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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC12-246

JERONE HUNTER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

Lower Tribunal No. 2004-01380-CFAWS

INITIAL BRIEF OF THE APPELLANT

Robert T. Strain
Florida Bar Number 0325961
Assistant CCRC
Office of the Capital Collateral
Regional Counsel - Middle Region
3801 Corporex Park Dr. - Suite 210
Tampa, Fl 33609-1004
(813) 740-3544
strain@ccmr.state.fl.us
support@ccmr.state.fl.us
Counsel for the Appellant

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REQUEST FOR ORAL ARGUMENT

Undersigned counsel for the Appellant respectfully requests the opportunity to present oral argument pursuant to Fla.R.App.P. 9.320. This is a capital case, the resolution of the issues presented will determine whether Jerone Hunter will live or die, and a complete understanding of the complex factual, legal and procedural history of this case is critical to the proper disposition of this appeal.

JURISDICTIONAL STATEMENT

This is a timely appeal from the trial court's final order denying an original motion for postconviction relief from a judgment and sentence of death. This Court has plenary jurisdiction over death penalty cases. Art. V, § 3(b)(1), Fla. Const.; Orange County v. Williams, 702 So. 2d 1245 (Fla. 1997).

PRELIMINARY STATEMENT ABOUT THE RECORD

References to the record on direct appeal are designated "R" followed by the volume and page number. References to the postconviction record are designated "PCR" followed by the volume and page number. References to the supplemental postconviction record are designated "PCSR" followed by the volume and page number.

STATEMENT OF THE CASE AND FACTS

The procedural history and facts presented at the trial were summarized by

this Court in its direct appeal opinion. In part, they are as follows:

> On August 27, 2004, Hunter was charged in a fourteen-count superseding indictment relating to the murders of Erin Belanger, Roberto Gonzalez, Michelle Nathan, Anthony Vega, Jonathon Gleason, and Francisco Ayo-Roman. Hunter, with codefendants Troy Victorino and Michael Salas, went to trial on July 5, 2006. Codefendant Anthony Cannon previously pled guilty as charged.
>
> The evidence at trial established the following. On the morning of August 6, 2004, a coworker of two of the occupants of a residence on Telford Lane in Deltona, Florida, discovered the victims' bodies. Belanger lived at the Telford residence with Ayo-Roman, Nathan, and Vega. Gonzalez and Gleason happened to be at the house the night of the murders. The six victims had been beaten to death with baseball bats and had sustained cuts to their throats, most of which were determined to have been inflicted postmortem. Belanger also sustained lacerations through her vagina up to the abdominal cavity of her body; the injuries were consistent with having been inflicted by a baseball bat. The medical examiner determined that some of the victims had defensive wounds. A dead Dachshund was also found in the house.
>
> . . .
>
> The jury returned its verdicts on July 25, 2006. It convicted Hunter of six counts of first-degree murder, three counts of abuse of a dead human body, and one count each of conspiracy to commit aggravated battery, murder, tampering with physical evidence, and armed burglary of a dwelling. The jury acquitted Hunter of the two counts of abuse of a dead human body with a weapon (postmortem cutting of throats or stabbing) and one count of cruelty to an animal.
>
> . . .
>
> The jury recommended a death sentence for the murder of Gleason by a vote of ten to two, a death sentence for the murder of Gonzalez by a vote of nine to three, a death sentence for the murder of Nathan by a vote of ten to two, a death sentence for the murder of Vega by a vote of nine to three, and life sentences for the murders of Belanger and Ayo-Roman.

. . .

On August 28, 2006, a Spencer (footnote omitted) hearing was held and the trial court imposed sentence on the noncapital convictions. Sentencing on the capital convictions was imposed on September 21, 2006. The trial court followed the jury's recommendations and sentenced Hunter to death for the murders of Gleason, Gonzalez, Nathan, and Vega. In doing so, the trial court found the following five aggravating circumstances with their respective assigned weights: (1) the defendant has been previously convicted of another capital felony or felony involving the use or threat of violence to a person-very substantial weight; (2) the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary-moderate weight; (3) the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest-moderate weight; (4) the capital felony was especially heinous, atrocious, or cruel-very substantial weight; and (5) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification-great weight.

As for mitigation, the trial court found three statutory mitigating circumstances and assigned weights: (1) age of the defendant at the time of the crime-some weight; (2) the defendant acted under extreme duress or under the substantial domination of another person-some weight; (3) the defendant has no significant history of prior criminal activity-little weight.

The trial court also found three nonstatutory mitigating circumstances: (1) the level of maturity of the defendant at the time of the crime-little weight; (2) the defendant exhibited good conduct during incarceration-very little weight; and (3) the defendant exhibited good conduct during trial-very little weight.

Hunter v. State, 8 So.3d 1052, 1057-1061 (Fla. 2008).

In denying the appealed claims, this Court affirmed the judgment and sentences. *Id.* The defendant filed a timely petition for writ of *certiorari* to the U.S. Supreme Court that was denied. Hunter v. Florida, 129 S.Ct. 2005 (April 20, 2009).

Mr. Hunter filed his Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 on April 14, 2010. PCR V4 555-653. The defendant raised 8 claims. The postconviction court denied all the claims on January 25, 2012. PCR V6 880-921. This appeal follows.

STANDARDS OF REVIEW

Claims of ineffective assistance of counsel are governed by Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). To establish deficiency under Strickland, the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms." Morris v. State, 931 So.2d 821, 828 (Fla.2006) (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). To establish prejudice, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (quoting Strickland, 466 U.S. at 694, 104 S.Ct. 2052). Both prongs of the Strickland test present mixed questions of law and fact.

For this reason, the Court employs a mixed standard of review, deferring to the factual findings of the circuit court that are supported by competent, substantial evidence, but *de novo* review of legal conclusions. See Sochor v. State, 883 So.2d 766, 771-72 (Fla.2004).

In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003), the United States Supreme Court held that "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins, 539 U.S. at 510. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness." Id. at 521 (quoting Strickland, 466 U.S. at 690 91).

Prejudice, in the context of claims of penalty phase ineffective assistance of counsel, is shown where, absent the deficient performance, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the

outcome of the proceedings. Lynch v. State, 2 So.3d 47, 70 (Fla.2008); Floyd v. State, 18 So. 3d 432, 453 (Fla. 2009).

The constitutionality of statutes are pure questions of law and rulings are, therefore, subject to *de novo* review. Troy v. State, 948 So. 2d 635, 643 (Fla. 2006).

SUMMARY OF THE ARGUMENT

Issue 1: (A) Defense counsel were ineffective and prejudiced the appellant for failure to present available and known nonstatutory mitigation evidence to the jury and judge; **(B)** because the only nonstatutory mitigators argued by counsel were their client's schizophrenia, his jail record waiting for and during trial and his good conduct during trial, it was ineffective and prejudicial to the appellant for counsel and their experts not to extend the same notions to Mr. Hunter's probable future conduct in prison; and **(C)** defense counsel was ineffective and prejudiced the appellant when he misstated the law and misled the jury about its vote on the sentencing recommendation.

Issue 2: Trial counsel rendered deficient performance and prejudiced the appellant by failing to properly litigate the motion for mistrial at the time co-defendant Anthony Cannon testified.

Issue 3: The rules denying counsel the right to interview jurors are unconstitutional and denies defendants adequate assistance of counsel.

