IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

CASE NO.: SC10-318
L.T. NO.: 2000-CF-1549

LUTHER DOUGLAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INTIAL BRIEF

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PRELIMINARY STATEMENT

Appellant, LUTHER DOUGLAS, will be referred to as "Appellant." The State of Florida will be referred to as "Appellee." Attorney Frank J. Tassone, who is representing Appellant in this matter, will be referred to as the "undersigned counsel."

References to the Record on Appeal for the Direct Appeal will be designated (_ ROA _) with the volume number listed first, followed by the page number indicated on the Index to the Record on Appeal, for instance (3 ROA 1.) References to the Record on Appeal for the Initial Brief to this court will be designated "R" followed by the volume number and page number indicated on the Index to the Record on Appeal, for instance (3 R 1). References to the Supplement Record on Appeal for the Initial Brief to this court will be designated "Supp." followed by the volume number and page number indicated on the Index to the Record on Appeal, for instance (1 Supp. 1)

STATEMENT OF THE CASE AND FACTS

The following facts are as stated in the trial court's order denying 3.851. (5 R 788-792):

On March 15, 2002, a jury found Douglas guilty, by special verdict, of first-degree felony murder of Mary Ann Hobgood with sexual battery as the underlying felony. The jury did not find that the killing was premeditated. The jury found Douglas guilty of a separate count of sexual battery. Douglas had not presented any witnesses during the guilt phase of his trial.

During the penalty phase of the trial, counsel presented the testimony of 12 family members and friends to establish mitigation. Many of the witnesses admitted that they had little contact with Douglas as an adult. The jury recommended the death penalty by an 11 to 1 vote. The trial court held a Spencer hearing where trial counsel for Douglas presented nothing but a statement from Douglas requesting a life sentence. The court found one statutory mitigator (defendant had no significant criminal history—little weight) and two aggravating factors: HAC, and that the crime was committed in the commission of a sexual battery. Additionally, of the 30 proposed non-statutory mitigators, 14 were rejected. (Please refer to Argument 1 for a briefing of the non-statutory mitigation presented). Finding the aggravating circumstances outweighed the mitigating

circumstances, the trial court sentenced Douglas to death for the murder of Mary Ann Hobgood and life imprisonment for the sexual battery.

Following conviction and sentence, Douglas filed a direct appeal to the FSC on or about May 1, 2003, alleging five claims: (1) The trial court erred in admitting numerous enlarged crime scene and autopsy photographs of the slain victim, whether the photographs were inflammatory and had little or no relevance to any material issues; (2) The trial court abused its discretion in rejecting mitigating evidence related to Douglas' background and character and in minimizing the weight given to mitigating circumstances related to Douglas' abusive childhood on the theory that these events occurred in the past; (3) The trial court erred in instructing the jury on and in finding that the murder was especially heinous, atrocious, or cruel; (4) The death sentence is disproportionate to the offense committed in this case; (5) The death sentence was unconstitutionally imposed in violation of Ring v. Arizona, 122 S.Ct. 2428 (2002). Each of these claims was denied by the FSC in Douglas v. State, 878 So. 2d 1246 (Fla. 2004) and Douglas' conviction(s) and sentence(s) were affirmed and a mandate was issued on July 15, 2004.

Douglas filed a Writ of Certiorari with the United States Supreme Court (USSC) on October 13, 2004, which was denied on January 10, 2005. Douglas v. Florida, 543 U.S. 1061 (2004).

Douglas filed an Amended 3.851 Motion to Vacate Judgment and Sentence on May 17, 2005 raising 28 claims. Douglas filed a Second Amended 3.851 Motion on December 28, 2005 raising 32 claims: (1) Whether rule 3.851, Florida rules of criminal procedure is unconstitutional in that it requires any motion for post-conviction relief to be filed within on year of the date a capital defendant's conviction becomes final; (2) Whether the trial court properly found the HAC aggravator applied in this case; (3) Whether Florida's jury instructions on aggravating circumstances are vague and overboard; (4) Whether Douglas is innocent of first degree murder and denied adversarial testing; (5) Whether newly discovered evidence establishes that Douglas' convictions and sentence are unconstitutionally unreliable in violation of the 5th, 6th, 8th, and 14th amendment; (6) Whether Douglas is innocent of the death penalty; (7) Whether the prosecutor impermissibly suggested to the jury that the law required it to recommend a sentence of death; (8) Whether Douglas' inability to interview jurors violates his rights under the 6th, 8th, and 14th amendments; (9) Whether the trial court erred in instructing the jury that "No one has the right to violate the rules we all share;" (10) Whether the trial counsel was ineffective during the penalty phase of Douglas' capital trial; (11) Whether Florida's capital sentencing statute fails to prevent the arbitrary and capricious imposition of the death penalty or violates Douglas' constitutional right to due process and to be free from cruel and unusual

punishment; (12) Whether Douglas' constitutional rights were violated because no reliable transcript of his capital trial was produced rendering reliable appellate review impossible; (13) Whether Douglas' constitutional rights were violated because the trial court permitted the state to introduce gruesome and shocking photographs to the jury; (14) Whether Douglas' constitutional rights were violated when defense counsel failed to adequately question potential jurors about their views on the death penalty and failed to ensure an impartial jury was seated; (15) Whether the trial judge erred in instructing the jury regarding expert testimony; (16) Whether the trial judge erred in refusing to find and weigh the mitigating circumstances set out in the record; (17) Whether the instruction of non-statutory aggravating factors resulted in the arbitrary and capricious imposition of the death penalty in violation of the 8th and 14th amendments; (18) Whether the prosecutor's comments and jury instructions unconstitutionally diluted the juror's sense of responsibility toward sentencing in violation of the United States Supreme Court's decision in Caldwell v. Mississippi; (18-2) Whether the trial counsel was ineffective at the guilt and penalty phase of Douglas' capital trial, including the following subclaims: a) counsel was ineffective in failing to subpoena critical penalty phase witnesses; b) counsel was ineffective by failing to present available mental health mitigation; c) counsel was ineffective in failing to object and allowing the state to lead witnesses on direct examination; d) counsel was

ineffective in failing to investigate and impeach critical state witnesses; e) counsel was ineffective by failing to investigate, develop, and present readily available defenses based on the Defendant's diminished capacity; g) trial court erred in rejecting mitigating evidence; (19) Whether Douglas was deprived of an adequate mental health evaluation in accord with the United States Supreme Court's decision in Ake v. Oklahoma; (20) Whether the aggravating factors found by the trial judge were unconstitutionally applied; (21) Whether there was improper consideration of the victim impact evidence; (22) Whether the trial judge's instructions improperly shifted the burden to the defendant to prove a life sentence was appropriate; (22-2) Whether the jury was misled about its role in sentencing in violation of the 8th and 14th amendment; (23) Whether the trial judge erred in permitting the state to argue a lack of remorse (24) Whether the state withheld material and exculpatory evidence, whether counsel was ineffective for failing to investigate and whether Douglas was deprived of an adequate adversarial testing (25) Whether cumulative error deprived Douglas of a fair trial in violation of the 6th, 8th, and 14th amendments; (31)(sic) Whether the trial was ineffective at the guilt and penalty phase of Douglas' capital trial; (32) Whether the totality of the trial demonstrates counsel was ineffective at the guilt and penalty phase of Douglas' capital trial; (33) Whether the state withheld material and exculpatory evidence in violation of Brady v. Maryland; (34) Whether Florida's capital sentencing scheme

is unconstitutional in light of the United States Supreme Court decision in Ring v. Arizona; (35) Whether Douglas' death sentence is disproportionate.

The court after Huff hearing, in a May 16, 2006 Order, granted evidentiary hearing on Claim 10, in part (only with respect to the claim that trial counsel was ineffective for failing to investigate available mental mitigation evidence and to present the testimony of Dr. Harry Krop during the penalty phase of the Defendant's capital trial), and on Claim 18-2, in part (only with respect to the claim that trial counsel was ineffective during the investigation and presentation of available mental mitigation evidence through Dr. Krop during the penalty phase of the Defendant's capital trial). An evidentiary hearing was conducted on October 12, 2006 and November 21, 2006.[1] On November 20, 2009, in written order, the court denied all claims. This appeal follows.

Douglas is currently incarcerated in Union Correctional Institution in Raiford, Florida.

[1] After evidentiary hearing was conducted in this case, post-conviction counsel withdrew from the case due to his Judicial appointment in the Florida Fourth Judicial Circuit. Undersigned assumed representation of Douglas on February 23, 2009. On March 5, 2009 undersigned filed a motion with the court to stay ruling on the 3.851 Motions of previous counsel so that undersigned could review the record. This motion was denied by the court on March 24, 2009.

STANDARD OF REVIEW

Appellate courts review a circuit court's resolution of a Strickland claim under a mixed standard of review, because both the performance and the prejudice of the Strickland test present mixed questions of law and fact. Appeals courts defer to the circuit court's factual findings, but appellate courts review de novo the circuit courts legal conclusions. Sochor v. State, 883 So. 2d 766 (Fla. 2004).

