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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-4

JOSEPH P. SMITH,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
Lower Tribunal No. 2004-CF-002129

INITIAL BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

As the postconvition court noted, the claims below sought relief based on the federal and Florida Constitutions. No evidentiary or factual issues were raised in that proceeding. (PCROA, Vol. 2, p. 336).[1] Mr. Smith accordingly does not request oral argument in connection with this appeal.

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

STATEMENT OF THE 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 February 20, 2004, Joseph Peter Smith was charged with one count of sexual battery by a person over eighteen years of age upon a child less than twelve years of age and one count of kidnapping for the alleged [February 1, 2004] abduction of and sexual battery upon Carlie Jane Brucia, an eleven-year-old female. That same day, Smith was also indicted on one count of first-degree murder for the killing of Ms. Brucia.
>
> Smith v. State, 28 So.3d 838, 844 (Fla. 2009).
>
> Smith chose not to testify on his own behalf and waived his guilt-phase closing statement. The jury convicted Smith of first-degree murder, sexual battery upon a child less than twelve years of age, and kidnapping.
>
> During the penalty phase, the State presented evidence that Smith was on drug offender probation during the time of these crimes. Dr. Vega testified that he believed Carlie was conscious when the ligature was applied to her throat because there was no evidence of an injury that would have produced unconsciousness. Moreover, the ligature marks on the wrists indicated that she was restrained. Finally, the State offered victim-impact statements written by Carlie's father, mother, stepfather, and a teacher.
>
> Smith presented nineteen penalty-phase witnesses, who provided the following evidence: (1) Smith was extremely helpful to his friends, family, and neighbors; (2) Smith loved animals; (3) Smith's father had a drinking problem; (4) Smith appeared to have a good relationship with his children and loved them; (5) Smith began taking drugs at an early age, and addiction and relapse pervaded his adult life; (6) Smith suffered from chronic back pain and became addicted to prescription

drugs; (7) Smith had expressed the desire to cease his drug use; (8) Smith's life began to unravel after he discovered the body of his best friend after a drug overdose; (9) Smith had been hospitalized or admitted to treatment programs for his drug addiction over a period of years and also for depression [20] and suicidal thoughts; 7 (10) Smith had no disciplinary problems and had not engaged in violent acts while he was in jail; (11) Smith sought spiritual counseling; and (12) if Smith received a life sentence, he would be housed at the highest level of security, and it was highly unlikely that his security status would ever change. Smith declined to testify during the penalty phase ... .

Smith, 28 So.3d at 850-851

On December 1, 2005, the jury recommended a death sentence by a vote of ten to two. During the Spencer hearing, defense counsel explained that he would not call any experts to testify with regard to mental-health mitigation and would only introduce this mitigation through documentary evidence. The trial court inquired of both defense counsel and Smith with regard to this decision. Smith then offered the testimony of Dr. Vega, who testified that when he viewed the photos of Smith, he identified injection marks that were consistent with intravenous drug use. Smith offered an allocution statement to the court ... .

Smith, 28 So.3d at 851

On March 15, 2006, the trial judge sentenced Smith to death for the murder. The trial court determined that the State had proven beyond a reasonable doubt the existence of six statutory aggravators: (1) Smith committed the felony while he was on probation, see § 921.141(5)(a), Fla. Stat. (2003) (moderate weight); (2) the murder was committed while Smith was engaged in the commission of a sexual battery or kidnapping, see § 921.141(5)(d), Fla. Stat. (2003) (significant weight); 9 (3) the murder was committed for the purpose of avoiding lawful arrest, see § 921.141(5)(e), Fla. Stat. (2003) (great weight); (4) the murder was especially heinous, atrocious [23] or cruel (HAC),

see § 921.141(5)(h), Fla. Stat. (2003) (great weight); (5) the murder was cold, calculated, and premeditated (CCP), see § 921.141(5)(i), Fla. Stat. (2003) (great weight); and (6) the victim was under twelve years of age, see § 921.141(5)(l), Fla. Stat. (2003) (great weight).

