Seibert's allegation as true and granted an evidentiary hearing on his claim.

The circuit court additionally relied on State's Exhibit 48 at trial, which is a diagram showing the layout of the apartment, concluding that the diagram "clearly shows that the bathroom is in close proximity to the front door." (Supp. PC-R. 208.) The circuit court further found that "All the officer had to do was enter the main room of small studio apartment, take a couple of small steps, and turn his head to see the bathroom." (Id.). There is absolutely no evidence in the record to support this factual determination. At trial, crime scene investigator Marsha Knowles testified that the purpose of creating the diagram was to show the location in which pieces of evidence were found. (T. 3021). She did not prepare the diagram in this case. (Id.). While Knowles testified that the diagram was to scale, it is clearly marked as being "Not to scale" and was admitted over trial counsel's objection. (T. 3022). Furthermore, there are no measurements on the diagram to support the trial court's finding that Officer Bales took "a couple of small steps" and then turned his head to see into the bathroom. Nor is there any testimony in the record to support the finding that all Officer Bales had to do was take "a couple of small steps" and turn his head in order to see into the bathroom. The diagram does not support the circuit court's finding, nor does it positively refute Mr. Seibert's allegation.

The salient issue under the deficient performance prong of the *Strickland* standard is whether trial counsel presented all available evidence to demonstrate

the extent of the officers' search of the apartment. Based on the evidence presented at the suppression hearing, the circuit court found that Officer Bales was "literally taking a step back" when he saw a severed foot on the edge of the bathtub. (T. 1311-12). The circuit court, however, made a different finding in its sentencing order: "The officers sat down with the Defendant in the living area to talk. One of the officers then turned his head to the side, and through the partially open door to the bathroom, observed a severed foot on the side of the bath tub." (R. 796). And now, without having heard any additional evidence, the circuit court has made yet another finding: "All the officer had to do was enter the main room of small studio apartment, take a couple of small steps, and turn his head to see the bathroom." (Supp. PC-R. 208).

The ease with which the circuit court changed its findings of fact between the trial and the denial of Mr. Seibert's rule 3.851 motion suggests that the court deemed the difference between turning one's head, "literally taking a step," and "taking a couple of small steps" trivial. Yet the point is that there is a factual dispute over the extent of the officers' search of the apartment which is simply not resolved in the record. Many questions remain unanswered: Could Officer Bales see into the bathroom from the main living room? Did he walk through the doorway with the sliding door into the hallway where the bathroom was located in order to be able to see into the bathroom? How far was it from where Officer

Bales was standing, talking to Mr. Seibert, to the far side of the bathroom door where the hinges were? Where exactly must Officer Bales have been standing in order to see through the opening between the hinged side of the door and the doorway to the far edge of the bathtub? Mr. Seibert alleged that his trial counsel was ineffective for failing to present available evidence that would prove that the officers' search of Mr. Seibert's apartment constituted an unreasonable search in violation of the Fourth Amendment. Since the record does not positively refute Mr. Seibert's allegations, an evidentiary hearing is required.

This Court made very clear at oral argument and in its opinion affirming the sentence and conviction that the question of the extent of the search was intricately tied to the dimensions of the apartment and the extent of Officer Bales's physical movement within the apartment. Justice Cantero stated that based on the record and the briefs, it was his impression that it was really not much more than the officer just being in the presence of the Defendant and then turning his head to look at what else was around. Justice Cantero invited appellate counsel to explain how Officer Bales's search which led to the discovery of the victim's body involved more than just a turning of his head, but appellate counsel was unfortunately constrained by the lack of record below and was therefore unable to describe to this Court the extent of the search. This alone serves to prove the Sixth Amendment claim.

In evaluating Mr. Seibert's argument on direct appeal, this Court relied on *Mincey v. Arizona* for the proposition that "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Seibert v. Florida*, 923 So. 2d 460, 470 (2006), *citing Mincey v. Arizona*, 437 U.S. 385, 393 (1978). Further, this Court cited the Fifth District Court of Appeal's opinion stating that "if the police enter a home under exigent circumstances and, prior to making a determination that the exigency no longer exists, find contraband in plain view, they may lawfully seize the illegal items." *Id., citing Davis v. State*, 834 So. 2d 322, 327 (Fla. 5th DCA 2003). "However, if the police determine the exigency that initially allowed their entry into the residence no longer exists, any subsequent search is illegal and any contraband discovered pursuant to the illegal search is inadmissible." *Seibert v. Florida*, 923 So. 2d 460, 470 (2006).

