IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2137

CHARLES WILLIAM FINNEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal involves a summary denial of a Rule 3.851 motion before Circuit Court Judge Wayne Timmerman in Tampa, Hillsborough County, Florida. Citations in this brief to designate references to the record, followed by the appropriate page number, are as follows:

(R. ___) - Record on direct appeal;

(PC-R. ___) - Record in this instant appeal.

STATEMENT OF FONT

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STATEMENT OF THE CASE AND FACTS

Mr. Finney was charged by indictment returned on February 13, 1991, with first-degree murder (Count I); robbery with a deadly weapon (Count II); sexual battery (Count III); and trafficking in stolen property (Count IV). The sexual battery charge was nolle prossed.

Mr. Finney went to trial on September 14, 1992. Mr. Finney testified in his own defense. After the jury deliberated for eight hours, the jury returned a verdict of guilty of murder, armed robbery and stolen property (R. 756-758).

Mr. Finney's sentencing phase began on September 18, 1992. The jury returned an advisory sentence of death that day, with a vote of 9-3. Mr. Finney was sentenced to death on November 10, 1992 (R. 941-942). The trial court found the aggravating factors of previous conviction of a felony involving the use or threat of violence; the capital felony was committed for financial gain; and the crime was especially heinous, atrocious or cruel (R. 941-952). The trial court found several non-statutory mitigating circumstances, including that Mr. Finney had a good work and military history; that he had positive character traits; there was potential for rehabilitation; that he enlisted in the service; and was honorably discharged (R. 948-950).

On direct appeal, the Florida Supreme Court affirmed the conviction and death sentence. Finney v. State, 660 So. 2d 674

(Fla. 1995), cert. denied, 116 S. Ct. 823 (1996).

Mr. Finney sought post-conviction relief pursuant to Fla. R. Crim. P. 3.850/3.851. No evidentiary hearing was held in circuit court. The Florida Supreme Court affirmed the summary denial of relief. Finney v. State, 831 So. 2d 651 (Fla. 2002).

Mr. Finney filed various pro se motions to dismiss his post-conviction attorneys and a pro se motion for rehearing in the Florida Supreme Court, but was denied. The mandate from the Florida Supreme Court was issued on December 23, 2002.

On January 14, 2003, then counsel for Mr. Finney filed a Petition for Writ of Habeas Corpus and it was amended on July 21, 2003. On July 8, 2003, counsel for Mr. Finney filed in circuit court a Motion to Vacate Judgment of Conviction and Sentence raising two claims, a Brady v. Maryland[1] claim, arguing that the State withheld exculpatory evidence, and a claim alleging a conflict of interest with his post-conviction counsel. These claims were denied without an evidentiary hearing or a written opinion in Finney v. State, 907 So. 2d 1170 (Fla. 2005).

The United States District Court denied all claims on July 5, 2006, Finney v. McDonough, 2006 U.S. Dist. LEXIS 45292 (M.D. Fla. July 5, 2006). A corrected order was filed on July 17, 2006, Finney v. McDonough, 2006 U.S. Dist. LEXIS 48789 (M.D. Fla. July 17, 2006).

[1]Brady v. Maryland, 383 U.S. 83 (1963).

Mr. Finney filed a timely Notice of Appeal and Application for a Certificate of Appealability on August 3, 2006. The District Court denied the application on August 14, 2006, Finney v. McDonough, 2006 U.S. Dist. LEXIS 57288 (M.D. Fla. August 14, 2006).

On August 18, 2006, Mr. Finney submitted an Application for Certificate of Appealability to the Eleventh Circuit Court of Appeals. Judge William H. Pryor, Jr. denied Mr. Finney's Application without comment on September 13, 2006. Mr. Finney filed a Motion for Reconsideration for Certificate of Appealability, which was denied by a three-judge panel on November 9, 2006.

A petition for certiorari to the United States Supreme Court was filed on February 5, 2007 and denied on June 11, 2007.

On June 21, 2007, Mr. Finney filed a Rule 3.851 motion in which he raised two arguments -- that Florida's lethal injection procedure used violates the Eighth amendment to the U.S. Constitution and constitutes cruel and unusual punishment and newly available evidence shows that Mr. Finney's conviction and sentence constitute cruel and unusual punishment, and violates the Eighth Amendment to the U.S. Constitution (PC-R. 47-93). The State filed a response (PC-R. 101-112).

At a hearing on the motion on April 23, 2008, Mr. Finney argued for an opportunity to pursue public records on the lethal injection claim, and asked for an opportunity to argue his

claims in state court (PC-R. At 114).