However, though the trial court's factual findings are to be given deference, said trial court decisions must be supported by competent, substantial evidence in order for an appellate court to give same. Id. [Holding that, "so long as the trial court's decisions are supported by competent, substantial evidence, an appellate court will not substitute its judgment for that of the trial court on questions of fact, and likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court.]. *See also* Oceanic International Corp v. Lantana Boatyard, 402 So. 2d 507 (Fla. 4th DCA 1981) [Holding that, "when an appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence, or that the trial court has misapplied the law to the established facts, then the decision is clearly erroneous and the appellate court will reverse because the trial court has failed to give legal effect to the evidence in its entirety."].

Lastly, when an appellate court is convinced that…the trial court misapplied the law to the established facts, then the decision is "clearly erroneous" and the appellate court will reverse because the trial court has "failed to give legal effect to the evidence" in its entirety. Holland v. Gross, 89 So. 2d 255 (Fla. 1956); See also Dorton v. Jensen, 676 So. 2d 437 (Fla. 2nd DCA 1996).

STATEMENT OF THE ISSUES

I. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PROVIDE HIS EXPERT WITH THE REQUESTED INFORMATION TO DIAGNOSE MR. DOUGLAS WITH AN "EXTREME EMOTIONAL DISTURBANCE," CHRONIC DEPRESSION, BORDERLINE INTELLECTUAL FUNCTIONING, FRONTAL LOBE IMPAIRMENT, AND OTHER SIGNIFICANT MENTAL HEALTH MITIGATION AND SUBSEQUENTLY PRESENT THESE MITIGATORS TO THE JURY

II. WHETHER THE REQUIREMENT THAT DOUGLAS MUST FILE A MOTION UNDER FLA. R. CRIM. PRO. 3.851 ONE YEAR AFTER HIS CONVICTION HAS BECOME FINAL VIOLATES HIS RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE 8TH AND 14TH AMENDMENTS AS WELL AS THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND ACCESS TO THE COURTS AS WELL AS HIS RIGHT TO PETITION FOR WRIT OF HABEAS CORPUS

III. WHETHER FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND IS A VIOLATION OF THE CONSTITUTIONAL PROVISIONS ENSURING DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT

SUMMARY OF THE ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PROVIDE HIS EXPERT WITH THE REQUESTED INFORMATION TO DIAGNOSE MR. DOUGLAS WITH AN "EXTREME EMOTIONAL DISTURBANCE," CHRONIC DEPRESSION, BORDERLINE INTELLECTUAL FUNCTIONING, FRONTAL LOBE IMPAIRMENT, AND OTHER SIGNIFICANT MENTAL HEALTH MITIGATION AND SUBSEQUENTLY PRESENT THESE MITIGATORS TO THE JURY

Trial counsel for Douglas failed to provide its mental health expert with background information such as school records and contact information for Douglas' family member despite explicit requests for same by the expert for further evaluation of Douglas for mitigation purposes.

Douglas' school records, which were not secured by trial counsel nor provided to the jury or the expert for diagnostic and evaluative purposes evince that Douglas suffers from borderline intelligence, with an IQ of 75; that he was diagnosed with cognitive and emotional disabilities as a child such as excessive anxiety, self-doubt, and self-consciousness; that he received C's, D's, and F's in almost every class despite regular attendance throughout his short academic career; and that he was unable to complete the seventh grade after failing three times.

Had these records been presented to the mental health expert and had Douglas undergone a follow up evaluation with this expert, as requested, trial counsel would have learned that Douglas has emotional and cognitive disabilities,

frontal lobe dysfunction, suffers from chronic depression as a result of his childhood abuse, that because the depression was never treated, he turned to drugs and alcohol, and that at the time of the crime, Douglas was under extreme mental or emotional disturbance.

There was no valid, strategic reason for failing to follow up with the mental health expert, as defense counsel's decision to follow its chosen penalty was made without completing a reasonable mitigation investigation.

Douglas was prejudiced by the failures of his trial counsel—had counsel conducted a complete mitigation investigation and provided his mental health expert with requested information, a the statutory mitigator of extreme mental or emotional disturbance would have been proven; various new non-statutory mitigators would have been proven; the court would have found that several proven non-statutory mitigators deserved greater weight; and the found statutory mitigator, that Douglas had no significant criminal history, would have been given greater weight. Had this additional, powerful mitigation been shown during the penalty phase, there is a reasonable likelihood that the jury would not have recommended death for Douglas.

II. THE REQUIREMENT THAT DOUGLAS FILE A MOTION UNDER FLA. R. CRIM. PRO. 3.851 ONE YEAR AFTER HIS CONVICTION HAS BECOME FINAL VIOLATES HIS RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE 8TH AND 14TH AMENDMENTS AS WELL AS THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND

ACCESS TO THE COURTS AS WELL AS HIS RIGHT TO PETITION FOR WRIT OF HABEAS CORPUS

The distinction between inmates sentenced to death and all other inmates with respect to the filing deadlines for motions for post-conviction relief under Fla. R. Crim. Pro. 3.850/3.851 is unconstitutional. The one-year filing deadline for Motions filed under 3.851 violates a defendant's rights to due process, equal protection, effective assistance of counsel, access to the courts, and the defendant's rights to petition for writ of habeas corpus.

III. FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND IS A VIOLATION OF THE CONSTITUTIONAL PROVISIONS ENSURING DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT

The sentencing statute denies Douglas due process and constitutes cruel and unusual punishment because electrocution or lethal injection imposes physical and psychological torture. Florida's capital sentencing statute fails to prevent the arbitrary imposition of the death penalty. Florida Statute § 921.141 violates Art. V, Sec. 2(a) of the Florida Constitution by regulating matters of practice and procedure which are exclusively within the province of the Florida Supreme Court. (1 R 116-118.)

ARGUMENT I

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PROVIDE HIS EXPERT WITH THE REQUESTED INFORMATION TO DIAGNOSE MR. DOUGLAS WITH AN "EXTREME EMOTIONAL DISTURBANCE," CHRONIC DEPRESSION, BORDERLINE INTELLECTUAL FUNCTIONING, FRONTAL LOBE IMPAIRMENT, AND OTHER SIGNIFICANT MENTAL HEALTH MITIGATION AND SUBSEQUENTLY PRESENT THESE MITIGATORS TO THE JURY

I. Trial counsel failed to investigate and provide sufficient background information to the mental health expert retained by counsel for the purpose of determining competency and establish mitigating evidence.

Because the mental health expert retained during Douglas' trial proceedings was not provided necessary background information to assist in an evaluation of mental mitigation, counsel was left unaware that Douglas suffered an extreme emotional disturbance at the time of the crime, suffered chronic depression since childhood, was functioning at in the borderline range of intelligence with a full scale IQ of 75, and had frontal lobe dysfunction likely resultant from organic brain damage. As such, this powerful mitigation was not presented in the penalty phase. The mitigation that was presented in the penalty phase, according to the trial court's sentencing order was, "***relatively insignificant," "when considered collectively***." (3 R 440) [2] (emphasis added.)

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[2] Trial counsel's failure to adequately investigate, prepare, and present evidence at the penalty phase of Douglas' trial was raised on 3.851 appeal at the trial level in claims 10,[2] 18 subpart 2,[2] and 19[2] of previous counsel's brief. The trial court granted evidentiary hearing on claims 10 and 18-2.[2]

A. Counsel failed to honor the request of its mental health expert to provide him documentation relevant to mitigation and schedule a date where the expert could conduct a full neurological battery of testing.

Dr. Krop was retained by trial counsel to evaluate Douglas for competency and potential mitigation. Dr. Krop issued an initial report to trial counsel (well before Douglas' trial) on June 15, 2000 stating that Douglas was competent to proceed. In this report, Dr. Krop, who had been unable to develop mitigation due to lack of information, requested additional records and materials necessary for completing a full neurological battery of testing for establishing mental mitigation. Dr. Krop requested depositions, school records, prior police reports, prior PSI's, medical records, and any other relevant material that might pertain to potential mitigation. (3 R 385-86). Dr. Krop's letter also requested that counsel assist him in coordinating a time where he could administer a complete battery of neurological testing necessary for determining whether mental mitigation existed. (3 R 386).

Dr. Krop did not receive any of the requested information from Douglas' counsel. (3 R 386). Dr. Krop did not have an opportunity to evaluate Douglas for mitigation purposes. (3 R 386). Dr. Krop did not have the opportunity to speak with Douglas' family members. (3 R.386). According to Dr. Krop, "It appears that I just – I never followed up with Mr. Douglas and I guess never heard from Mr. Eler, so I'm not sure I would have even known that the case had gone to trial."

(3 R 392). Second chair counsel, whose sole responsibility was to handle the penalty phase of Douglas' trial, never spoke with Dr. Krop about Douglas' case. (6 R 956). Nor did penalty phase counsel provide Dr. Krop with the requested information.