When Mr. Seibert's factual allegations in his rule 3.851 motion are accepted as true—as they must be at this stage—it is clear that Mr. Seibert is entitled to an evidentiary hearing to prove that trial counsel failed to properly investigate the crime scene and sufficiently cross examine Officer Bales. Had trial counsel not been deficient in his investigation and subsequent cross examination of Officer Bales, it would have been apparent that the officers' search of the apartment exceeded the scope of the search that this Court held on direct appeal was justified by the exigent circumstances. Had trial counsel not been deficient, it would have

been clear that the victim's body was not in plain view, and only by conducting an illegal search of Mr. Seibert's apartment was Officer Bales able to see into the bathtub.

D. Conclusion.

Due to trial counsel's ineffectiveness, no adversarial testing occurred at the pre-trial and guilt phases of Mr. Seibert's capital trial. The circuit court erred in summarily denying this claim. It is not procedurally barred, and when the facts alleged by Mr. Seibert in his rule 3.851 motion are accepted as true, it is clear that the record does not positively refute the claim and that an evidentiary hearing is required. This Court should reverse the circuit court's order and remand the case for an evidentiary hearing on this claim.

ARGUMENT II

MR. SEIBERT WAS DENIED AN ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

In his rule 3.851 motion, Mr. Seibert alleged that he was denied the effective assistance of counsel at the sentencing phase of his capital trial due to his counsel's failure to object to certain statements concerning Mr. Seibert's prior conviction. Mr. Seibert argued that the statements were classic hearsay and that their admission violated Mr. Seibert's right of confrontation. Trial counsel's failure to object to the statements on these grounds resulted in the jury hearing highly

prejudicial and inflammatory testimony that Mr. Seibert had no opportunity to rebut. Additionally, trial counsel's failure to object resulted in the issue not being preserved for direct appeal where, had it been raised, there is a reasonable probability that this Court would have granted relief. The circuit court denied this claim on two grounds: first, the admission of the hearsay statements was consistent with the state of the law at the time of the penalty phase, citing *Lawrence v. State*, 691 So. 2d 1068, 1073 (Fla. 1997) and *Rodriguez v. State*, 753 So. 2d 29, 43-45 (Fla. 2000); and second, counsel cannot be deemed ineffective for failing to anticipate changes in the law. (Supp. PC-R. 209).

The circuit court erroneously denied this claim on the ground that the admission of the hearsay statements was consistent with the state of the law at the time of the penalty phase. This Court has long held that the right of confrontation applies to all three phases of capital trials. *Donaldson v. State*, 722 So. 2d 177, 186 (Fla. 1998); *Engle v. State*, 438 So. 2d 803, 813-14 (Fla. 1983). The legislature has seen fit to relax the usual rules of evidence during the penalty phase of capital trials:

> evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence,

> provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Section 921.141(1), Florida Statutes (1998); *see also Marquard v. State*, 850 So. 2d 417, 425 (Fla. 2002). In sum, the state of the law at the time of Mr. Seibert's penalty phase was that capital defendants had a right of confrontation during the penalty phase and hearsay was admissible at the penalty phase, provided the defendant was accorded a fair opportunity to rebut any hearsay statements.

The circuit court's reliance on *Lawrence v. State*, 691 So. 2d 1068, 1073 (Fla. 1997) and *Rodriguez v. State*, 753 So. 2d 29, 43-45 (Fla. 2000) for the proposition that the admission of the hearsay statements in Mr. Seibert's penalty phase were consistent with the state of the law at the time simply erroneous. In *Lawrence*, the issue was whether a witness's former testimony, offered by the State, could be read to a re-sentencing jury where the State failed to demonstrate that the witness was unavailable. This Court reasoned that because the witness was not unavailable, her testimony amounted to hearsay. *Lawrence*, 691 So. 2d at 1073. The issue, therefore, turned on whether the defendant had a fair opportunity to rebut the hearsay statement, and this Court concluded that because the defense had cross-examined the witness at the original trial, the defense could have offered that cross-examination during the re-sentencing proceeding, and therefore the lower court did not err in admitting the hearsay. *Id*. *Lawrence* is distinguishable from the instant case because Mr. Seibert did not have a fair opportunity to rebut

the hearsay statements offered at his penalty phase. Unlike in *Lawrence*, the hearsay offered in Mr. Seibert's case was not former testimony; Mr. Seibert's prior felony conviction was the result of a guilty plea. Mr. Seibert was never afforded an opportunity to cross-examine the hearsay declarants in a prior trial.