Issue 4: Florida's jury instructions unconstitutionally diminish the jury's responsibility in sentencing.

Issue 5: Florida's death sentencing statute unconstitutional as applied for failing to prevent arbitrary and capricious death sentences.

Issue 6: Just as with Arizona's suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive, it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support of the recommendations of death for appellant.

Issue 7: Each claim raised in postconviction justifies relief, but, to the extent any single one fails to rise to that level, the claims in combination, cumulatively, require a new trial and resentencing.

ARGUMENT
ISSUE 1

THE POSTCONVICTION COURT ERRED WHEN IT DENIED MR. HUNTER'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. HUNTER'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION AND UNDER FLORIDA COMMON LAW.

A. Failure to Present Available and Known Nonstatutory Mitigation Evidence.

Defense counsel were ineffective for failure to present available and known nonstatutory mitigation evidence to the jury and judge. The law does not require that aspects of a defendant's social history be presented only through social workers; they can be presented by an expert such as a psychologist or other witnesses. However, counsel had no strategic justification in its failure to present available and known nonstatutory mitigation evidence. The failures, discussed in the Rule 3.851 motion and below, severely prejudiced Mr. Hunter. There is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Mr. Hunter would have been acquitted of his death penalties and sentenced to life in prison, without parole.

Mr. Hunter's attorneys performed deficiently, and prejudiced Mr. Hunter, by failing to reasonably use, at minimum, the product of their mitigation specialist. Their mitigation specialist expended numerous efforts to obtain a comprehensive social history, biological history and psychological history on Mr. Hunter. Those efforts and the resulting work product were provided to counsel; they were reviewed and discussed by the mitigation specialist, defense counsel and the defense mental health experts. Frank Bankowtiz testified that "[with all four of us meeting, I can recollect two specific meetings. There may have been more. And then there were meetings separately with Mr. Mills, myself, and Ms. Rojas or Mr. Mills, myself, and Dr. Mings or myself and Dr. Mings or myself and Ms. Rojas. You know, Ms. Rojas and I met fairly frequently and e-mailed even more frequently." PCR V2 264. As to this deficiency, counsel also failed to adequately prepare the experts and lay witnesses who were called to testify to ensure that the witness testimony was presented in a meaningful, comprehensive manner without interruption.

While the defense successfully established the statutory mental health mitigator that the defendant acted under extreme duress or under the substantial domination of another person, it was given only some weight by the sentencing judge. Hunter v. State, 8 So.2d 1052, 1061 (Fla. 2008). However, the experts

seemed to focus exclusively on the family history of mental illness when discussing the family members and history in their testimony. The defense experts, however and in fact, omitted relevant and significant psychosocial data and history in their testimony - data and history that was known, provided and reviewed with counsel by their mitigation specialist.

As pled in the Rule 3.851 Motion, a number of aspects of the social history should have been introduced at trial. That list, and relevant testimony from the evidentiary hearing, included:

> 1. Hunter at a young age observed his mentally ill father physically abuse his mother. Hunter spent his early developmental years in a family environment of considerable stress and tension. Later his father is absent from his life after his parents divorce.
>
> *Evidentiary hearing testimony:*
>
> ". . . But based on my understanding of his family, and taken together with Mr. Hunter's current situation, I believe that he was probably exposed to domestic violence and probably was exposed to, over a period of years, before his father actually was separated from Mr. Hunter -- when the two got separated, if his father was indeed schizophrenic, as I believe that he was, I don't know for sure because I haven't seen him, I have not ever seen any original records of his, I would think that a child in a household where a father is getting arrested for domestic violence and acting in an aberrant manner, if that is true, and I believe it is, that that would be a traumatic event for a child in that many people that I have previously examined who had mentally ill parents perceived their parents' behavior -- while the person I was examining was a child, most of the people that I've examined who had schizophrenic parents and there was domestic

violence involving them, most of these people, who were adults when I was examining them, but upon reflection to their early childhood, most of them perceived it as a very disturbing thing to have your mother or father arrested, to witness domestic violence, and to observe aberrant behavior consistent with schizophrenia. That's the best answer I can give you."

Dr. Harry McClaren, on cross-examination, PCR V3 470-471.

2. Hunter's stepfather was overbearing, rigid, and exceptionally strict - "dictator" and felt like they were in a "prison" were words used to describe him.

Evidentiary hearing testimony:

Q And likewise, is it would your knowledge of Mrs. Hunter's marriage to her second husband, who would be Mr. Hunter's stepfather, and -- did you have any understanding or appreciation that the -- from all those records, that the stepfather had experienced a -- some period of cocaine abuse that may have reverberations for the family household?

A According to some of the information I reviewed, I came to believe, and believe that it is true, that his stepfather, at a period in his life where Mr. Hunter was young, in the -- around the third grade, which he had to repeat, that he probably was exposed to that negative influence, too. So again, basing it on interviewing Mr. Hunter, who is the person of interest here, and taken together with other people that have lived through similar things, it would be my opinion that experiencing a parent dependent on cocaine, especially crack cocaine, that would be another traumatic experience.

Dr. Harry McClaren, on cross-examination, PCR V3 472-473.

3. Stress between mother and stepfather was so great (and stepfather emotionally abused mother) that mother was

psychiatrically hospitalized.

Evidentiary hearing testimony:

Q Well, Dr. McClaren, in your understanding, as you told us this morning, about Mr. Hunter's background, did your review of the trial record or the other materials involving the mental health history of the family, if you will -- would the fact that Jerone Hunter's mother had her own mental illnesses and periods while Mr. Hunter was a young toddler, or even thereafter, would that be traumatic of one of these things you were referring to?

A Yes.

Dr. Harry McClaren, on cross-examination, PCR V3 471-472.

4. Hunter felt abandoned by his older brother when he moved out, leaving him alone to deal with his stepfather. Others described the moving out of his brother as having a significant impact on Hunter.

Evidentiary hearing testimony:

Q . . . Did you -- also I understand from your evaluation of Mr. Hunter that there was a time period, again shortly before the Deltona event, that Mr. Hunter's older brother moved out, and after a lifetime of reliance on him as an advisor and friend, it seemed to change in a sudden way? Is that a fair way of characterizing your understanding of that?

A Well, that's what he told me, and that certainly is -- could be a loss of a big brother. Whether or not that is the kind of traumatic experience -- I mean it's a loss, but the kind of traumatic experience that tends to be the event, or one of a series of events, that causes people to develop posttraumatic stress disorder . . . that is not the kind of thing that usually causes or contributes to posttraumatic stress disorder.

Dr. Harry McClaren, on cross-examination, PCR V3 473-474.

5. The relationship between these factors (and Hunter being a follower and impressionable) and Hunter being kicked out of his home exposed him to delinquent peers and subculture. A spiral effect occurred where he lost his job due to no transportation, hung out with the wrong people to have a place to live, got involved in drugs, etc... leading up to the offenses.

Evidentiary hearing testimony:

"[I] knew that he had a family history of mental -- I eventually I became aware he had a family history of mental illness. I didn't know that initially. And I knew other aspects of his history. I knew about the fact that he had been kicked out of the house before this happened, that he had gone to basically live with Troy Victorino after that happened and had only been -- my recollection is, according to Jerone, he had only been with Troy for about a month or so before all this went down. So, I -- my job, from my perspective, is to tell them what I believe that they have from the point of view of a mental health person. And their job is to decide how to use it and then I answer questions that are asked of me."