B. Counsel failed to conduct an adequate mitigation investigation in preparation for the penalty phase of Douglas' trial.

The failure to provide Dr. Krop with documentation, additional information, and family contacts that he requested, in addition to the failure of counsel to schedule a complete battery of neurological testing, resulted in counsel being unaware that substantial mental health mitigation existed in Douglas' case save a "reading deficiency." Had counsel conducted a reasonable mitigation investigation, they would have been aware than Douglas suffered from an extreme emotional disturbance at the time of the crime; suffered from chronic depression since childhood; had an IQ of 75 and was in the borderline range of intelligence; had frontal lobe dysfunction likely resultant from organic brain damage; was placed in special education classes for the duration of his academic career due to his cognitive and emotional difficulties; received mostly C's, D's and F's, failed the second and fourth grades, and was unable to complete the seventh grade, despite very good attendance thus dropped out of middle school; displayed unspecified inappropriate behaviors at school at precisely the same time that his father left the home; turned to drugs and alcohol as a way to cope with his depression; etc.

Without knowledge of this mitigation, defense counsel could not explain or link Douglas' abuse history, educational history, and cognitive and mental deficiencies with the crime itself, which resulted in a penalty phase where no statutory mitigation was presented, and the nonstatutory mitigation that was presented, as opined by the trial court, ***when considered collectively, is relatively insignificant***." (3 R 440) (emphasis mine).

According to the FSC in Hurst v. State, 18 So. 3d 975, 1008 (Fla. 2009), "an attorney's obligation to investigate and prepare for the penalty portion of a capital case *cannot be overstated* because this is an integral part of a capital case." Citing State v. Pearce, 994 So. 2d 1094, 1102 (Fla. 2008) (internal citation omitted) (emphasis added). The United Status Supreme Court in Wiggins stated that the American Bar Association (ABA) standards have long been utilized to determine what is reasonable in terms of trial counsel's performance:

> The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor...

Wiggins v. Smith, 539 U.S. 510, 524-25 (2003), citing Strickland v. Washington, 466 U.S. 668, 688 (1984), ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p 93 (1989)(internal citations omitted); see also Parker v. State, 3 S. 3d 974,982 (Fla. 2009). The United States Supreme Court in Wiggins noted that the topics counsel should consider presenting

for mitigation include, "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Id. at 524, citing ABA Standards for Criminal Justice 4-4.1, commentary, p 4-55.

In Blackwood, with facts similar to those in Douglas, the FSC held that where trial counsel fails to consult with and present testimony of a mental health expert, a defendant is denied effective representation in the penalty phase of trial. Blackwood v. State, 946 So. 2d 960, 971 (Fla. 2006). In Blackwood, the court found that the defendant, "was denied the effective assistance of counsel because trial counsel failed to adequately investigate and prepare mitigation evidence and because he was deprived of the adequate assistance of a mental health expert." Id. Blackwood's attorney retained a mental health expert and a competency evaluation was conducted. Id. However, the FSC found that where there was no evidence that trial counsel had discussed non-statutory mental health mitigation evidence with an expert, this was grounds for reversal even upon counsel's contention that his decision not to present mental health mitigation was strategic in nature. Id. at 971-973.

C. Counsel failed to conduct an adequate mitigation investigation although such mitigation was available and discoverable.

Because counsel failed to provide Dr. Krop the information he requested after Douglas' initial evaluation, or follow up with Dr. Krop so that additional

testing could be performed, counsel failed to discover extensive mitigation relating to Douglas' cognitive and mental deficiencies, including the existence of the "extreme mental or emotional distress or disturbance" mitigator at the time of his crimes.

<u>Extreme Emotional Disturbance statutory mitigator</u>

In Douglas' 3.850 post-conviction proceedings, testimony of two licensed mental health experts were given, demonstrating that if counsel would have investigated Douglas' case, the statutory mitigator of "extreme emotional disturbance" was available.

In post-conviction proceedings, Dr. Krop indicated that after conducting a full battery of neuropyschogical testing for purposes of the post-conviction proceedings, although it is not his job to quantify emotional distress or disturbance, he believed that Douglas was under serious mental or emotional disturbance at the time of his crime:

> Defense: Based on your evaluations of Mr. Douglas in total, would you be able to testify that he committed these crimes for which he's under sentence at a time when he was under the influence of extreme mental or emotional disturbance?
>
> Dr. Krop: I hear your question and – I'm just looking through some of the other testing. I would say and again, I would probably say this if you or the defense attorney would ask me that question on the stand, I would say that that's really a question for the trier of fact.

> What I would say is *clinically I believe he was emotionally distraught at the time, most likely under the influence of alcohol and combined with the neuropsychological deficits, which would have been present at the time in question, that he would likely have presented with a serious emotional or psychological disturbance.* I probably would not – would not use the terms, extreme, because I believe that's more of a trier of fact term rather than a clinical term.

(3 R 401-2)(emphasis added.) Furthermore, Dr. Miller, a licensed forensic psychiatrist, upon reviewing Douglas' case and meeting with Douglas for the purpose of evidentiary hearing opined in evidentiary hearing that Douglas was under extreme mental or emotional disturbance at the time of the crime:

> Defense: So would you say that he was suffering from extreme mental emotional condition at the time of the act or the incident?
>
> Dr. Miller: <u>Yes</u>, all the diagnostic entities that I set forth do appear in the diagnostic and statistic anatomy and are significant entities.

(3 Supp 456). The state offered no evidence or witnesses to rebutting these findings at the 3.850 evidentiary hearing.

Because evidence was available to support the statutory mitigator of "extreme mental or emotional distress" but trial counsel failed to discover and present it, Douglas was prejudiced. The FSC in <u>Rose</u> stated that this court has "consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, and the failure to present it in the penalty phase may constitute

prejudicial ineffectiveness." Rose v. State, 675 So. 2d 567 (Fla. 1996)(citations omitted).

Mitigation derived from expert evaluations

Had counsel utilized the available mental health expert's services for the penalty phase, a litany of non-statutory mental mitigation would have been discovered that would have linked and given an explanation as to why Douglas' could have committed the crimes he was convicted of.

Mental health experts Dr. Krop and Dr. Miller both evaluated in the post-conviction stage of Douglas' proceedings.

Dr. Krop was retained by post-conviction counsel to conduct a neuropsychological evaluation for mental mitigation. (3 R 10). Dr. Krop found that Douglas' IQ was consistent with the IQ test that was administered when Douglas was 10 years old. (3 R 12). Additionally, after administering a battery of tests specific for diagnosing frontal lobe deficits, Dr. Krop opined that Douglas suffers from frontal lobe deficiencies and that frontal lobe deficiency is typically resultant from organic brain damage. (3 R 389).

Dr. Miller testified in evidentiary hearing that Douglas experienced "extreme violence" (3 Supp 446) by his father as a child. Because Douglas was not provided proper treatment as a youngster to address the violence in his home, Douglas was inclined to engage in destructive behaviors. Dr. Miller found that

Douglas had a profound alcohol and drug abuse problem, and that his drug use would have "inhibited functions of the frontal lobe." (3 Supp 455). Dr. Miller found that the "very intense ingestion" of drugs and alcohol combined with the rage and frustration which was built up in him and repressed through the years, made it "understandable, at least in part, why if in fact he engaged in the acts he was convicted of, why he did so, at least in large part." (3 Supp 456).

Dr. Miller at evidentiary hearing explained how Douglas' background led to the type of behavior of which he was convicted. Dr. Miller stated that Douglas displayed symptoms which are "subtle indices of neural dysfunction, problems with nerve cell exchanging information in the manner in which they should." (7 R 1149). Dr. Miller's diagnostic impressions were that Douglas suffered with alcohol and drug dependency, chronic depression, related to the abuse that Douglas suffered as a child, and personality disorder, NOS, not otherwise specified with clustered B features. Clustered B features are, "the area of personality disturbance that is embraced by persons who suffer problems with egocentricities, self-centeredness, lack of empathy, problems with restraint, inhibition, problems with inhibitions, problems with deferring future gain to deferring their activities for something which might be a reward in the future." (7 R 1149).

Mitigation derived from school records

Had counsel conducted an adequate investigation and gathered school records, the following mitigation could have been presented at penalty phase, or at a minimum provided to a mental health expert in order to link and explain Douglas' personal and educational history with the crime:

Low IQ

A 1985 report of school psychologist Bernice Parker indicated that Douglas was originally tested in 1983, when Douglas was 8, and it was determined that he was "functioning in the borderline range of intelligence." Weaknesses were identified in long term memory, abstract thinking, arithmetic reasoning, comprehension, and psycho-motor functioning." (1 Supp 2-3).

In 1985, when Douglas was 10, school psychologist, Parker administered the Weschler Intelligence Scale for Children-Revised; the IQ test results indicate that Douglas had a full scale IQ of 75,[3] which is within the borderline range of intelligence. (1 Supp 2-5).