This Court's similar reasoning in *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000) is likewise distinguishable from the instant case. In *Rodriguez*, this Court held that a neutral witness is allowed to give hearsay testimony as to the details of a prior violent felony conviction during a capital penalty phase. *Id*. at 44. This Court reasoned that:

> the defendant's interest in cross-examining the witness is less compelling where the testimony concerns a prior felony conviction. The defendant previously had the opportunity to cross-examine fact witnesses during the trial for the prior felony. The transcripts of the prior trial are also available to rebut the hearsay testimony describing the prior conviction. This is analogous to cases allowing a penalty phase witness to summarize prior testimony because the defendant had the opportunity to cross-examine the declarant during the original proceeding.

Id. at 45. The Court's reasoning in *Rodriguez* assumes that the prior felony conviction occurred after a trial at which the defendant had an opportunity to cross-examine witnesses. That reasoning is simply inapplicable here, where Mr. Seibert was never afforded an opportunity to cross-examine the hearsay declarants in a prior trial.

Furthermore, in *Rodriguez*, this Court cautioned "the State and trial courts against expanding the exception to allow witnesses to become the conduit for hearsay statements made by other witnesses who the State chooses not to call, even though available to testify." *Id*. Here, Andrea Henderson's hearsay statement was not necessary to establish the prior violent felony. Mr. Seibert was not charged with any sexual assault. The only purpose for presenting that hearsay was to present needlessly inflammatory, shocking, and highly prejudicial testimony.

The circuit court's admission of the hearsay statements of Andrea Henderson, Michelle Kendricks, and Leon Golden was not consistent with the state of the law at the time of Mr. Seibert's penalty phase. Contrary to the circuit court's conclusion, trial counsel need not have anticipated a change in the law in order to properly object to these statements. The Sixth Amendment right of an accused to confront witnesses against him is a fundamental right which has been made obligatory on the states by the due process clause of the Fourteenth Amendment. *Engle v. State* 438 So. 2d 803, 814 (Fla. 1983), *citing Pointer v. Texas*, 380 U.S. 400 (1965). "The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination." *Id*. This right has been applied to the sentencing process in capital cases. *Specht v. Patterson*, 386 U.S. 605 (1967). Trial counsel's failure to object on hearsay/

confrontation grounds constitutes deficient performance which falls below reasonable professional standards.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*. at 688 (citation omitted). Beyond the guilt-innocence stage, defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The U.S. Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion). In *Gregg* and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." *Id*. at 206. *See also Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

The prejudice to Mr. Seibert caused by defense counsel failing to object to the admission of the prior crime victims' statements on hearsay and Confrontation Clause grounds was that the jury heard highly prejudicial and inflammatory testimony that Mr. Seibert had no opportunity to rebut. Furthermore, had trial counsel objected to the admission of the statements on hearsay and Confrontation

Clause grounds, the claim would have been preserved for direct appeal. This Court has held that a specific objection based on the right to confrontation is necessary in order to preserve a confrontation violation for review. *Schoenwetter v. State*, 931 So. 2d 857, 871 (Fla. 2006). Since the U.S. Supreme Court opinion in *Crawford v. Washington*, 541 U.S. 36 (2004) was issued in the intervening time between Mr. Seibert's sentencing and the filing of his initial brief on direct appeal, appellate counsel would have been able to raise the issue on appeal had the issue been preserved, and there is a reasonable probability that this Court would have granted relief.

In *Crawford*, the U.S. Supreme Court held that the admission of testimonial statements of a witness who did not appear at trial violates the Confrontation Clause of the Sixth Amendment unless (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity for cross-examination. *Franklin v. State*, 965 So. 2d 79, 90 (Fla. 2007), *citing Crawford v. Washington*, 541 U.S. 36 (2004). The Court emphasized that if "testimonial" evidence is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* While *Crawford* did not establish a precise definition of the term "testimonial," the Court did provide some guidance, holding that, at a minimum, statements are testimonial if the declarant made them

"at a preliminary hearing, before a grand jury, or at a former trial; and [in] police interrogations." *Id.*

Here, the statements of Andrea Henderson, Leon Golden, and Michelle Kendricks are testimonial under *Crawford* because they were given in the course of police interrogations. There was no showing at trial that any of the declarants were unavailable. Mr. Seibert was not afforded any prior opportunity for cross examination of Leon Golden or Michelle Kendricks. While Mr. Seibert's public defender appointed for his 1986 case took Andrea Henderson's deposition on October 14, 1986, such pre-trial discovery depositions are not a substitute for in court cross-examination. In *State v. Lopez*, 974 So. 2d 340 (Fla. 2008), this Court held a discovery deposition does not satisfy the "opportunity to cross-examine" under *Crawford*, reasoning that

> the right to take a discovery deposition under rule 3.220 does not serve as the functional substitute of in-court confrontation of the witness because the defendant is usually prohibited from being present, the motivation for the deposition does not result in the "equivalent of significant cross-examination," and the resulting deposition cannot be admitted as substantive evidence at trial.

