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

REPLY BRIEF OF THE APPELLANT

David R. Gemmer
Florida Bar Number 0370541
Robert T. Strain
Florida Bar Number 0325961
Assistant CCRC's -Middle
Office of The Capital
Collateral Regional Counsel
3801 Corporex Park Drive
Suite 210
Tampa, Fl 33609-1004
(813) 740-3544
Counsel for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OTHER AUTHORITY

ARGUMENT

PRELIMINARY STATEMENT

The Appellant relies on his Initial Brief for all purposes, and offers the following replies to the State's Answer Brief regarding Issues 1, 2, 3, and 7. In all cases, remand for an evidentiary hearing is necessary.

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.

The State argues that trial counsel was not ineffective because he proffered only inadmissible testimony "related to conditions in prison for any inmate sentenced to life," and that no amount of preparation would render that testimony admissible. Answer Brief at 23. However, the issue raised in these postconviction proceedings is that it was ineffective to make the empty gesture of a proffer of inadmissible testimony. Competent counsel would have known that he needed to develop Mr. Galemore as a witness who could offer admissible testimony, not about "any inmate," but about Mr. Troy's future prospects serving a life term without parole.

This Court affirmed the trial court's ruling that "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." *Troy v. State*, 948 So.2d 635, 651 (Fla. 2006). Preparation would have eliminated speculation and rendered the testimony admissible.

The State endorses the flawed reasoning of the circuit court, which held in its order denying postconviction relief that:

> 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 821 (emphasis added).

The problem with this ruling is that the postconviction court is egregiously wrong when it finds that Mr. Galemore was being called to testify about anything other than "parole ineligibility and the Defendant's threat while in prison." To the contrary, the defense proffer at trial which the State quotes in its Answer Brief refutes the court's finding:

> The defense proposes to call Mr. Galemore to address some of the following issues: The fact that if the defendant were sentenced to life imprisonment without possibility of parole, that that would be considered close custody, C-L-O-S-E; that under close custody, the inmate would be supervised in a particular fashion; that the inmate would work in prison; that the inmate would have to follow the rules

> in prison; he would address the issue of drugs in prison; and he would address the issue of leadership in prison by an inmate; the fact that a specific leader is prohibited by the rules, but the Department of Corrections encourages positive leadership [Defendant's threat while in prison] when it can be found.

State's Answer Brief at 17, quoting ROA V30 at 2727 (emphasis and bracketed comments added).

The proffer quoted above offered testimony on the two subjects the postconviction court noted had been properly ruled as admissible: expressly ruled were admissible: "parole ineligibility and the Defendant's threat while in prison were proper mitigation considerations." The proffer offered "[t]he fact that if the defendant were sentenced to life imprisonment without possibility of parole . . . ." And the proffer offered multiple instances addressing the Defendant's threat while in prison: "[life without parole] would be considered close custody;" "under close custody, the inmate would be supervised in a particular fashion;" "the inmate would have to follow the rules in prison;" "the issue of drugs in prison;" "leadership in prison by an inmate;" and "the Department of Corrections encourages positive leadership."

The record evidence clearly establishes that the defense proffered testimony that would have been admissible, but for the witness's lack of personal knowledge about Mr. Troy. The postconviction court's ruling that "It therefore does not appear that Mr. Galemore's personal knowledge would have made his testimony

more appropriate," is nonsensical and a *non sequitur*, based on a factual finding directly refuted by the record.

The holding from this Court in the direct appeal was that any attempt by Galemore to apply general principles to Mr. Troy would be inadmissible because "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." *Troy*, 948 So.2d at 651. Mr. Troy urged in his postconviction motion that trial counsel could have made Galemore's testimony admissible if only he had provided Mr. Galemore with the records and evidence of Mr. Troy's prior incarceration history, removing the specter of "speculation." Mr. Galemore, a prison administrator with years of experience (including past responsibility for supervising Florida's death row), would have been able to draw on Mr. Troy's past experience to project what his future prison experience serving a life sentence would be, and to contrast that with life on death row, to explain that Mr. Troy would never be free and that he would be held in special "close confinement conditions" which would require him to work and to follow rules substantially more strict than those imposed on the general prison population.