The trial court concluded that Smith had failed to prove the existence of any statutory mitigating circumstances. 10 The trial court found a total of thirteen non-statutory mitigating circumstances: (1) a long and well-documented history of mental illness (moderate weight); (2) a long and well-documented history of drug abuse (moderate weight); (3) longstanding severe pain from back injuries that contributed to his addiction (little weight); (4) Smith repeatedly sought help for his problems (little weight); 11 (5) Smith was repeatedly denied treatment or received inadequate treatment (little weight); (6) positive qualities, including--(a) skills as a mechanic, plumber, and carpenter; (b) performance of [24] kind deeds for others; (c) love and support with his family; (d) despite his incarceration, attempts to exert a positive influence on family members; (e) artistic skills; and (f) he cares about animals (moderate weight); (7) providing information that led to the resolution of this case (very little weight); (8) his family assisted law enforcement with Smith's knowledge and cooperation (slight weight); (9) demonstration of spiritual growth [853] (moderate weight); (10) maintenance of gainful employment (slight weight); (11) he is a loving father to his three daughters (moderate weight); (12) remorse (little weight); and (13) he is amenable to rehabilitation and a productive life in prison (little weight).

In imposing a sentence of death, the trial court found that the aggravating circumstances in the case far outweighed the mitigating circumstances. The trial court also held that, with the exception of the probation aggravator, "[e]ach one of the aggravating factors in this case, standing alone, would be sufficient to outweigh the mitigation submitted in this case."

Smith, 28 So.3d at 852-853.

Mr. Smith timely filed a notice of appeal on April 20, 2006 and raised the following issues with this Court:

> ISSUE I - WAS APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT TO CONFRONTATION VIOLATED WHEN THE STATE WAS ALLOWED TO INTRODUCE DNA LAB RESULTS WITHOUT THE PERSON WHO ACTUALLY CONDUCTED THOSE TESTS AND OBTAINED THE RESULTS TESTIFYING?
>
> ISSUE II - DID THE TRIAL COURT ERR IN ALLOWING THE MEDICAL EXAMINER TO GIVE AN OPINION THAT WAS BEYOND HIS COMPETENCE TO GIVE AND INVADED THE PROVINCE OF THE JURY AS TO WHETHER THE VICTIM HAD BEEN SEXUALLY ASSAULTED?
>
> ISSUE III - DID THE TRIAL COURT ERR IN NOT SUPPRESSING APPELLANT'S BROTHER'S STATEMENTS CONCERNING APPELLANT'S STATEMENTS, BECAUSE THE BROTHER WAS ACTING AS AN AGENT OF THE STATE?
>
> ISSUE IV - DID THE TRIAL COURT ERR IN DENYING APPELLANT'S COUNSEL'S CHALLENGES FOR CAUSE?
>
> ISSUE V - DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO INTRODUCE GRUESOME AND SHOCKING PHOTOS THAT HAD NO OR LITTLE RELEVANCE, BUT WHICH INFLAMED THE JURY?
>
> ISSUE VI - DID THE TRIAL COURT ERR IN WHEN IT IMPERMISSIBLY DOUBLED SENTENCING AGGRAVATORS THAT THE MURDER WAS COMMITTED DURING THE COURSE OF THE FELONY OF SEXUAL BATTERY ON A CHILD UNDER 12 AND THE MURDER WAS COMMITTED ON A VICTIM UNDER 12?

ISSUE VII - IS THE AGGRAVATOR OF THE VICTIM BEING UNDER 12 YEARS OLD UNCONSTITUTIONAL?

ISSUE VIII - DID THE TRIAL COURT ERR IN FINDING THE MURDER WAS COMMITTED TO AVOID ARREST?

ISSUE IX - DID THE TRIAL COURT ERR IN FINDING CCP AS AN AGGRAVATOR?

ISSUE X - DID THE TRIAL COURT ERR IN RULING THE STATE COULD CROSS-EXAMINE APPELLANT'S MOTHER AND SISTER ON HIGHLY PREJUDICIAL BUT IRRELEVANT ACTS THAT OCCURRED BETWEEN APPELLANT AND HIS SISTER IF THE MOTHER AND/OR SISTER TESTIFIED ON BEHALF OF APPELLANT AT THE PENALTY PHASE?

ISSUE XI - DID THE TRIAL COURT ERR IN REFUSING TO ALLOW APPELLANT THE RIGHT OF ALLOCUTION BEFORE THE JURY AFTER THE JURY ASKED ABOUT THE APPELLANT MAKING A STATEMENT OF ALLOCUTION?

ISSUE XII - DOES SECTION 775.051, FLA. STAT. (2003), WHICH ABOLISHES THAT THE DEFENSE OF VOLUNTARY INTOXICATION AND EXCLUDES EVIDENCE OF A DEFENDANT'S VOLUNTARY INTOXICATION UNDER SOME BUT NOT ALL CIRCUMSTANCES, VIOLATE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BECAUSE, UNLIKE THE MONTANA STATUTE UPHELD BY A 5-4 VOTE IN MONTANA V. EGELHOFF, 518 U.S. 37 (1996), THE FLORIDA STATUTE NEITHER REDEFINES THE REQUIRED MENTAL STATE FOR CRIMINAL RESPONSIBILITY NOR REMOVES THE ENTIRE SUBJECT OF VOLUNTARY INTOXICATION FROM THE MENS RE INQUIRY?