Id. at 350; *see also Blanton v. State*, 978 So. 2d 149 (Fla. 2008), *State v. Belvin*, 33 Fla. L. Weekly S 279 (Fla. May 1, 2008).

Trial counsel's failure to object to the prior crime victims' statements cannot be attributed to any reasonable trial strategy or tactic. Trial counsel was clearly

trying to prevent the jury from hearing these extremely inflammatory and prejudicial statements. It would be unreasonable for trial counsel to have refrained from objecting to the confrontation violation in order to prevent the victims of the prior crimes from testifying in front of the jury. This Court has repeatedly held that while the State can present testimony concerning the details of prior violent felonies during the sentencing phase of capital trials, "the details of the collateral offense must not be emphasized to the point where that offense becomes the feature of the penalty phase." *Finney v. State*, 660 So. 2d 674, 683 (Fla. 1995); *see also Hitchcock v. State*, 673 So. 2d 859 (Fla. 1996); *Duncan v. State*, 619 So. 2d 279, 282 (Fla. 1993). Therefore, had trial counsel objected to the admission of the hearsay statements of the prior crime victims, and had the court sustained trial counsel's objection, it is unlikely that the State would have been able to present as much prejudicial, harmful, and inflammatory testimony via live witnesses as it did through hearsay. This is especially true of Andrea Henderson, because Mr. Seibert was never charged with any crime related to her. Trial counsel's failure to object to the admission of the hearsay statements of prior crime victims on confrontation grounds, and the ensuing testimony that the jury heard prejudiced Mr. Seibert.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING AS REQUIRED BY FLA. R. CRIM. P. 3.851(5)(B) ON MR. SEIBERT'S CLAIM CHALLENGING THE CONSTITUTIONALITY OF FLORIDA'S LETHAL INJECTION PROCEDURES.

Mr. Seibert sought an evidentiary hearing on his claim challenging Florida's lethal injection procedures. He pled facts regarding the merits of his claim which must be accepted as true. This Court, like the lower court, must accept that Mr. Seibert's allegations are true at this point in the proceedings. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that Mr. Seibert's claims are not positively refuted by the record and that an evidentiary hearing is required. An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *Owen v. State*, 33 Fla. L. Weekly S 569 (Fla. May 8, 2008).

In his rule 3.851 motion, Mr. Seibert argued that newly discovered evidence demonstrates that Florida's lethal injection procedures violate the Eighth Amendment to the U.S. Constitution and corresponding provisions of the Florida Constitution. Specifically, Mr. Seibert alleged that the Department of Corrections' August 1, 2007 lethal injection procedures create a constitutionally unacceptable risk of pain. The circuit court rejected Mr. Seibert's claim without an evidentiary hearing. (Supp. PC-R. 209).

Mr. Seibert acknowledges that this Court has recently upheld the constitutionality of Florida's lethal injection procedures in *Schwab v. State*, 2008 Fla. LEXIS 1113 (Fla. June 27, 2008), *Schwab v. State,* 2008 Fla. LEXIS 55 (Fla. Jan. 24, 2008), *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), and *Schwab v. State*, 969 So. 2d 318 (Fla. 2007). Mr. Seibert submits, however, that the circuit court erred in denying his claim without evidentiary hearing. Mr. Seibert's rule 3.851 motion pled facts regarding the merits of his claim and his diligence which must be accepted as true. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively rebut Mr. Seibert's claim and that an evidentiary hearing is required.

Mr. Seibert also acknowledges that the U.S. Supreme Court issued an opinion in a case involving a challenge to Kentucky's lethal injection protocols. On April 16, 2008, the Court upheld the constitutionality of Kentucky's lethal injection protocol and laid out the legal standard that governs Eighth Amendment challenges to methods of execution. *Baze v. Rees*, 128 S. Ct. 1520 (2008). That standard requires plaintiffs to first establish a "substantial risk of harm." *Id*. at 1531. If an alternative is proffered, *Baze* requires the plaintiff to show that the alternative procedure is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate

penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment." *Id*. at 1532.