Competent counsel would have properly prepared Mr. Galemore to testify in a non-speculative manner about the admissible and relevant issues of serving a

sentence without parole and Mr. Troy's threat while serving that sentence. The memo from his investigator notifying counsel of the need to properly prepare Mr. Galemore was dated January 27, 2003. PCROA V3 525 (date of memo alleged in 3.851 motion). Counsel had plenty of time to work with Mr. Galemore before he listed the warden as a witness July 11, 2003. ROA V3 506 (witness list). If Mr. Galemore had proven to be inappropriate, there was still time until the trial began in August 2003 to develop another witness. However, Galemore should have been an excellent witness as the Department of Corrections had referred the defense investigator to Mr. Galemore as a good witness, as indicated by a memo from the investigator to counsel dated December 12, 2002. See note 4, infra, regarding the memos.

Even if counsel dropped the ball in pretrial preparation, once the court ruled that the proffered general testimony was inadmissible, effective counsel would have cured his oversight by preparing Mr. Galemore with the personalized information necessary to render his testimony admissible. Counsel had three evenings to do this. The proffer was rejected the afternoon on August 26, 2003, ROA V30 2765. The defense rested its penalty phase case at the end of proceedings August 28, 2003, ROA V34 3264. The ensuing charge conference ran into the following day, August 29, 2003, and the defense could have delayed resting or sought to reopen the testimony on the 29th. Counsel also missed the

opportunity to present Mr. Galemore's properly prepared testimony at the *Spencer* hearing three months later, November 21, 2003. ROA V36 3487-3547.

This Court, the postconviction court, and the State, align themselves with the position that the defense was unfettered in presenting evidence of Mr. Troy's prison experience, and equally unfettered in making a closing argument inferring future prison behavior from Mr. Troy's prior prison behavior. However, this glosses over the simple fact that all of the evidence about prison behavior was limited to Mr. Troy's past behavior. Mr. Galemore should have been utilized to draw upon the wealth of evidence of past behavior, and explain to the jury how that evidence, applied to the conditions Mr. Troy would be subject to serving a sentence of life without parole, showed, *inter alia*, that Mr. Troy would likely present no safety risk, that he would, in fact, most likely take on a positive leadership role which would be helpful to staff and fellow inmates, and that he would not be living high on the taxpayers' dollars, given the strict conditions of close confinement.

Because Mr. Galemore was not utilized to introduce that evidence, defense counsel was necessarily limited to general and nonspecific arguments in his closing. The power and authority of a prison administrator's testimony was lost, leaving the defense to scramble for generalities unsupported by evidence:

> I submit to you that if John is sentenced to life in prison, that John can still be useful, that John can still contribute, and that John will still have plenty

> of incentive to do so. But if John is sentenced to death, he can't make any contribution at all.

ROA V35 3422. This brief discussion consumed only five of the more than 800 lines of the defense closing argument (albeit some objections are included in the line count). The hole in the evidence could not possibly have been cured by this closing argument.

Similarly, the evidence the State argues was admitted in abundance as to Mr. Troy's past prison behavior cannot cure the fact that all of that evidence would have served as the basis for Mr. Galemore's testimony that Mr. Troy had a good potential to be rehabilitated and to be a useful model prisoner while serving a life sentence. The United States Supreme Court specifically holds that evidence of future conduct is desirable in making a capital sentencing decision:

> *Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing . . . . Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.FN1 Under Eddings, such evidence may not be excluded from the sentencer's consideration.*
> FN1. The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. *Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of Lockett and Eddings that requires that the defendant be afforded an opportunity to introduce evidence on this point;* it is also the elemental due process requirement that a defendant not be sentenced

> to death "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977).

Skipper v. South Carolina, 476 U.S. 1, 5 (1986) (emphasis added, citations deleted).

This Court recognized the propriety of evidence of probable future conduct in prison in *Valle v. State*, 502 So.2d 1225 (Fla. 1987). Applying *Skipper* as required by the United States Supreme Court when it vacated and remanded the case, *Valle v. Florida*, 476 U.S. 1102 (1986), this Court found that expert opinions that Mr. Valle would be a model prisoner if sentenced to life had to be admitted. Such evidence was not cumulative to evidence at the first trial which only spoke to Mr. Valle's previous behavior in prison. *Valle*, 502 So.2d at 1226.