Academic and behavioral problems related to anxiety, poor self concept, ego strength, and personality instability

[3] Psychologist, Dr. Harry Krop reviewed the school records provided to him by appellate counsel and performed an adult Weschler Intelligent test on Douglas in 2006 in preparation for evidentiary hearing in the trial court. Dr. Krop's testing revealed that Douglas had a full-scale IQ of 77, which was consistent with the 1985 test.

Ms. Parker opined that Douglas' academic and behavior problems, at the age of 10, were related to feelings of anxiety, poor self concept, poor ego strength and personality instability. (1 Supp 3). Additionally, the report indicates that Douglas showed weaknesses in long term memory, abstract thinking, arithmetic, reasoning, comprehension, and psycho-motor functioning. (1 Supp 1-3). The school psychologist noted that Douglas' "Emotionality" indicated: 1) feelings of insecurity personality instability; 2) poor self concept, poor peer relationships, self blame; 3) feelings of self-doubt, excessive anxiety. (1 Supp 3). The results of the Piers-Harris Children's Self-concept Scale indicate that Douglas, at the age of 10, perceived himself as having problems with intellectual achievement, peer relationships, and behavior patters. (1 Supp 3).

Douglas' problems were not at all related to truancy, as the records indicated that he had good attendance. (1 Supp 2, 6).

Repeatedly failed grade levels, placed in Exceptional Student Education

Douglas failed the second and fourth grades, and failed the seventh grade three times, received exclusively C's, D's, and F's, and was in Exceptional Student Education under the tutelage of a teacher for the Emotionally Handicapped from 1985 to 1991. (1 Supp 6, 9). In 1991, at the age of 16, Douglas dropped out of the seventh grade after attempting to pass this grade level three times. (1 Supp 7-9).

The third time that Douglas attempted to pass the seventh grade, he did not miss a single day of school. (1 Supp 7).

If trial counsel for Douglas had gathered Douglas' school records for the penalty phase of Douglas' trial, it would have altered the defense strategy. There was no strategic reason in failing to gather these records. The information contained in the school records provides compelling explanation for why Douglas "chose to stop attending school" as stated by the court in its sentencing order and by the prosecution in its closing argument. (3 R 438). It also would have prohibited the prosecution's repeated argument in the penalty phase that Douglas was smart and had "no physical or mental deficiencies" prohibiting him from succeeding in life. (16 R 1297) Because trial counsel had not gathered school records, counsel knew so little about Douglas' background, that it presented inaccurate information—that Douglas never finished *high school*—to the court as non-statutory mitigation—when in fact Douglas had not even finished middle school. (1 Supp 7).

Correlation with difficulties in school to facts of the crime

Had Douglas' school records been available at trial, the defense could have used them to support the mitigation they did present, diminished the state's argument that Douglas had everything going for him and chose his own path, and

correlated Douglas' unusual educational struggles with the facts of the instant crime.

Defense counsel could have also linked Douglas' placement in special education classes with the year his father was convicted for raping Douglas' sister and subsequently removed from the household. (3 R 435; 1 Supp 2). This would have diminished the trial court's finding in its sentencing order that his father's absence was "beneficial" to Douglas because his father was a violent and abusive man. (3 R 436).

Counsel did not gather medical records, school records, employment records, nor honored their expert's request to conduct a full battery of testing necessary for discovering mental mitigation, as suggested in Wiggins, Parker, Blackwood, and by the ABA. As proven with counsel's testimony at evidentiary hearing, she simply was not aware of Douglas' IQ, which, if discovered, was plainly stated in Douglas' school records:

> State: Did [Douglas] seem to be intelligent – well, an intelligent guy?
>
> Trial counsel: From what I recall, yes, ma'am. [Douglas] certainly never gave me any indication, just from talking to him, that he had any cognitive deficits or unusually low IQ or anything like that. I've certainly represented hundreds of people who have given that impression just from talking to them. So I, you know, can certainly tell the difference…

(6 Supp 970)

Trial Counsel:	[Y]ou can tell by talking to someone when they're, you know, sub par intelligence.

(6 Supp 971)

Defense:	You had said something about low IQ. What is a low IQ to you?
Trial Counsel:	Well, I have had clients who have ranked anywhere from the fifties to the low seventies, and even somebody who's – I mean, I can recall specifically one client that I'll never forget, who had like a 74…I can tell from talking to her at a 74 IQ that she's very slow, that she doesn't understand things, and et cetera. So it's – I mean, like I said, it's pretty easy to tell.

(6 Supp 973).

Mr. Morrow:	*Would it surprise you to hear that Mr. Douglas has an IQ of 75?*
Trial Counsel:	*It would shock me*.

(6 Supp 974)(emphasis added). When asked by post-conviction counsel at evidentiary hearing whether school records for Douglas were collected by trial counsel, counsel responded:

> You know, I don't believe – I don't know. I looked at what was left of my file and there's portions of the file that were missing, so I'm not sure exactly. I don't have an independent recollection…of what records we had or we didn't have.

(6 R 927). When asked by post-conviction counsel at the evidentiary hearing whether Douglas was evaluated for a complete full battery of neuropsychological

and mitigation evaluation by Dr. Krop, per the Doctor's request, counsel responded:

> Yeah. I'm not exactly sure what Dr. Krop did. I know that as far as my involvement was, I seem to recall getting him appointed early on, had an initial competency, and then handing the torch over to Ms. Helpler [penalty phase counsel] and having some teleconferences with Dr. Krop regarding his findings. I don't know if that answers your question but that's what I remember.

(6 R 930). However, Dr. Krop had no memory or any recollection of having spoken with trial counsel after his initial evaluation and report. (3 R 392). As stated above, penalty phase counsel for Douglas never spoke with Dr. Krop regarding mitigation or anything else. (6 R 956).

II. <u>Douglas was prejudiced by the deficiencies of his counsel</u>

The jury, the trial court, nor the Florida Supreme on direct appeal was aware of the impact of Douglas' cognitive and mental deficiencies and disorders and what impact they had on his mental state at the time of the crime. This mitigation would not only have been used to support the mitigation the defense used at trial, but countered the prosecution's repeated efforts to diminish the mitigation by stating Douglas had no physical or mental disabilities impairing him from not only committing the crime, but from succeeding at life. Coupled with the fact Douglas was convicted only of felony murder using two aggravating factors and no statutory mitigators with "collectively insignificant" nonstatutory mitigation, confidence in the outcome of the penalty phase is undermined.

A. Evidence Presented in Penalty Phase

As conceded by the state, the entirely of the defense's penalty phase consisted of calling Douglas' family members and friends to portray Douglas in a positive light—as a person that deserves a second chance. (1 R. 10)(3 R. 423) The state opined that the minimal mitigation presented by the defense should be given little weight because "nothing in the Defendant's background is compelling mitigation as he is not the product of depravation, the victim of circumstance, or a result of the system." (3 R 425) The state, in its memorandum in support of the death sentence, stated that Douglas was "a man standing at the end of his chosen path." (3 R 425)

The trial court considered thirty non-statutory mitigators proposed by trial counsel, rejected 14,[4] and found that the following 16 were proven:

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[4] The mitigating circumstances rejected by the trial court were:

> (1) Douglas' father left the home when Douglas was nine years old (not mitigating); (2) Douglas' father did not spend a significant amount of time with Douglas after he left the home (not mitigating); (3) Douglas loves his children (not proven); (4) Douglas is a good father to his children (not proven); (5) Douglas supports his children by buying food, diapers and other items (not proven); (6) Douglas is a positive, upbeat person (not proven); (7) Douglas has worked at several different jobs (not mitigating); Douglas has an outgoing, friendly personality (not proven); (9) Douglas is and always has been respectful to his elders (not proven); (10) Douglas has been a good son to his mother and is protective of her; (11) Douglas has been a good brother to his siblings (not proven); (12) Douglas was impaired by alcohol at the time of the crime (not mitigating); (13) Douglas has

> (1) Douglas has a close-knit, religious family (little weight); (2) Douglas' family supports him even after his conviction (little weight); (3) Douglas was abused by his father both psychologically and physically (little weight); (4) Douglas witnessed his father commit acts of domestic violence against his mother (little weight); (5) Douglas and his siblings were afraid of their father when they were children (little weight); (6) Douglas' father was arrested for child abuse after beating Douglas with a belt (little weight); (7) Douglas' father sexually abused Douglas' oldest sister for seven years and was eventually arrested for the crime (little weight); (8) the revelation of the sexual abuse of Douglas' oldest sister had a devastating impact on Douglas and the rest of his family (little weight); (9) Douglas has an interest in the scriptures (little weight); (10) Douglas was helpful to his father around the house (little weight); (11) Douglas was diagnosed with learning disabilities in the second grade (very little weight); (12) Douglas never finished high school (very little weight); (13) Douglas has made plans for self-improvement since his incarceration, including obtaining his GED (little weight); (14) Douglas can be rehabilitated (moderate weight); (15) Douglas can be a productive inmate in prison (moderate weight); and (16) Douglas exhibited appropriate behavior during the trial (little weight). The trial court rejected Douglas' other fourteen proposed mitigating circumstances as either not proven or not mitigating in nature. Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court agreed with the jury's recommendation and imposed the death penalty.