ISSUE XIII - IS FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH EMPHASIZES THE ROLE OF THE CIRCUIT JUDGE OVER THE TRIAL JURY IN THE DECISION TO IMPOSE A

SENTENCE OF DEATH, CONSTITUTIONALLY INVALID UNDER RING V. ARIZONA, 536 U.S. 584 (2002)?

The State of Florida filed a cross-appeal on April 27, 2006, and raised a single issue as follows:

ISSUE I - WHETHER THE TRIAL COURT ERRED IN DENYING APPLICATION OF THE AGGRAVATING FACTOR OF PRIOR VIOLENT FELONY CONVICTION.

In denying all of 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 on June 28, 2011. Smith v. Florida, 131 S.Ct. 3087 (2011), reh. den. 133 S.Ct. 73 (June 29, 2012).

Mr. Smith filed his Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 on June 21, 2012. PCROA V2 244-289. The defendant raised 6 claims. The postconviction court denied all the claims on December 26, 2012. PCROA V2, 335-369.

SUMMARY OF THE ARGUMENT

Issue 1: The rules denying counsel the right to interview jurors are unconstitutional. Access to jurors is necessary to assure the jury was not tainted by impermissible influences or otherwise acted in an unconstitutional manner. The blanket prohibition imposed on counsel is unconstitutional and denies defendants adequate assistance of counsel.

Issue 2: Caldwell claim. Florida's jury instructions unconstitutionally diminish the jury's responsibility in sentencing.

Issue 3: Death sentence statute unconstitutional as applied. The state and federal constitutions require that penalty phase juries must unanimously find each aggravating factor to exist.

Issue 4: Death sentence statute unconstitutional on its face and as applied. Florida's sentencing scheme fails to guarantee that the death penalty is not arbitrarily imposed or that it will be imposed only on the worst offenders.

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

execution, evidence from the Lightbourne hearings, and the Dyehouse memos, demonstrate the constitutional necessity of public review of the team members.

Issue 6: Cumulative error. Each claim raised in postconviction justifies relief, but, to the extent any single one fails to rise to that level, the claims in combination and in totality require a new trial and resentencing.

STANDARD OF REVIEW

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

ARGUMENT

ISSUE 1

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

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

> In Claim One, the Defendant argues that the rules prohibiting his lawyers from interviewing jurors to determine if constitutional error was present violates equal protection principles, the First; Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution, and denies the Defendant adequate assistance of counsel in pursuing his postconviction remedies. At the October 29,2012 hearing, counsel for the Defendant updated claims in the Motion. The Court made this oral amendment part of the record. The transcript of the hearing is attached hereto.
>
> This claim challenges the validity of Florida Rule of Criminal Procedure 3.575 and Florida Rule of Professional Responsibility 4-3.5(d)(4). The Florida Supreme Court has repeatedly recognized that this claim must be presented on direct appeal, and is procedurally barred when raised for the first time in postconviction proceedings. See Troy v. State. 57 So. 3d 828, 841 (Fla. 2011)(internal citations

> omitted); Reese v. State, 14 So. 3d 913,919 (Fla. 2009)(internal citations omitted); Isreal (sic) v. State, 985 So. 2d 510, 522 (Fla. 2008)(internal citation omitted); Suggs v. State, 923 So. 2d 419,440 (Fla. 2005); Dufour v. State, 905 So. 2d 42, 69-70 (Fla. 2005)(internal citations omitted). The Court has also rejected the substantive merits of the claim. Troy, 57 So. 3d at 841 (internal citations omitted); Reese, 14 So. 3d at 919 (internal citation omitted); Kormondy v. State, 983 So. 2d 418, 440 (Fla. 2007)(internal citations omitted); Barnhill v. State, 971 So. 2d 106, 116-17 (Fla. 2007)(internal citations omitted); Johnson v. State, 804 So.2d 1218, 1225 (Fla. 2001). Therefore, this claim is denied as it is procedurally barred and meritless.
>
> PCROA V2 336-337.