In the instant case, the state's closing argument included an extensive review of the negative aspects of Mr. Troy's prison behavior, leading to the argument that

> Now one of the things that defense may argue is the -- what he can do for others in life, what John Troy can do for others in life. You need to look at what he has done, what he has done in life already, and whether he is qualified to do for others. You are allowed to look at that.
>
> . . . .
>
> The defense is suggesting through the witnesses that John Troy should counsel others. That's what some of the witnesses said, that he could counsel others in prison. You make a decision as to whether that is appropriate. He's not fixed. He's not led a fixed, cured life. They've said through witnesses the defendant is not violent. Well, you know different, you know different.

ROA V35 3388-89. John Troy was deprived of the right to rebut the state's argument. A properly prepared witness knowledgeable in corrections, such as the ones deemed admissible in *Valle*, *id.*, would have been able to meet this argument by testifying, for instance, that Mr. Troy's behavior had improved over his years in prison, that he had developed skills to help others in the prison system, and that being "not fixed" did not disqualify Mr. Troy from being a useful member of the prison population or continuing to counsel fellow inmates as he had in the past. Obviously, any defendant returning to prison has failed in becoming "fixed," yet many are able to continue improving and contribute in a positive way.

The State argues that substantial evidence of Mr. Troy's likelihood of success serving a life sentence was introduced at trial:

> Trial counsel presented testimony from twenty-nine witnesses at the penalty phase, including multiple correctional officers who, unlike Galemore, actually had direct contact and supervisory roles over Appellant, to testify regarding Appellant's conduct in a structured environment and his ability to adapt to a life sentence in prison and be a model prisoner. [6]
>
> 6. At the penalty phase, trial counsel presented evidence from family members regarding Appellant's ability to be a productive member of society while serving a life sentence and presented testimony from a number of other law enforcement/correctional employees with personal knowledge of Appellant.

Answer Brief at 23-24. The footnote continues on to enumerate eight law enforcement or corrections witnesses who testified. However, not one of them testified about Mr. Troy's future prospects.

Of the 29 defense witnesses in the penalty phase, only three members of the family and a former teacher offered brief opinions of John's possible contributions while serving a life sentence. [1] The defense asked no such question of seven other family members, including his mother. [2] The state successfully objected when the defense sought the same testimony from three other witnesses. [3]

---

[1] The defense asked a single question of Mr. Troy's father about his future prospects, whether he could be of assistance to others in the future, and the father replied, over the objection of the state, that "I have no doubt about that. I think that my son has a lot of good things yet to do. I'm certain that he can help others in many different ways." ROA V29 2587. The defense elicited from Mr. Troy's sister her opinion that he could contribute if he served a life term because he could help others rehabilitate themselves. ROA V29 2635. Mr. Troy's grandfather testified he though John could be a benefit to society if he served a life term because he has learned skills in prison and could serve as an example. ROA V 30 2714. A former teacher testified John could be a counselor and teach literacy to fellow inmates if he served a life sentence. ROA V30 2776.

[2] Childhood friend, ROA V 29 2639 et seq.; grandmother, ROA V 30 2682 et seq.; aunt, ROA V30 2787 et seq.; first cousin. ROA V30 2796 et seq.; stepmother, V30 2819 et seq.; brother, ROA 33 3174 et seq.; mother, ROA 34 3256-57, mother asked only to describe positive characteristics of the defendant).

[3] ROA V29 2624 (objection sustained to question to former neighbor who knew the defendant when he was a teen, "Based on what you knew of him, do you feel that even today that his life still has some value, even if he were to be locked up for the rest of his life?"); ROA V31 2840-41 (on state's objection, court denies a proffer of testimony from a corrections officer as to the lack of access to drugs in close custody – court says the issue of access to drugs in close custody is irrelevant). ROA V33 3166-67 (objection sustained to question to Troy's uncle, "Based on everything that you know about Buzzy, do you feel that he could make a contribution to society even if he's locked up in prison for the rest of his life?")