(3 R 411-12) Douglas v. State, 878 So. 2d 1246 , 1254 (Fla. 2004). Douglas' cognitive and mental deficiencies were not presented to the judge or jury at trial because counsel had not conducted a sufficient mitigation investigation; defense

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been courteous and pleasant to the courtroom personnel (not proven); and (14) codefendant Misty Jones entered a guilty plea to the charge of accessory after the fact and will receive a maximum sentence of seven years imprisonment (not proven).

counsel was unaware that the powerful statutory and non-statutory mitigation presented in post-conviction existed. Counsel did not present any statutory mitigation to the jury, nor did they present any to the trial court in the Spencer hearing[5]

B. The Florida Supreme Court in Douglas' direct appeal specifically distinguished Douglas' from cases where the death penalty was found disproportionate based on the lack of statutory mitigation of extreme emotional disturbance in his case

The FSC in its opinion upholding the death sentence for Douglas specifically referred to the fact that Douglas had not proven the statutory mitigator of "extreme mental or emotional distress" in finding the death penalty proportionate in his case:

> Moreover, the cases cited by Douglas to support his argument that his death sentence is not proportionate are distinguishable. In Larkins, 739 So. 2d at 92-93, Sager v. State, 699 So. 2d 619, 621 n.2 (Fla. 1997), Voorhees v. State, 699 So. 2d 602, 606 n.2 (Fla. 1997), Kramer v. State, 619 So. 2d 274, 276 (Fla. 1993), and Nibert, 574 So. 2d 1059, 1061-62 (Fla. 1990), evidence was presented that the defendants suffered from a mental or emotional disturbance at the time of the murder. In this case, although there was testimony that Douglas had trouble reading and was diagnosed with learning disabilities in the second grade, there was no evidence as to how or whether these learning disabilities affected him at or about the time of the murder. Further, no evidence was presented that Douglas suffered from any mental or emotional disturbance.

Douglas, 878 So. 2d at 1263. Had Douglas' trial counsel presented the testimony of Drs. Krop and Miller at the trial level, the statutory mitigator of extreme mental

[5] The trial court found that Douglas did not have a significant criminal history, and accorded this factor little weight because Douglas was involved in drug activity, but was never arrested or convicted. (3 R 434-435)

or emotional disturbance would have been found by the court in Douglas' case. Additionally, evidence that Douglas suffered from frontal lobe dysfunction and an IQ of 75, indicate that Douglas suffered from more than "trouble reading" and "learning disabilities in the second grade." Had this information been presented to court and jury the FSC would have found that Douglas' case is more closely analogous to Larkins, Sager, Voorhees, Kramer, and Nibert where the death penalty was found to be disproportionate.

C. Mental health experts at evidentiary hearing were able to correlate Douglas' personal background, educational struggles, chronic depression, drug and alcohol abuse and dependency, frontal lobe damage, and borderline intellect to the facts of the crime

Mental health experts Dr. Krop and Dr. Miller in Douglas' post-conviction stage of his proceedings provided compelling insight into Douglas' mental state at the time of his crimes.

Dr. Krop was retained by post-conviction counsel to conduct a neuropsychological evaluation for mental mitigation. (3 R 10). Post-conviction counsel provided Dr. Krop with Douglas' school records. (3 R 11). Among his findings, Dr. Krop found that Douglas' IQ was consistent with the IQ test that was administered when Douglas was 10 years old. (3 R 12). Had this information been presented at the penalty phase of Douglas' trial, the court could not have stated in its sentencing order that, "there is no evidence that the Defendant suffered with any learning or mental disabilities in 1999 through the present time" and ruled that the

non-statutory mitigator that Douglas was diagnosed with learning disabilities in the second grade was entitled to only "very little weight." (3 ROA 438)

Additionally, after administering a battery of tests specific for diagnosing frontal lobe deficits, Dr. Krop opined that Douglas suffers from frontal lobe deficiencies and that frontal lobe deficiency is typically resultant from organic brain damage. (3 R 389).

Dr. Miller testified in evidentiary hearing that Douglas experienced "extreme violence" (3 Supp 446) by his father as a child. Dr. Miller stated that individuals who experience violence by witness and experience during their "tender years" are doubly cursed as both witnessing and experiencing violence are "extremely destructive" to children in their developmental period. (3 Supp 454). Dr. Miller described that when there is no one in a child's life to identify the victimization of a child, the effects of the violence go untreated. (3 Supp 454). Dr. Miller stated:

> [T]reatment given time might have been very successful in meliorating these problems [associated with violent household] and moving him into a different lifestyle, for instance, in moving him from the path of needing alcohol or other types of psychopathic or self-treatment to deal with chronic depression and made it less likely that he would act out with violence, precipitous violence, when a stress was introduced into his life.

(3 Supp 454). Because Douglas was not provided proper treatment as a youngster to address the violence in his home, Douglas was inclined to engage in destructive behaviors.

Dr. Miller found that Douglas had a profound alcohol and drug abuse problem, and that his drug use would have "inhibited functions of the frontal lobe." (3 Supp 455). Dr. Miller found that the "very intense ingestion" of drugs and alcohol combined with the rage and frustration which was built up in him and repressed through the years, made it "understandable, at least in part, why if in fact he engaged in the acts he was convicted of, why he did so, at least in large part." (3 Supp 456).

Dr. Miller at evidentiary hearing explained how Douglas' background led to the type of behavior of which he was convicted.

Because the jury was only informed during penalty phase that Douglas was a nice, caring man by friends and family members (a theory entirely inconsistent with his crime), Douglas was deprived of compelling non-statutory mental mitigation that the violence of Douglas' father had a profound effect on Douglas which resulted in drug abuse and ultimately the crimes he was convicted of.

Dr. Miller's testimony, that the abuse experienced by Douglas profoundly affected Douglas' life, even up to the crime, would have dispelled the trial court's

misconception that the domestic violence Douglas both witnesses and experienced was too "remote in time" to be given more than little weight.

D. Statutory mitigator of age was denied where defense counsel presented no evidence that Douglas' mental, emotional, or intellectual age was lower than his chronological age

Defense counsel at trial requested that the court accept the statutory mitigator of Douglas' age at the time of the crime, even though Douglas was 25, because Douglas dropped out of school in the seventh grade and because "25 is pretty young…I would submit that 25, combined with the fact that he never graduated from high school, and the fact that he has been diagnosed with some learning disabilities from a young age supports this mitigator." (17 ROA 1446) The state countered, stating that although the FSC in Sims v. State, 681 So. 2d 1112 (Fla. 1996) does take mental emotional, or intellectual age into consideration, there was no evidence that Douglas functioning below his chronological age. (17 ROA 1447) The state mentioned that "a number of witnesses testified that, in fact, Luther Douglas is very smart, and there was no, of course, expert testimony that his intellectual age is other than his chronological age." (17 ROA 1447)

Based on the information presented by the state and the Sims case, the court denied counsel's request for the statutory mitigating factor of age. (17 ROA 1447) Had counsel found and presented Douglas' school records, which indicate that Douglas has a full scale IQ of 75, and had Douglas presented the testimony of Dr.

Krop whose test results corroborated the 75 IQ and established that Douglas suffers from frontal lobe impairment, it is likely that the court would have found that Douglas' mental, emotional, or intellectual age was far below his chronological age and granted this statutory mitigator.

E. At trial the state negated and demeaned the "good person - second chance" defense as illogical and expressed Douglas be held fully accountable because he was smart and had no physical or mental disabilities prohibiting him from choosing the path he chose

Without an adequate mitigation investigation, the prosecution severely diminished and negated counsel's penalty phase presentation by opining that because Douglas was smart and had everything going for him, and suffered from no physical disabilities, he should be held fully accountable for his actions and receive the death penalty. Without contradiction, the state portrayed Douglas as being a person who had all the tools for success, including intelligence, a loving family, and a person with no physical or mental disabilities. (16 R 1297), and despite this, choose the path of murder.

The stated argued to the jury in its closing Douglas could have finished school but chose not to, stating:

> The defendant didn't finish school, but he's very smart they said. Again, he chose not to finish school. He talked about it but words and actions are two different things. He made no effort to go back and get his education even though he could have.

(17 ROA 1476). The state cross-examined penalty phase witnesses, asking them if they were "aware of any physical or mental disabilities that would prevent him" from going back to school.

(16 R 1297). The state negated Douglas' sparse employment history by stating in closing:

> I asked [defense witnesses] "Is there any reason he couldn't have continued his employment if he had chosen to? Any limitation?" No, by everybody.