Circuit Court Judge Wayne Timmerman summarily denied the motion and an evidentiary hearing (PC-R. at 114-115).

A written order denying Mr. Finney's motion was filed on September 26, 2008 (PC-R. at 109-199). A motion for rehearing was filed and denied on October 22, 2008 (PC-R. at 200-208; 215-324).

A timely notice of appeal was filed on November 13, 2008 (PC-R. at 325). This appeal follows and is timely.

SUMMARY OF THE ARGUMENT

Mr. Finney was deprived of his due process rights of notice and opportunity to be heard and to present evidence on his challenge to Florida's lethal injection procedures. Mr. Finney filed his challenge to the lethal injection procedures in light of the events during the execution of Angel Diaz. Although Mr. Lightbourne was given an opportunity to be heard and present evidence on his challenge to the lethal injection procedures, Mr. Finney was denied that right when the circuit court erroneously ruled that this Court's case law predating the Diaz execution precluded a challenge to the lethal injection procedures.

The manner in which Florida's capital sentencing scheme operates is arbitrary and capricious within the meaning of the Eighth Amendment, and thus unconstitutional. Arbitrary factors are present and can be seen in Mr. Finney's case. Accordingly, his death sentence violates the Eighth Amendment principles enunciated in Furman v. Georgia.

STANDARD OF REVIEW

The claims presented in this brief are constitutional issues on which no evidentiary development occurred. The circuit court summarily denied an evidentiary hearing, but the facts alleged by the Appellant must be accepted as true for purposes of this appeal in order to determine whether the Appellant is entitled to an opportunity to present evidence in support of his factual allegations. Peede v. State, 748 So. 2d 253 (Fla. 1999); Gaskin v. State, 737 So. 2d 509 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The review conducted on such claims is *de novo*.

ARGUMENT I

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CHALLENGE TO FLORIDA'S PROCEDURES FOR CARRYING OUT A LETHAL INJECTION EXECUTION AS VIOLATING THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.[2]

On June 21, 2007, Mr. Finney filed his Rule 3.851 motion in which he argued that Florida's lethal injection procedures violated the Eighth Amendment. The trial judge denied Mr. Finney an evidentiary hearing on this claim. In the order summarily denying Mr. Finney's lethal injection claim, the circuit court found in ground one that Florida's three-drug lethal injection protocol does not constitute cruel and unusual punishment, and Mr. Finney was not entitled to relief.

In ground two, the trial court held that the 2006 ABA Report was not newly discovered evidence, and Mr. Finney's argument was not filed within one year of his judgment and sentence (PC-R. at 110-111).

What the circuit court did not address in its order

[2]Even though this Court has denied claims similar to Mr. Finney's claim in other cases, Mr. Finney is obligated to present his claim to this Court in order to "exhaust" for purposes of seeking federal habeas relief. As this Court's precedent holds, Mr. Finney cannot summarily present his constitutional arguments or rely upon pleadings detailing the claim that was presented in the circuit court. By virtue of his obligation to "exhaust" his constitutional claims and his obligation to fully brief the claim before this Court in order to have the merits heard, Mr. Finney must set forth his detailed argument even though this Court has adversely decided claims like his in other cases.

was Mr.

Finney argument that he was entitled to the same opportunity to be heard that had been afforded Mr. Lightbourne. In his motion for rehearing, Mr. Finney specifically addressed Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), and this Court's opinion in Schwab v. State, 969 So. 2d 318 (Fla. 2007), and argued that Mr. Finney was entitled to an evidentiary hearing. Mr. Finney even proffered the evidence that he wished to present that Mr. Lightbourne had not presented at his evidentiary hearing.[3]

The circuit court deprived Mr. Finney of his due process rights under the state and federal constitutions. The decision to not grant Mr. Finney the right to present evidence and be heard that was extended to Mr. Lightbourne violates due process.

In Lightbourne, this Court affirmed the ultimate denial of Lightbourne's challenge to Florida's lethal injection procedures. In Lightbourne, a lengthy evidentiary hearing had been held, and this Court found competent and substantial evidence in the record to support the circuit court's factual conclusions.

When this Court issued its opinion in Lightbourne,

[3]Mr. Finney also sought to obtain public records on the Richard Henyard execution that occurred on September 23, 2008. Newspaper accounts of the execution indicated that Henyard "appeared to be shaking and having a hard time breathing," and that there may have been problems during the execution. Associated Press, Rapist and murderer of girls, 7 and 3, executed, the Florida Times-Union, (September 25, 2008). The circuit court did not address this issue in its order denying relief to Mr. Finney.

it also issued an opinion in Schwab v. State, 969 So. 2d 318 (Fla. 2007). In Schwab unlike in Lightbourne,[4] the circuit court had not held an evidentiary hearing on an Eighth Amendment challenge to Florida's lethal injection procedures in light of the Diaz execution. This Court in Schwab clearly stated that "when an inmate presents an Eighth Amendment claim which is based primarily upon facts that occurred during a recent execution, the claim is not procedurally barred." Schwab, 969 So. 2d at 321.