The *Skipper* Court recognizes that the testimony of friends and family carries little weight. The testimony of a witness like Mr. Galemore would be profoundly more important and influential:

> We think, however, that characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us. The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. *The testimony of more disinterested witnesses-and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges-would quite naturally be given much greater weight by the jury.*

Skipper, 476 U.S. at 8 (emphasis added).

The state diminished the impact of several of the jailers who testified in the case by drawing out their favorable predisposition to their charge, John Troy. The State also diminished the impact of the three family members and the teacher who opined that Mr. Troy could serve out a useful life if sentenced to life without parole when it argued to the jury:

> I'm asking you to recognize the testimony of the family members and the friends for what it is. These are people who support the defendant. They love him unconditionally. You heard member after member of the family say that, they were here for John Troy because they support him.

ROA V35 3357.

This Court had no problem making the distinction between testimony of past behavior and testimony of a prisoner's future prospects serving a life term rather

than facing execution. *Valle*. An intelligent understanding of the claim clearly distinguishes this from the claim raised in the direct appeal. It is abundantly clear that the Defendant claims that trial counsel was ineffective for failing to properly prepare Mr. Galemore to testify to the inarguably admissible question of Mr. Troy's likelihood of becoming a useful and likely model prisoner if given a life sentence without parole. Without that testimony, the trial court's instructions to rely solely on the evidence took away from the jury any consideration of the defense argument that "that John can still be useful, that John can still contribute, and that John will still have plenty of incentive to do so."

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 dated January 27, 2003, establishes that the investigator, at least, recognized the need for the defense to better prepare Mr. Galemore.[4] That memo and the investigator's testimony would have established

[4] The State notes the discrepancy between the allegation of authorship of the memo in the 3.851 motion (defense counsel Tebrugge), and the Initial Brief (the investigator). Answer Brief at 20 n. 5. The memo was written by the investigator and, if any issue in this appeal turns on authorship of the memo, a remand for hearing is required to allow its introduction. The State also notes that the memo was never attached to the 3.851 motion or included in the record. The lack of record presence is the direct result of the trial court's summary denial of the claim. Had an evidentiary hearing been ordered, the document would have been available, through discovery, *Reed v. State*, 640 So. 2d 1094 (Fla. 1994), and would have

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.

---

been properly introduced at the hearing, along with the December 12, 2002, memo referenced earlier in the discussion on this issue. Postconviction counsel would have provided copies of the memos upon formal or informal request from the State, but the State has never raised a question until its Answer Brief. Further, if the claim was denied for failure to attach the memo to the 3.851 motion, Mr. Troy should be offered the opportunity to cure the deficiency. *Spera v. State*, 971 So.2d 754 (Fla.2007).

It was error for the postconviction court to deny a hearing because trial counsel proffered inadmissible testimony when the basis for the claim is that trial counsel was ineffective for that very reason -- 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. Without a hearing, the record is silent as to what options counsel may have considered before deciding not to prepare Mr. Galemore before the proffer or after the ruling but before the mitigation phase concluded.

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.

The State repeatedly references the trial testimony of Bob Ortiz, the victim's father, as having been "an extremely brief victim impact statement," Answer Brief at 30 n. 10, "a very brief victim impact statement, " *id*. at n. 11, and a "brief victim impact statement," *id*. at 35. However brief, the statement was powerful. Mr. Ortiz was the final witness presented by the State in its penalty phase case in chief, and the one who made the most memorable and dramatic victim impact statement:

> I miss my Bonnie. I miss my Bonnie. How could I lose my Bonnie? She was the kind of girl you had to love. Bonnie made sure of that. She was tough. She was strong. She was one beautiful girl. As much as she made me crazy sometimes, I couldn't help but love her. I think that forever I will never be able to hear her voice. It will break my heart until the day that I die. I miss my Bonnie. I miss my Bonnie.

ROA V28 2430. Had there been the opportunity for a full evidentiary hearing, the impact of that statement could have been established by the testimony of trial counsel, courtroom observers or replaying the tape of the testimony. The courtroom surely must have fallen silent in contemplation of a father's eloquent and anguished statement. They had already witnessed the emotional testimony of the victim's mother, who was allowed a moment to collect herself before she stepped down from the stand. ROA V28 2429. The State quite effectively finished its presentation with two powerful witnesses, and there should be some question of Mr. Hamblin's recollective powers if he was unable to recall the culmination of the State's penalty phase presentation.

