IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-526

JOHN TROY,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

INITIAL BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this appeal will determine whether Mr. Troy lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Mr. Troy accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE

> John Troy was indicted for first-degree murder of Bonnie Carroll, as well as armed burglary and armed robbery; a fourth count, attempted sexual battery with a weapon upon Carroll, was later added by information. Troy was separately charged by information for the related armed burglary, aggravated battery, armed kidnapping, and armed robbery of Traci Burchette. Trial by jury resulted in guilty verdicts on all counts in both cases. Following a penalty phase, the jury recommended a death sentence for the murder by an eleven-to-one vote and the trial court imposed a death sentence.

Troy v. State, 948 So.2d 635, 638 (Fla. 2006)

The judgment and sentences were affirmed on appeal. *Id*. The defendant filed a timely petition for writ of certiorari to the U.S. Supreme Court that was denied on June 18, 2007. *Troy v. Florida*, 551 U.S. 1135 (2007).

Mr. Troy filed his Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 on June 10, 2008. PCROA V3 511 to V4 606.[1] The defendant raised 12 claims and sought an evidentiary hearing on five of them. The postconviction court summarily denied all claims on March 3, 2009, including the five claims designated for an evidentiary hearing. PCROA V5 816 to V7 1304.

In an unusual procedural move, despite denial of the motion for postconviction relief, the postconviction court granted the defendant's motion to interview a juror. PCROA V7 1305. The motion had been filed at the case management conference to allow the defendant to present testimony from the juror in support of the claim addressed in Issue 2 herein. The court addressed the motion as a separate matter, and took testimony from the juror and the victim's father at a hearing held after the defendant filed a notice of appeal of the denial of the postconviction motion. Additional facts are set out in the argument on Issue 2.

[1] Citations in this brief shall be as follows: The record on appeal concerning the trial proceedings shall be referred to as "ROA ___" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to as "PCROA ___" followed by the appropriate volume and page numbers.

STATEMENT OF THE FACTS[2]

Mr. Troy was convicted for the murder of 20-year-old Bonnie Carroll in Sarasota, Florida. She had been killed after midnight on September 12, 2001, and her mother discovered her body the following afternoon. The victim suffered multiple knife wounds and impact injuries to her face.

The evidence showed that Mr. Troy lived with his mother in the same apartment complex as the victim. He had been released from prison on probation more than a month before the murder. The day of the murder, he failed a drug test and his probation officer told him he was going to return to prison. Mr. Troy returned home, but left after an argument and ingested cocaine with a friend during three visits before the homicide, and in one visit after. A downstairs neighbor refused to let him in when he pounded on her door shortly before the murder

Early in the morning, several hours after the murder, Mr. Troy went to the home of Traci Burchette, a friend of his mother who had put up both of them briefly the month before. He attacked her and took her car and an ATM card. He drove south toward Naples but police stopped and arrested him. A passenger in the car led police to a two-by-four by the road bearing what appeared to be blood and containing DNA from Ms. Burchette. DNA found on Mr. Troy's clothing matched

[2] The facts are drawn from the opinion in the direct appeal, *Troy v. State*, 948 So.2d 635, 638 (Fla. 2006).

that of the two victims. Investigators found Mr. Troy's DNA under Ms. Carroll's fingernails and on a broken piece of glass, and they found his fingerprints on a glass on her kitchen counter.

> At the outset of trial, with Troy's consent, defense counsel acknowledged in his opening statement both that Troy killed Carroll and that he had attacked Burchette. However, he claimed Troy was only guilty of second-degree murder on the basis that the killing was neither premeditated nor committed during the perpetration of any felony. Although Troy did not contest most of the charges, the defense, in its case and on cross-examinations, introduced physical evidence, photographs, and testimony to corroborate Troy's statements. Specifically, the defense substantiated that Troy was in Carroll's apartment by invitation, that the two of them were socializing prior to their argument which culminated in her murder, and that Troy used drugs while in her apartment. There was no evidence of forced entry into Carroll's apartment. Despite the defense claims, Troy was found guilty of first-degree murder and all other charges.
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> . . . .
>
> The defense's penalty phase presentation focused on Troy's upbringing, his behavior and adjustment in prison, his potential for rehabilitation if sentenced to life imprisonment, and the impact of the tragic national events of September 11, 2001, which the defense claimed resulted in Troy's explosion of violence. In addition to the numerous family members and other character witnesses who testified on Troy's behalf, Dr. Michael Maher, a clinical and forensic psychiatrist, also gave expert testimony concerning the effects of Troy's difficult upbringing. He testified regarding (1) Troy's unstable, physically and emotionally abusive childhood; (2) Troy's being sexually molested at age thirteen by an adult male teacher, which resulted in humiliation and ostracism after Troy was the key witness at the teacher's high-publicity trial in a small town; (3) Troy's arrested psychological development; (4) Troy's lifelong depressive illness; (5) Troy's chronic drug addiction from an early age; (6) Troy's response to the national events of September 11; and (7) Troy's acute intoxication at the time of Carroll's murder.

Troy, 948 So.2d at 640-41. At the *Spencer* hearing, the defense presented testimony from a detective who had taken a confession from Mr. Troy that had been suppressed at trial. The detective testified that Mr. Troy accepted responsibility for the death of Carroll and expressed remorse for his crimes. The trial court ruled this opened the door to the entire confession, revealing details of the murder of Ms. Carroll. However, the confession also revealed that Mr. Troy denied having sex with the victim and that he said he had ingested heroin, cocaine, and Paxil the night of the crimes, that he had used cocaine in Ms. Carroll's apartment, that he thought his use of Paxil influenced his actions, and that the argument with Ms. Carroll started when she disparaged his mother.

The trial court found four aggravators, the two statutory mental health mitigators, and fifteen nonstatutory mitigators, and sentenced Mr. Troy to death. This Court denied relief on the direct appeal. This postconviction proceeding followed.

SUMMARY OF THE ARGUMENT

The overriding basis for relief on Issues 1-5 is that the postconviction court erred in summarily denying without hearing the claims designated by the defendant as requiring an evidentiary hearing. Error is claimed for the failure to grant relief on the remainder of the claims.

Issue 1: Ineffective assistance of counsel for failing to prepare a penalty phase witness. Trial counsel sought to introduce testimony from an assistant DOC warden. The trial court recognized that testimony would be admissible from a witness with specific knowledge of Mr. Troy and how he would adapt to life in prison, but barred the testimony for lack of the individualized knowledge. The postconviction court denied this claim because this Court affirmed the trial ruling based on the lack of individualized knowledge. However, the postconviction tribunal overlooked the essence of the claim, i.e. that trial counsel was ineffective **because** the testimony was not intended to be based on personal knowledge -- it was ineffective for trial counsel to have sought to introduce inadmissible testimony, and that competent counsel would have educated the witness so that his testimony would have been admissible. The postconviction motion alleges facts supporting the claim unrefuted by the record that require an evidentiary hearing.

Issue 2: Ineffective assistance of counsel in jury selection. One of the jurors disclosed on his trial information sheet that he belonged to a small beach-community chamber of commerce. Postconviction investigation determined that the victim's father was the treasurer of that chamber of commerce. The juror and the victim's family lived in the same small community a short distance from each other and the juror and the family both were involved in real estate. The postconviction court conducted an ancillary proceeding on a motion it took to be

separate from the 3.851 motion to determine whether the juror and family actually knew each other, but it erred in summarily denying the claim in the 3.851 motion. The summary denial found that the question of the juror's actual acquaintance was mere speculation. Ignored by the court was the additional claim that competent trial counsel would have struck the juror even if actual acquaintance were not shown, because the parties would inevitably become known to each other. Trial counsel knew the victim's father was erratic and aggressive (continuing to this date), requiring a restraining order to force him to stop harassing Mr. Troy's mother, and could reasonably anticipate the father would testify in the penalty phase. The potential for intimidation by someone the juror knew lived and worked in close proximity compelled striking the juror. The jury also developed a close identification with the victim's family, for instance forcing the dismissal of the forewoman after she embraced the victim's mother and offered sympathy and encouragement in the middle of the trial. The jury also sat for a group photograph. One intimidated or sympathetic juror would have biased the entire panel.

Issue 3: The age mitigator. In finding no error in failure to instruct on the age mitigator, this Court held two mutually exclusive conditions existed – Mr. Troy proved he was functioning at an immature, adolescent level at the time of the crimes, and Mr. Troy was functioning as a mature adult. As this Court found, the evidence clearly proved Mr. Troy was functioning at an adolescent level. Trial

counsel completely failed to marshal that evidence when he sought the age instruction, tossing away the substantial evidence of immaturity, which this Court agrees established the fact, with "And also, Judge, there was some testimony about the Defendant's emotional immaturity that may be relevant to the consideration of [the age instruction]." Competent counsel is obliged to prepare and argue effectively at trial, and his failure to do so here was ineffective assistance of counsel. A hearing would have allowed the evidence supporting the claim to be developed.

Issue 4: Lethal injection protocol. An individualized hearing is necessary to ascertain whether Florida's lethal injection protocol adequately protects Mr. Troy from cruel and unusual punishment. Recent developments including the problems with Ohio's lethal injection procedures demonstrate the need for an evidentiary hearing on a case-by-case basis.

Issue 5: **Lethal injection – identity of execution team.** The constitutionality of the execution process in Florida is ensured, in part, by public scrutiny. Keeping the identities of the execution team a secret is neither necessary nor constitutionally justifiable. Botched executions in Florida, Ohio, and elsewhere, as well as the evidence from the Governor's Commission appointed after the Diaz execution, evidence from the *Lighbourne* hearings, and the

Dyehouse memos, demonstrate the constitutional necessity of public review of the team members.

Issue 6: Constitutional infirmity of section 27.702.** Capital defendants represented by CCRC are deprived of the option of a 42 U.S.C. § 1983 challenge to lethal injection, contrary to similarly situated defendants represented by registry counsel, *pro bono* counsel, or privately retained counsel.

Issue 7: The rules denying counsel the right to interview jurors are unconstitutional. Access to jurors is necessary to assure the jury was not tainted by impermissible influences or otherwise acted in an unconstitutional manner. The blanket prohibition imposed on counsel is unconstitutional and denies defendants adequate assistance of counsel.

Issue 8: *Caldwell* claim. Florida's jury instructions unconstitutionally diminish the jury's responsibility in sentencing.

Issue 9: Incompetent to be executed. An unresolved quirk in federal jurisprudence requires the defendant to raise the issue of his competency in the initial postconviction proceeding.

Issue 10: Death sentence statute unconstitutional as applied. The state and federal constitutions require that penalty phase juries must unanimously find each aggravating factor to exist.

Issue 11: Death sentence statute unconstitutional on its face and as applied. Florida's sentencing scheme fails to guarantee that the death penalty is not arbitrarily imposed or that it will be imposed only on the worst offenders.

Issue 12: Cumulative error. Each claim raised in postconviction justifies relief, but, to the extent any single one fails to rise to that level, the claims in combination and in totality require a new trial and resentencing.

STANDARD OF REVIEW

The question is whether the trial court erred in summarily denying all claims in the postconviction motion for relief. The standard of review this Court applies is set out thusly:

> As a general proposition, a defendant is entitled to an evidentiary hearing on any well-pled allegations in a motion for postconviction relief unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. *See Maharaj v. State,* 684 So.2d 726 (Fla. 1996); *Anderson v. State,* 627 So.2d 1170 (Fla.1993); Fla. R. Crim. P. 3.850. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are insufficient to meet this burden. *See Kennedy v. State,* 547 So.2d 912 (Fla.1989). However, in cases where there has been no evidentiary hearing, the court must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. *See Peede v. State,* 748 So.2d 253 (Fla.1999); *Valle v. State,* 705 So.2d 1331 (Fla.1997). We must examine each claim to determine if it is legally sufficient and, if so, determine whether or not the claim is refuted by the record.

Parker v. State, 904 So.2d 370, 376 (Fla. 2005).

The claims of ineffective assistance of counsel, for purposes of determining whether a legally valid claim has been presented, requiring a hearing, are measured by the polestar of *Strickland v. Washington*, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

> defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

ARGUMENT

ISSUE 1

THE POSTCONVICTION COURT ERRED IN SUMMARILY DENYING MR. TROY'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF THE TRIAL, IN VIOLATION OF MR. TROY'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN COUNSEL FAILED TO PROPERLY AND ADEQUATELY PREPARE A MITIGATION WITNESS, MICHAEL GALEMORE, LEADING TO THE EXCLUSION OF THE WITNESS'S PROPOSED TESTIMONY.

At trial, the court excluded the testimony of Michael Galemore, a Florida Department of Corrections assistant warden. Trial counsel argued that Galemore would testify about alternatives to the death sentence, i.e. life without parole, and the conditions under which the sentence would be served. ROA Vol. 30 2726-29.

In the 3.851 motion, Mr. Troy argued:

> From his efforts during the pretrial and at trial, counsel had the duty to ensure that Mr. Troy received a fair trial. During the Galemore proffer, counsel referred the court to the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and its obligation to produce "witnesses who can testify about the applicable alternative to a death sentence and/or *the conditions under which the alternative sentence would be served*." (ROA V.30 p. 2728)(in citing to ABA Guidelines 10.11(F)(3), 31 *Hofstra L. Rev*. 913, 1055-56 (Summer 2003)(emphasis added).
>
> As noted previously, trial counsel informed the trial court that Galemore had no personal contact with the defendant and had no knowledge of the facts of the defendant's case. (ROA V30 p.2727).