In rejecting the claim, the court below failed to address or discuss why academics, journalists and those lawyers not connected with a particular case may interview capital jurors while trial and postconviction defense counsel may not do so. The court's citing to Evans does not cure this deficiency. The Evans ruling relied on the rejection of "fishing expedition interviews" based on this court's previous ruling in Arbelaez v. State, 775 So.2d 909 (Fla. 2000) as quoted in Johnson v. State, 804 So.2d 1218 (Fla. 2001). The overall constitutional challenge in Evans and in the Troy ruling below was also rejected under the Barnhill case as a representative authority from this court.

However, none of the cases utilized in this Court's Evans and Barnhill rulings have addressed why academics may conduct "fishing expeditions" with

former capital trial jurors. An example presented was the 1,198 interviews with jurors from 353 capital trials in 14 states, including Florida (as of August 15, 2005) performed by the Capital Jury Project and used in criminal justice doctorate dissertations. See http://www.cjp.neu.edu which lists Julie Goetz, "The Decision-Making of Capital Jurors in Florida: The Role of Extralegal Factors" (unpublished dissertation (1995), School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida) as a representative dissertation.

None of the cases utilized in this Court's Evans and Barnhill rulings have addressed why journalists may conduct "fishing expeditions" with former capital trial jurors without restrictions. The court below was aware that a juror in the Troy case was interviewed about the experience of sitting through a death penalty trial. "Many Jurors Scarred by Trials;" Sarasota Herald-Tribune, December 4, 2005 (http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20051204). See also, e.g., Chris Tisch, "Defense Fears Comments Affect Verdict;" St. Petersburg Times, October 25, 2004 (available at http://www.sptimes .com/advancedsearch .html), where the jury foreman of a murder trial is interviewed about the jury's deliberations.

Lastly, none of the cases utilized in this Court's Evans and Barnhill rulings have addressed why lawyers not connected with a case may conduct "fishing

expeditions" with former capital trial jurors without restrictions. Because post-trial questioning of jurors can and does come from academic researchers, journalists and lawyers and others not connected with the case, the Florida rules infringe upon the appellant's rights to due process, access to the courts, and the equal protection concepts enunciated in such cases as Bush v. Gore, 531 U.S. 98 (2000). Criminal defense counsel in Florida are treated differently, unfairly and unequally compared to academics, journalists, and those lawyers and others not connected with a particular case. Consequently, the reliability and integrity of appellant's capital sentence is thereby flawed.

ISSUE 2

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. SMITH'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. Smith'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).

ISSUE 3

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. Smith 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. Smith 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. Smith 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. Smith 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. Smith immediately after conviction, the court could only have imposed a life sentence. § 775.082 Fla. Stat. (1995). Dixon, 283 So.2d at 9.

Mr. Smith'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. Smith'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. Smith'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 it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support of the recommendation of death.

ISSUE 4

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. SMITH 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. Smith 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. Smith's case entitles him to relief.

ISSUE 5

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

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

provisions of the Florida Constitution.

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

457 U.S. at 606, 102 S.Ct. 2613; accord Richmond Newspapers, 448 U.S. at 572, 100 S.Ct. 2814.

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

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

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

Access to prisons by the press and public is a constitutional right. Pell v. Procunier, 417 U.S. 817 (1974). This access to prisons has been found to include access to view executions as well, based upon both historical traditions and the functional importance of public access to executions. California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002). The right to view executions includes all parts of the execution, including the manner in which intravenous lines are injected. Id. at 883. The court held that limitations on what parts of the execution were viewed by the public based on safety concerns for the prison staff members involved was not justified. Id. at 880. The court found that concerns that execution team members would be publically identified and retaliated against was "an overreaction, supported only by questionable speculation." Id. Importantly, the court pointed out that numerous high profile individuals are involved with the implementation of executions, including a warden, a governor and judges, and there is a significant history of safety around these publicly known officials. Id. at 882. Pennsylvania courts have likewise rejected safety concerns as a basis for protecting the identity of execution witnesses as wholly unsupported speculation. Travaglia v. Dept. of Corrections, 699 A.2d 1317, 1323 n.5 (Pa. Commw. Ct. 1997).

The litany of states that have had challenges to the manner in which lethal injection is used has grown as additional problems have been documented. These states include Florida and then Governor Jeb Bush's moratorium on executions following news accounts of the botched execution of Angel Diaz. In Maryland, a federal district court issued a stay of execution after lethal injection chemicals leaked onto the floor during a previous execution. Oken v. Sizer, 321 F. Supp. 2d 658, 659 (D. Md. 2004). In Ohio, two executions were marked by long delays related to venous access, including one in which the inmate's hand swelled because of improper venous access. See State v. Rivera, Case No. 04CR065940, Lorraine County, Court of Common Pleas (July 24, 2007); Cooey v. Taft, 2006 WL 352646 (S.D. Ohio Dec. 6, 2006). And, of course, the pending Broom case suggests Ohio is still unable to properly administer the lethal injection protocols.