At an evidentiary hearing, the Defendant could have also established that Mr. Ortiz almost certainly was present for the entire trial, given his strong emotions about the case. As demonstrated by the foreperson's unexpected embrace of Mrs. Ortiz, the jurors clearly knew the identities of the victim's family. The State's Victim's Advocate was the person who witnessed and reported the embrace, further indicating the family's continuing presence at the trial.

The State claims there is no evidence that trial counsel knew of Mr. Ortiz' volatile character before trial. Answer Brief at 30 n.11. Failure to know of the pretrial behavior of the victim's father towards Mr. Troy's mother, a key defense witness, would be indicative of a lack of competent counsel. However, trial

counsel was acutely aware of the problem, as was the State, and, had there been an evidentiary hearing, defense counsel's knowledge would have been established by testimony.

Contrary to the State's mischaracterization of the argument on the volatility of Mr. Ortiz, Answer Brief at 30 n. 10, the postconviction motion does not claim ineffective assistance for failure to strike Juror Hamblin because Mr. Ortiz was volatile during the trial. The postconviction motion references the incidents during and after trial as evidence of the prejudice created by allowing a neighbor with so many close geographical and professional connections to Mr. Ortiz to serve on the jury. A juror, knowing he will likely face Mr. Ortiz in the street, at the Chamber of Commerce, and around town during or after the trial, is a juror who could, at the least, be intimidated by that prospect.

As with the postconviction court, the State ignores the second prong of the claim. Even if Mr. Ortiz and Mr. Hamblin were not acquainted, the close associations present in their lives would have compelled a competent defense lawyer to strike Mr. Hamblin. Beyond the Chamber of Commerce reference in the newspaper, the defense had available the juror questionnaire and could have readily matched up Mr. Hamblin's residence and business activities with those of Mr. Ortiz. Juror screening is a fundamental investigative job for the defense of a capital case. It took little effort for postconviction counsel's investigator to make

the connections using the background investigation tools readily available then and now.

An evidentiary hearing is necessary to allow Mr. Troy to develop and present all the evidence. Because the hearing was denied, Mr. Troy was unable to utilize discovery tools to obtain records from the Chamber of Commerce which could confirm or refute the juror's claim that he never crossed paths with Mr. Ortiz at Chamber functions. Defense counsel's knowledge of the restraining order against Ortiz and other indicators of volatility would be established by testimony. Mr. Ortiz' behavior in the courtroom during trial could be established, as well as the impact of his victim impact statement in the penalty phase. A meaningful interview of the juror could be conducted after discovery including materials from the Chamber and evidence of Ortiz' continuing presence and behavior during trial, which could serve to refresh the juror's memory. Discovery, evidence, and a juror interview utilizing that information would establish the inherent likelihood of prejudice which would have compelled competent counsel to strike the juror.

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.

The State claims that this issue is procedurally barred because it was raised on direct appeal. Mr. Troy can only reiterate that the claim is clearly differentiated from the claim raised in the direct appeal. *Bruno v. State*, 807 So.2d 55, 63 (Fla. 2001) ("claims may arise from the same underlying facts, but the claims themselves are distinct"), and Judge Altenbernd's opinion in *Corzo v. State*, 806 So.2d 642 (Fla. 2d DCA 2002), put to rest that canard. The language from those cases quoted in the Initial Brief at 52-54 directly refutes the State's argument that the claim is procedurally barred because "Appellant raises the same exact evidence and arguments presented in his direct appeal proceedings . . . ." Answer Brief at 45. As urged in the Initial Brief, an evidentiary hearing or remand for a new penalty trial is required.

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 State first submits, as to a basis not addressed by the postconviction court's ruling, that the juror interview claim is procedurally barred as it was a claim that could have been raised on direct appeal but was not. Answer Brief at 57. This argument ignores the fact that the Appellant's Rule 3.851 motion included specific complaints regarding postconviction counsels' restrictions as to interviewing jurors under Florida law. PCROA V3 p.557.