Not discussed in court by counsel were his January 27, 2003, written comments to his investigator that "[t]his will be the first time in his [Galemore's] career that he has had to testify. I think the more details that we could offer regarding our line of questioning the better witness that he would be." It would appear, therefore, that the failure to have Mr. Galemore meet and interview Mr. Troy before trial was contrary to the stated and written pre-trial intentions of trial counsel and his investigative team. Counsel also failed to have Mr. Galemore review Mr. Troy's previous prison records and the proposed or existing testimony of the eight witnesses who, in fact, testified as to Troy's general good behavior in prison beginning at age eighteen. Again, combined with exposure to other "details" of the case, Galemore could have been presented as a DOC witness familiar with the defendant and his case, thereby overcoming the court's emphasized basis for the proffer ruling. As counsel recognized at least seven months before trial, providing the witness with this background and information would have made him a "better witness" for testimony before the jury about conditions of future incarceration. *See United States v. Johnson*, 223 F.3d 665, 671 (7th Cir. 2000) (describing how, to rebut the government's assertion of future dangerousness, federal capital defendant put on evidence at penalty phase regarding conditions at "Supermax" prison where defendant would be housed if sentenced to life imprisonment), *cert. denied*, 534 U.S. 829 (2001); Benjamin Weiser, "Lawyers for Embassy Bomber Push for Prison Over Execution," *N.Y. Times*, June 27, 2001, at B4; ("In the federal capital sentencing of a defendant convicted of bombing American embassies overseas, the defense presented evidence about conditions at the federal 'Super Max' prison in Florence, Colorado, where the defendant would be incarcerated if sentenced to life without parole."); *cited in* ABA Guidelines, Commentary to 10.11, 31 *Hofstra L. Rev*. 913, 1063 at footnote 290*; Brown v. State*, 526 So.2d 903, 908 (Fla.. 1988)("Mitigating evidence is not limited to the facts surrounding the crime but *can be anything* in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant. *See Hitchcock v. Dugger, Eddings v. Oklahoma,; Lockett v. Ohio*.")(citations omitted)(emphasis added).

> One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial.

> "Pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps the most critical stage of a lawyer's preparation." *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir.), *cert. denied*, 469 U.S. 870, 105 S.Ct. 218, 83 L.Ed.2d 148 (1984). *See Weidner v. Wainwright*, 708 F.2d 614, 616 (11th Cir.1983) ("At the heart of effective representation is the independent duty to investigate and prepare") (*quoting Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982)). Although all criminal defendants are entitled to the effective assistance of counsel, "the seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance." *Proffitt v. Wainwright*, 685 F.2d 1227, 1247 (11th Cir.1982) (*citing Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir. Unit A Sept.1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982)).
>
> *Magill v. Dugger*, 824 F.2d 879, 886 (11th Cir. 1987).

PCROA V3 525-26 (emphasis added).

Trial counsel failed to meet the standards of reasonable attorney performance during the representation and was therefore deficient. Counsel's deficiency during this critical phase of Mr. Troy's case prejudiced Mr. Troy and led to his improper death sentence. Had counsel been effective in his attempts to present a crucial feature of his mitigation case, there was a reasonable probability that the sentencing jury would not have recommended his death and the trial court would not have sentenced him to death.

The basis for the postconviction claim was that trial counsel knew that competent representation required familiarizing Mr. Galemore with the specific circumstances of the case:

> Counsel also failed to have Mr. Galemore review Mr. Troy's previous prison records and the proposed or existing testimony of the eight witnesses who, in fact, testified as to Troy's general good behavior in prison beginning at age eighteen. Again, combined with exposure to other "details" of the case, Galemore could have been presented as a DOC witness familiar with the defendant and his case, thereby overcoming the court's emphasized basis for the proffer ruling.

PCROA V3 525-26

The postconviction court failed to address the factual issue of whether trial counsel's failure to have Mr. Galemore review the prison records, the testimony of the eight other witnesses, and the details of the case, was deficient. Instead, the court's order merely reiterates what has already been said -- what was proffered did not include personal knowledge.

> Counsel's stated purpose in offering Mr. Galemore's testimony was to show that any person sentenced to life imprisonment without the possibility of parole would (1) be under close custody, and as such would be supervised in a particular manner; (2) work while imprisoned; (3) have to follow the rules of prison, including those pertaining to the use of drugs; and (4) have to follow rules regarding leadership. Indeed, on his subsequently-file "Mitigation Proffer," the Defendant's counsel indicated that Mr. Galemore's testimony was to be "regarding Department of Corrections policy and procedures." See Attachment 5. It appears that counsel also intended to offer an exhibit relating to "common misperceptions about prison life." Mr. Galemore's testimony was not intended to be based on personal knowledge, :but a general knowledge of DOC's policies and procedures regarding various issues. The obvious import of such evidence would have been that, generally speaking, a defendant sentenced to life without the possibility of parole would be more productive than one sentenced to death, and to clear up "misperceptions" about the life of an inmate serving a life sentence. **Although the Court found that parole ineligibility and the Defendant's threat while in prison were proper mitigation**

> **considerations, it found that the "testimony as proffered" by Mr. Galemore did not address those issues. It therefore does not appear that Mr. Galemore's personal knowledge would have made his testimony more appropriate.**

PCROA V5 820-21.

If trial counsel had competently prepared by ensuring that Mr. Galemore had personal knowledge of the case, trial counsel would have either framed the initial proffer to include the personalized knowledge, or he would have been able to rebut the trial court's ruling that the lack of personal knowledge rendered his testimony irrelevant.

In ruling to exclude Mr. Galemore, the court expressly held that evidence about how Mr. Troy would fare serving life without parole would be relevant and admissible:

> *** [E]vidence which tends to prove or disprove that he poses a threat to prison personnel and other inmates, or that he is well suited to imprisonment, are issues that are properly presented to the jury, but I don't find that the testimony as proffered in regards to witness Galemore address those issues, and he doesn't have any knowledge of his particular defendant, and I don't think his testimony would be relevant or probative for those reasons.
>
> So I'm going to grant the state's motion to exclude him as a witness for those reasons and make those findings here on the record as a matter of law.

ROA V30 2765.

Had trial counsel properly prepared Mr. Galemore, his testimony would have been deemed relevant and would have been presented to the jury.

In the direct appeal from the trial, this Court found that Mr. Galemore's testimony about Troy's possible prison experience would be entirely speculative because the witness did not observe Mr. Troy serving time in prior prison incarcerations and did not know Mr. Troy personally.

> Troy's next claim involves the exclusion of the proffered testimony of Department of Corrections official Michael Galemore, an assistant warden at the Polk County Correctional Institution. He asserts that this exclusion violated the Eighth and Fourteenth Amendments because Galemore's testimony was relevant to the mitigating factor of Troy's potential for rehabilitation and positive contribution in a structured prison environment.
>
> According to the trial records, defense counsel planned to call Galemore to testify that, hypothetically, were Troy sentenced to life imprisonment, it would be considered close custody, that Troy would be supervised in a particular fashion, and that he would work while in prison. Galemore was also to testify regarding the presence of drugs in prison, specifically that they are not easily obtained. The trial judge granted the State's motion to exclude him as a witness, **emphasizing that Galemore had no personal knowledge of the defendant or the case.**
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> . . . .
>
> We conclude that the trial court did not abuse its discretion in excluding Galemore's testimony. First, it should be noted that Galemore's testimony was offered during the penalty phase of Troy's trial, which lasted over four and a half days. Defense counsel called twenty-nine witnesses during this phase, indicating that the judge was not categorically excluding mitigation evidence or the presentation of defense witnesses. Furthermore, **Galemore had never met Troy, nor had he ever witnessed Troy during one of his periods of incarceration, making his potential assessment regarding Troy's possible prison experience entirely speculative.** When considered in context of the entire penalty phase, the other witnesses called, and the arguments defense counsel nevertheless made regarding a possible

> life sentence, the exclusion of Galemore as a witness was not an abuse of discretion.

Troy v. State, 948 So.2d 635, 650 (Fla. 2006) (emphasis added). Drawing from this holding, the other side of the coin is that if the defense had properly prepared Mr. Galemore, "Galemore . . . met Troy, [and had familiarized himself with records of] Troy during one of his periods of incarceration, making his potential assessment regarding Troy's possible prison experience entirely [admissible]."

The state certainly had no problem at trial understanding that the thrust of Galemore's testimony was to address how Mr. Troy would fare in life imprisonment because the state argued "... not to mention that Mr. Galemore had never met the defendant, does not even know where Mr. Troy would be sentenced if he was sentenced to life." ROA V30 at 2730.

Assuming trial counsel had properly prepared Mr. Galemore, when the judge ruled that it would be proper to introduce evidence of Mr. Troy's suitability for life imprisonment, but that Mr. Galemore was not being proffered for that purpose, defense counsel could easily expand on his proffer and argument to relieve the court of that misconception. If the witness had not been prepared before the proffer, competent counsel would have, at the earliest opportunity, had Mr. Galemore meet with Mr. Troy and review Mr. Troy's history and records so that Mr. Galemore could indeed testify as to Mr. Troy's personal suitability for life

imprisonment. The failure to prepare Mr. Galemore before trial or after the proffer was the specific nature of the claim in Mr. Troy's 3.851 motion.

The post conviction court, in holding in its order that Mr. Galemore's testimony was not intended to be based on personal knowledge, completely misses the point of the claim. The claim is that trial counsel was ineffective **because** Mr. Galemore's testimony was not intended to be based on personal knowledge.

The reasoning in the postconviction order is a tautology -- counsel only intended to introduce the objective testimony, objective testimony was not admissible, so there was no error or prejudice when counsel failed to introduce inadmissible testimony. Ignored is the essence of the claim -- it was ineffective for trial counsel to have sought to introduce inadmissible testimony, and that competent counsel would have educated Mr. Galemore so that his testimony would have been admissible.

If, indeed, the controlling law is that evidence of generalized conditions are admissible only if the same witness is also able to testify about how those generalized conditions relate to the defendant's personal suitability, then trial counsel was ineffective for failing to prepare his witness to testify in the manner deemed admissible. If the postconviction court had reached the claim embodied in the motion rather than the claim the court addressed, an evidentiary hearing would have been necessary to resolve the factual matters raised by the claim.

To resolve the competency prong of *Strickland*, trial counsel needs to be questioned for the reason he failed to consider presenting admissible evidence of Mr. Troy's personal suitability, or failed to utilize Mr. Galemore for that purpose. The pretrial memo from the investigator establishes that the investigator, at least, recognized the need for the defense to better prepare Mr. Galemore. That memo and the investigator's testimony would have established that the need for proper preparation was recognized long before trial. Counsel's representation would fall below the standard of the first prong of the *Strickland* criteria if he failed to anticipate or understand the state of the law, which rendered evidence of general conditions of life imprisonment inadmissible unless presented in the context of the personal suitability of the defendant, based on specific knowledge of the defendant.

The prejudice arising from this failure of representation is also a factual matter requiring an evidentiary hearing. Prejudice would be established by testimony from a properly prepared Mr. Galemore or a similar witness who would have been available at trial. The witness would be familiar with Mr. Troy's circumstances, his incarceration history and disciplinary behavior during that time, and would have met with Mr. Troy, satisfying the prerequisites of admissible testimony in this case. The witness would also be able to testify how prison regulations would affect Mr. Troy's personal access to drugs on the question of whether he would simply spend the rest of his life in a drug-induced state.

It was error for the postconviction court to deny a hearing on the ground that trial counsel had proffered inadmissible testimony when the basis for the claim was that trial counsel was ineffective because he proffered inadmissible testimony. He failed to address his team's concern that the witness needed better preparation, he failed to recognize on his own accord the necessity of properly preparing the witness, and he failed to cure the omission and re-proffer the witness with testimony that the court had already ruled would have been admissible.

The fact that "the judge was not categorically excluding mitigation evidence or the presentation of defense witnesses," *Troy*, 948 So.2d at 650, in no way cures a non-systemic but erroneous ruling. Just because the defense presented other witnesses who testified about other aspects of the issue does not cure the prejudice from denying the jury the testimony of one knowledgeable in Florida's prison system that could vividly describe the deprivations of serving a life sentence without parole and explain how those conditions would affect Mr. Troy. The other witnesses and argument do not cure the prejudice from denying the jury compelling testimony of Mr. Troy's expected contributions and success in adapting to a lifetime of incarceration.

Evidence from unbiased expert witnesses supporting a capital defendant's adaptability to lifetime imprisonment is admissible, and reversible error when excluded. *Skipper v. South Carolina*, 476 U.S. 1 (1986). This Court had occasion

to find reversible error in excluding evidence of adaptability in a case remanded from the Supreme Court for consideration after *Skipper*:

> Skipper introduced, as mitigating evidence, the testimony of himself, his former wife, and his mother in proof of his good conduct while in jail awaiting trial. As additional proof of his adjustment to prison life, **Skipper proffered the testimony of two jailers and a regular visitor, which testimony was excluded by the trial court as irrelevant and inadmissible.** The United States Supreme Court held that the exclusion of this testimony violated the precepts of *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which mandate that "the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record," and that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence,' " 106 S.Ct. at 1670-71, quoting *Eddings*, 455 U.S. at 110, 114, 102 S.Ct. at 874, 876. In reaching this conclusion, **the Court rejected the state's argument that the excluded testimony was cumulative, finding that the jailers and the visitor were disinterested witnesses whose testimony would be given greater weight by the jury.**
>
> A rehabilitation officer testified in the instant case that Valle had been a model prisoner and was rehabilitated during his prior imprisonment. **The trial court excluded the expert testimony of a clinical psychologist and two corrections consultants which was proffered in proof of Valle's claim that, if given a sentence of life imprisonment rather than death, he would be a model prisoner.** The United States Supreme Court in *Skipper* found that evidence of probable future conduct in prison is relevant mitigating evidence.
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> > [E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration.
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> > ....
> >
> > [A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.

106 U.S. at 1671, 1672 (footnotes omitted).

> When we first considered this matter, 474 So.2d at 804, we found that this proffered "model prisoner" testimony was cumulative and properly excluded. **We are now persuaded that the excluded testimony of these experts differed in quality and substance from that of the rehabilitation officer. The expert testimony was proffered in proof of the probability that Valle would be a model prisoner in the future. It cannot be said that this evidence was cumulative in light of the rehabilitation officer's testimony that he could only vouch for Valle's behavior while previously imprisoned and that he had no opinion as to Valle's ability to adjust, in the future, to prison life.**

Valle v. State, 502 So.2d 1225, 1225-26 (Fla. 1987) (emphasis added).