Beyond simply being able to present the claim and obtain merits consideration, this Court indicated in Schwab that when presented with a timely Rule 3.851 challenging lethal injection after the Diaz execution, the movant is entitled to have the circuit court either 1) take judicial notice of the evidence presented in the Lightbourne proceedings, or 2) conduct an evidentiary hearing on the claim:

> Under the unique circumstances of this case and based on the court's other ruling summarily denying relief, we hold that the postconviction court erred in failing to take judicial notice of the record in *Lightbourne.* **Since Schwab's allegations were sufficiently pled, the postconviction court should have either granted Schwab an evidentiary hearing, or if Schwab was relying upon the evidence already presented in *Lightbourne,* the court should have taken judicial notice of that evidence**.

[4]Procedurally, Mr. Finney's case is similar to Schwab in that the lethal injection claim was denied without an evidentiary hearing being conducted. However, it is clear from this Court's opinion that Mr. Schwab waited until after his warrant was signed in July of 2007 to file lethal injection challenge based on the Diaz execution.

Schwab, 969 So. 2d at 322-23 (emphasis added).[5]

After finding error in Schwab when neither an evidentiary hearing was conducted nor judicial notice were taken, this Court concluded that the error was harmless. Mr. Schwab had specifically asked for the circuit court to take judicial notice of the evidence presented in Lightbourne. The circuit court's refusal to take judicial notice of that evidence was found to be harmless error "because Schwab has not presented any argument as to specific evidence he wanted to present in this case that had not been presented in the Lightbourne proceeding." Schwab, 969 So. 2d at 323, n. 2.

Like Schwab, Mr. Finney presented a facially sufficient lethal injection challenge based upon the circumstances of the Angel Diaz execution and the subsequent changes to Florida's lethal injection procedures. Unlike Schwab, Mr. Finney did not ask the circuit court to take judicial notice of the evidence presented in Lightbourne, but instead specifically requested that an evidentiary hearing be conducted in his case at which time he is able to present evidence in support of his claim. Unlike Schwab, Mr. Finney specifically invoked his due process right to notice and reasonable opportunity to be heard. Unlike Schwab, Mr. Finney asked for an evidentiary hearing at which he would be represented by

[5]This Court also noted in its Schwab opinion that the circuit court there had asserted that judicial economy would not be served if it were to hold an evidentiary hearing on the same issue litigated in Lightbourne. Clearly, this Court did not accept this reasoning when it found error.

counsel, able to present evidence, confront the State's evidence, and make his own arguments based upon the evidence presented challenging Florida's lethal injection procedures. Unlike Mr. Schwab, Mr. Finney sought and continues to seek the opportunity to present evidence not presented at the Lightbourne evidentiary hearing. Under the clear language in Schwab, the circuit court erred in denying Mr. Finney's lethal injection challenge without conducting an evidentiary hearing in his case.

Because he asked for an evidentiary hearing and did not seek to invoke judicial notice, the specific error presented in Mr. Finney's case is different from the error this Court found in Schwab's case. While an erroneous ruling denying a party judicial notice can be evaluated for harmlessness, the erroneous denial of an evidentiary hearing is a different matter. At an evidentiary hearing there would have been the opportunity to have counsel present evidence, challenge evidence, all in support of a constitutional claim. Such error is a structural defect - a basic denial of that bedrock due process principle of notice and opportunity to be heard and present material evidence.

A lethal injection challenge involves first a resolution of factual issues, and then second, the application of the legal standard, which was most recently enunciated in Baze v. Rees, 128 S. Ct. 1520 (2008). When this Court affirmed the decision in Lightbourne, a case heard over ten days, this Court employed the

standard of review requiring it to give deference to the circuit court's findings of fact. As result, this Court's ultimate decision affirming was premised upon whether there was competent and substantial evidence to support the circuit court's ruling. Certainly, a different judge hearing disputed evidence could reach different factual conclusions that would produce a different final result. The decision in Lightbourne rests upon factual findings. It cannot be divorced from the facts that were found by the circuit court and relied upon by this Court in affirming.