Dr. Eric Mings; Deposition Transcript; PCSR V 2 217-218.[1]

6. Hunter's family's failure to seek treatment for him, despite the persistence of symptoms into adulthood.

Evidentiary hearing testimony:

"[I] started doing some neuropsychological evaluation. I became convinced fairly early on that he probably was in the early stages of schizophrenia. And that's why I suggested that it would be

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[1]The defendant and the State agreed to use Dr. Mings' November 16, 2010, deposition in lieu of his in-person testimony at the evidentiary hearing. PCR V 2 200.

advantageous to have a psychiatrist. I don't know if I specifically said Dr. Berns, but that's who they ended up using. And I did specifically recommend Rubin Gur, because I knew from some things that I had read in the past that he was considered one of the leading experts in schizophrenia and neuropsychological deficits. So, my concern was this: we had a kid who was facing multiple counts of murder, who I believe had a severe psychotic mental illness, who had no history of treatment. So I knew it was going to be a hard sell to the jury. So, I -- my thought in that regard was we needed to get people on board who could evaluate him besides myself, who would either agree or disagree with what I felt was going on. And that's how Dr. Gur and Dr. Berns eventually came on board...."

Dr. Eric Mings; Deposition Transcript; PCSR V 2 219.

The only nonstatutory mitigators argued by counsel were the defendant's schizophrenia, jail record and good conduct during trial. See Defendant Jerone Hunter's Sentencing Memorandum, R V 9 1550-1568 at 1554-1555. Mr. Hunter's counsel ignored the work product, advice and entreaties of their own mitigation specialist when they failed, without strategic justification, to present reasonably available mitigation to the jury.

As to the development and presentation of nonstatutory mitigation, this Court has stated that:

"...this Court [has] noted ... "[T]he defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish (quoting from Lucas v. State, 568 So.2d 18 (Fla. 1990). Unlike statutory mitigation that has been clearly defined by the legislature, nonstatutory mitigation may consist of any factor that could reasonably bear on the sentence. The parameters of nonstatutory mitigation are largely undefined. This

is one of the reasons that we impose some burden on a party to identify the nonstatutory mitigation relied upon."

Israel v. State, 837 So.2d 381, 392 (Fla. 2002).

In deciding this claim, this court must also consider the standards for counsel's performance recognized as guides by the United States Supreme Court in cases such as Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) and Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). The ABA Standards for the Appointment and Performance of Counsel in Death Penalty Cases (1989) provided the following standards, among others:

> The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case. [1.1, p. 2]
>
> [D]eath penalty cases have become so specialized that defense counsel has duties and functions definably different from those of counsel in ordinary criminal cases. [1.1, commentary, p. 21]
>
> In many capital cases, no credible argument for innocence exists, so that the life or death issue of punishment is the real focus of the entire case. The Constitution requires individualization of the capital sentencing process. A capital defendant has the right to present his or her sentencer with any mitigating evidence that might save his or her life. Counsel should be aware of methods to effectively advocate for the life of the client, and should strive for an effective defense presentation in every case... [1.1, commentary, p. 22]
>
> Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is

presented to the sentencing entity or entities in the most effective possible way. [11.8.2(D), p. 69].

[A]s soon s appropriate, counsel should ... [c]ollect information relevant to the sentencing phase of trial including, but not limited to medical history; ... educational history; ...military history; ... employment and training history; ... family and social history; ... and religious and cultural influences. [11..4.1(D), pp. 10-11].

Counsel should secure the assistance of experts where it is necessary or appropriate for ... presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent ... [11.4.1(D), pp. 11-12].

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) at http://new.abanet.org/DeathPenalty/ Representation Project/Public Documents/1989Guidelines.pdf.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Id., at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. Id. at 690. "An ineffective assistance of counsel claim has two components: A petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" Strickland v. Washington, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

(internal citations omitted). Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. At 694.

In Wiggins, the United States Supreme Court held "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy. " Id. at 2538. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness . . . " Wiggins at 2535.

Counsel's highest duty is the duty to investigate and prepare. Where counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly

investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). A reasonable strategic decision is based on informed judgement. "[T]he principal concern . . . is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable." Wiggins at 2536. In making this assessment, the Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. " Id. at 2538.

In Rompilla, the United States Supreme Court held that counsel rendered deficient performance and cited counsel's failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of Rompilla's prior incarcerations, and failure to gather evidence of a history of substance abuse. Id at 2463. The Rompilla Court found that "this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts..." Id at 2462. However, despite the scope of this mitigation investigation, the Court still found that counsel rendered deficient performance.

Long before the time of Mr. Hunter's trial, capital litigation attorneys and experts were well aware of and used complete social histories when presenting mitigation to capital juries. Professor Haney wrote in 1995 that:

> The social history of the defendant has become the primary vehicle with which to correct the misinformed and badly skewed vision of the capital jury ... mitigation evidence is not intended to excuse, justify or diminish the significance of what they [i.e., capital defendants] have done, but to help explain it, and explain it in a way that has some relevance to the decision capital jurors must make about sentencing ... no jury can render justice in the absence of an explanation. In each case, the goal is to place the defendant's life in a larger social context and, in the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically-important events has been shaped and influenced by them.
>
> Craig Haney, "The Social Context of Capital Murder: Social Histories and the Logic of Mitigation." 35 Santa Clara L.Rev. 547, 559-61 (1995).

See, also, Lee Norton, *Capital Cases: Mitigation Investigations*, The Champion, National Association of Criminal Defense Lawyers (May, 1992).

In the instant case, trial counsel's failure to present the available mitigation, as recommended by their mitigation specialist, was deficient performance which violated Mr. Hunter's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and the corresponding provisions of the Florida Constitution. The prejudice is Mr. Hunter's multiple death sentences.

Had the jury been aware of the unique nature of Mr. Hunter's personality, his background, and the full circumstances surrounding his life and the crimes, there exists a reasonable probability that he would have received life sentences instead of the alternate death sentences. "Accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion).

The subclaim was denied by the postconviction court which held, in part, that "[t]he defendant has failed to prove any conduct that would support his claim of ineffectiveness of counsel in regard to Claim IA. Further Mr. Hunter has failed to show that the claimed deficiencies deprived the defendant of a reliable penalty phase proceeding. ... [m]uch of the mitigation evidence was integrated by which the court means that it was a blend of both statutory and nonstatutory factors assembled and presented through both nationally and regionally recognized experts who painted a comprehensive picture of the difficulties Mr. Hunter had been through in his life at all stages of his life. The evidence presented at the evidentiary hearing does not present any reliable evidence that would change or alter that picture in any relative way." PCR V6 885-886. Mr. Hunter respectfully disagrees and argues that a review of the full record will show that the court below

erred with this ruling.

B. Failure to Present Evidence of Mr. Hunter's Probable Future Conduct in Prison

As previously noted, the only nonstatutory mitigators argued by counsel were the defendant's schizophrenia, his jail record waiting for and during trial and his good conduct during trial. See Defendant Jerone Hunter's Sentencing Memorandum, R V9 1550-1568 at 1554-1555. Consequently, defense counsel and their mental health experts unreasonably failed to extend the notion of Mr. Hunter's behavior to evidence of his probable future conduct in prison if given life sentences rather than the death penalty for the subject charges.