Trial counsel knew or should have known about the nature of admissible evidence a properly prepared prison warden could provide pursuant to *Skipper* and *Valle*. Instead, he offered as support only the case of *Ford v. State*, 802 So.2d 1121 (Fla. 2001), which addressed only the general admissibility of evidence of life without parole. The trial judge ruled that general testimony about life without parole was not admissible. In addressing *Ford*, the trial judge recognized evidence that would have been admissible:

> There's also an additional footnote here that states, quote, [quoting from *Ford* at note 37] "For instance where the defendant is well suited to imprisonment, life imprisonment may serve as a viable alternative to death, but whether defendant poses a threat to prison personnel and fellow inmates, life imprisonment may be viewed less favorably." So certainly **evidence which tends to prove or disprove that he poses a threat to prison personnel and other inmates, or that he is well suited to imprisonment, are issues that are properly presented to the jury, but I don't find that the testimony as proffered in regards to witness Galemore address those issues, and he doesn't have any knowledge of this particular defendant,**

> and I don't think his testimony would be relevant or probative for those reasons.

ROA V30 2764-65.

The *Ford* decision at note 37 recognized this Court's precedent from *Valle* and its implementation of *Skipper*, but stated the principle without the citation. Competent counsel would have known from the outset that *Skipper/Valle* evidence would be admissible. Competent counsel would have ensured that Mr. Galemore was properly prepared to provide that evidence.

The excerpt from the 3.851 motion quoted above includes citations to a sampling of additional authorities favoring the admissibility of conditions and adaptation, *i.e. United States v. Johnson*, 223 F.3d 665, 671 (7th Cir. 2000) (evidence of prison restrictions minimized future dangerousness concern), *cert. denied*, 534 U.S. 829 (2001); Benjamin Weiser, "Lawyers for Embassy Bomber Push for Prison Over Execution," *N.Y. Times*, June 27, 2001, at B4; (evidence of "supermax" conditions in capital sentencing); *cited in* ABA Guidelines, Commentary to 10.11, 31 *Hofstra L. Rev*. 913, 1063 at footnote 290*; Brown v. State*, 526 So.2d 903, 908 (Fla.. 1988) ("Mitigating evidence is not limited to the facts surrounding the crime but *can be anything* in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant. *See Hitchcock v. Dugger, Eddings v. Oklahoma,; Lockett v. Ohio*.") (citations omitted) (emphasis added).

At an evidentiary hearing, Mr. Troy would have had the opportunity to prepare Mr. Galemore or a similarly situated warden to offer evidence of Mr. Troy's potential for adapting to a life sentence. Mr. Troy would have had the opportunity to establish whether trial counsel's failure to prepare his witness was anything other than incompetent performance. The two prongs of *Strickland* cannot be established or rejected without an evidentiary hearing.

ISSUE 2

THE POSTCONVICTION COURT ERRED WHEN IT SUMMARILY DENIED MR. TROY'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF THE TRIAL, IN VIOLATION OF MR. TROY'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND QUESTION JURORS WHO HAD UNDISCLOSED CONNECTIONS WITH THE HOMICIDE VICTIM'S FAMILY. THE SEATING OF JURORS WITH UNDISCLOSED CONNECTIONS WITH THE VICTIM ALSO CONSTITUTED FUNDAMENTAL ERROR VIOLATING MR. TROY'S RIGHT TO A FAIR TRIAL GUARANTEED BY STATE AND FEDERAL DUE PROCESS.

Mr. Troy claimed in his postconviction motion that one of the jurors seated for his trial may have known the father of the victim. Even if the juror's close ties to the same community and organization as the victim's father did not lead to the two men being personally acquainted, competent counsel would have struck any juror with such close ties within the same small island community. The claim was set out in the postconviction motion:

> The defense had an absolute right to rely on truthful answers from the jurors during voir dire. The trial judge in this case questioned the venire as to whether they knew either the victim or the family of the victim, identifying the victim as "Bonnie Ortiz Carroll." Venire member Fred Hamblin, who would sit on the jury, did not identify himself as knowing the victim or her family. However, Juror Hamblin was actively involved in the Siesta Key Chamber of

Commerce and conducted his real estate business a block from the Chamber. The victim's father, Bob Ortiz, was also active in the Siesta Key Chamber of Commerce, and was selected as the Chamber Treasurer in August 2003, or shortly before, contemporaneous with the beginning of jury selection in the trial in this case. Both the Ortiz family and the Hamblin family lived on Siesta Key at the time of the homicide and at the time of trial, a geographically small and confined area of about 7,000 residents, according to the 2000 census.

Juror Hamblin provided a "Prospective Juror Questionnaire" prior to trial, and the defense had a copy of that document. On that document, Hamblin disclosed that he was currently employed, as of August 10, 2003, by Waterside Realty, and had previously been employed by Remax Realty. An examination of the maps of Siesta Key and the locations of the businesses shows that Remax Realty was located on the corner immediately south of the small strip center complex in which the Siesta Key Chamber of Commerce was located. Further, Waterside Realty was across the street and one block south of the Chamber office. Juror Hamblin also disclosed on his questionnaire only a single club or organization to which he belonged, the "Siesta Key Chamber."

Bob Ortiz, the father of victim Bonnie Ortiz Carroll, had been extremely active in addressing the family of John Troy. Within months of the homicide, he had undertaken to harass Debra Troy, John Troy's mother, with letters and telephone calls which caused her to be in fear for her safety and resulted in the issuance of a restraining order to stop the behavior. Mr. Ortiz's strong feelings continue to this day, as he continues to communicate with Mr. Troy in correspondence with threats and diatribe. He has also been quite public with his animosity, establishing a MySpace page devoted solely to soliciting suggestions from others of ways to make Mr. Troy's life difficult.

Mr. Ortiz and his wife resided at and managed an apartment complex on Siesta Key at the time of the homicide and trial. He also was named to be the treasurer for the Siesta Key Chamber of Commerce as reported in the "Comings and Goings" section of the Sarasota Herald-Tribune of August 11, 2003.

There is a substantial likelihood that Bob Ortiz, the Chamber treasurer, would know Fred Hamblin, who lived within a couple of miles of the Ortiz family, and who worked within yards of the Chamber office. The likelihood is amplified by the fact that the only "affinity" organization Mr. Hamblin felt was important enough to

> identify in his questionnaire was the Chamber of Commerce. Obviously, his membership in the chamber was not trivial – the fact that he did not name a church, country club or other organizational affiliation suggests that the Chamber figured large in his mind. The likelihood is further amplified by the fact that Bob Ortiz has been active and open in publically voicing his feelings about the case. Given that Mr. Hamblin asserted an active membership in the Chamber, and that Mr. Ortiz was elected to be the treasurer by the membership within a month or two prior to the beginning of the trial, it is virtually impossible that Mr. Hamblin did not know Mr. Ortiz, and know that Mr. Ortiz was the father of homicide victim Bonnie Ortiz Carroll.
>
> Even though the juror questionnaire provided all the information a defense investigator would need to piece together Mr. Hamblin's very close connections in the Siesta Key business community, which overlapped with Bob Ortiz' similarly close connections, the defense in this case either failed to discover the connection, or failed to inquire of Mr. Hamblin about the connections. In either case, failure to discover and explore these facts deprived Mr. Troy of a fair trial. Even if Hamblin did not know Ortiz at the time of voir dire, it is impossible that he did not make the connection when Mr. Ortiz and his wife testified at the trial that they lived in and managed the rental property on Siesta Key. Hamblin was a real estate broker who had to have been familiar with the rental properties on the island. He also claimed active membership in the Chamber and would have had to have recognized Mr. Ortiz from his participation in the Chamber.
>
> Finally, communications by Mr. Ortiz to Mr. Troy after the trial indicate that Mr. Ortiz spoke with jurors after the trial about their deliberations. Mr. Ortiz indicated to Mr. Troy that the impeachment of Debra Troy was apparently an important factor in the jury's recommendation of death. The asserted acquaintance with the jurors further supports the conclusion that Mr. Hamblin knew Mr. Ortiz at the time of the voir dire.

PCROA V3 527-530.

The postconviction court erred in denying the claim summarily. PCROA V5 822-24. First, the question of whether the juror knew the victim's family was a

question of fact which required an evidentiary hearing to resolve. Second, the postconviction court ignored the second part of the claim, that even if the juror and the victim's family were not acquainted, no competent trial counsel would want a juror with such close common ties on the panel.

The issue before this Court is complicated as to the first part of the claim. The postconviction court denied a hearing and issuing a final order summarily denying all claims. However, at the same time the court granted the defendant's Motion to Interview Juror that had been filed with the defendant's motion for limited discovery. PCROA V4 680-86 (motion); PCROA V7 1305-07 (order). The motion sought to interview the juror to determine whether he actually knew the victim's family.

When the juror was interviewed, he testified he did not recall or recognize the victim's father. The victim's father attended the hearing and was presented to the juror for possible identification. The court had the oath administered and questioned the victim's father, who testified that he did not know the juror. PCROA V8 Hearing of 4/22/09 at 2-26. The hearing was limited solely to the testimony of the juror and the father.

The testimony at the juror interview shows that the Chamber of Commerce connection was undeniable (the juror admitted membership and attending at least one social function of the Chamber, PCROA V8 Hearing of 4/22/09 at 20 (a

business card exchange). The juror also received the newsletter, and volunteered that he paid his dues and would "have received an invoice from somebody." *Id*. at 21.

Had a full evidentiary hearing been held, the defendant would have been able to utilize discovery to obtain records from the Siesta Key Chamber of Commerce, which would have confirmed or impeached the juror or the father as to their acquaintance or knowledge of each other. Discovery materials would have also served to refresh the recollection of the juror. The juror was 67 at the time of the postconviction interview, PCROA V8 Hearing of 4/22/09 at 18, when he was asked to recollect facts and events five years after trial.

The juror's trouble with recollection of what he knew and when he knew it at the time of trial was demonstrated at the interview hearing, showing the need for discovery to properly address the question whether the juror and father were acquainted. The juror testified that he knew that Mr. Ortiz worked at a condominium on Siesta Key, but he could not recall whether he learned that during the trial or from reading the newspaper afterwards. PCROA V8 Hearing of 4/22/09 at 19-20. In fact, the jury was informed at trial that Mr. Ortiz lived and worked at the Siesta Key condominium. The victim's mother, Betty Ortiz, testified to those facts repeatedly:

> "When my husband accepted a position as a condominium manager out on Siesta Key, it came with a residence."

ROA V20 1298 (guilt phase).

> Asked what route the victim took from her parent's residence the night she was killed, Debbie Ortiz said "There was winding through Siesta Key. But, yes, I would say normally she would have taken the south bridge."

ROA V20 1303 (guilt phase).

> "Some of the duties in my husband's position as manager of a condominium association on Siesta Key were to plan social events."

ROA V28 2428 (penalty phase).

When the court presented Mr. Ortiz to the juror for a possible identification, the juror's memory again failed him, as he did not recall seeing Mr. Ortiz at trial despite the fact Mr. Ortiz attended the trial and testified in the penalty phase. PCROA V8 Hearing of 4/22/09 at 25. Discovery would have provided additional material to refresh the witness's memory.

Mr. Ortiz testified at the interview hearing that he believed he was not living in the Siesta Key condominium at the time of trial. PCROA V8 Hearing of 4/22/09 at 24. Regardless of whether Mr. Ortiz lived off the Key at the time of trial, there is no testimony in the trial record which would have relieved a juror's mind if the juror was concerned about having to continue living and working in close proximity to Mr. Ortiz on Siesta Key. A juror would only know, from Mrs. Ortiz's repeated assertions, that the family lived and worked on Siesta Key.

Therefore, the testimony of the juror at the interview, confirmed by the trial record, establishes he knew that Mr. and Mrs. Ortiz resided in the same small

island community as he did, and that Mr. Ortiz managed a condominium, a real estate undertaking placing him in the same sector of business as the juror. The juror was a real estate agent with an office on Siesta Key, who, like Mr. Ortiz, was a licensed community association manager. PCROA V4 711.

The second part of the claim of ineffective assistance of counsel was that effective counsel would not have wanted to have a juror on the panel who had so many close connections with the victim's family. Those close connections are confirmed by the juror interview. The record also established that the juror knew of those connections during the trial.

The defense knew long before trial that the victim's father was volatile and intimidating – Mr. Troy's mother had to obtain a restraining order pretrial to stop the victim's father from harassing her, a fact known to the defense. PCROA V4 729-39. That demeanor was apparent when the father testified in the penalty phase. No competent trial counsel would want a juror with such close common ties on the panel, knowing that the victim's father would be improperly influential on a juror who had to go back to the same neighborhood, the same shared business interests, and joint membership in the same small Chamber of Commerce. PCROA V3 527-33.

The failure to address the juror claim with an evidentiary hearing is error requiring a remand for hearing. Because of the denial of a hearing, combined with

the holding a an interview hearing, the defendant was denied the opportunity to conduct discovery which could have assisted in developing a complete picture of what the juror knew and when he knew it, for purposes of impeachment or refreshing recollection.

Even after the juror interview was ordered, the court denied Mr. Troy's motion for reconsideration of the denial of his motion for limited discovery or for limited discovery in support of the 3.575 motion, wherein he sought a subpoena directed to the Siesta Key Chamber of Commerce to obtain files which would assist in framing questions during the juror interview and might also have provided materials to help refresh Mr. Hamblin's admittedly spotty recollection of the period around the trial. Also, the outright prohibition on defense approaches to jurors, challenged elsewhere in this appeal, prevented the defense from approaching Mr. Hamblin in a less formal environment, where open-ended questioning could have provided critical information.