. (17 ROA1475) The state told the jury in its closing not to give Douglas a second chance, had he had his second chance with his abusive father was removed from the household, inferring Douglas had no other impediments to his life:

> And the very most important thing of all, the plea yesterday also was for a second chance. Luther Douglas has had his second chance. That abusive father, the center of all of this, moved out of his house nearly two decades ago. That was his second chance, he was free from the tyranny of that father, and he had the love and support of everybody we heard from yesterday, every one of them represented reasons why this did not have to happen. But he is not like them. That is the mitigation.

(17 R1476). Without a reasonable investigation, defense counsel could not rebut the state's contentions that Douglas simply chose his own path without any mental or physical limitation. No evidence was presented, because it was unknown to counsel at the time of Douglas' educational struggles, when Douglas was 10 years old, school psychologist opinion that Douglas suffered from weaknesses in long term memory, abstract thinking, arithmetic, reasoning, comprehension, and

psycho-motor functioning. (1 Supp 1-3). Douglas' "emotionality" indicated feelings of insecurity personality instability; poor self concept, poor peer relationships, self blame, feelings of self-doubt, excessive anxiety. (1 Supp 3). Douglas perceived himself as having problems with intellectual achievement, peer relationships, and behavior problems. (1 Supp 3). Mental health experts who evaluated Douglas for the penalty phase of his proceedings opined that that Douglas' intellectual deficits, abusive childhood, depression, and frontal lobe impairment which led to poor decision-making and self-medication with drugs.

Conclusion

Where it is clear from the record that trial counsel did not conduct an adequate mitigation investigation and failed to find and present Douglas' school records or present expert testimony that Douglas was under extreme mental or emotional distress at the time of the crime and many other powerful non-statutory mitigators, counsel was deficient and there is a reasonable probability that had this mitigation been presented at trial, the jury would not have recommended the death penalty. There was also no strategic reason not to investigate and find the above mitigation and present it to either the jury or the trial court in the Spencer hearing.

ARGUMENT II

THE REQUIREMENT THAT DOUGLAS MUST FILE A MOTION UNDER FLA. R. CRIM. PRO. 3.851 ONE YEAR AFTER HIS CONVICTION HAS BECOME FINAL VIOLATES HIS RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE 8TH AND 14TH AMENDMENTS AS WELL AS THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND ACCESS TO THE COURTS AS WELL AS HIS RIGHT TO PETITION FOR WRIT OF HABEAS CORPUS

This issue was addressed in Claim I of Douglas' Amended 3.851 to the trial court. The trial court denied relief on this claim, stating, "The Florida Supreme Court has repeatedly rejected arguments that the one-year time limit imposed by Rule 3.851 is unconstitutional." (5 Supp 794) Despite the trial court's ruling, Douglas maintains that the distinction as between inmates sentenced to death and all other inmates is unconstitutional. Douglas re-alleges and reincorporates the argument provided in his Amended 3.851 to the trial court in support of this claim. (1 Supp 93-96) In further support, Douglas states:

As argued in Douglas' 3.851, the one-year filing deadline for Motions filed under 3.851 violates a defendant's rights to due process, equal protection, effective assistance of counsel, access to the courts, and the defendant's rights to petition for writ of habeas corpus.

Fla. R. Crim. Pro. 3.850(b) and 3.851(d)(1) violate the due process and equal protection rights of death sentenced individuals and are thereby unconstitutional because they enforce a one-year filing deadline only upon a single class of

appellants. Death row inmates must be afforded due process of the law on post-conviction proceedings. Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994), Huff v. State, 622 So. 2d 982 (Fla. 1993). The U.S. Supreme Court in Rinaldi v. Yeager, 384 U.S. 305 (1966), held that a New Jersey law violated equal protection rights where the only unsuccessful appellants who were required to repay court costs were those who were imprisoned. While the factual situation is different as between Rinaldi and Douglas' case, the analysis is the same.

The court in Rinaldi held:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons…But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification is made.

384 U.S. 305, 308 (internal citations omitted). With regard to the constitutionality of the one-year time limit imposed only upon death-sentenced individuals, the distinctions drawn between the two types of inmates are illusory and thereby irrelevant to the purpose for which the classification is made. The rationale set out by the Florida Supreme Court in the commentary to Rule 3.851 for distinguishing as between death and non-death inmates with regard to the filing deadlines for motions for post-conviction relief is illusory. The explanation that death sentenced individuals are automatically appointed counsel is not a reasonable explanation for

the distinction for a number of reasons: (1) the issues presented in post-conviction appeal in death cases are notoriously complex; (2) the volume of material that an attorney must review in most death cases is exponentially greater than most non-death cases; (3) attorneys are both court-appointed and hired by non-death inmates for purposes of post-conviction appeal and these inmates enjoy a full two year period to file a post-conviction appeal, nonetheless. This creates a system where non-death inmates who have the luck of getting an attorney appointed by the court or can afford to hire an attorney have a better opportunity of gaining relief in post-conviction than death-sentenced individuals.

As demonstrated above, the "rationale" in imposing a significantly reduced filing deadline for 3.850 post-conviction appeals of death-sentenced individuals is false and therefore irrelevant to the purpose for which the distinction was made.

ARGUMENT III

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND IS A VIOLATION OF THE CONSTITUTIONAL PROVISIONS ENSURING DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT

Douglas presented his issue in Claim XI of his Amended 3.851 to the trial court. Within the claim, Douglas raised a number of constitutional challenges to Florida Statute § 921.141. Douglas argued: (1) that the sentencing statute denies him due process and constitutes cruel and unusual punishment because electrocution or lethal injection imposes physical and psychological torture (2) that Florida capital sentencing statute fails to prevent the arbitrary imposition of the death penalty; and (3) Florida Statute § 921.141 violates Art. V, Sec. 2(a) of the Florida Constitution by regulating matters of practice and procedure which are exclusively within the province of the Florida Supreme Court. (1 Supp 116-118) The court denied this claim. (5 Supp 807-810) In support of this issue, Douglas re-alleges and reincorporates the argument provided in his Amended 3.851. (1 Supp 116-118) Undersigned in further support of this claim alleges as follows:

I. Florida's Capital Sentencing Structure is Unconstitutional

Florida's capital sentencing scheme denies Douglas 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. See Richmond v. Lewis, 113 S.Ct. 528 (1992). Execution by lethal injection imposes 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.

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." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to the arbitrary and capricious imposition of the death penalty, as in Douglas' case, and thus violates the Eighth Amendment.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances envisioned in Profitt v. Florida, 428 U.S. 242 (1976). The aggravating circumstances in the Florida capital

sentencing statute have been applied in a vague and inconsistent manner, and the jury receives unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992). 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 even 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. This systematic presumption of death cannot be squared with 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 this issue, defense counsel rendered prejudicially deficient assistance. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

In view of the arbitrary and capricious application of the death penalty under the current statutory scheme, the constitutionality of Florida's death penalty statute is in doubt. For this and previously stated arguments, the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and Article 1 Section 17

of the Constitution of the State of Florida. Its application in Douglas' case entitles him to relief.

Lastly, Douglas claims that failure to have his sentencing jury determine the existence of any aggravating factors beyond a reasonable doubt violates his constitutional rights under the 6th, 8th, and 14th Amendments, because any fact used to increase the authorized punishment (first-degree murder) must be found by said jury. See also: Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); and Blakely v. Washington, 124 U.S. 2531 (2004) (these cases collectively held that any fact, other than a prior conviction, used to increase a sentence beyond the Douglas' authorized punishment, must be found by a jury beyond a reasonable doubt.)

II. Lethal Injection is Unconstitutional

A. Fla. Stat. §§ 945.10(1)(e), 922.10, and 922.106 are unconstitutional.

1) Section 945.10(1)(e) states:

> Confidential information.– Except as otherwise provided in this section, the following records and information of the Department of Corrections are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution:.... (e)Information which if released would jeopardize a person's safety.

Article II, section 3 of the Florida Constitution provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers

> appertaining to either of the other branches unless expressly provided herein.

"The prohibition contained in the second sentence of Article II, section 3 of the Florida Constitution could not be plainer, as [the Florida Supreme Court's] cases clearly have held. [The Florida Supreme Court] has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers." B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994). This "strict separation" means "the legislature is not free to redelegate to an administrative agency so much of its lawmaking power as it may deem expedient." Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978).