A situation involving a claim of a constitutional dimension that can be developed only after the trial and direct appeal certainly qualifies as a proper postconviction claim under Florida Rule of Criminal Procedure 3.851(e)(1). Postconviction interviewing of trial jurors, after all, is affected by the common knowledge that juror misconduct is "not a recent problem" but is "on the rise." Reining In Juror Misconduct - Practical Suggestions for Judges and Lawyers. Ralph Artigliere, Jim Barton and Bill Hahn, Vol. 84, No. 1 *Fla. B.J.* 9 (January,

2010). As elaborated by the authors:

> To say that current jurors have enhanced temptation and ability to communicate about the trial with the outside world is the understatement of this still young century. Jurors have the capability instantaneously to tweet, blog, text, e-mail, phone, and look up facts and information during breaks, at home, or even in the jury room if they are allowed to keep their digital "windows to the world." Jury instruction by the judge about communication outside the courtroom has not kept pace with technology.
>
> The problem of outside influence on jurors is no longer confined to high profile cases that are covered in the press or other media. Courtroom misconduct seems to be everywhere.
> ...
> The[se] examples represent recent transgressions that were discovered, and probably represent just the tip of the iceberg of juror behavior. (FN14 *See* Hoenig, Juror Misconduct on the Internet, *New York L. J.* (October 9, 2009), in which the author notes that juror forays to the Internet are a "growing phenomenon" of unknown magnitude because post-trial interviews are generally forbidden or discouraged).
>
> Improper juror communication and research are only part of the problem. Another insidious type of juror misconduct is misrepresentation or disinformation provided to the judge and lawyers in qualification and voir dire. Deception during voir dire deprives the examining attorneys and the judge of the opportunity to obtain accurate information for challenges for cause and peremptory challenges. The level of deception ranges from jurors who puff their qualifications or hide or gloss over information to avoid embarrassment to "stealth jurors" on a mission and willing to lie to get on the jury in order to carry out an objective for or against one of the parties. Regardless of motive, jurors who betray their oath as jurors subvert the jury system and threaten the fairness of the process.

Id. at 9-10.

The State additionally and simply repeats the postconviction court's reliance

on *Barnhill v. State*, 971 So.2d 106 (Fla. 2007), and *Evans v. State*, 995 So.2d 933 (Fla. 2008), as reflective of this Court's authority for denying the claim as lacking merit. In doing so, the State again waives its opportunity to address the components of the claim, namely, its view of the legal and logical reasons why academics, journalists and lawyers not associated with a case may all - collectively or individually - conduct "fishing expeditions" by interviewing capital jurors without restriction while trial and postconviction counsel may not.

Appellant's morass of not having fish to fry because of restrictions on counsel against fishing is a Catch-22 situation for post-trial counsel recently considered by the U.S. Supreme Court. *See Wellons v. Hall*, 130 S.Ct. 727, 22 Fla. L. Weekly Fed. S 51 (January 19, 2010) ("Neither Wellons nor any court has ascertained exactly what went on at this capital trial or what prompted such 'gifts.' Wellons has repeatedly tried, in both state and federal court, to find out what occurred, but he has found himself caught in a procedural morass . . . ."). Appellant again and respectfully urges this Court to provide the legal and logical reasons why academics, journalists and lawyers not associated with a capital case[5] may all - collectively or individually - conduct "fishing expeditions" by interviewing capital jurors without restriction while trial and postconviction

[5] Even the victim's father in this case, Mr. Ortiz, boasted that he freely spoke with jurors after the trial. PCROA V4 750.

counsel may not. Absent such considerations, Appellant should be entitled to postconviction relief.

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. A new trial is required to assure confidence in the integrity of this State's capital trial and sentencing scheme. Mr. Troy also requests any other relief this Court deems appropriate.

Respectfully submitted,

_____

David R. Gemmer
Florida Bar Number 0370541

_____

Robert T. Strain
Florida Bar Number 0325961

Assistant CCRC's
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Dr. - Suite 210
Tampa, Florida 33619
(813) 740-3544
Counsel for Petitioner

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 26th day of March, 2010.

_____

David R. Gemmer
Florida Bar Number 0370541
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.

_____

David R. Gemmer
Florida Bar Number 0370541
Attorney for Petitioner