The narrow interview hearing did not cure the denial of an evidentiary hearing on the claim. The lack of discovery undermines the reliability of the exploration of the first prong of the claim – actual acquaintance of the juror and the father. For instance, the exhibits submitted by the defense at the prehearing conference included evidence that Mr. Ortiz was the treasurer for the Siesta Key Chamber from 2003 to 2006, from the time of the trial until well after the trial.

PCROA V4 703. The exhibits show Mr. Ortiz resided at 6150 Midnight Pass Road, the Siesta Key condominium, from December 2000 through July 2003 (voir dire started August 11, 2003). Other overlapping addresses in the same information source suggest further inquiry of Mr. Ortiz, refreshing his recollection, would have clarified precisely where he resided on August 11, 2003. PCROA V4 702. His license to manage the condominium did not expire until September 2004. He apparently continued to do business in Siesta Key well after trial, given his position as secretary of the Chamber continued until 2006.

The lack of an evidentiary hearing also deprived the defendant the opportunity to establish evidence of the father's behavior in the courtroom during trial as an observer, and during his testimony. The defendant, bailiffs, and others would have established facts which, combined with knowledge of the common ties in the small community, would have shown that competent counsel would have excluded the juror in question, and that the prejudice was real.

The trial record did not conclusively refute the allegation that Mr. Hamblin knew the victim's family. The trial record did not conclusively refute the claim that Mr. Troy's right to a fair trial and due process under the protections of the state and federal constitutions was denied because of the juror's failure to disclose his acquaintance with the victim's family.

When a potential juror fails to disclose his acquaintance with the victim or her family, the defendant is entitled to a new trial. The First District Court of Appeal sets out one statement of the conditions justifying a new trial:

> Even assuming, as the trial court found, that the juror had no intent to deceive [when the juror failed to disclose her nephew was a jail officer in voir dire for prosecution for a major disturbance at the jail], nevertheless relief will be afforded where (1) the question propounded is straightforward and not reasonable susceptible to misinterpretation; (2) the juror gives an untruthful answer; (3) the inquiry concerns material and relevant matter to which counsel may reasonably be expected to give substantial weight in the exercise of his peremptory challenges; (4) there were peremptory challenges remaining which counsel would have exercised at the time the question was asked; and (5) counsel represents that he would have peremptorily excused the juror had the juror truthfully responded.[FN2]
>
> FN2. In *Skiles v. Ryder Truck Lines, Inc.*, 267 So.2d 379 (Fla. 2nd DCA 1972), the court stated (quoting from *Drury v. Franke*, 247 Ky. 758, 797, 57 S.W.2d 969, 984-5 (1933)):
>
> > [T]he fact that the false information was unintentional, and that there was no bad faith, does not affect the question, as the harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant; while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; ... when the fact appears that false information was given, and that it was relied upon, the right to a new trial follows as a matter of law. See also *Redondo v. Jessup*, 426 So.2d 1146 (Fla. 3rd DCA 1983). . . .
>
> Failure to enforce the right to elicit from prospective jurors truthful answers to material questions renders hollow the right of peremptory challenge.

Mitchell v. State, 458 So.2d 819, 821 (Fla. 1st DCA 1984).

In the instant case, competent defense counsel would have been prepared to directly address juror Hamblin and explore the multiple and close business and

geographical links between Mr. Hamblin and the Ortiz family. The business connections were disclosed on the juror form showing Mr. Hamblin's place and type of business, his home address, and his membership in an organization that had Bob Ortiz as its treasurer.

"Trial attorneys in death penalty cases must be able to apply sophisticated jury selection techniques..." ABA Guidelines, Commentary to Guideline 1.1, 31 *Hofstra L. Rev*. 913, 924 (Summer 2003); Commentary p. 21 (1989). That would include the basic background investigation that postconviction counsel's investigator conducted, producing the documentation embodied in the exhibits filed in the postconviction proceeding, all of it readily available online. Armed with that knowledge, competent trial counsel would have had Hamblin explain how he could remain ignorant of the man his organization had just elected to be treasurer. Had discovery been allowed to prepare for a full evidentiary hearing, the defendant would have been able to obtain all relevant records from the Siesta Key Chamber of Commerce, which could have helped refresh or impeach Mr. Hamblin's and Mr. Ortiz's testimony at the interview hearing.

Even if Mr. Hamblin persisted in his claim that he did not know Mr. Ortiz, the close connections and overlapping business and personal coincidences would alone require effective counsel to strike Mr. Hamblin. The necessity for the strike is amplified by the defense's knowledge that Mr. Ortiz was a volatile character.

The demeanor of Mr. Ortiz on the stand and during the trial would telegraph to anyone, including those who lived and worked in close but unacquainted proximity to Mr. Ortiz, that they should be concerned that such anonymity would quickly disappear. That was clear from Mr. Ortiz's post-trial contacts with one or more jurors. Any member of a panel who recommended life for Mr. Troy would fear being left in questionable and vulnerable straits in their day-to-day life in the small town of Siesta Key. It is irrelevant whether problems actually developed after trial – a juror's immediate concerns in the trial are what would influence his actions in deliberations.

Confidence in the reliability of the verdict and recommendation is further diminished by the fact that the jury in this case was repeatedly compromised, beyond the problems with juror Hamblin. The jury forewoman was so overcome with sympathy for the victim's mother that she was unable to conform her behavior to the dictates of the court and the law when she was moved to embrace Mrs. Ortiz and comfort her during the penalty phase. ROA V35 3346-51. The entire jury sought and obtained permission to take a group photograph. ROA V 33 3094. A jury with that high degree of camaraderie would have been vulnerable to being unduly influenced by Hamblin and the woman the jury had chosen to be their forewoman, only to see her discharged after the incident with Mrs. Ortiz. Trial counsel did nothing to ascertain the details of Hamblin's knowledge and bias, or to

discover how much the demonstrative sympathy of a juror for the victim's family intruded into the panel as a whole, or was observed by other jurors.

Trial counsel failed to meet the standards of reasonable attorney performance during the jury selection and trial and was therefore deficient. Counsel's deficiency during this critical phase of Mr. Troy's case prejudiced Mr. Troy and led to his improper death sentence. Had counsel been effective, there was a reasonable probability that the sentencing jury would not have recommended his death and that the trial court would not have sentenced him to death.

The postconviction court should have ordered an evidentiary hearing on this claim. The claim was facially valid. *See Williams v. Taylor*, 529 U.S. 420, 440-43 (2000) (explaining that because state post-conviction counsel made a reasonable effort to investigate possibility that a juror concealed on voir dire a relationship that would have disqualified her from sitting at the guilt phase, petitioner was entitled to pursue claim on federal habeas corpus) (quoting ABA Guidelines, Commentary to Guideline 10.10.2; footnote 260, in part, 31 *Hofstra L. Rev*. 913, 1052 (Summer 2003). The record does not refute the claim – it supports it.

ISSUE 3

THE POSTCONVICTION COURT ERRED IN SUMMARILY DENYING MR. TROY'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF THE TRIAL, IN VIOLATION OF MR. TROY'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN COUNSEL FAILED TO PROPERLY AND ADEQUATELY PREPARE AND ARGUE THAT THE INSTRUCTION FOR THE STATUTORY MITIGATOR OF AGE BE GIVEN TO THE JURY, AND WHEN HE FAILED TO PREPARE AND ARGUE TO THE SENTENCING COURT THAT THE AGE MITIGATOR APPLIED IN THIS CASE.

This Court rejected Mr. Troy's claim on appeal that the jury should have been instructed that it could consider the statutory mitigator of age. Trial counsel had sought the instruction but the trial court denied the request. Trial counsel also failed to argue for the mitigator in the sentencing memorandum or the Spencer hearing.

Substantial evidence existed in the record to support the mitigator, but the evidence was not effectively argued by defense counsel when requesting the instruction.

This Court held:

> Troy argues that the trial court erroneously denied his requested instruction to the jury on the statutory mitigating factor of age because the evidence established his emotional immaturity and arrested psychological development at the level of a teenager.

> In his brief, Troy argues that **during the penalty phase, psychologist Dr. Maher testified that the trauma from the sexual molestation and ensuing trial in Troy's teen years arrested his psychological and emotional development, and also that Troy has functioned throughout his life at an adolescent level. These claims are borne out by the record.** However, we are not inclined to reverse the trial judge's decision on the age mitigator, given that we do not find a clear demonstration of abuse of discretion or harmful error.
>
> . . . .
>
> [W]e find no clear abuse of discretion in the trial judge's decision to deny Troy's request. First, Troy was thirty-one at the time of his crimes, nearly thirteen years older than the legal age of majority. Furthermore, pursuant to *Nelson*, there is ample evidence that Troy functioned as a mature adult, including the fact that he was employed and cared for his girlfriend's daughter. **Troy also failed to present any additional evidence regarding the applicability of the age mitigator before he was sentenced at his Spencer hearing.** However, the record indicates that the judge did find and assign weight to various other mitigators that could have a bearing on Troy's emotional maturity, including the fact that the crime was committed while Troy was under extreme mental or emotional disturbance, that Troy's capacity to appreciate the criminality of his conduct was impaired, that his family background was dysfunctional, and that he had a long history of severe substance abuse and mental and emotional problems. All of these matters were also presented to the jury. In essence then, Troy was able to assert the substance of the claim he now makes, and thus was not deprived of the opportunity to assert his emotional immaturity. Given the unrestricted opportunity, Troy's counsel took full advantage and pursued the strategy of advancing Troy's emotional maturity as part of nonstatutory mitigation. We find no error by the trial court.

Troy v. State, 948 So.2d 635, 651-52 (Fla. 2006) (emphasis added).

This Court therefore found that the defense had proven that trauma from the sexual molestation and trial arrested Mr. Troy's psychological and emotional development and that he only had the ability to function in life at an adolescent level. In other words, there was "reliable evidence tending to link his . . .

chronological age to 'some other [relevant] characteristic of the defendant or the crime,'" *Campbell v. State*, 679 So.2d 720, 726 (Fla 1996), which should have compelled the trial court to give an appropriate instruction, *id*.

After finding sufficient evidence that Mr. Troy was functioning as an adolescent at the time of the offense, this Court found there had been no abuse of discretion or harmful error because the mitigation was overshadowed by the fact that Mr. Troy was 31, 12 years past the age of majority. This Court also concluded that Mr. Troy functioned as a "mature adult" because he had a job and cared for his girlfriend's daughter. The two findings, that Mr. Troy "functioned throughout his life at an adolescent level" and that he "functioned as a mature adult," are mutually exclusive. The decision in the direct appeal did not resolve the conflict of finding Mr. Troy functioned at two mutually exclusive levels of maturity at the same time.

The opinion on direct appeal found harmless error because defense counsel was able to present "the substance of his claim" that Troy's emotional immaturity was a nonstatutory mitigator. However, the evidence cited was that Mr. Troy qualified for two other statutory mitigators, extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of his conduct, and nonstatutory mitigators of a dysfunctional family, and a history of severe substance abuse and mental and emotional problems.

At trial, the only arguments defense counsel made to justify the age instruction were that Mr. Troy's relative youth made the prospect of life in prison worse than a death sentence, and, offhandedly, "there was some testimony about the Defendant's emotional immaturity that may be relevant to the consideration of that factor."

> MR. TEBRUGGE: That's one I wish to address. But before we get to paragraph 3, I'm requesting the age mitigator or statutory age mitigator. I know that typically that involves a youthful defendant, 17 or 18. But the Legislature simply said, the age of the Defendant at the time of the crime. It could be argued that for a 33-year-old Defendant having to serve life imprisonment without possibility of parole is potentially even a worse sentence due to the amount of time that he may actually serve. And, also, Judge, there was some testimony about the Defendant's emotional immaturity that may be relevant to the consideration of that factor.
>
> MS. RIVA: Judge, we would oppose the age mitigator. The case law indicates that if age is to be given any weight, it should be linked with some other characteristic of the Defendant or the crime. And in this case there's been nothing like that. It's typically in a case where you have an older person that maybe has a low IQ or low mental age, something of that fashion, or like Mr. Tebrugge said, a young person 19, 20 years old. That sort of thing.
>
> THE COURT: All right. I deny that request.

ROA V.13 at 3324-25. The state expressly attacked the adequacy of the defense presentation when it argued in its answer brief in the direct appeal that "the defense certainly made no effort to rebut the prosecutor's contention of the inapplicability of the age mitigator." State's Answer Brief at 70. The other side of the coin is that if the defense had made a viable effort to rebut the state's argument against the instruction, the instruction could have been given.

Counsel was ineffective for failing to respond to the state's argument that "if age is to be given any weight, it should be linked with some other characteristic of the Defendant or the crime." The argument is almost verbatim from *Mahn v. State*, 714 So.2d 391, 400 (Fla. 1998):

> [I]f a defendant's age is to be accorded any significant weight as a mitigating factor, 'it must be linked with some other characteristic of the defendant or the crime such as immaturity.'

Effective counsel would have linking the emotional age of the defendant to other characteristics of the defendant and the crime with the evidence that appellate counsel drew upon in the briefing and the additional evidence set out in the postconviction motion and discussed infra. Rebutting the state by advising the court of all factual grounds supporting the age instruction would have compelled the court to give the instruction, as required by *Campbell*:

> [W]here the defendant has requested an instruction on age and submitted reliable evidence tending to link his or her chronological age to "some other [relevant] characteristic of the defendant or the crime," an appropriate **instruction should be given.** *See Stewart v. State*, 558 So.2d 416, 420 (Fla.1990) ("[A]n instruction is ***required*** on all mitigating circumstances 'for which evidence has been presented' and a request is made.").

679 So.2d at 726 (emphasis added). Defense counsel's failure to advise the court of any of the evidence supporting the age instruction allowed this Court to conclude that the trial court, not being advised of the evidence to support the instruction, did not abuse its discretion in denying the request.

The evidence that supported the instruction which trial counsel failed to marshal includes the following:

1. John Troy was already immature when he was molested: "he was emotionally and psychologically less mature than the average child of his chronological years." ROA V.32 p. 2997.