Article I, § 24 of the Florida Constitution, Access to public records and meetings, states in relevant part:

> (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.
>
> * * *
>
> (c) This section shall be self-executing. The legislature, however, may provide by general law for the exemption

> of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. . . . Laws enacted pursuant to this section shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

In § 945.10(1)(e), the legislature has granted DOC the authority to create public records exemptions with a single, nebulous "guideline:" that the release of records would jeopardize a person's safety. The breadth of discretion afforded DOC is virtually standardless, and certainly beyond the "no broader than necessary" mandate of the Florida Constitution. Hence, the Legislature has unlawfully delegated the authority vested in them by the Florida Constitution to an administrative agency and, as such is the case, the statute must fall. See, e.g., Clark v. State, 395 So.2d 525 (Fla. 1981) (finding a statute a reasonable delegation of authority because the only discretion the legislature left to DOC in a statute forbidding contraband to brought into a prison was the designation of points of ingress and egress, while the legislature defined--and listed--contraband; cf. Solimena v. DBPR, 402 So.2d 1240 (Fla. 3d DCA 1981) (stating as the basis for upholding a more detailed statute than those attacked here the "recognized exception to the requirement that the legislature expressly enunciate guidelines and

standards occurs in licensing and in the determination of the fitness of license applicants");

Furthermore, nowhere in § 945.10 did the Legislature "state with specificity the public necessity justifying the exemption." Where the Legislature enacts a public records exemption without following the express provisions of Art. I, § 24, the statute must be found unconstitutional. See Mem'l Hosp.-West Volusia, Inc. v. News-Journal Corp., 729 So.2d 373, 380 (Fla. 1999) (Wells, J., writing for a majority of six) ("[W]e believe that an exemption from public records access is available only after the legislature has followed the express procedure provided in article I, section 24(c) of the Florida Constitution.") (emphasis added) (footnote citing to Fla. Const. Art. I, § 24 omitted).

In passing § 922.10, the Legislature, as with § 945.10(1), failed to "state with specificity the public necessity justifying the exemption." See § 922.10 (2000). Worse still, the legislature stated no public purpose whatsoever--much less the specific articulation of public necessity required by the Florida Constitution. Therefore, this court must follow the mandates of the Florida Supreme Court and the Florida Constitution and find § 922.10 unconstitutional. See Mem'l Hosp.-West Volusia, Inc. v. News-Journal Corp., supra; Fla. Const. Art. I, § 24.

B. The Legislature's Act adopting lethal injection is fatally flawed and, of necessity, must be struck down as unconstitutional under controlling case law and the Florida Constitution.

1) The Legislature erased the line between the legislative and Judicial Branches in gross violation of Article II, § 3 of the Florida Constitution.

"The prohibition contained in the second sentence of Article II, section 3 of the Florida Constitution could not be plainer, as [the Florida Supreme Court's] cases clearly have held. [The Florida Supreme Court] has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers." B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994).

Sections 922.105(3), (4), and (5) all exceed the Legislature's power in violation of Fla. Const. Art. II, § 3, in that the Legislature is performing constitutional interpretation which is the exclusive domain of the judiciary. See Marbury v. Madison, 5 U.S. 137 (1803); Commission on Ethics v. Sullivan, 489 So.2d 10 (Fla. 1986)

> The judicial power is defined by the declaration of policy as follows: The judicial branch has the purpose of…adjudicating any conflicts arising from the interpretation or application of the laws. In perhaps the most famous characterization of the judicial power, Chief Justice John Marshall said: "It is emphatically the province and duty of the judicial department to say what the law is."

(internal citations omitted) (citing Marbury); Mikolsky v. Unemployment Appeals Comm'n, 721 So.2d 738, n. 2 (Fla. 5th DCA 1998) ("The fact that interpreting the

law is a uniquely judicial function has been firmly established since at least 1803....") (citing Marbury); State v. Shaktman, 389 So.2d 1045 (Fla. 3d DCA 1980) ("The statutory law, both federal and state, appears to authorize the subject of electronic eavesdropping. These statutes, however, do not and cannot resolve the constitutional issue posed by this case as it is settled that constitutional issues are solely for the courts to determine. Thus, the constitutional issue under discussion remains before us as unresolved as ever.") (citing Marbury and Corn v. State, 332 So.2d 4 (Fla. 1976)) (statutory citations omitted). Therefore, there is no logical conclusion other than that this court should strike down §§ 921.105(3), (4), and (5) as violative of the Florida Constitution.

2) The Legislature violated the Florida Constitutional provisions prohibiting "special laws."

Florida Stat. § 922.105(2) (2000) states in relevant part:

> Execution of death sentence . . . – A person convicted and sentenced to death for a capital crime shall have one opportunity to elect that his or her death sentence be executed by electrocution. . . . [I]f mandate issued before the effective date of this act, the election must be made and delivered to the warden within 30 days after the effective date of this act. . . .

This portion of § 922.105(2) applies only to specific individuals who were known to the Legislature at the time the section was passed: death-sentenced inmates whose sentences were final prior to the law's passage. Hence, as the Florida Supreme Court has held for over 60 years—and has in recent years been

restated by the District Court of Appeal controlling this circuit—it is a special law. See State v. Lewis, 368 So.2d 1298, 1301 (Fla. 1979) ("A statute relating to particular persons or things or other particular subjects of a class is a special law."); State ex rel. Gray v. Stoutamire, 179 So. 730, 733 (Fla. 1938) ("[A] statute relating to particular persons or things or other particular subjects of a class, is a 'special law.'"); State v. Leavins, 599 So.2d 1326, 1331 n.10 (Fla. 1st DCA 1992) (same) (citing State v. Stoutamire).

> Florida Const. Art. III, § 11(a)(4) states:
>
> There shall be no special law or general law of local application pertaining to . . . punishment for crime. . . .

As illustrated *supra*, § 922.105(2) is a special law. The only reading to which it is susceptible is that it pertains to punishment for crime. Hence, § 922.105(2) is in clear violation of Fla. Const. Art. III, § 11(a)(4) and must be struck down under precedent governing this court.

3) The Legislature has unlawfully overruled constitutional case law regarding knowing and voluntary waiver of fundamental rights.

In §§ 922.105(1) and (2), the Legislature purports to create a situation whereby Mr. Douglas is to have "elected" to be executed and disfigured in the electric chair either within 48 hours of his execution being scheduled or within 30 days of the law being enacted, else be considered to have, by statute, waived such an "election" and be given a potentially lethal injection administered by an

untrained, unskilled, unknown DOC death squad who has no written or adequate procedures to follow.

"Superadd[ing]" to Mr. Douglas' original sentence the terror this "choice" engenders violates the Eighth Amendment and the Ex Post Facto Clause. See In re Medley, 134 U.S. 160, 171, 172 (1890).

As Justice Wells noted, "A change to lethal injection for inmates **may be** legally attainable based upon an **express waiver** by the prisoner of **any contest** to the method of execution." Provenzano v. Moore, 744 So.2d 413, 419 (Fla. 1999) (Wells, J., concurring). Mr. Douglas has made no such waiver.

To presume that a person has waived one thing and elected another by being silent is, at best, intellectual dishonesty. Mr. Douglas does not know his options and he has never acted in such a way that would legally allow a valid choice or waiver to be found.

By relying on the instant unconstitutional statute, the State cannot meet its burden of establishing a valid waiver because **none** of the procedural requirements for waiving a fundamental right is included in §§ 922.105(1) and (2). A waiver of a fundamental constitutional right **must** comport with stringent procedural requirements – a fact that the Legislature is not at liberty to change. Such a right may **only** be deemed waived after a court has determined that the decision to waive the right is knowing and voluntary. See, e.g., Godinez v. Moran, 509 U.S. 389, 400

(1993). Courts are obligated to embark upon this "serious and weighty responsibility" precisely because of the import of the constitutional rights involved. See Johnson v. Zerbst, 304 U.S. 458, 465 (1938); see also Schneckloth v. Bustamente, 412 U.S. 218, 237-38 (1973) (fundamental rights include rights to counsel, both at trial and upon a guilty plea; right to confrontation; right to a jury trial; right to a speedy trial; and right to be free from double jeopardy). The waiver must appear on the record. See Johnson v. Zerbst, 304 U.S. at 465; see also, United States v. Christensen, 18 F.3d 822, 824 (9th Cir. 1994). A waiver can be accepted only after the person has had the opportunity to consult with counsel. See, e.g., Brady v. United States, 397 U.S. 742, 748 n.6 (1970).

"The purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." Godinez, 509 U.S. at 401 n.12; see also Boykin v. Alabama, 395 U.S. 238, 243 (1969) ("Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."). Thus, before a waiver can be found to be "knowing" and "intelligent," a court must apprise the person "of the dangers and disadvantages" of waiver and ensure "that the record . . . establish[es] that 'he knows what he is doing and his choice is made with eyes open'." Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. U.S. ex rel. McCann, 317

U.S. 269, 279 (1942)); Boykin, 395 U.S. at 244. To verify that the waiver is "voluntary," the court must consider whether, in the totality of the circumstances, it was obtained "by physical or psychological coercion or by improper inducement so that the [individual's] will was overborne." See United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988). The coercive power of the law exceeds well beyond the physical or psychological power discussed in Guerrero, hence, § 922.105(1) and (2) must be found unconstitutional.

4) The Legislature has unlawfully created a retroactive change in punishment in violation of the Ex Post Facto Clause of the Federal Constitution and the Savings Clause of the Florida Constitution.