Available for the jury and sentencing judge was evidence that would have served as the basis for testimony that Mr. Hunter had a good potential to be rehabilitated and to be a nonviolent prisoner while serving a life sentence. Given that the few nonstatutory mitigators argued by counsel, it was inexcusable and unreasonable for counsel and their experts not to extend the same notions to Mr. Hunter's probable future conduct in prison.

Competent counsel and properly prepared mental health experts could have focused on the lack of psychopathy from the testimony that was provided. Readily available and frequently used psychological tools were available to assess Mr.

Hunter for psychopathy and risk for violence.

Yet, defense counsel retained Dr. Mings for a role limited to his use as a neuropsychologist and the statutory mental health issue involving Hunter's and his family's mental illnesses. Dr. Mings testified as follows:

> Q. How would you characterize, either at the beginning or as your work for Mr. Bankowitz and Mr. Mills progressed, the -- I guess one way to say it is the parameters of your retention in planning testimony. Again, going while -- let's see. How shall I say this? In recognition that any neuropsychologists or other psychologist would be completely interested in full family history –
>
> A. Uh-huh.
>
> Q. -- in terms of evaluation and diagnosis and opinions in general, was there any inkling or notion that your retention was to be the key mitigation specialist that would inform and advise defense counsel what mitigation they should present to the court?
>
> A. No. I don't believe that was my role. My role was to tell them what I believe were the relevant mental health issues, but I don't run the show. And I was -- you know, certainly was aware that there were family history issues.
>
> And as I said, I don't remember the details that was gone into in the actual testimony in the trial. To me, having done this for many years, death penalty cases, I felt that the most important thing to explain to the jury was the issue of a severe major psychotic mental illness. As you know, we had a very serious case of a mass murder. I believed, and I still believe, though I have had no contact with Jerone Hunter since that time, I believe that

he was in the early stages of schizophrenia. And I had concerns about his competency to proceed throughout the time that I worked with him.

And so I felt that that was the major mental illness aspect of it. If there were other personal history aspects of it, we talked about those. I knew that he had a family history of mental -- I eventually I became aware he had a family history of mental illness. I didn't know that initially.

And I knew other aspects of his history. I knew about the fact that he had been kicked out of the house before this happened, that he had gone to basically live with Troy Victorino after that happened and had only been -- my recollection is, according to Jerone, he had only been with Troy for about a month or so before all this went down.

So, I -- my job, from my perspective, is to tell them what I believe that they have from the point of view of a mental health person. And their job is to decide how to use it and then I answer questions that are asked of me.

Deposition Transcript; PCSR V2 216-218.

Limiting Dr. Mings and the other experts to a focus on mental health issues was confirmed by Edwin Mills testimony at the evidentiary hearing:

Q Well, explain to me about the — besides Ms. Rojas being retained, at least as the final mitigation specialist, give us a description of how it was that you and Mr. Bankowitz went through hiring the three doctors that testified in the penalty phase.

A Dr. Berns and Dr. Mings were well-known to both of us. Dr. Berns' office at that time, I believe, was in Lake Mary, which

is just north of Orlando. Mr. Mings practiced either out of east Orange County or west Seminole County and was well-known to both of us. Dr. Gur was someone that Mr. Bankowitz learned about and heard speak at a seminar and was impressed with his credentials and qualifications. So we had — I believe Dr. Mings got involved in the case first, and then I'm not — I'm not clear on who was next, either Dr. Gur or Dr. Berns.

Q And what was the purpose of retaining them, and where did that retention take you to, if I could ask that type of question?

A Dr. Mings is a neuropsychologist, and he was brought in to do a neuropsychological evaluation, which he did. He was used at various times throughout the case, including the trial. He evaluated Mr. Hunter when we tried to start the first trial in DeLand. We had some concerns about his competency based upon his actions or, frankly, his lack of action, interaction with us during jury selection in DeLand. The case was ultimately moved to St. Johns County, and we had the same concerns at least one occasion up there, and Dr. Mings came up and evaluated him for competency. I did not deal with Dr. Gur prior to the trial in St. Augustine. Mr. Bankowitz was dealing with Dr. Gur. I mean, we had passing conversations about, you know, scheduling matters and the fact that he was a good distance away and travel arrangements and everything that needed to be made, but Mr. Bankowitz was primarily working with Dr. Gur. Dr. Berns was brought in, and he conducted an evaluation, and I don't recall what it was about or what triggered it, but he did conduct an evaluation fairly close to the real trial time, and I don't recall what that was about.

Q Mr. Mills, earlier you were referring to the work of Ms. Rojas as your mitigation specialist and then the retention of local experts, Dr. Mings and Berns. Can you give us a description of the topics of mitigation that you were working up from a particular part in your case preparation through to your argument about the statutory mitigators involving Mr. Hunter?

A We were interested or focusing on mental health — what I call mental health issues. We were also interested — in fact, Mr. Bankowitz met numerous times with Mr. Hunter's family in an attempt — or in an effort, rather, to gather information that would be useful for both the statutory and nonstatutory mitigators. Ms. Rojas met with the Hunter family a number of times in an attempt to explore mental health issues from an historical perspective with the family. Mr. Bankowitz — well, let me preface it by saying that during the course of the mitigation investigation, we learned, of course, that Mr. Hunter attended high school and he was active in some sports or athletics at the school. We — Mr. Bankowitz contacted at least one of the coaches at that school in an effort to try to come up with some mitigation evidence or testimony regarding how Jerone interacted with people at school, and that didn't pan out, so we didn't pursue that. But that was primarily the focus of the mitigation.

. . .

Q Would you agree — and right now I'm referring to Dr. Mings' deposition, and as you heard me introduce with the preliminary matter this morning, the State and I have agreed that it's most proficient to have his deposition transcript in rather than have him testify. But would this be an accurate statement, would you agree with what Dr. Mings told us, that as the neuropsychologist, he was not hired as an overall consulting mitigation expert in terms of his work for you in the case? Does that sound like an accurate way of describing your retention and usage of him?

A He was hired as a neuropsychologist.

PCR V2 219-221; 225.

Defense counsel Frank Bankowitz, in fact, explained that the team just never thought of adding future conduct in prison to the non-statutory mitigators of

defendant's good jail record waiting for and during trial and his good conduct during trial:

> Q [addressing the Court:] In the written motion, Mr. Bankowitz points out to the Court that the good conduct in jail and good conduct in trial, they had requested jury instructions, and you had given them that. And then they added, in a sentencing memo, as Mr. Nunnelley pointed out, the extra statement about using the overall mental health thing as nonstatutory.
>
> [addressing the witness:] Tell us about how it was that the two of you came down to deciding what to argue to the jury and what to argue to the judge in the sentencing memorandum.
>
> A Well, I'll separate it out. What to argue to the jury was Mr. Mills and I talked about, you know, what we had, basically. And we had a, I want to say, somewhat uncooperative family, who was not willing to assist us, not willing to admit the family history of mental illness. And, I mean, I met with the family a number of times, and it was never admitted.
>
> And, finally, Ms. Rojas came up with the natural — Jerone's natural father's medical history. And, you know, we felt that the mental health defenses were our best bet in this case. And, you know, in the heat of the moment, you know, he made his argument to the jury, and I — I mean, I back him up 110 percent.
>
> And as far as the sentencing memorandum, you know, we felt we had, you know, presented a sufficient case to the Court. Obviously, Judge Parsons was there, you know, and he heard everything, and he knew what was going on, and our sentencing memorandum was directed to him and what he would do at sentencing. So, you know, to change it would seem futile.