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

member was diagnosed with post-traumatic stress disorder. In general, team members expressed minimal concern about problems that arose. Id. at 979. The court wrote:

> However, the record in this case, particularly as it has been developed through discovery and the evidentiary hearing, is replete with evidence that in actual practice OP 770 does not function as intended. The evidence shows that the protocol and Defendants' implementation of it suffer from a number of critical deficiencies, including:
>
> > 1. Inconsistent and unreliable screening of execution team members: For example, one former execution team leader, who was responsible for the custody of sodium thiopental (which in smaller doses is a pleasurable and addictive controlled substance), was disciplined for smuggling illegal drugs into San Quentin; another prison guard led the execution team despite the fact that he was diagnosed with and disabled by post-traumatic stress disorder as a result of his experiences in the prison system and he found working on the execution team to be the most stressful responsibility a prison employee ever could have.
> >
> > 2. A lack of meaningful training, supervision, and oversight of the execution team: Although members of the execution team testified that they perform numerous "walk-throughs" of some aspects of the execution procedure before each scheduled execution, the team members almost uniformly have no knowledge of the nature or properties of the drugs that are used or the risks or potential problems associated with the procedure. One member of the execution team, a registered nurse who was responsible for mixing and preparing the sodium thiopental at many executions, testified that "[w]e don't

> have training, really." While the team members who set the intravenous catheters are licensed to do so, they are not adequately prepared to deal with any complications that may arise, and in fact the team failed to set an intravenous line during the execution of Stanley "Tookie" Williams on December 13, 2005. Although Defendants' counsel assured the Court at the evidentiary hearing that "Williams was a lesson well learned, one that will never occur again," the record shows that Defendants did not take steps sufficient to ensure that a similar or worse problem would not occur during the execution of Clarence Ray Allen on January 17, 2006, or Plaintiff's scheduled execution the following month.

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

In North Carolina, a federal district court found that an inmate "raised substantial questions as to whether North Carolina's execution protocol creates an undue risk of excessive pain." Brown v. Beck, 2006 WL 3914717, *8 (E.D.N.C. 2006). This conclusion was based upon both toxicology studies of post-mortem levels of sodium pentothal in inmates and the testimony of multiple witnesses indicating possible complications. Id. at *4-5. The district court allowed Brown's execution to go forward on the condition that execution personnel with sufficient

medical training be present to ensure that the condemned was unconscious prior to and during the administration of the lethal chemicals. Id. at *8. However, executions were halted again when it was revealed that the state had not properly monitored inmates' levels of consciousness as promised. Conner v. North Carolina Council of State, Case No. 07GOV0238, County of Wake, Office of Administrative Hearings (Aug 9, 2007).

Finally, in Missouri, a federal district court temporarily put a halt to executions after hearing anonymous testimony from a medical doctor involved in executions. Taylor v. Crawford, 2006 WL 1779035 (W.D. Mo. 2006). This medical doctor/executioner testified that he made his own changes to the amounts of drugs that were administered and the location where drugs were administered during executions and said he often made mistakes in writing things down because he was dyslexic. Id. at *5. Along with these concerns, the court also noted the constitutional problems created by the fact that little or no monitoring was done to ensure that an adequate dose of anesthesia was administered prior to other drugs being injected. Id. at *8. It was also revealed that the doctor had been sued for malpractice more than twenty times and that his privileges had been revoked at two hospitals. Missouri then agreed to stop employing him for executions.

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

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

If the State wants to ensure integrity in its method of executing its citizens, it should want everything out in the open and above board. If the execution team members and self-described medically qualified personnel meet FDOC's minimal qualifications then the State should be pleased to identify these people. Likewise, safety concerns for the members of the execution team are purely speculative and,

more importantly, run counter to the evidence that far more prominent individuals involved in executions, such as judges, governors, and wardens, have not been the target of any serious or widespread harm. Finally, the cases in Ohio, Missouri, California and North Carolina show that merely requiring the involvement of medical personnel is not a sufficient protection. Without access to the identities of these individuals, there is no way for a condemned to determine whether they are competent and qualified to ensure the Eighth Amendment is not violated.

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

ISSUE 6

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

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic mail to Carol Dittmar, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607-7013, at Carol.Dittmar@myfloridalegal and capapp@myfloridalegal and by U.S. Mail to Joseph P. Smith DOC # 899500,

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CERTIFICATE OF COMPLIANCE

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

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