The substance of the Florida Constitution's prohibition on retroactive application of criminal statutes was clearly established at the time of the crime for which Mr. Douglas was wrongfully convicted and sentenced to die by electrocution. The law was and remains (1) amendment or repeal of a criminal statute could not be applied to a crime committed before a change in the law, Fla. Const. Art. I, § 9, and (2) a change in a method of execution falls within this constitutional rule of non-retroactivity. See Washington v. Dowling, 109 So. 588, 589 (Fla. 1926) (decided after Malloy v. South Carolina, 237 U.S. 180 (1915)); Ex parte Browne, 111 So. 518 (Fla. 1927) (same).

Under these constitutional rules of Florida law, the recent adoption of lethal injection as a method of execution cannot be applied to Douglas. These rules have

remained in place for three-quarters of a century. The Florida Supreme Court's glossing over this precedent and distinguishing of Dowling was an insult to Florida constitutional law and the ruling, purporting to allow lethal injection to apply to Mr. Douglas, violates his federal constitutional right to due process and the prohibition on ex post facto laws.

5) The Legislature has unlawfully delegated its authority in violation of Article II, § 3 of the Florida Constitution.

The amendments to Fla. Stat. §§ 922.10 and 922.105 purport to change Florida's method of execution to "lethal injection." These statutes vest in the Department of Corrections ("DOC") the authority to determine exactly what the lethal mixture will be and how it will be administered. Furthermore, DOC is granted the authority to determine whether a method of execution has been properly elected or "defaulted" by an inmate. These broad concessions of agency discretion constitute unlawful delegations of legislative authority to an executive agency.

"The prohibition contained in the second sentence of Article II, section 3 of the Florida Constitution could not be plainer, as [the Florida Supreme Court's] cases clearly have held. [The Florida Supreme Court] has stated repeatedly and without exception that Florida's Constitution absolutely requires a `strict' separation of powers." B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994) This "strict separation" means "the legislature is not free to redelegate to an administrative

agency so much of its lawmaking power as it may deem expedient." Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978). In the statutes at issue, the Legislature has granted DOC the authority to put people to death by a "lethal injection" without further explanation, has exempted from the definition of the practice of medicine the person who will administer the "lethal injection," and has divested the executive agency responsible for regulating the practice of medicine and all affected parties of any informational or adversarial process for developing and challenging the procedure under Fla. Stat. Ch. 120. (Subsection (7)). Under case law governing this court, these standardless statutes must be found unconstitutional as unlawful delegations of legislative authority.

The Florida Supreme Court has held that:

> Under the [nondelegation] doctrine fundamental and primary police decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program. Cross Key Waterways, 372 So.2d at 925.

While the standard has been variously articulated, "one clear principle emerges from the case law outlined above: the Legislature may not delegate open-ended authority such that 'no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law.'" B.H., 645 So.2d at 993 (quoting Conner v. Joe Hatton, Inc., 216 So.2d 209, 211 (Fla. 1968)). In B.H., the Court found that the Legislature had unlawfully given standardless discretion to

HRS to determine which commitment facilities were sufficiently restrictive such that leaving the facility constituted the crime of escape. As in the instant case, B.H. involved the intersection of the nondelegation doctrine and the criminal law; and where there is a challenge to agency delegation in the criminal context, both separation of powers and due process considerations apply:

> The non-delegation doctrine arising from article II, section 3 is directly at issue because 'the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch.' Perkind v. State, 576 So.2d 1310, 1312 (Fla. 1991). Likewise, due process is implicated because article I, section 9 requires that a criminal statute reasonably apprise persons of those acts that are prohibited; and the failure to do so constitutes a due process violation.

B.H., 645 So.2d at 992. The authorizing legislation in B.H. did not meet the constitutional command of "strict separation" because "while these [statutory] restrictions may create a minimum standard, they completely fail to create a maximum point beyond which HRS cannot go." The Court continued:

> At the very least, all challenged delegations in the criminal context must expressly or tacitly rest on a legislatively determined fundamental policy; and the delegations must also expressly articulate reasonably definite standards of implementation that do not merely grant open-ended authority, but that impose an actual limit – both minimum and maximum – on what the agency may do. Art. II, Sec. 3, Fla. Const. The statute here fails because it made an open-ended delegation of the kind condemned in Conner.

B.H., 645 So.2d at 994. The lethal injection bill set no standards at all--minimum or maximum--it simply informs DOC to carry out "lethal injection." Furthermore,

while the bill requires a person authorized by state law to dispense and mix the lethal "medication," it does not require the person who administers it to be authorized by state law to do so – or require any training whatsoever for that person.

An element courts consider in determining whether an attempted delegation is constitutional is whether the legislation involves fluid and complex issues: "As we recognized in Askew and Brown, the sufficiency of adequate standards depends upon the complexity of the subject matter and the 'degree of difficulty involved in articulating finite standards.'" Avatar Development Corp. v. State, 723 So.2d 199, 207 (Fla. 1998) (citations omitted). Execution by lethal injection is by no stretch of the imagination a fluid and complex scenario like land use or environmental regulation. The Legislature, had they not acted in unconscionable haste, had the ability to determine the specifics themselves. If it held hearings and took expert testimony on lethal injection procedures, it could easily have set forth "minimum and maximum" standards to be followed by DOC. It did not, so this Court must declare the statute to be an unconstitutional delegation of legislative authority. In exempting the development of lethal injection procedures from Chapter 120, Florida's Administrative Procedures Act, the Legislature deprived interested parties of any voice in the development of the lethal injection procedures. Had they not done so, they might otherwise have made such procedures "amenable to

articulation and refinement by policy statements adopted as rules under the 1974 Administrative Procedures Act." See Cross Key Waterways, 372 So.2d at 919. The total lack of any process for input upon and challenge of the lethal injection procedures exacerbates the already overbroad delegation of legislative authority and is further support for this court to follow governing precedent and declare the lethal injection bill unconstitutional.

C. Lethal Injection in Florida is Cruel and/or Unusual Punishment in Violation of the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

1) Lethal Injection Can Be Cruel and Unusual Punishment

Experts in the field have concluded that lethal injection is the most commonly botched form of execution in the United States today. Problems have arisen in the breakdown of the drug sequence leading to gasping for breath and other indications of agony, prolonged difficulty in locating the vein, the straps so tight they impeded the flow of chemicals, prolonged interruption of the process, a kink in the tubing, the needle falling out or a vein collapsing during injection, an interaction of the drugs resulting in the chemicals clogging the IV tube, and unusual reaction to the drugs. These problems have occurred in states having practiced lethal injection for an appreciable period of time.

The consequences of a botched lethal injection can be horrifying: administering sodium pentothal, pancuronium bromide, and potassium chloride

require proper sequencing in the administration. A mistake in sequencing due to mislabeling or other human error, such as seems common in Florida's electrocution process, can result in conscious suffocation, sensation like a "hot poker" in the arm, and painful and gradual paralysis and muscle contractions.

2) Lack of Written Procedures

Despite the record of botched lethal injections in other states and Florida's inability to perform a constitutional judicial electrocution with written procedures, the Florida Department of Corrections has no meaningful written procedures to safeguard Mr. Douglas from the possible horrors of lethal injection. There are no written guidelines specifying the chemicals to be used, proper sequence, proper dose, proper timing in administration, time of inmate's last meal, who is in charge if a specific problem (known risk) arises, etc. The lack of written procedures constitutes an unreasonable risk of pain and suffering to Mr. Douglas in the event the State of Florida chooses to execute him by lethal injection.

3) Confusion Among Key Personnel

All evidence to date, which is admittedly minimal due to the Department of Corrections' defiant posture of denying the existence of any meaningful records detailing the lethal injection protocol, indicates key personnel involved in the lethal injection process are confused about who does what when and under what circumstances. There is particular confusion regarding the medical staff, their role

in a botched execution, and whether they may ethically engage in the process of killing a human being under the guise of minimizing pain. This matter must be clarified by a hearing.

4) Lethal Injection violates the Eighth Amendment

The Eighth Amendment "proscribes more than physically barbarous Punishments." Estelle v. Gamble, 429 U.S. 97, 102 (1976). It prohibits the **risk** of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death," Gregg v. Georgia, 428 U.S. 153, 173 (1976); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981). The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," id. at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. Id. at 370 (emphasis added). All courts must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid undue risks of inflicting inhumane punishments. Compare Maynard v. Cartwright, 486 U.S. 356 (1988), with Lewis v. Jeffers, 497 U.S. 764 (1990). There are no such assurances under the current state of affairs with Florida's lethal

injection procedures. The files and records in this matter do not conclusively defeat the instant claim. This court should grant full hearing into the matter.

CONCLUSION:

Wherefore, Appellant respectfully requests this Honorable Court to reverse and remand the trial court's denial of Appellant's 3.850 Motion for Postconviction relief, entitling Appellant to a new trial and/or penalty phase.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

s/Frank Tassone Esq.
A T T O R N E Y

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to Assistant Attorney General, Meredith Charbula, Esq. at PL-01, The Capitol, Tallahassee FL 32399 on this 2nd day of September, 2010.

s/Frank Tassone Esq.
A T T O R N E Y