Q Well, specifically — maybe this is just a different way of asking the same thing — from what you've just said, Mr. Bankowitz, did you not even think about arguing about future conduct, where his past good conduct would mean he, likely, would not be a danger to guards or other inmates if he had gotten a life sentence? That just didn't — the notion never came to mind?

A I can only tell you I assume not because we didn't argue it.

PCR V2 272-273.

Consequently, Dr. Mings was never called upon to address the issue of future dangerousness as a non-statutory mitigator. The defense similarly did not have any of their other experts or other witnesses address the matter - despite its logical connection to the good jail behavior mitigators they did present as referenced in their Sentencing Memorandum [R V 9 1550-1568 at 1554-1555].

Only the testimony of experts at the evidentiary hearing addressed the issue, largely through their use of common assessment tools used in the field of psychology. As noted in the Rule 3.851 motion, the Psychopathy Checklist Revised (PCL-R) is an important tool used by experts since psychopathy is a static risk factor that research has shown to be one of the most robust single predictors of future risk of dangerousness. Psychopathy is a constellation of behavioral, affective, and interpersonal characteristics that is related to, although not synonymous with, Antisocial Personality Disorder. Psychopaths are characterized

as having a general disregard for social mores and the rights of others, demonstrate chronic irresponsibility, dishonesty, and emotional shallowness, and evidence a conning and manipulative personality. They are known for criminal versatility and persistent and serious rule violations. The Psychopathy Checklist - Revised (PCL-R) is the most widely accepted measure of psychopathy. The PCL-R is a 20-item rating scale of psychopathic personality traits that is predictive of a range of antisocial behavior, including criminal behavior and future violence. It has been researched on a variety of clinical and forensic (including correctional) populations with comparable reliability and validity. PCR V4 710-712.

The Violence Risk Appraisal Guide (VRAG) is a well researched actuarial instrument that uses research derived static variables to assess risk for future dangerousness. The VRAG is considered one of the most well-established and well validated actuarial methods to assess violence potential. It has generally matched or surpassed all other tested prediction methods for assessing violent recidivism in the published research on risk assessment.

The VRAG estimates the probability that a male offender with the opportunity to recidivate in the community or on an open psychiatric ward will be charged or convicted with a subsequent violent offense against persons (ranging from assault to homicide). The recidivism estimates provided by the VRAG are

group estimates derived from groups of individuals with these characteristics. As such, these estimates do not directly correspond to the recidivism rate of an individual offender. The VRAG contains 12 items that are summed to produce a total score which places the rate in one of 9 risk categories. PCR V4 712-713.

Using these assessment tools led to the conclusions of Dr. Kimberly Brown, the defense psychologist at the postconviction evidentiary hearing. She testified that Mr. Hunter has a low degree of psychopathy, that he is not a psychopath, and is also classified as having a relatively low risk of re-offending violently in the future. PCR V2 344. Dr. Brown lastly concluded as follows:

> THE WITNESS: [after addressing the Court:] . . . which kind of brings me to my next conclusion, which is that there are some factors that seem to be related to a person's risk of violent infractions in prison.
>
> This is largely from the work of Mark Cunningham and Jon Sorenson. These factors, based on the research, are an inmate who is young, especially under the age of 21; having had a prior prison sentence, any prior prison sentence; having had past prison violence; education, in other words, being highly educated, or at least having a high school education being less associated with violence in prison; length of sentence. This is not intuitive. The longer the sentence length, the less likely — those people were less likely to commit prison violence than people with shorter sentences.
>
> So there are a few factors that we can look at to help estimate both Mr. Hunter's risk of violence, in general, and then, in particular, his risk of violence in prison. And in Mr. Hunter's case, most of those factors were absent. In other words, he did not have a short sentence,

> he had a long sentence, he had not been in prison before, there was no indication of past violence or misconduct. In fact, testimony at the penalty phase was that he was a good inmate while in the jail.
>
> What he has — and that he's fairly educated. He was — he didn't graduate high school, but he was about to enter the twelfth grade and did fairly well in school. What he does not have going for him is his age. He was very young at the time. He's gotten a little bit older, and as he gets older, his risk will continue to go down. But I guess the bottom line is that these aren't intuitive factors in that people who are serving life or death sentences are no more likely to commit violence in prison, and there's a good bit of research to suggest that they're actually less likely compared to other prisoners.
>
> PCR V2 345-347.

As to this issue and the evidentiary hearing, Mr. Hunter lastly notes that the State's psychologist, Dr. Harry McClaren, obtained the same score on the PCL-R as did Dr. Johnson. Furthermore, Dr. McClaren agreed with Dr. Brown's conclusion that Mr. Hunter is [was] not a psychopath. PCR V3 429.

Trial counsel and their experts inexplicably failed to conduct such available assessments with the results that this significant mitigation evidence was not presented to the jury or judge. Not thinking about future conduct as a mitigator - and never having it come to mind - is inexcusable.

The 2003 revised edition of the Guidelines provides that counsel should consider including "[w]itnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would

be served." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11(F)(3)(published at 31 Hofstra L. Rev. 913, 1055-56 (Summer 2003).

Available for the jury and sentencing judge was evidence that would have served as the basis for testimony that Mr. Hunter had a good potential to be rehabilitated and to be a nonviolent prisoner while serving a life sentence. The United States Supreme Court specifically holds that evidence of future conduct is desirable in making a capital sentencing decision:

> There is no disputing that this Court's decision in Eddings requires that in capital cases " 'the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " Eddings [v. Oklahoma,] 455 U.S. [104], at 110, 102 S.Ct., at 874] (quoting Lockett [v. Ohio], 438 U.S. [586], at 604, 98 S.Ct., at 2964 (plurality opinion of BURGER, C.J.)) (emphasis in original). Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence." 455 U.S., at 114, 102 S.Ct., at 877.
>
> . . .
>
> Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." Jurek v. Texas, 428 U.S. 262, 275, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). The Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as

> establishing an "aggravating factor" for purposes of capital sentencing, Jurek v. Texas, supra; see also Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration.
>
> Skipper v. South Carolina, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 1671-72 (1986)(footnote omitted).

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

In another case, this Court stated:

> Second, evidence showed that Nibert has felt "a great deal" of remorse and has a "good potential for rehabilitation," especially in the kind of structured prison environment where his mental condition has improved markedly since the crime occurred. We have held the potential for rehabilitation to be a valid mitigating circumstance. Brown v. State, 526 So.2d 903, 908 (Fla.) cert. denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988)("The potential for rehabilitation constitutes a valid mitigating factor. Francis v. Dugger,

514 So.2d 1097, 1098 (Fla.1987); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987)"); see also Songer v. State, 544 So.2d 1010, 1011-12 (Fla.1989) (mitigation found in, among other things, unrebutted evidence that defendant's reasoning abilities were substantially impaired by addiction to hard drugs; defendant was remorseful; defendant experienced positive change and self-improvement while in prison; and defendant was adaptable to structured prison life); cf. Carter v. State, 560 So.2d 1166, 1169 (Fla.1990) (defendant's amenability to rehabilitation considered a factor in reversing jury override). The trial court erred by not finding and weighing this uncontroverted mitigating circumstance.

Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990).

See, also, Guardado v. State, 965 So.2d 108, 113 (Fla. 2007)(moderate weight given to the nonstatutory mitigator that defendant was not a psychopath and would not be a danger to other inmates or correctional officers should he be given a life sentence); Seibert v. State, 923 So.2d 460, 466 (Fla. 2006)(moderate weight given to the nonstatutory mitigator that defendant was a nonviolent prisoner and posed no threat of harm to prison staff); and Deck v. Missouri, 544 U.S. 622, 633, 125 S.Ct. 2007, 2014 (2005)(whether the offender is a danger to the community is "nearly always" a relevant factor in jury decision making, even where the state does not specifically argue the point).

Counsel thus was ineffective for failing to develop and present evidence of Mr. Hunter's potential for rehabilitation and a nonviolent existence in Florida's prison system under life sentences without parole. But for counsel's deficient

performance, there is a reasonable probability that Mr. Hunter would have received life sentences instead of the death penalties that were imposed.

The court below denied this subclaim, doing so without mentioning the "good behavior in jail and during trial" nonstatutory arguments of counsel, by ruling that "[e]ven if the information should have been presented, there is no reliable evidence that the attorney's performance deprived the defendant of a reliable penalty phase proceeding. That evidence, if presented and believed, could never have overcome the power of the statutory aggravators presented by the State and could never have impacted the conclusion and outcome of the result concerning the four death sentences. The defendant has failed to prove either prong of the Strickland test." PCR V6 888. Mr. Hunter respectfully disagrees and argues that a review of the full record will show that the court below erred with this ruling.

C. Defense Counsel Was Ineffective When He Misstated the Law and Misled the Jury About Its Vote on the Sentencing Recommendation

In the sentencing phase closing argument, counsel for Mr. Hunter misstated the law and misled the jury about its vote on the sentencing recommendation when he told the jury:

And I ask you, accordingly, to very carefully once again deliberate

and reach the conclusion that you, as a body – and *in this case it doesn't have to be anything more than a majority recommendation* – but *as a majority of the body* feel is appropriate.

...

You don't have to do this as a group because, remember, it's not required to be a unanimous recommendation or a unanimous conclusion *as to the appropriate penalty in the case. It has to be just a majority.*

R V49 4968-4970 (emphasis added).

At the evidentiary hearing, defense counsel Edwin Mills was asked to explain his jury statements as follows:

Q Well, at one point, and that's Volume 49 and pages 49 to 68 in sequence, and I quote, and you're telling the jury, "And I ask you, accordingly, to very carefully once again deliberate and reach the conclusion that you, as a body — and in this case, it doesn't have to be anything more than a majority recommendation but as a majority of the body feels appropriate. And then a second time you said, "You don't have to do this as a group because, remember, it's not required to be a unanimous recommendation or a unanimous conclusion as to the appropriate penalty in this case, it has to be just a majority." And, of course, case law in Florida, at one point or another, maybe having to get up to from 1976 to 1982, but the Florida Supreme Court finally made it clear that a 6-to-6 vote, which is not a majority vote, actually determines a life sentence. Do you agree that's the State of Florida law?

A I think it is, yes.

Q Well, Mr. Mills, is there any way in terms of all this thinking on the case ever since I first contacted you, since I did your deposition in April or so, or you were getting ready for this hearing and talking to Mr. Nunnelley, any way to recollect how

it is that you — well, first, I think you already acknowledge you did misquote law in those two occasions, talking to the jury; right?

A Yes.

Q Any recollection how that happened? I mean, I just need you to describe how that's part of the record.

A I don't have any recollection as to what —

Q Well, it doesn't quite, to me, seem to fall into the criteria I'm supposed to show in this hearing from Strickland that — is there any chance you considered — you didn't consider any options and then make a strategic decision to mislead the jury in any such fashion, did you?

A No.

Q So this would be, what I gather, as pure accidental as far as that goes. Is that one way to characterize it?

A I think that's one way to characterize it.

PCR V2 239-241.

Accident or not, the law in Florida is that a majority vote is not required for a life recommendation. A six-six vote is a recommendation for life imprisonment. Rose v. State, 425 So.2d 521, 525 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983); Harich v. State, 437 So.2d 1082 (Fla. 1983); Derrick v. State, 641 So.2d 378, 379 (Fla. 1994).

If the court, over a defense objection, had instructed the jury that its recommendation had to be by majority vote, Mr. Hunter would have been entitled to a new trial after direct appeal. See Jackson v. State, 438 So.2d 4 (Fla.1983); and Rembert v. State, 445 So.2d 337, 340 (Fla. 1984). It is reversible error if a trial court gives an "Allen" charge to a jury inquiry about its tie vote. Patten v. State, 467 So.2d 975 (Fla.), cert. denied, 474 U.S. 876, 106 S.Ct. 198, 88 L.Ed.2d 167 (1985).

Consequently, defense counsel presented incorrect information to the jury that had to be confusing as it was about to start its most important sentencing role. At one moment, counsel tells the jury that a majority vote is required for their recommendation. Later, the court issues a different and conflicting jury instruction that stated, correctly, if by six or more votes the jury determined that Mr. Hunter should not be sentenced to death, the advisory sentence would be a recommendation to the court that it impose a sentence of life imprisonment without the possibility of parole. R V8 1483.

Counsel's statements about the majority vote violated a specific standard enunciated in the ABA Guidelines:

> Counsel should seek to ensure that the client is not harmed by improper, inaccurate or *misleading information* being considered by the sentencing entity or entities in determining the sentence to be

imposed.

> ABA Guidelines (1989), supra, Guideline 11.8.2(C) Duties of Counsel Regarding Sentencing Options, Consequences and Procedures (emphasis added).

Counsel's misleading statement of the law was not only inexplicable but constitutes ineffective assistance. Counsel failed in his duty to bring such skill and knowledge as to render the trial a reliable adversary testing process in violation of Strickland v. Washington, 466 U.S. 668 (1984). But for counsel's deficient performance, there is a reasonable probability that Mr. Hunter would have received life sentences instead of the death penalties that were imposed.

The postconviction court found that "[w]hile the defense counsel made a mistake, there has been no showing of prejudice." PCR V6 10. Mr. Hunter respectfully disagrees and argues that a review of the full record will show that the court below erred with this ruling.

ISSUE 2

THE POSTCONVICTION ERRED WHEN IT DENIED MR. HUNTER'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. HUNTER'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE

UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION.

Trial counsel's representation of Mr. Hunter in the guilt phase of the trial fell below acceptable professional standards in several respects. Each of these failures, discussed below, severely prejudiced Mr. Hunter. There is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different; Mr. Hunter would have been convicted and/or sentenced to life or a term of years.

Trial counsel rendered deficient performance by failing to properly litigate the motion for mistrial at the time co-defendant Anthony Cannon testified.