2. Mr. Troy's ability to function was limited to an adolescent level, which required a highly structured environment:

> [H]e is, essentially has throughout his life continued to function on an adolescent level. His psychological, emotional, and social issues all resolve around identifying who he is, what his identity is, what his values are, what his choices are, and whether he can follow through with his choices in a reasonable and consistent manner. This has been interwoven certainly with his pattern of drug abuse.
>
> He has generally functioned reasonably well while in a highly structured environment, an environment that one might hope that a rebellious, impulsive teenager would have imposed upon them by home, and school, and community if they were having difficulty as a 15 year old. It is difficult to impose that kind of an environment on an adult.

ROA V.32 p. 3005.

3. Psychiatric and drug treatment failed because Mr., Troy was functionally a teenager:

> Q. But, Dr. Maher, Mr. Troy received treatment at around the age of 17 at a psychiatric hospital, around the age of 18 at a substance abuse facility, and while incarcerated at the Gainesville Correctional Institute around 1998. How come these treatment options didn't influence that?
>
> A. The main reason that these treatment options didn't influence that that is identifiable in his background and history, is the lack of solid and mature psychological development. In spite of all this treatment, we're still

dealing with an individual who is psychologically and emotionally a teenager.

ROA V.32 p. 3019.

Given that this Court found that the recognition of Mr. Troy's long history of severe substance abuse was a surrogate for the age mitigator sufficient to support harmless error, 948 So.2d at 652, had defense counsel argued to the trial court that the evidence showed that the immaturity prevented successful drug treatment, the evidence, alone and in conjunction with the other evidence enumerated herein would have compelled the age instruction.

4. The decade-long prison term Mr. Troy was released from shortly before the murder interfered with any maturation which might have taken him past the 15-year-old level he had always functioned at. This particular fact, the hiatus/stunting of development while in prison, takes Mr. Troy from a 31 year old to a 21 year old, in a sense, and rebuts the argument that emotional or psychological immaturity may be relevant for a young adult close to the age of majority, but not for a 31-year-old:

> The problem here again is that this is an individual who in his early 20's goes into prison, he's in prison for approximately ten years, and then he's released without probation, without after care, without somebody saying you have to do these things in a way that is more than a very limited intervention.
>
> So **he goes from this absolute clear structure of a prison environment, an institutional prison environment that he's been in the last ten years of his life, where he hasn't really matured or grown up**, into the world where he can do anything at all again. So the risk of returning to previously established habits and behaviors is very high, almost inevitable, and given what his previously established patterns and behaviors were, that meant returning to drug use.

ROA V.32 p. 3021 (emphasis added).

5. The Rip Van Winkle Effect, where a long-term prison inmate misses out on the changes in free society because of his isolation, while not directly addressing the stunting effect of maturational development while in prison, supports the concept that inmates are

> "on hold" while in prison and cannot move along developmentally or culturally while isolated. Dr. Maher, ROA V.32 p. 3021-22; T. K. Parsons (Troy's prison drug counselor), ROA V.31 p. 2913-14.
>
> 6. Impaired capacity to appreciate the criminality of his conduct arose, in part, from the fact Mr. Troy "was functioning on a very impulsive, reflexive level, rather than a thoughtful level." ROA 32 p. 3024. Impulsivity is one of the characteristics of the adolescent behavior, "a rebellious, impulsive teenager," ROA V.32 p. 3005.
>
> 7. Severe mental and emotional distress. Dr. Maher noted this arose from two problematical aspects of Mr. Troy's development: chronic drug use, which arose from and remained active because of the immaturity, and chronic lifelong depression which arose from the childhood traumas of the dysfunctional family and sexual abuse. ROA V.32 p. 3025-26.

Defense counsel had an obligation to effectively seek the age instruction in this case. The evidence developed in the penalty phase offered numerous grounds to support the instruction. The ABA Guidelines expressly require defense counsel to seek an instruction such as this:

> **Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence.** Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

ABA Guidelines 10.11(K), 31 *Hofstra L. Rev*. 913, 1058 (Summer 2003).

This Court was presented with a record in which defense counsel failed to enumerate any specific ground that would require the instruction under the principles set out in *Campbell*. The Court had to look to the abbreviated evidence

supporting the instruction brought out in the appellate brief, and to look generally at a few other nonstatutory and statutory mitigators that also brought out the facts that would have supported the age mitigator. By virtue of the fact that this Court found that the other mitigators existed and were sufficient to serve as a substitute or surrogate for the age mitigator, the Court essentially found that if trial counsel had mentioned those facts, he would have established the grounds for requiring the instruction.

A request for the age instruction based solely on the observation by defense counsel that "there was some testimony about the Defendant's emotional immaturity that may be relevant to the consideration of that factor," could easily (although not correctly) be found to be so inadequate that a trial judge would be acting within his discretion to deny the request. This would be especially so when the state has set out the proper standard of evidence for requiring the instruction and the defense, after developing numerous grounds for the instruction, fails to enumerate a single one of those grounds for the benefit of the court.

Similarly, had the grounds been properly enumerated and argued at the time of the request for the instruction, the fact that some of the grounds also support other mitigators would not be a basis for denying the instruction. In *Campbell*, the trial court found a single statutory mitigator, "impaired capacity," and a single nonstatutory mitigator, a history of drug and alcohol abuse, abusive childhood,

limited education, and learning disabilities. 679 So.2d at 723 nn. 6 & 7. In holding that the age mitigator instruction should have also been given to the jury, the *Campbell* Court found that Campbell's age, 21, was linked to the defendant's significant emotional immaturity functioning at an adolescent level. *Id.* at 726. The impaired emotional age is closely related to "impaired capacity," as well as the limited education and learning disabilities.

Similarly, in *Mahn*, the trial court found mitigation in family background, abuse by the parents, remorse, potential for rehabilitation, mental problems not rising to the level of the statutory mental health mitigators, and a voluntary confession. 714 So.2d at 395 n.1. In finding that the age mitigator was wrongfully rejected, this Court found that the defendant's long-term substance abuse, chronic mental and emotional instability, and extreme passivity under physical and mental abuse "[provided the essential link between his youthful age and immaturity which should have been considered a mitigating factor . . . ." 714 So.2d at 400. Thus, the fact that the trial court found family abuse and mental problems did not excuse the failure to find mitigation for age proven by mental problems and passivity in the abuse.

Had defense counsel properly presented the factual basis for the age instruction that already existed in the record, it would have been an abuse of discretion to refuse to give the instruction. Had the facts been properly marshaled,

this Court would not have found the limited subset sufficiently substituted for the age mitigator, nor would it have been able to find harmless error.

Trial counsel failed to meet the standards of reasonable attorney performance for this critical phase of Mr. Troy's trial and was therefore deficient. Counsel's deficiency during this critical phase of Mr. Troy's case prejudiced Mr. Troy and led to his improper death sentence. Had counsel been effective, there was a reasonable probability that the sentencing jury would not have recommended his death and that the trial court would not have sentenced him to death.

The postconviction court should have ordered an evidentiary hearing to allow the introduction of evidence regarding the ineffectiveness claim. Instead, the court ruled:

> The Defendant attempts to now couch this claim in terms of an IAC claim, and to relitigate the same issue addressed on appeal. It is, therefore, procedurally barred. *See Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990) ("allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve *as a* second appeal"). Nevertheless, even addressing the merits of the claim, the Court denies it. The trial court heard all of the evidence that was presented by the Defendant to support this claim, and the Supreme Court fully evaluated the propriety of an age mitigator instruction. A review of the record and the Supreme Court's opinion makes clear that the issue of emotional maturity of the Defendant was fully presented to the jury for its consideration. vacated Mr. Troy's death sentence.

PCROA V5 827.

The postconviction order is in error. The issue was not procedurally barred, The merits of the true claim, ineffective assistance, required a hearing and relief -- the ineffectiveness claim does not merely reframe the appellate claim in the sense prohibited by *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990).

It is well settled that in criminal cases, "[t]he general rule is that the adequacy of a lawyer's representation may not be raised for the first time on direct appeal … because there usually is insufficient opportunity to develop the record pertaining to the merits of these claims." *Baker v. State*, 937 So. 2d 297, 299 (Fla. 4th DCA 2006) (citations omitted). Thus, the courts of this state have consistently declined to consider such contentions on direct appeal, see, e.g., *Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001); *Smokes v. State*, 940 So. 2d 607, 607 (Fla. 4th DCA 2006); *Blanco v. State*, 933 So. 2d 1152, 1152 (Fla. 3d DCA 2006); *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002), "but only by collateral challenge." *Wuornos v. State*, 676 So. 2d 972, 974 (Fla. 1996).

The claim in the postconviction motion is that trial counsel was ineffective for failing to marshal all of the evidence from the trial that supported the instruction. This failing is critical when this Court in the direct appeal reached conflicting conclusions, that the defense had established the fact that Mr. Troy was functioning as an adolescent, and that he was functioning as a mature adult. The defense had established the fact of immature emotional functioning, and the

evidence presented in the case, as set out supra, established the critical links with some other characteristic of the defendant or the crime necessary to justify the instruction. *See, e.g., Mahn v. State,* 714 So.2d 391, 400 (Fla. 1998) (age was a mitigating circumstance when the defendant's long history of substance abuse, mental and emotional instability, and passivity in the face of mental and physical abuse provided the essential link between defendant's age and immaturity); *Campbell v. State,* 679 So.2d 720, 725-26 (Fla. 1996) (the trial court erred in not giving requested jury instruction on age as a mitigating circumstance when evidence established that 21-year-old defendant's emotional age was "somewhere in the adolescent range").

The argument that a postconviction claim of ineffective counsel based on facts raised on direct appeal impermissibly reframes a procedurally barred issue is clarified by the analysis of Judge Altenbernd's opinion in *Corzo v. State*, 806 So.2d 642 (Fla. 2d DCA 2002). Judge Altenbernd distinguishes between an impermissible *Medina* claim and a fully proper and cognizable true postconviction claim such as in this case:

> We can understand the trial court's confusion concerning whether Mr. Corzo's claim for ineffective assistance of counsel was procedurally barred. There are many precedents holding that a motion pursuant to rule 3.850 may not raise issues that were or could have been raised on direct appeal. *See, e.g., Robinson v. State,* 707 So.2d 688, 698 (Fla.1998); *Medina v. State*, 573 So.2d 293, 295 (Fla.1990); *State v. Waters,* 718 So.2d 225, 226 (Fla. 2d DCA 1998). These cases have sometimes further explained that an issue rejected on direct

appeal may not simply be realleged as a claim of ineffective assistance of counsel. *See, e.g., Freeman v. State,* 761 So.2d 1055, 1067 (Fla.2000); *Medina,* 573 So.2d at 295; *Childers v. State,* 782 So.2d 946, 947 (Fla. 4th DCA 2001). There are a few cases in which appellate courts have reversed a conviction or sentence on direct appeal based upon ineffective assistance of counsel. *See, e.g., Stewart v. State,* 420 So.2d 862 (Fla.1982); *Ross v. State,* 726 So.2d 317 (Fla. 2d DCA 1998); *Rios v. State,* 730 So.2d 831 (Fla. 3d DCA 1999); *Gordon v. State,* 469 So.2d 795 (Fla. 4th DCA 1985). Logic might therefore suggest that when such an issue is raised on direct appeal, a subsequent postconviction motion raising the same issue is barred.

The policies behind the above-cited cases are designed to assure that direct appeal issues are considered only once, and matters that require inquiry beyond the face of the record are reviewed in a forum that is equipped to conduct the additional evidentiary inquiry. For example, a defendant may raise on direct appeal the issue of whether the trial court erred when it denied a motion for new trial. Because that issue may be raised on direct appeal, it may not be raised later in a motion under rule 3.850. Likewise, the defendant may not raise the same issue again merely by recasting it as a claim for ineffective assistance of counsel. Thus, in this hypothetical, the defendant could not argue in a postconviction motion that his lawyer was ineffective because the trial court denied the motion for new trial. In that situation, the postconviction allegation is simply adding the words "ineffective assistance of counsel" without adding any new facts or legal arguments.

On the other hand, **the fact that a defendant unsuccessfully raised the denial of his motion for new trial on direct appeal would not bar a claim that his counsel was ineffective** because counsel filed an untimely motion for new trial or **because counsel omitted a critical ground when drafting and arguing that motion.** In such a situation, unlike the previous hypothetical, **the postconviction motion is not merely repeating the issue raised on direct appeal. Instead, it is raising a separate issue that is somewhat interrelated with the issue raised on direct appeal.** [FN1] In such a case, **the defendant often needs to allege and explain that his appellate counsel was unsuccessful on an issue during the direct appeal because his trial counsel was ineffective during the presentation of that issue in the trial court.**

> FN1. The Florida Supreme Court recently explained in *Bruno v. State*, 807 So.2d 55 (Fla.2001):
>
> > **Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and-of necessity-have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant thus has little choice: As a rule, he or she can *only* raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal. Thus, the trial court erred in concluding that Bruno's claim was procedurally barred.**
>
> *Id.* at 63 (footnotes omitted).

Corzo, 806 So. 2d at 644-45 (emphasis added). *Bruno v. State,* 807 So.2d 55 (Fla. 2001), quoted in footnote 1 in *Corzo*, demonstrates that this Court is well aware of the distinction.

In this case, Mr. Troy alleged in his postconviction motion that his "trial counsel was ineffective during the presentation of [the request for the age instruction] in the trial court," *Corzo*, precisely the type of allegation Judge Altenbernd says is often needed to explain how a claim, which failed in the direct appeal, failed because of the inadequate and ineffective presentation.

The inadequate presentation in the appellate record in this case failed to satisfy this Court that the connection had been made between the defendant's age, his emotional age, and the circumstances of the crime. Appellate counsel's effort

to flesh out trial counsel's throwaway allusion to "some testimony about the Defendant's emotional immaturity" marshaled some of the facts requiring the instruction. This Court agreed that even that partial enumeration established functional adolescence. Now that the full record support is presented, showing how trial counsel failed to present his request for the age instruction effectively, an evidentiary hearing, or ordering a new penalty phase without hearing, is the proper remedy for this constitutional infirmity.