The *Baze* decision turned wholly on Kentucky's written protocol. It left open the important question of whether a protocol that is constitutional on its face may violate the Eighth Amendment when it is not carried out as written. The U.S. Supreme Court upheld the constitutionality of Kentucky's lethal injection procedures on the basis that, in light of the safeguards included in the written protocol, the risks identified by the petitioners were not so substantial or imminent as to amount to an Eighth Amendment violation. *Baze*, 128 S. Ct. at 1535. Among the safeguards lauded by the Court were the written protocol's requirement that "members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman"; that "IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year"; that "[t]hese sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers"; and that "the protocol calls for the IV team to establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences." *Id*. at 1533-34. The Court concluded that "[t]hese redundant measures ensure that if

an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected." *Id.*

Florida's unique history of deviating from written execution protocols reveals the gravity of the question of whether a protocol that is constitutional on its face may violate the Eighth Amendment when it is not carried out as written. *See, e.g., Davis v. Florida*, 742 So. 2d 233 (Fla. 1999) (relying on the presumption but expressing concern with respect to the electric chair that "once again" . . . "there is an indication that [the Florida Department of Corrections] has not followed the protocol established for the appropriate functioning of the electric chair and carrying out of the death penalty."); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999) (detailing the subsequent bloody execution of Allen Lee Davis, only a week after his challenge was denied, which eventually led to the decision to adopt lethal injection as a method of execution in Florida). Mr. Seibert's claim was based in large part on the 2006 botched execution of Angel Diaz. What the Diaz execution demonstrates is that although a state may have a written protocol in place that contains myriad safeguards, if the people carrying out the execution choose not to follow the protocol, its existence does little to mitigate the risk of harm.

Florida's August 16, 2006 written lethal injection protocol, under which Diaz was executed, contained some safeguards similar to those contained in the

Kentucky written protocol. Yet despite the written requirements for training, the written sequence for injecting drugs, and the written contingency plan for what to do if venous access became compromised, this Court concluded that "it is undisputed that in the execution of Angel Diaz, the intravenous lines were not functioning properly because the catheters passed through his veins in both arms and thus delivered the lethal chemicals into soft tissue, rather than into his veins." *Lightbourne v. McCollum*, 969 So. 2d 326, 343 (Fla. 2007).

In *Baze*, the U.S. Supreme Court reiterated that "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Baze*, 128 S. Ct. at 1531, *citing Farmer v. Brennan*, 511 U.S. 825, 842 (1994). The facts of the Diaz execution make clear that the botch cannot be written off simply as an "isolated mishap." Despite the written protocol's requirement that the execution team be qualified and trained to carry out their duties, the evidence presented in the Lightbourne litigation showed that the execution team observed Diaz moving, talking, and struggling long after the first administration of sodium thiopental, and then went ahead and injected pancuronium bromide and potassium chloride into him while he was still conscious. *State v. Lightbourne*, Case Number 1981-170CF. The Diaz execution demonstrates that the mere existence of a written protocol is not enough

to safeguard against even the most predictable problems and therefore, that any evaluation of an Eighth Amendment challenge to a method of execution must go beyond the written document.

The circuit court erred in denying Mr. Seibert an evidentiary hearing on this claim since the motion and the files and records in the case do not conclusively show that Mr. Seibert is entitled to no relief. This Court should reverse the circuit court's order and remand the case for an evidentiary hearing.

ARGUMENT IV

MR. SEIBERT WAS DENIED ACCESS TO PUBLIC RECORDS.

Mr. Seibert alleged in his rule 3.851 motion that he was denied his rights under the due process clause of the Fourteenth Amendment and corresponding law because he was denied access to public records under Fla. R. Crim. P. 3.852, which he alleged was unconstitutional on its face and as applied. The circuit court denied his claim:

> Defendant contends that he was denied access to public records from the DOC that he was entitled to. In September, 2007, this court entered an order on Defendant's entitlement to records. The Defendant has not filed any motions alleging that he has not received the records from DOC, this court conclude that DOC complied with the order.
>
> * * *
>
> Defendant also contends that Fla. R. Crim. P. 3.852 is unconstitutional. This claim has been rejected by the Florida Supreme Court. *In re: Amendments to*

> *Fla. R. Crim. P.- Capital Postconviction Records Production*, 683 So. 2d 475, 475-476 (Fla. 1996).

(Supp. PC-R. 200).