This Court addressed the matter on direct appeal as follows:

> Hunter contends that the trial court erred in denying his motion for mistrial as his rights under the Sixth Amendment to confrontation and cross-examination were violated when the State's witness, Cannon, the fourth perpetrator, refused to be cross-examined. Hunter argues that he was prejudiced as a result because Cannon implicated Hunter during his direct testimony. Upon review of the record, we conclude that Hunter is not entitled to relief.
>
> At trial, the State called Cannon to testify in its case-in-chief. Cannon was a codefendant and had pled guilty to all fourteen counts as charged. Cannon testified that he expected to be sentenced to life imprisonment without parole. However, Cannon testified that he was not guilty and therefore could not answer the State's questions as to what happened. Cannon did testify that Victorino intended to kill everyone in the house and that he and Salas had no choice but to go

with the others. Cannon further testified that he and Salas felt they had no choice because Victorino would kill them. Cannon thereafter denied doing anything but did explain that all of the defendants including himself went into the house where the murders occurred and everyone was armed with a baseball bat. Counsel for defendants Salas and Victorino objected to this testimony; counsel for Hunter did not.

Counsel for Victorino attempted to cross-examine Cannon. He would not answer any questions other than to repeat that he was not guilty. Cannon then testified that his lawyers made him plead guilty and that he wanted to withdraw his pleas. After Victorino's defense attorney completed his cross-examination, counsel for Hunter expressly stated that "Mr. Hunter has no questions." Counsel for Salas also declined to cross-examine Cannon.

The following morning, after the State had presented the testimony of seven witnesses, counsel for Salas renewed his motion for mistrial, adding the new grounds that counsel was concerned the State either knew or had reason to know that Cannon was not going to testify. Victorino and Hunter joined in the motion. However, the trial court denied the motion for mistrial, observing that, from opening statements, Cannon was expected to be a commentator as to what happened at the crime scene and that it was to the defendants' benefit because the State was not able to elicit much of the information intended from Cannon. The trial court further found that everyone in the courtroom was surprised by Cannon's testimony, including the State, which then requested that Cannon be declared an adverse witness. Finally, the trial court stated that none of the defendants requested that he strike Cannon's testimony.

We deny Hunter's claim. First, the alleged error was not preserved. Hunter did not seek a mistrial at the time of Cannon's testimony on the basis that Cannon would not answer questions, and Hunter expressly waived his right to cross-examine the witness. Cf. Norton v. State, 709 So.2d 87, 94 (Fla. 1997) (failing to object contemporaneously to a witness's testimony waived right to raise

> issue on appeal, notwithstanding motion for mistrial at the close of the witness's testimony). Moreover, the basis upon which Salas belatedly sought a mistrial, joined by Hunter, was not the Sixth Amendment, on which Hunter now relies, but a procedural rule. FN6 [The State may not call a witness to testify that it knows will invoke his or her Fifth Amendment right against self-incrimination. Richardson v. State, 246 So.2d 771, 777 (Fla.1971). Nor may the defense. Faver v. State, 393 So.2d 49, 50 (Fla. 4th DCA 1981).
>
> Hunter v. State, 8 So.3d 1052, 1065-066 (Fla. 2008).

Thus, the Court found that trial counsel was ineffective for (a) failing to preserve the alleged error for appeal and (b) for raising a belated basis on a state procedural rule rather than on Constitutional grounds. This Court ruled that Mr. Hunter was not entitled to relief on the issue without further analysis or reasoning.

At the evidentiary hearing, this claim was addressed by defense counsel Edwin Mills on direct examination as follows:

> Q Now, I think I might be at my last component of questioning you today, Mr. Mills. You also know in my 3.851 I utilized the Supreme Court's ruling on your objections during Mr. Cannon's — can I use an adjective — the fiasco he caused at the trial when he started testifying and then quit testifying against co-defendants. And I asked you this in the deposition, if you may recall, the Supreme Court said that yours and Mr. Bankowitz's motion for mistrial and all that wasn't preserved properly, and, yet, in your deposition you indicated to me that of course you had gone over that tons, heavy duty, at the time it was happening, including the next day or so, and then, also, during — you said you just, in April, just couldn't believe that's what the record showed, that you didn't preserve that. Since April — now I get to my question, with that big introduction and my apologizes, Mr. Mills — since April, have you had any recollections or other efforts to come up with a different answer as far as that part of the trial and the Supreme Court's

ruling?

A No. I am one hundred percent confident that we joined in that objection for mistrial. I've spoken to Mr. Dowdy, who was Mr. Victorino's counsel. He recalls it, Mr. Bankowitz recalls it, I recall it. I recall standing in the well with the other lawyers next to the bench and joining in that objection. I have no explanation as to why it's not in the record.

PCR V2 241-242.

By these actions, counsel violated a specific standard in the ABA Guidelines which states that "counsel should take steps where appropriate to preserve, on all applicable state and federal grounds, any given question for review." ABA Guidelines (1989), supra, Guideline 11.7.3 Objection to Error and Preservation of Issues for Post Judgment Review. Consequently, Mr. Hunter's trial counsel rendered deficient performance by failing to properly preserve and argue this issue with a relevant Constitutional basis. Prejudice is shown by the Florida Supreme Court's ruling on the direct appeal claim. The postconviction court adopted, without record attribution, the analysis it hade made in codefendant Victorino's postconviction proceeding on this claim and concluded that Mr. Hunter similarly failed to establish either ineffectiveness or prejudice. PCR V6 892-895. Mr. Hunter respectfully disagrees and argues that a review of the full record will show that the court below erred with this ruling.

ISSUE 3

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

After the time of filing the Rule 3.851 motion and its jury interview claim, this Court ruled on an identical claim as follows:

> Troy challenges the constitutionality of rule 4–3.5(d)(4) of the Rules Regulating the Florida Bar on equal protection grounds and the sufficiency of the postconviction order with regard to this claim. As we explain below, relief is not warranted.
>
> Rule 4–3.5(d)(4) precludes a lawyer from initiating communication with any juror concerning a trial with which the lawyer is connected, "except to determine whether a verdict may be subject to legal challenge." Under the rule, "a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist." R. Regulating Fla. Bar 4–3.5(d)(4). Troy's constitutional challenge to this rule fails for two reasons. First, this claim is procedurally barred because it should have been raised on direct appeal. See Reese v. State, 14 So.3d 913, 919 (Fla.2009) (citing Israel v. State, 985 So.2d 510, 522 (Fla.2008)). Second, even if the claim was not procedurally barred, we have repeatedly rejected constitutional challenges to rule 4–3.5(d)(4). Id. (citing Barnhill v. State, 971 So.2d 106, 117 (Fla.2007)) (rejecting claim that rule 4–3.5(d)(4) violates a defendant's constitutional right of equal

protection). "Furthermore, where the defendant merely complains about the 'inability to conduct "fishing expedition" interviews,' the claim is without merit." Evans v. State, 995 So.2d 933, 952 (Fla.2008) (quoting Johnson v. State, 804 So.2d 1218, 1225 (Fla.2001)). Thus, Troy is not entitled to relief on this subclaim.

Troy's challenge to the sufficiency of the lower court's order also fails. To support a lower court's summary denial of a postconviction claim, rule 3.851 requires a lower court to disclose its basis for denying relief. See Rose v. State, 985 So.2d 500, 503–04 (Fla.2008). To do so, the court must either state its rationale or attach portions of the record that would refute the claims. Id. Troy challenges the postconviction order for failing to explain why academics, journalists, and lawyers not connected to his case can conduct "fishing expedition" interviews while trial and postconviction counsel are precluded from doing so. Although the lower court in the present case did not address this point in detail, the court did explain that the claim was denied because we have repeatedly rejected constitutional challenges to rule 4–3.5(d)(4). The lower court provided its rationale for denying relief on the constitutional challenge and, in doing so, sufficiently complied with rule 3.851. Accordingly, Troy is not entitled to relief as to this subclaim.