ISSUE 4

THE POSTCONVICTION COURT ERRED WHEN IT DENIED AN EVIDENTIARY HEARING ON THE CLAIM THAT THE LETHAL INJECTION OF MR. TROY UNDER THE STATE'S PROCEDURES VIOLATES HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

Mr. Troy alleges that Florida's procedures, training and method of lethal injection are unconstitutional. He acknowledges that *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007), and *Schwab v. State*, 969 So.2d 318 (Fla. 2007), hold to the contrary. However, an individualized examination of the procedure as it would apply to a death-sentenced defendant is necessary to ensure constitutional compliance.

The *Lightbourne* opinion explained the constitutional standard for addressing a method of execution claim:

> [To] constitute cruel or unusual punishment, it must involve 'torture or a lingering death' or the infliction of 'unnecessary and wanton pain.' . . . [A] punishment is not cruel and unusual if a state's protocol does not expose the prisoner to 'more than a negligible risk of being subjected to cruel and wanton infliction of pain,' . . . 'the mere possibility of human error or a technical malfunction cannot constitute a sufficient showing to meet this burden.

Lightbourne v. McCollum, 969 So.2d at 349 (internal citations omitted).

After Lightbourne, the Supreme Court of the United States issued its decision in *Baze v. Rees*, 553 U.S. --, 128 S. Ct. 1520 (2008). The *Baze* plurality held that in order to prevail on a claim that a method of execution violates the Eighth Amendment, a petitioner must demonstrate that the particular method of carrying out a death sentence raises a "substantial risk of serious harm," or an "objectively intolerable risk of harm," that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Baze*, 128 S. Ct. at 1530-31 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n.9 (1994)).

The Supreme Court explicitly rejected the "unnecessary risk standard." *Id*. at 1532. The Court further explained:

> Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947), a plurality of the Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction had interfered with the first attempt. The principal opinion noted that "[a]ccidents happen for which no man is to blame," *id*., at 462, 67 S.Ct. 374, and concluded that such "an accident, with no suggestion of malevolence," *id*., at 463, 67 S.Ct. 374, did not give rise to an Eighth Amendment violation, *Id*., at 463-464, 67 S.Ct. 374.
>
> As Justice Frankfurter noted in a separate opinion based on the Due Process Clause, however, "a hypothetical situation" involving "a series of abortive attempts at electrocution" would present a different case. *Id*., at 471, 67 S.Ct. 374 (concurring opinion). In terms of our present Eighth Amendment analysis, such a situation-unlike an "innocent misadventure," *Id.*, at 470, 67 S.Ct. 374-would demonstrate

> an "objectively intolerable risk of harm" that officials may not ignore. *See Farmer*, 511 U.S., at 846, and n. 9, 114 S.Ct. 1970. In other words, 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." *Id*., at 842, 114 S.Ct. 1970.

Baze, 128 S.Ct. at 1531.

An Eighth Amendment violation can be shown if a state refuses to adopt a reasonably feasible alternative when it has been shown that the alternative "effectively addresses a 'substantial risk of serious harm.' To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce 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." *Baze*, 128 S.Ct. at 1532 (internal citations omitted).

Because Florida's Constitution was amended in 2002 to require this state's courts to interpret Florida's cruel and unusual punishment clause in conformity with the United States Supreme Court, the postconviction court and this Court must apply the standard set out in *Baze* to its analysis of Mr. Troy's claim. *Lightbourne v. McCollum*, 969 So.2d at 334, 335.

Florida's method of execution, as shown by the evidence of the botched execution of Angel Diaz, testimony presented in the Lightbourne hearings, and the

Governor's Commission on Lethal Injection, establishes that Florida's training methods and protocols create a substantial and objectively intolerable risk of harm.

Florida's lethal injection procedures and its protocol effective August 1, 2007 (hereafter the "August 2007 Protocol" or "protocol") is defective for the following reasons:

> (1) The Florida Department of Corrections (hereinafter DOC) screening of members of the execution team is inadequate, inconsistent and unreliable. The DOC has failed to set meaningful and adequate standards, qualifications or verifiable or documented safeguards in ensuring that meaningful qualifications or standards are met for the primary or secondary executioners, team members or medically trained personnel. By way of example, the executioner need merely be an adult who has undergone a criminal background check and who is sufficiently trained to administer the lethal chemicals. There is no other requirement and no description of the contents or method of training, who administers it or what qualifies as "sufficient" training. There is no way of knowing if the executioner is mentally ill, has a personality disorder, a drug and alcohol problem, pending legal troubles or whether he/she has been able to achieve a high school education. For example, the new protocols do not describe the manner in which the "team warden" who is in charge, will select the execution team members. The warden who was in charge of the last four executions by lethal injection, Warden Bryant, testified at the Lightbourne hearing. At the hearing, Warden Bryant described the following procedure: He is taken by a third person (whose name he stated he could not disclose per the confidentiality statute) to the place of employment of the "medically qualified persons." He is shown their medical licenses and makes sure that they are valid, but admits that their names are blocked out. Even the Warden does not know who the "medically qualified persons" are. The unidentified third person literally points out to the Warden who the individuals are who will be serving as the "medically qualified persons" for the upcoming execution. Then, when the "medically qualified persons" arrive at the prison, Warden Bryant is able to recognize them by sight as being the same people who were pointed out to him.
>
> There is nothing in the August 1, 2007 protocols to suggest that the "team warden," who by definition in the protocol "has the final and ultimate

decision making authority in every aspect of the lethal injection process," will know the identity of all of the members of his execution team. The new protocols still do not require the "team warden" to obtain the employment records, error rates, and proficiency testing of the execution team members.

(2) The DOC has failed to ensure or implement meaningful training, supervision, or oversight, and/or verifiable or documented safeguards that training, supervision and oversight of the execution team/executioners and medically qualified personnel is met, which has created an undue risk of unnecessary pain during the execution procedure. By way of example, DOC personnel at the Lightbourne hearing testified that the executioners have no professional licensures or certifications, and no medical training or background, and the DOC training consisted of pushing empty syringes or, when the chemicals were actually used, emptying the syringes into a bucket, a method that would be inadequate to train clinically naive personnel to competently and reliably detect IV infiltration or other potential problems with the IV site. The August 1, 2007, protocols also state that there should be at a minimum, quarterly training sessions where all members of the execution team will be present. The protocols call for a written record of these training sessions, but do not state what should be included in the written record. Under the new protocols, it appears that it would be sufficient for the "team warden" to state that a training occurred, without documenting who was present and what training they actually completed.

(3) The DOC has failed to conduct or implement meaningful oversight to ensure that executions are carried out in a lawful manner or required accurate and reliable record keeping of the lethal injection procedures, including but not limited to time frames of the actual execution process, injection of chemicals, maintenance of the chemicals, participants roles and locations and documentation of unforeseen events and responses to those events. For example, while the new protocols do require some written records of activities, there is still no written record of when the lethal chemicals begin to flow, nor is there a written printout of the data from the heart monitors.

(4) The DOC has allowed improper mixing, preparation and administration of the lethal chemicals by unqualified execution team members, has failed to require accurate and reliable record keeping of the storage, mixing, preparation and administration of the chemicals , which has created an undue risk of unnecessary pain during the execution procedure.

Further, the use of pancuronium bromide as a paralytic creates an undue and unnecessary risk that the inmate will experience excruciating and undue pain as he slowly suffocates to death but will be unable to move or speak to indicate that he is in pain. The use of pancuronium bromide is prohibited in the euthanasia of animals.

(5) The FDOC execution chamber is an inadequate and poorly designed facility and clothing and other apparatus used to conceal the identities of the executioners and medically qualified personnel creates an undue risk of unnecessary pain and wanton suffering because it impairs the executioners and medically qualified personnel's ability to monitor intravenous infiltration and other potential problems. Deficiencies in the design and set up of the chamber which create an undue risk of unnecessary pain during the execution procedure include but are not limited to: inadequate lighting, the chemicals and the individual administering the chemicals are not in direct view, close enough to or even in the same room with the inmate which creates an undue risk that the executioners will fail to detect difficulty or problems with anesthetic, consciousness, or intravenous access, which creates an undue risk of unnecessary pain. The syringes are kept in a syringe holder which is a departure from clinical practice and is not used in any other execution chamber in the country that Mr. Troy is aware of. The use of a syringe holder also creates the risk of unnecessary pain and undue suffering. DOC has failed to obtain or require the use of a bispectral index monitor to monitor anesthetic depth as recommended by DOC's general counsel in the August 15, 2006 Dyehouse memorandum.

(6) The DOC has failed to ensure that properly trained, clinically experienced, certified and licensed medical professionals oversee and conduct the lethal injection procedure. The August 2007 Protocols fail to ensure or set minimal standards that execution team members and/or licensed medical professionals are qualified to properly monitor and/or adequately assess consciousness of the inmate, implement and monitor intravenous access, address medical issues likely to occur as a result of inadequate, compromised or failed intravenous access. FDOC has failed to obtain or require the presence of an anesthesiologist as outlined by DOC's general counsel in the August 15, 2006 Dyehouse memo.

(7) The DOC has failed to ensure a sufficient protocol to reasonably manage complications inherent in the lethal injection process. For example, there is nothing in the new protocols that defines a procedure for notification

to the inmate or the inmate's counsel should the medical examination reveal any potential complications with venous access or any other aspect of the lethal injection other than to say that the "team warden" will "resolve the issue." Nothing in the August 1, 2007 protocols addresses the possible remedies for complications noted in the medical examinations that take place a week prior to the execution. The protocols merely state that the "team warden" will consult with the other team members that performed the evaluation and "conclude what is the more suitable method of venous access (peripheral or femoral) for the lethal injection process given the individual circumstances of the condemned inmate based on all information provided." In addition, there is no provision for the inmate to have his own designated independent physician or medically qualified professional present for the examination.

(8) The FDOC's refusal to provide any information as to the qualifications, training or background of the executioners, execution team members or the medically qualified members prohibits meaningful review or oversight of the lethal injection process, fails to comport with Due Process and renders meaningless any assessment as to whether the Department of Corrections is capable of carrying out lethal injections in a humane manner. The State's death penalty scheme cannot maintain integrity if the State is not accountable to the public. As noted above, not even the Warden will know the identity of all of the members of his execution team. The employment records, error rate, and proficiency testing are not required or requested, nor is up to date medical equipment to monitor levels of consciousness required. In addition, the FDOC has dug in its heels and continues to mandate the use of pancuronium bromide, a paralytic, the only purpose for which it is used is for aesthetic concerns for the observers. This purpose does not warrant the undue risk that pancuronium may cause a person to experience excruciating pain while he suffocates to death, unable to breath, speak or move.

(9) The provision for Periodic Review and Certificate from the Secretary is insufficient to insure that there will not be a risk of unnecessary pain during the execution procedure. For example, all that is required is that the Secretary of the Department of Corrections certify to the Governor that "the Department is adequately prepared to carry out executions by lethal injection." The Certification is not required to contain how the lethal injection procedure was reviewed, what aspects the Secretary considered in his review of the procedures, or how the Secretary verified that he does in fact have all the "necessary procedures, equipment, facilities, and personnel

> in place..." In addition, the Certification is to be provided to the inmate and the inmate's counsel, after the review has been completed. There is no provision for the inmate or the inmates counsel's to be present during the actual reviewing process and certification.

PCROA V3 544-47.

Based on Florida's unique history of botched executions, including that of Angel Diaz and Bennie Demps, the method of execution and the training and procedures create a substantial and objectively intolerable risk of harm. Mr. Troy alleges that not only are there problems with the training, oversight and actual practice of executions but he also alleges that there exists a "reasonably feasible alternative" to effectively address Florida's substantial risk of serious harm.' The reasonably feasible alternative is to follow the practices set out by veterinarians, using either a single barbiturate or another alternative that does not include the paralytic.

While some parts of Mr. Troy's claims may have been addressed in the above-referenced cases, several of which were cited by the postconviction court as the basis for summary denial, the court should have held an evidentiary hearing to address the potential issue of Mr. Troy's venous access, a factual question essential to an individualized determination of whether lethal injection can be constitutionally administered to Mr. Troy. The lower court should have also taken testimony from veterinarians and others experienced in euthanasia, and allowed testimony about the training, experience and identity of the actual executioners.

The venous access issue has come to the forefront of lethal injection litigation after the September 15, 2009, failure of the State of Ohio to execute Romell Broom. This account was portrayed in the facts section of Mr. Broom's "Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction":

> Romell Broom is a death row inmate. He was sentenced to die by lethal injection at the Southern Correctional Facility on September 15, 2009 at 10:00 a.m. Defendants spent "about two hours" attempting to access a vein. Jon Craig, *Botched execution brings reprieve*, Cincinnati Enquirer, Sept. 15 2009. He was struck 18 times in efforts to gain venous access. Alan Johnson, *Effort to kill inmate halted*, Columbus Dispatch, Sept. 16, 2009 at A1. Broom was "clearly frustrated as he leaned back on the gurney, covering his face with his hands and visibly crying." Craig, *Botched execution brings reprieve*. The execution staff moved to place IVs in his legs with Broom grimacing from pain at least four times. Id. "As Broom's anxiety grew, he repeatedly wiped his sweaty forehead with toilet paper." *Id*. Broom said that he was in pain. At one point the execution team members were placing needles in areas that were already bruised and swollen. In an attempt to find a vein in his ankle, the execution team member missed and the needle hit his bone. The pain was so severe that it caused him to scream. When the execution team attempted to find a vein in his hands broom's pain was extreme. By that time eighteen attempts to place the needles had been made.
>
> Prior to the execution Broom was denied the right to consult with his counsel privately. During the course of the execution, after it became apparent that the procedure was not proceeding according to Ohio's execution protocol, counsel was denied access to Broom and Broom was denied access to his counsel. Counsel was denied use of the telephone in the death house and was not allowed to have cell phone in the death house. Counsel was required to leave the building in order to make telephone calls to co-counsel and others in order to take legal steps to try and stop the execution-gone-wrong.