Upon receiving the mandate from the this Court, the Attorney General's Office notified the Department of Corrections (DOC) and the State Attorney's Office for the Eleventh Judicial Circuit on May 25, 2006. On June 12, 2006, the Attorney General's Office also notified the Miami-Dade County Medical Examiner's Office and the Miami-Dade County Department of Corrections. On June 9, 2006, the State Attorney's Office for the Eleventh Judicial Circuit then notified the Florida Department of Law Enforcement (FDLE), the State Attorney's Office for the Seventeenth Judicial Circuit, the Miami Beach Police Department, the Hollywood Police Department, the North Miami Beach Police Department, and the Broward County Sheriff's Office.

Mr. Seibert timely filed his requests for additional public records, pursuant to Fla. R. Crim. P. 3.852 (g) and (i) on January 17, 2007. This Court held hearings on those requests on March 29, 2007, June 15, 2007, and June 22, 2007. On June 22, 2007, the circuit court orally ordered the DOC to turn over certain records relating to lethal injection. On September 12, 2007, the circuit court issued a written order to the same effect. (PC-R. 617). The State immediately filed a petition for review of that nonfinal order in this Court, which was fully briefed by both parties and remained pending when the circuit court denied Mr. Seibert's rule

3.851 motion. The State subsequently voluntarily dismissed the petition and Mr. Seibert filed a motion to compel the production of public records simultaneously with his motion for rehearing in the circuit court.[8] (PC-R. 731-33). The circuit court never ruled on Mr. Seibert's motion to compel. As a result, Mr. Seibert has never received the public records to which the circuit court found he was entitled. The circuit court's order finding that DOC complied with its order is in error.

Collateral counsel for Mr. Seibert must obtain all public records in existence which may bear on the issues in this case or risk issues being procedurally barred. *Porter v. State*, 653 So. 2d 375 (Fla. 1995). Mr. Seibert is entitled to these records, (*see Anderson v. State*, 627 So. 2d 1170 (Fla. 1993); *Muehleman v. Dugger*, 623 So. 2d 480 (Fla. 1993); *Walton v. Dugger*, 643 So. 2d 1059 (Fla. 1993); *State v. Kokal*, 562 So. 2d 324 (Fla. 1990)) as an obligation rests with State agencies to furnish requested materials. *Ventura v. State*, 673 So. 2d 479 (Fla. 1996). The delay and/or denial of access to crucial public records in his case results in Mr. Seibert being denied his rights to due process and equal protection of the law.

[8] That issue is the subject of the State's cross-appeal in the instant case.

ARGUMENT V

THE LOWER COURT ERRED IN SUMMARILY DENYING THE REMAINDER OF MR. SEIBERT'S CLAIMS.

A. Mr. Seibert had a right to be present at all critical stages of the trial.

The lower court erred in denying the claim that Mr. Seibert was absent from critical stages of his trial in violation of his Sixth and Fourteenth Amendment rights. (Supp. PC-R. 202 (Claim V). The record reflects that on at least twenty-five (25) occasions, Mr. Seibert, without any record of having submitted a written waiver, was not present during pretrial conferences. (PC-R. 81; T. 20, 28, 98, 116, 185, 193, 199, 205-13, 232-35, 243, 250-51; 261, 285, 292-299, 307, 335, 619, 733, 742). A capital defendant is absolutely guaranteed by the U.S. Constitution the right to be present at all critical stages of judicial proceedings. *See, e.g., Faretta v. California*, 422 U.S. 806, 819, n.15 (1975); *Drope v. Missouri*, 420 U.S. 162 (1975); Fla. R. Crim. P. 3.180. To the extent that Mr. Seibert's claim is premised on the right to effective assistance of counsel, the circuit court erred in denying the claim on the grounds that it is procedurally barred. Trial counsel's waiver of Mr. Seibert's right to be present constituted deficient performance and resulted in prejudice to Mr. Seibert under *Strickland v. Washington*, 466 U.S. 668 (1984). This Court has held that generally, claims of ineffective assistance of counsel are not cognizable on direct appeal, but only by collateral challenge. *Wuornos v. State*, 676 So. 2d 972, 974 (Fla. 1996).