Troy v. State, 57 So.3d 828, 841 -842 (Fla. 2011).

The postconviction court relied on this Court's case authorities to hold that the claim was procedurally barred and without merit. PCR V6 896. Mr. Hunter disputes the basis for this ruling and urges this Court to explain, with a due process analysis, why academics, journalists, and lawyers not connected to his case can conduct "fishing expedition" interviews while trial and postconviction counsel are precluded from doing so.

ISSUE 4

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

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

Mr. Hunter's jury was unconstitutionally instructed by the Court that its role was merely "advisory." Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. The jury's sense of responsibility was diminished in this case by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. See Caldwell v. Mississippi, 472 U.S. 320 (1985). The postconviction court relied on multiple case authorities to hold that the claim and its components was procedurally barred and without merit. PCR V6 897-898. Mr. Hunter respectfully urges this Court to reconsider its holdings in the cases cited by

the court below.

ISSUE 5

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

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

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

1. Execution by both electrocution and lethal injection impose unnecessary physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

2. Florida's death penalty statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances."

3. Further, the statute does not sufficiently define for the judge's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980).

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

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

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

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

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

The postconviction court found this claim to be procedurally barred or already litigated. PCR V6 899. Mr. Hunter urges this Court to specifically consider this ruling to the extent this claim was not properly litigated at trial and whether Mr. Hunter thereby received prejudicially ineffective assistance of counsel.

ISSUE 6

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

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

> In Ring [v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)], the Supreme Court held that in capital sentencing schemes where aggravating factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." Id. at 609, 122 S.Ct. 2428 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The effect of that decision on Florida's capital sentencing scheme remains unclear. ... Since Ring, this Court has not yet forged a majority view about whether Ring applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. See, e.g., Windom v. State, 886 So.2d 915, 936-38 (Fla.2004) (Cantero, J., specially concurring) (explaining the post- Ring jurisprudence of the Court and the lack of consensus about whether Ring applies in Florida). Cf. Johnson v. State, 904 So.2d 400 (Fla.2005) (holding that Ring does not apply retroactively in Florida). That uncertainty has left trial judges groping for answers. ... The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.
>
> Steele, 921 So.2d at 540 and 550 (Fla. 2005).

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

Mr. Hunter is compelled to maintain that the Florida death penalty scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Florida law. In 1999, the United States Supreme Court held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). The Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000).

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

in the separate penalty phase proceeding before Mr. Hunter was eligible for the death penalty. Fla. Stat. § 775.082 (1995).

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

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

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

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

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

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

Mr. Hunter's death recommendation also violates the federal and state constitutions because it is impossible to determine whether a unanimous jury found any one aggravating circumstance. Fla.R.Crim.P. 3.440 requires unanimous jury verdicts on criminal charges. "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So.2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So.2d 261 (Fla. 1956). However, in capital cases, Florida permits jury recommendations of death based upon a simple majority vote, and does not require jury unanimity as to the existence of specific aggravating factors. See, e.g., Thompson v. State, 648 So.2d 692, 698 (Fla. 1994) and Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990).

Mr. Hunter's death recommendation violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. Implicit

in the state and federal government's requirements that a capital conviction must be obtained through a unanimous twelve person jury is the idea that "death is qualitatively different from a sentence of imprisonment, however long." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. See Johnson v. Louisiana, 406 U.S. 354, 364 (1972).

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

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

Id. at 2431.

A new penalty phase is required because, at minimum, it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support of the recommendations of death. The postconviction court found this issue as being rejected and resolved in Mr. Hunter's direct appeal. PCR V6 899.

ISSUE 7

MR. HUNTER'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The allegations and factual matters contained elsewhere in this brief are fully incorporated herein by specific reference. Mr Hunter contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). It is Mr. Hunter's contention that the process itself failed him. It failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentences that he would receive. State v. Gunsby, 670 So2d 920 (Fla. 1996).

The flaws in the system which sentenced Mr. Hunter to death are many. They have been pointed out throughout not only in this pleading, but also on Mr. Hunter's direct appeal. While there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence – safeguards which are required by the Constitution. These errors cannot be

harmless. The results of the trial and sentencing are not reliable.

In Penalver v. State, 926 So.2d 1118 (Fla. 2006), this Court held:

> The commission of an error by the trial court is only considered harmless where there is no reasonable possibility that the error contributed to the verdict. See Walton v. State, 847 So.2d 438, 446 (Fla. 2003). Moreover, even when we find multiple harmless errors, we must still consider whether "the cumulative effect of [the] errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." Brooks v. State, 918 So.2d 181, 202 (Fla. 2005) (quoting Jackson v. State, 575 So.2d 181,189 (Fla. 1991). In assessing the cumulative effect of such errors, we have considered whether (1) the errors were fundamental, (2) the errors went to the heart of the State's case, and (3) the jury would still have heard substantial evidence in support of the defendant's guilt.

Id. at 1137.

In applying this criteria to Mr. Hunter's guilt and penalty phase claims; it is clear that each of the errors singularly, and the combination of all, should entitle Mr. Hunter to a new penalty phase. The postconviction court found no cumulative relief due to the rejection on Mr. Hunter's other claims. PCR V6 900. Mr. Hunter respectfully disagrees and argues that a review of the full record will show that the court below erred with this ruling.

CONCLUSION

Based on the numerous constitutional violations which occurred in this case, individually and in concert, justify remanding to the trial court for a new trial and sentencing.

Respectfully submitted,

/s/ Robert T. Strain
Robert T. Strain
Florida Bar Number 0325961
Assistant CCRC
Office of the Capital Collateral
Regional Counsel - Middle Region
3801 Corporex Park Drive - Suite 210
Tampa, Fl 33609-1004
(813) 740-3544
strain@ccmr.state.fl.us
support@ccmr.state.fl.us
Counsel for the Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic mail to Mitchell D. Bishop, Assistant Attorney General, 444 Seabreeze Blvd. 5th FL, Daytona Beach, FL 32118 at Mitchell.Bishop@myfloridalegal.com and CapApp@myfloridalegal.com and by

U.S. Mail to Jerone Hunter DOC # V26165, Florida State Prison, 7819 NW 228th Street, Raiford, Florida 32026 on this 21st day of January, 2014.

/s/ Robert T. Strain
Robert T. Strain
Florida Bar Number 0325961
Assistant CCRC
Office of the Capital Collateral
Regional Counsel - Middle Region
3801 Corporex Park Drive - Suite 210
Tampa, Fl 33609-1004
(813) 740-3544
strain@ccmr.state.fl.us
support@ccmr.state.fl.us
Counsel for the Appellant

CERTIFICATE OF COMPLIANCE

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

/s/ Robert T. Strain
Robert T. Strain
Florida Bar Number 0325961
Assistant CCRC
Office of the Capital Collateral
Regional Counsel - Middle Region
3801 Corporex Park Drive - Suite 210
Tampa, Fl 33609-1004
(813) 740-3544
strain@ccmr.state.fl.us
support@ccmr.state.fl.us
Counsel for the Appellant