> After more than two hours of poking and prodding that brought Broom to tears, the State of Ohio was required to abandon its efforts to execute Broom for that day because Ohio Governor Ted Strickland issued a one week reprieve during which time the Ohio Department of Rehabilitation and Correction is required to recommend "appropriate next steps" to be used in Broom's next execution attempt. The Governor's reprieve expires on September 22, 2009, at which time Defendants intend to try and execute Broom.

Broom v. Strickland, Case 2:09-cv-00823-GLF-MRA Document 4 (M.D. OH Sept. 18, 2009) (references to appendices omitted).

Mr. Troy had a right to an individualized determination of this issue. Due process required that Mr. Troy be afforded the opportunity to challenge the method of execution as cruel and unusual punishment under the United States Constitution. The resolution of the *Broom* case will raise issues which can only be resolved by an evidentiary hearing, such as whether Florida's protocols share the failings of the Ohio protocols.

The refusal of the postconviction court to allow a hearing deprived Mr. Troy of his right to access to the courts and otherwise deprived him of the protections of his Constitutional rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.

ISSUE 5

THE POSTCONVICTION COURT ERRED IN REFUSING TO ALLOW AN EVIDENTIARY HEARING TO ADDRESS FLORIDA'S LETHAL INJECTION PROCEDURES, COUPLED WITH FLORIDA STATUTE 945.10 WHICH PROHIBITS MR. TROY FROM KNOWING THE IDENTITY OF SPECIFIED MEMBERS OF THE EXECUTION TEAM VIOLATES HIS CONSTITUTIONAL RIGHTS UNDER THE FIRST, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Troy raises this claim based on the evidence of the botched execution of Angel Diaz, testimony before the Governor's Commission and the *Lightbourne* hearings, recent developments of information of botched executions in other states including Ohio's experience with Mr. Broom, and evolving standards of decency protected by the Eighth Amendment to the United States Constitution. He recognizes the Florida Supreme Court's decision in Bryan v. State, 753 So.2d 1244 (Fla. 2000), holding Fla. Stat. 945.10 to be constitutional. Nevertheless, Mr. Troy alleges that the Florida statutory provision which prohibits the disclosure of the identity of the members of the execution team is unconstitutional and deprives him of Due Process of law, meaningful access to the courts and protection against cruel and unusual punishment under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and of the corresponding provisions of the Florida Constitution.

Independent public scrutiny -- made possible by the public and media witnesses to an execution -- plays a significant role in the proper functioning of capital punishment. An informed public debate is critical in determining whether execution by lethal injection comports with "the evolving standards of decency which mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the "initial procedures," which are invasive, possibly painful and may give rise to serious complications. *Cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 at 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole."). This information is best-gathered first-hand or from the media, which serves as the public's surrogate. *See Richmond Newspapers v. Commonwealth of Virginia*, 448 U.S. 555 at 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."). Further, "public access ... fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper*, 457 U.S. at 606, 102 S.Ct. 2613; *accord Richmond Newspapers*, 448 U.S. at 572, 100 S.Ct. 2814.

Section 945.10, Fla. Stat. (2006) exempts from disclosure under Section 24(a), Article I of the Florida Constitution (the right to access public records), "g) Information which identifies an executioner, or a person prescribing, preparing, compounding, dispensing, or administering a lethal injection."

This Court found the statute constitutional based upon concerns for the safety of those involved in executions. *Bryan v. State*, 753 So.2d at 1250-51. The opinion held that there is a presumption that the members of the executive branch will properly perform their duties in carrying out an execution. *Provenzano v. State*, 761 So.2d 1097, 1099 (2000). However, *Bryan* raised a public records request and therefore did not address Mr. Troy's precise issue.

Mr. Troy argues that, in light of the botched execution of Angel Diaz, testimony presented to the Governor's Commission, testimony presented at the *Lightbourne* proceedings, and the Dyehouse memos, this presumption is no longer valid. Evolving standards of decency as recognized in Eighth Amendment jurisprudence, notions of Due Process and access to the courts and information about government conduct, render Statute 945.10 unconstitutional.

Access to prisons by the press and public is a constitutional right. *Pell v. Procunier*, 417 U.S. 817 (1974). This access to prisons has been found to include access to view executions as well, based upon both historical traditions and the functional importance of public access to executions. *California First Amendment*

Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002). The right to view executions includes all parts of the execution, including the manner in which intravenous lines are injected. *Id*. at 883. The court held that limitations on what parts of the execution were viewed by the public based on safety concerns for the prison staff members involved was not justified. *Id*. at 880. The court found that concerns that execution team members would be publically identified and retaliated against was "an overreaction, supported only by questionable speculation." *Id*. Importantly, the court pointed out that numerous high profile individuals are involved with the implementation of executions, including a warden, a governor and judges, and there is a significant history of safety around these publicly known officials. *Id*. at 882. Pennsylvania courts have likewise rejected safety concerns as a basis for protecting the identity of execution witnesses as wholly unsupported speculation. *Travaglia v. Dept. of Corrections*, 699 A.2d 1317, 1323 n.5 (Pa. Commw. Ct. 1997).

The litany of states that have had challenges to the manner in which lethal injection is used has grown as additional problems have been documented. These states include Florida and then Governor Jeb Bush's moratorium on executions following news accounts of the botched execution of Angel Diaz. In Maryland, a federal district court issued a stay of execution after lethal injection chemicals leaked onto the floor during a previous execution. *Oken v. Sizer*, 321 F. Supp. 2d

658, 659 (D. Md. 2004). In Ohio, two executions were marked by long delays related to venous access, including one in which the inmate's hand swelled because of improper venous access. *See State v. Rivera*, Case No. 04CR065940, Lorraine County, Court of Common Pleas (July 24, 2007); *Cooey v. Taft*, 2006 WL 352646 (S.D. Ohio Dec. 6, 2006). And, of course, the pending Broom case suggests Ohio is still unable to properly administer the lethal injection protocols.

In California, a federal district court held that execution protocols violated the Eight Amendment. *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006). A review by the court of execution logs revealed potential problems with the administration of chemicals in six out of thirteen executions. *Id.* at 975. More significantly, the court also found serious problems with members of the execution team. One execution team member was disciplined for smuggling drugs into prison including pilfering the anesthetic used in executions. Another team member was diagnosed with post-traumatic stress disorder. In general, team members expressed minimal concern about problems that arose. *Id*. at 979. The court wrote:

> However, the record in this case, particularly as it has been developed through discovery and the evidentiary hearing, is replete with evidence that in actual practice OP 770 does not function as intended. The evidence shows that the protocol and Defendants' implementation of it suffer from a number of critical deficiencies, including:
>
> 1. Inconsistent and unreliable screening of execution team members: For example, one former execution team leader, who was responsible for the custody of sodium thiopental (which in smaller doses is a pleasurable and addictive controlled substance), was disciplined for

> smuggling illegal drugs into San Quentin; another prison guard led the execution team despite the fact that he was diagnosed with and disabled by post-traumatic stress disorder as a result of his experiences in the prison system and he found working on the execution team to be the most stressful responsibility a prison employee ever could have.
>
> 2. A lack of meaningful training, supervision, and oversight of the execution team: Although members of the execution team testified that they perform numerous "walk-throughs" of some aspects of the execution procedure before each scheduled execution, the team members almost uniformly have no knowledge of the nature or properties of the drugs that are used or the risks or potential problems associated with the procedure. One member of the execution team, a registered nurse who was responsible for mixing and preparing the sodium thiopental at many executions, testified that "[w]e don't have training, really." While the team members who set the intravenous catheters are licensed to do so, they are not adequately prepared to deal with any complications that may arise, and in fact the team failed to set an intravenous line during the execution of Stanley "Tookie" Williams on December 13, 2005. Although Defendants' counsel assured the Court at the evidentiary hearing that "Williams was a lesson well learned, one that will never occur again," the record shows that Defendants did not take steps sufficient to ensure that a similar or worse problem would not occur during the execution of Clarence Ray Allen on January 17, 2006, or Plaintiff's scheduled execution the following month.

Morales v. Tilton, 465 F.Supp. 972, 979 (footnotes omitted). The court also noted that "Indeed, the execution team members' reaction to the problem at the Williams execution was described by one member as nothing more than 'shit does happen, so.'" *Id.* at fn. 8. One of the Florida execution team members expressed a similar sentiment when he said the Diaz execution was successful because Diaz died.

In North Carolina, a federal district court found that an inmate "raised substantial questions as to whether North Carolina's execution protocol creates an undue risk of excessive pain." *Brown v. Beck*, 2006 WL 3914717, *8 (E.D.N.C. 2006). This conclusion was based upon both toxicology studies of post-mortem levels of sodium pentothal in inmates and the testimony of multiple witnesses indicating possible complications. *Id*. at *4-5. The district court allowed Brown's execution to go forward on the condition that execution personnel with sufficient medical training be present to ensure that the condemned was unconscious prior to and during the administration of the lethal chemicals. *Id*. at *8. However, executions were halted again when it was revealed that the state had not properly monitored inmates' levels of consciousness as promised. *Conner v. North Carolina Council of State*, Case No. 07GOV0238, County of Wake, Office of Administrative Hearings (Aug 9, 2007).

Finally, in Missouri, a federal district court temporarily put a halt to executions after hearing anonymous testimony from a medical doctor involved in executions. *Taylor v. Crawford*, 2006 WL 1779035 (W.D. Mo. 2006). This medical doctor/executioner testified that he made his own changes to the amounts of drugs that were administered and the location where drugs were administered during executions and said he often made mistakes in writing things down because he was dyslexic. *Id*. at *5. Along with these concerns, the court also noted the

constitutional problems created by the fact that little or no monitoring was done to ensure that an adequate dose of anesthesia was administered prior to other drugs being injected. *Id*. at *8. It was also revealed that the doctor had been sued for malpractice more than twenty times and that his privileges had been revoked at two hospitals. Missouri then agreed to stop employing him for executions.

This intersection of problems heightens the constitutional concerns that require the disclosure of the identity of members of the execution team and so called medically qualified members and compulsory testimony from those parties. Executions carried out by anonymous team members puts an inmate at an objectively intolerable risk of harm and violates Due Process and the Eighth Amendment.

The burden to show an Eighth Amendment violation in capital punishment cases is on the condemned. Without access to the identities of the team members, Mr. Troy cannot establish a violation. Mr. Troy cannot show that the team members are unqualified, or marginally qualified, or have a criminal history or a history of disciplinary proceedings for malpractice. To deprive him of this information violates his rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution to ensure his punishment is not cruel and unusual.

If the State wants to ensure integrity in its method of executing its citizens, it should want everything out in the open and above board. If the execution team members and self-described medically qualified personnel meet FDOC's minimal qualifications then the State should be pleased to identify these people. Likewise, safety concerns for the members of the execution team are purely speculative and, more importantly, run counter to the evidence that far more prominent individuals involved in executions, such as judges, governors, and wardens, have not been the target of any serious or widespread harm. Finally, the cases in Ohio, Missouri, California and North Carolina show that merely requiring the involvement of medical personnel is not a sufficient protection. Without access to the identities of these individuals, there is no way for a condemned to determine whether they are competent and qualified to ensure the Eighth Amendment is not violated.

Since the identity of the members of the execution team is protected by statute, there is no way for Mr. Troy to establish whether the involvement of any of these individuals creates a substantial risk of unnecessary pain during a lethal injection procedure. With the mounting evidence of botched executions continuing to grow, this statute deprives Mr. Troy of his due process rights to ensure he is not subject to cruel and unusual punishment and therefore this statue is unconstitutional.

An evidentiary hearing was required to provide meaningful access to the courts and Due Process of law. The hearing would have been the proper proceeding for the disclosure of the execution team members and so-called medically qualified members A hearing would allow him to present his claim that Florida's method of execution does not comport with evolving standards of decency because it (a) raises an objectively intolerable risk of harm or (b) raises a substantially intolerable risk of harm and (c) that there exists a reasonably feasible alternative to effectively address Florida's substantial risk of serious harm.

ISSUE 6[3]

THE POSTCONVICTION COURT ERRED IN DENYING MR. TROY'S CLAIM THAT SECTION 27.702 FLA. STAT. IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTION.

The Supreme Court of Florida, pursuant to statute, has appointed the Office of the Capital Collateral Regional Counsel - Middle Region (CCRC) to represent Mr. Troy in his post- conviction proceeding. § 27.702, Fla. Stat. (2006) prohibits CCRC from filing any 42 U.S.C. § 1983 claims on Mr. Troy's behalf.. In *Hill v. McDonough*, 126 S.Ct. 2096 (2006), the Supreme Court of the United States held that a section 1983 suit was a valid means to challenge lethal injection that did not implicate the federal law's prohibition against successive federal habeas petitions. In *Diaz v. State*, 945 So.2d 1136 (Fla. 2006), the Florida Supreme Court held that the prohibition against CCRC from filing an action under 42 U.S.C. § 1983 to attack the constitutionality of lethal injection was not unconstitutional, facially and as applied, because Mr. Diaz could have filed the claim in his federal habeas petition.

However, Mr. Troy may be unable to challenge lethal injection in a habeas petition due to the constraints of federal habeas law. Mr. Troy and any other

[3] This and the remaining issues were identified in the postconviction motion as raising purely legal and constitutional claims not requiring an evidentiary hearing.

similarly situated death row inmate should not have their right to challenge the constitutionality of lethal injection in a federal proceeding impaired or extinguished because of the arbitrary constraints of § 27.702, Fla. Stat.

The statutory limitation on CCRC is an unconstitutional deprivation of due process, access to the courts, equal protection and the protection against cruel and unusual punishment. A similarly situated death row inmate, who is not represented by CCRC but represented by registry counsel, *pro bono* counsel or privately retained counsel, can file a § 1983 suit challenging the constitutionality of Florida's lethal injection proceedings. Mr. Troy, who is indigent and cannot retain other counsel to represent him, is deprived of that right due to the arbitrary constraints of § 27.702, Fla. Stat.