B. Mr. Seibert is exempt from execution under the Eighth Amendment because he suffers from severe mental illness.

In his Rule 3.851 motion, Mr. Seibert alleged that he is exempt from execution under the Eighth Amendment to the U.S. Constitution because he suffers from such severe mental illness that death can never be an appropriate punishment. (PC-R. 134-39) (Claim X). Mr. Seibert's claim was based on the American Bar Association's Resolution 122A (PC-R. 768-69), which was approved on August 8, 2006 and recommends that each jurisdiction that imposes capital punishment implement policies and procedures to prevent severely mentally ill defendants from being executed. In its order summarily denying Mr. Seibert's claim, the circuit court stated:

> Defendant alleges that he can not be executed because he suffers from mental illness. He does not specifically state what his mental illness is. Mere allegory conclusions [sic] are not grounds for postconviction relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998); *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989).
>
> During trial proceedings, Defendant presented extensive mental health evidence. The trial court found that Defendant suffered from borderline personality disorder with antisocial features and a history of substance abuse. A personality disorder is not a mental illness. *Diaz v. State*, 945 So. 2d 1126, 1150 (Fla. 2006).
>
> Contra to Defendant's argument that mental illness and mental retardation can be equated, Defendant is not mentally retarded and *Atkins v. Virginia*, 536 U.S. 304 (2002) does not apply.

(Supp. PC-R. 210).

The circuit court erred in denying Mr. Seibert's claim that his severe mental illness places him within the class of defendants, like those who were under the age of eighteen at the time of the crime and those with mental retardation, who are categorically excluded from being eligible for the death penalty. *Cf. Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the death penalty is unconstitutional for defendants under 18 at the time of the crime); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the death penalty is unconstitutional for mentally retarded defendants). In denying Mr. Seibert's claim, the circuit court relied on *Diaz v. State*, 945 So. 2d at 1152, in which this Court noted that "there is currently no per se 'mental illness' bar to execution." The U.S. Supreme Court, however, has long cautioned that the Eighth Amendment's prohibition against cruel and unusual punishment is not simply a fixed ban on certain punishments, but rather depends on evolving standards of decency for its substantive application. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (noting that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); *Weems v. United States*, 217 U.S. 349, 368 (1910) (recognizing that the words of the Eighth Amendment are not precise, and that their scope is not static.). The ABA resolution urging states to exempt from the death penalty those defendants with severe mental illness at the time of their crimes as described in the resolution evinces an evolution in standards of decency

which must be considered in a proper Eighth Amendment analysis.[9]

Mr. Seibert has suffered continuously from mental illness since before the time of the crime for which he was convicted and sentenced to death. He has been diagnosed with major depression and severe emotional disturbances since his early teenage years. He falls within the class of persons who are so much less morally culpable and deterrable than the "average murderer" as to be categorically excluded from being eligible for the death penalty, no matter how heinous the crime. *Cf. Simmons, supra; Atkins, supra*. Given his severe mental illness, Mr. Seibert is constitutionally protected from execution because the death penalty is an unconstitutionally excessive punishment for Mr. Seibert for the same reasons delineated in *Atkins* and *Simmons*.

C. Newly discovered empirical evidence demonstrates that Mr. Seibert's conviction and sentence of death constitutes cruel and unusual punishment.

In his rule 3.851 motion, Mr. Seibert alleged that newly discovered

[9] It bears noting that prior to the U.S. Supreme Court's decisions holding that mentally retarded defendants and defendants under the age of eighteen at the time of the crime are categorically excluded from eligibility for the death penalty, the ABA passed resolutions urging the exemption of both classes of defendants from the death penalty. *See* American Bar Association, Report with Recommendations No. 107 (adopted February 1997), *available a*t http://www.abanet.org/irr/rec107.html (last visited July 15, 2008); American Bar Association, Recommendation (adopted February 1989), available at http://www.abanet.org/irr/feb89b.html (last visited July 15, 2008); American Bar Association, Recommendation (adopted August 1983), available at http://www.abanet.org/irr/aug83.html (last visited July 15, 2008).

empirical evidence demonstrates that his conviction and sentence of death constitute cruel and unusual punishment. (PC-R. 110-24) (Claim VIII). The basis of his claim was a comprehensive report of Florida's death penalty system, published September 17, 2006 by the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team. *See* American Bar Association, *Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report*, September 17, 2006 (PC-R. 772-1232) (hereinafter "ABA Report"). The circuit court denied the claim:

> Defendant alleges that American Bar Association Report constitutes newly discovered evidence that the death penalty is cruel and unusual punishment.
>
> The Florida Supreme Court has repeatedly held that the ABA Report does not constitute newly discovered evidence. *Diaz v. State*, 945 So. 2d 1136, 1146 (Fla. 2006); *Rolling v. State*, 944 So. 2d 176, 181 (Fla. 2006); *Rutherford v. State*, 940 So. 2d 1112, 1117-1118 (Fla. 2006).

(Supp. PC-R. 209).

Mr. Seibert acknowledges that this Court has recently addressed similar claims in *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006), *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006), and *Rolling v. State*, 944 So. 2d 176 (Fla. 2006). In those cases, the Court determined that the ABA Report was not "newly discovered evidence." Mr. Seibert submits, however, that this Court has, in the past,

recognized that "reports" issued by governmental or other bodies that affect the integrity of a defendant's trial or penalty phase can constitute newly discovered evidence. *See Trepal v. State*, 846 So. 2d 405 (Fla. 2003) (relinquishing jurisdiction in Trepal's pending appeal in order to permit him to file an amended Rule 3.850 based on the newly discovered information contained in the Department of Justice's Inspector General's Report). *Trepal*, 846 So. 2d at 409-10. Indeed, Mr. Seibert's case is no different from the situation in *Trepal*. Mr. Seibert made additional argument with regard to his claim that the ABA Report is newly discovered evidence in pointing out to the court that the newly discovered evidence is not the individual instances of error, but the totality of the empirical data and the conclusions drawn by the committee. At a minimum, the ABA Report should be considered newly discovered evidence.

D. Requiring the application of Rule 3.851 to Mr. Seibert violates his rights to due process and equal protection under the Fifth and Fourteenth Amendments.

On September 21, 2001, this Court promulgated Fla. R. Crim. P. 3.851 to apply only to motions filed by capital defendants on or after October 1, 2001. Under this rule, capital defendants are allowed only one (1) year from the date their conviction becomes final to file a Motion to Vacate Judgment and Sentence under Fla. R. Crim. P. 3.850. *See* Fla. R. Crim. P. 3.851 (d)(1)(A-B). In so doing, rule 3.851 carves out a class of persons, namely those criminal defendants sentenced to

death, and for no legitimate reason, treats them differently from all other persons seeking relief under Florida's postconviction procedure. The arbitrary application of this new rule, which has had significant detrimental effects on Mr. Seibert's attempt to seek state and federal postconviction review of his convictions and sentences, including his sentence of death, violates his rights to due process and equal protection as a violation of Article I, Section 2 of the Florida Constitution as well as the Fourteenth Amendment to the U.S. Constitution.

E. Mr. Seibert was denied his rights under the First, Sixth, Eighth, and Fourteenth Amendments because of the rules prohibiting his lawyers from interviewing jurors to determine if constitutional error was present.

In his rule 3.851 motion, Mr. Seibert alleged that he was being denied his rights under the First, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution because of rules prohibiting his lawyers from interviewing jurors to determine if constitutional error was present. (PC-R. 75-78) (Claim III). The circuit court rejected the claim on the ground that "[i]ssues regarding juror misconduct should have been raised on direct appeal and are procedurally barred," citing *Suggs v. State*, 923 So. 2d 419, 440 (Fla. 2005). (Supp. PC-R. 201). The circuit court failed to address Mr. Seibert's claim regarding the constitutionality of the rule prohibiting Mr. Seibert's lawyers from interviewing jurors.

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, 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.

Mr. Seibert is entitled to a fair trial and sentencing. His inability to fully explore possible misconduct and biases of the jury prevents him from fully detailing the unfairness 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. As detailed in the Statement of Facts, *supra*, Mr. Seibert's trial was tainted by inappropriate and bigoted comments by seated jurors. Three jurors were ultimately excused from the

jury as a result of the discovery of these 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 U.S. Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights, including Mr. Seibert's rights to due process and access to the courts of this State under Article I, § 21 of the Florida Constitution. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Turner v. Louisiana*, 379 U.S. 466 (1965).

F. Mr. Seibert is entitled to a new trial due to cumulative error.

Mr. Seibert did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. *See Heath v. Jones*, 941 F. 2d 1126 (11th Cir. 1991). Due process was deprived by the sheer number and types of errors involved in his trial which, when considered as a whole, virtually dictated the sentence that he would receive. *See Ellis v. State*, 622 So. 2d 991 (Fla. 1993); *Jackson v. State*, 575 So. 2d 181, 189 (Fla. 1991); *Jones v. State*, 569 So. 2d 1234 (Fla. 1990), *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990). A series of

errors may accumulate a very real, prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967).

CONCLUSION AND RELIEF SOUGHT

In light of the foregoing arguments, Mr. Seibert submits that he is entitled to have the lower court's order reversed and his case remanded to the circuit court for an evidentiary hearing. Based on his claims for relief, Mr. Seibert is entitled to a new trial and/or sentencing proceeding. Finally, Mr. Seibert submits that he should not be executed in a manner that constitutes cruel and unusual punishment.

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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