ISSUE 7

THE POSTCONVICTION COURT ERRED WHEN IT DENIED MR. TROY'S CLAIM THAT THE RULES PROHIBITING HIS LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. TROY ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

The postconviction court denied this claim in its entirety by ruling as follows:

> In Ground VII, the Defendant argues that Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional because criminal defense counsel are treated "differently, unfairly and unequally compared to academics, journalists and those lawyers not connected with a particular case." Specifically, he argues that it is unconstitutional "[t]o the extent it precludes [] counsel from investigating and presenting jury bias and misconduct that can only be discovered through interviews with jurors ... ." The Court denies this claim, as the Supreme Court "has repeatedly rejected challenges to the constitutionality of rule 4-3.5(d)(4)." *Evans v. State*, 995 So. 2d 933, 952 (Fla. 2008). *See Barnhill v. State*, 971 So. 2d 106, 117 (Fla. 2007).

PCROA V5 829 (footnote quoting bar rule omitted).

In rejecting the claim, the court below failed to address or discuss why academics, journalists and those lawyers not connected with a particular case may interview capital jurors while trial and postconviction defense counsel may not do

so. The court's citing to *Evans* does not cure this deficiency. The *Evans* ruling relied on the rejection of "fishing expedition interviews" based on this court's previous ruling in *Arbelaez v. State*, 775 So.2d 909 (Fla. 2000) as quoted in *Johnson v. State*, 804 So.2d 1218 (Fla. 2001). The overall constitutional challenge in *Evans* and in the Troy ruling below was also rejected under the *Barnhill* case as a representative authority from this court.

However, none of the cases utilized in this Court's *Evans* and *Barnhill* rulings have addressed why academics may conduct "fishing expeditions" with former capital trial jurors. An example presented was the 1,198 interviews with jurors from 353 capital trials in 14 states, including Florida (as of August 15, 2005) performed by the Capital Jury Project and used in criminal justice doctorate dissertations. See http://www.cjp.neu.edu which lists Julie Goetz, "The Decision-Making of Capital Jurors in Florida: The Role of Extralegal Factors" (unpublished dissertation (1995), School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida) as a representative dissertation.

None of the cases utilized in this Court's *Evans* and *Barnhill* rulings have addressed why journalists may conduct "fishing expeditions" with former capital trial jurors without restrictions. The court below was aware that a juror in the Troy case was interviewed about the experience of sitting through a death penalty trial. "Many Jurors Scarred by Trials;" *Sarasota Herald-Tribune*, December 4, 2005

(http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20051204). *See also, e.g.*, Chris Tisch, "Defense Fears Comments Affect Verdict;" *St. Petersburg Times*, October 25, 2004 (available at http://www.sptimes .com/advancedsearch .html), where the jury foreman of a murder trial is interviewed about the jury's deliberations.

Lastly, none of the cases utilized in this Court's *Evans* and *Barnhill* rulings have addressed why lawyers not connected with a case may conduct "fishing expeditions" with former capital trial jurors without restrictions. Because post-trial questioning of jurors can and does come from academic researchers, journalists and lawyers and others not connected with the case, the Florida rules infringe upon the appellant's rights to due process, access to the courts, and the equal protection concepts enunciated in such cases as *Bush v. Gore*, 531 U.S. 98 (2000). Criminal defense counsel in Florida are treated differently, unfairly and unequally compared to academics, journalists, and those lawyers and others not connected with a particular case. Consequently, the reliability and integrity of appellant's capital sentence is thereby flawed.

ISSUE 8

FLORIDA STATUTE 921.141 IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY UNCONSTITUTIONALLY DILUTED ITS SENSE OF RESPONSIBILITY IN DETERMINING THE PROPER SENTENCE. MR. TROY'S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE.

This claim is presented to preserve it for federal review and is evidenced by the following:

Mr. Troy's jury was unconstitutionally instructed by the Court that its role was merely "advisory." (ROA V.6 p. 1005). Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. The jury's sense of responsibility was diminished in this case by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

ISSUE 9

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

This claim as it is being presented to preserve it for federal review. The defendant is aware that the U.S. Supreme Court has ruled:

> In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's "second or successive" bar. There are, however, exceptions. We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party.
>
> The statutory bar on "second or successive" applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe. Petitioner's habeas application was properly filed, and the District Court had jurisdiction to adjudicate his claim.

Panetti v. Quarterman, 127 S.Ct. 2842, 2855 (2007). However, the 11th Circuit Court of Appeal has yet to expressly recede from its holding in *In re: Provenzano*, 215 F.3d 1233 (11th Cir. 2000), that a claim of incompetency to be executed pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986), must be brought in the initial federal habeas proceeding. The 11th circuit appears to recognize the principle announced in *Panetti*, but only to distinguish non-*Ford* claims. *See Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257 (11th Cir. 2009), *cert. denied* --- U.S. ----, 129

S.Ct. 1305, 173 L.Ed.2d 482 (2009). Consequently the ruling announced in *Provenzano* may still apply to Florida inmates.

The only time a Florida prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant -- the issue is not ripe until then. Section 922.07, Florida Statutes (1985); *Martin v. Wainwright*, 497 So.2d 872 (1986); *Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998) (respondent's *Ford* claim premature because his execution was not imminent and therefore his competency to be executed could not be determined at that time); *Herrera v. Collins*, 506 U.S. 390 (1993) (the issue of sanity [for *Ford* claim] is properly considered in proximity to the execution).

However, in *In re: Provenzano*, the 11th Circuit Court of Appeals has stated:

> Realizing that our decision in *In Re: Medina*, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, *See United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the *Medina* decision. We would, of course, not only be authorized but also required to depart from *Medina* if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted].
>
> *Stewart v. Martinez-Villareal* does not conflict with *Medina*'s holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

215 F.3d at 1235.

Given the current status of federal case law, the 11th Circuit may require a competency to be executed claim be raised in the initial petition for habeas corpus. The issue is raised here to satisfy the requirement that an issue must be raised and exhausted in state court before it can be raised in a federal habeas petition.

The defendant has been incarcerated since 2001. Statistics have shown that many inmates incarcerated over a long period of time incur diminished mental capacity. *See Panetti*, 127 S.Ct. 2842 at 2852: "All prisoners are at risk of deteriorations in their mental state." Because the defendant may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

ISSUE 10

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

This claim is raised to preserve it for federal review. Mr. Troy refers to relevant *dicta* in *State v. Steele*, 921 So.2d 538, (Fla. 2005):

> In *Ring [v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)], the Supreme Court held that in capital sentencing schemes where aggravating factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id*. at 609, 122 S.Ct. 2428 (*quoting Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d

> 435 (2000)). The effect of that decision on Florida's capital sentencing scheme remains unclear. ... Since *Ring*, this Court has not yet forged a majority view about whether *Ring* applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. *See, e.g.*, *Windom v. State*, 886 So.2d 915, 936-38 (Fla.2004) (Cantero, J., specially concurring) (explaining the post- Ring jurisprudence of the Court and the lack of consensus about whether *Ring* applies in Florida). *Cf. Johnson v. State*, 904 So.2d 400 (Fla.2005) (holding that *Ring* does not apply retroactively in Florida). That uncertainty has left trial judges groping for answers. ... The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

Steele, 921 So.2d at 540 and 550 (Fla. 2005).

Mr. Troy acknowledges that this Court holds that Florida's death penalty was not affected by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See, e.g.*, *Mills v. Moore*, 786 So.2d 532 (Fla. 2001); *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005); *Lebron v. State*, 982 So.2d 649 (Fla. 2008).

Mr. Troy is compelled to maintain that the Florida death penalty scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Florida law. In 1999, the United States Supreme Court held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must

be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). The Court held that the Fourteenth Amendment affords citizens the same protections under state law. *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2355 (2000).

In *Apprendi*, the issue was whether a New Jersey hate crime sentencing enhancement beyond the statutory maximum was an element of an offense requiring a jury determination beyond a reasonable doubt. *Apprendi*, 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 120 S.Ct. at 2365. Applying this test, the aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be noticed, submitted to a jury, and proven beyond a reasonable doubt. The state was obligated to prove at least one aggravating factor in the separate penalty phase proceeding before Mr. Troy was eligible for the death penalty. Fla. Stat. § 775.082 (1995).

The aggravating circumstances of § 921.414(6), Fla. Stat., actually define those crimes -- when read in conjunction with §§ 782.04(1) and 794.01(1), Fla. Stat. -- to which the death penalty is applicable in the absence of mitigating circumstances. *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973); §§ 775.082 and 921.141 (2)(a), (3)(a) Fla. Stat. (1995).

Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If the court sentenced Mr. Troy immediately after conviction, the court could only have imposed a life sentence. § 775.082 Fla. Stat. (1995). *Dixon*, 283 So.2d at 9.

Mr. Troy's indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense for which the death penalty was a possible punishment. Under the principles of common law, aggravators must be noticed.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision.

Apprendi, 120 S.Ct. 2348, 2355 (2000) quoting Archbold, Pleading and Evidence in Criminal Cases, at 51.

Because aggravators are circumstances of the crime and the defendant's mental state, they are essential elements of a crime for which the death penalty may be imposed and they must be noticed.

Mr. Troy's death recommendation also violates the federal and state constitutions because it is impossible to determine whether a unanimous jury found any one aggravating circumstance. Fla.R.Crim.P. 3.440 requires unanimous jury

verdicts on criminal charges. "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." *Flanning v. State*, 597 So.2d 864, 867 (Fla. 3d DCA 1992), *quoting Jones v. State*, 92 So.2d 261 (Fla. 1956). However, in capital cases, Florida permits jury recommendations of death based upon a simple majority vote, and does not require jury unanimity as to the existence of specific aggravating factors. *See, e.g., Thompson v. State*, 648 So.2d 692, 698 (Fla. 1994) and *Jones v. State*, 569 So.2d 1234, 1238 (Fla. 1990).

Mr. Troy's death recommendation violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. Noteworthy is the apparent confusion on this aspect of jury findings as expressed in "Jury Question (1)" that was submitted to the Court during Mr. Troy's trial. (ROA V.6 p. 1011). Implicit in the state and federal government's requirements that a capital conviction must be obtained through a unanimous twelve person jury is the idea that "death is qualitatively different from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. *See Johnson v. Louisiana*, 406 U.S. 354, 364 (1972).

The Supreme Court of the United States held in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002):

> If a legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. There is no reason to differentiate capital crimes from all others in this regard. Arizona's suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive.

Id. at 2431.

A new penalty phase is required because it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support of the recommendation of death.

ISSUE 11

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND FOR VIOLATING THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TO THE EXTENT THIS CLAIM WAS NOT PROPERLY LITIGATED AT TRIAL OR ON APPEAL, MR. TROY RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

This claim is raised to preserve the claim for federal review and is evidenced by the following:

Florida's capital sentencing scheme denies Mr. Troy his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. *See Profitt v. Florida*, 428 U.S. 242 (1976). Florida's death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. *Richmond v. Lewis*, 113 S.Ct. 528 (1992):

> 1. Execution by both electrocution and lethal injection impose unnecessary physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.
>
> 2. Florida's death penalty statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances."
>
> 3. Further, the statute does not sufficiently define for the judge's consideration each of the aggravating circumstances listed in the statute. *See Godfrey v. Georgia*, 446 U.S. 420 (1980).
>
> 4. Florida's capital sentencing procedure does not utilize the independent reweighing of aggravating and mitigating circumstances envisioned in *Profitt v. Florida*, 428 U.S. 242 (1976).

5. The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. *See Godfrey v. Georgia; Espinosa v. Florida*, 112 S. Ct. 2926 (1992).

6. Florida law creates a presumption of death where but a single aggravating circumstance applies. This creates a presumption of death in every felony murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence so strong as to outweigh the aggravating factors.

7. The systematic presumption of death is fatally offensive to the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. *See Richmond v. Lewis*, 113 S. Ct. 528 (1992); *Furman v. Georgia*, 408 U.S. 238 (1972); *Jackson v. Dugger*, 837 F.2d 1469 (11th Cir. 1988).

To the extent trial counsel failed to properly preserve these issues, defense counsel rendered prejudicially deficient assistance. *See Murphy v. Puckett*, 893 F.2d 94 (5th Cir. 1990). Because of the arbitrary and capricious application of the death penalty under the current statutory scheme, the Florida death penalty statute as it exists and as it was applied in this case is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and under Article 1 Section 17 of the Constitution of the State of Florida. Its application in Mr. Troy's case entitles him to relief.

ISSUE 12

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. TROY OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The number and types of errors in Mr. Troy's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each error individually, addressing these errors in isolation will not necessarily afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and an unconstitutional process significantly tainted Mr. Troy's capital proceedings. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Mr. Troy his fundamental rights under the Constitution of the United States and the Florida Constitution. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986); *Ray v. State*, 403 So.2d 956 (Fla. 1981); *Taylor v. State*, 640 So.2d 1127 (Fla. 1st DCA 1994); *Stewart v. State*, 622 So.2d 51 (Fla. 5th DCA 1993); *Landry v. State*, 620 So.2d 1099 (Fla. 4th DCA 1993).

CONCLUSION

Based on the numerous constitutional violations which occurred in this case, the ineffective assistance of counsel, operating outside the norms for capital representation as set out by the ABA Guidelines and the testimony and facts of this case, the summary denial of all claims without an evidentiary hearing was error requiring a remand for a hearing on the claims designated for hearing. All claims, especially those for which a hearing was not sought, individually and in concert, alone justify remanding to the trial court for a new trial or penalty phase, thereby mooting the remand for evidentiary hearing. A new trial is required to assure confidence in the integrity of this State's capital trial and sentencing scheme, and any other relief this Court deems appropriate.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Steven D. Ake, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607-7013, on this 30th day of October, 2009.

_____

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Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

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

_____

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