Similarly, the decision in Baze produced a legal standard. The United States Supreme Court explained the standard by which the facts demonstrated at an evidentiary hearing were to be measured. It is not a decision that applies in a vacuum. It requires the trier of fact to make findings to which the standard is applied to determine whether an Eighth Amendment violation has been demonstrated. Thus, neither Baze nor Lightbourne constitute a ruling that no matter what facts are found by the trier of fact, Florida's lethal injection procedure is constitutional.

This Court relied upon this basic due process guarantee in Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996).[6]

[6]The touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S.

There, several cases were consolidated in front of one judge for evidentiary hearing. At issue in these cases was the impact upon a capital defendant's right to effective and conflict-free representation at trial when the particular public defender assigned as counsel was a card carrying special deputy sheriff. At the consolidated proceeding, the joined capital defendants were present in court with counsel for the some of the testimony. However, large portions of the proceedings were conducted with only one defendant and his counsel in the courtroom. This Court found that capital post-conviction movants were entitled to be present with counsel for the entirety of their own separate evidentiary hearing on the individual claim, even though each defendant's claim was premised upon common factual allegations concerning the special deputy status that was enjoyed by the public defender. Under Teffeteller, due process requires each Rule 3.851 movant to a separate evidentiary hearing at which he can be present, be represented by counsel and present evidence in support of his claim while confronting any evidence presented by the State. Because the failure to provide due process in this fashion is structural error, this Court in Teffeteller did not look to whether the error was harmless before ordering the cases all remanded and separate evidentiary hearings to be conducted in each defendant's case.

399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). The deprivation of this bedrock due process right is structural error that can be no more harmless that the denial of the right to trial by jury.

To the extent that this Court disagrees and requires Mr. Finney to show prejudice - something he was not in a position to do in circuit court - this Court would have to remand in order to provide him with an opportunity to make that showing. It would be the height of absurdity to say that Mr. Finney was deprived of his right to be heard, but that he was not prejudiced because he has not demonstrated prejudice when he has never been given the opportunity to demonstrate prejudice.

Mr. Finney proffered the evidence that he was aware of at that point in time (PC-R. at 200-208). He sought to show what different evidence he would have presented. He proffered that he would call Sara Dyehouse as a witness to discuss the memoranda that she wrote in June-August, 2006 concerning the revisions to the lethal injection protocol (2PC-R. 2270). He proffered that he expected Ms. Dyehouse to testify that she had, through her interviews of the execution team and examination of events at prior executions, determined that an unconsciousness determination was necessary following the administration of sodium pentothal and that the procedures that had been followed in Florida did not provide for such a determination. He proffered that Ms. Dyehouse would testify that she advised the Department of Corrections that such a determination was necessary to eliminate the risk of unnecessary pain that would result from the administration of painful drugs to a conscious condemned inmate during an execution. Ms. Dyehouse would testify

that not only was this an unnecessary risk of pain, it was an entirely foreseeable risk of unnecessary pain. Ms. Dyehouse would testify that despite her identification of this specific defect in the lethal injection procedures, the Department of Corrections decided to ignore her warnings and did not adopt a procedure for making any kind of unconsciousness determination (PC-R. 204-205). Mr. Finney also proffered that he would call Secretary McDonough to testify about Ms. Dyehouse's memoranda. Though Secretary McDonough testified during the Lightbourne proceedings, he did not testify about Ms. Dyehouse or the memoranda that she prepared. In fact, when asked who on his legal staff worked on preparing the revised protocols in the summer of 2006, Secretary McDonough did not recall Ms. Dyehouse's involvement and gave no testimony in the Lightbourne proceedings regarding Ms. Dyehouse, her memoranda, or the content and recommendations contained therein. Mr. Finney proffered that the Secretary would testify in conformity with his statements to newspaper reporters following the conclusion of the Lightbourne evidentiary hearing that the decision to ignore Ms. Dyehouse's recommendation was premised upon matters totally unrelated to whether the risk of unnecessary pain had been eliminated or ameliorated in some fashion (PC-R. 205-206).

Similarly, Mr. Finney proffered that he would call Department of Corrections spokesperson Gretl Plessinger to testify. Though she testified during the Lightbourne proceedings, she did not

testify about the Dyehouse memoranda or the recommendations contained therein. Subsequent to the Lightbourne hearing, she too, made statements to the media about the decision not to provide for an unconsciousness determination. According to Plessinger's statements, the decision to reject the recommendation was made for the Department's convenience and not because there had been a determination that no risk of unnecessary pain existed (PC-R. 206).

Mr. Finney proffered that he would call Dr. David Varlotta, an anesthesiologist, who was on the Lethal Injection Commission that was put together after the Diaz execution to investigate what happened and make recommendations as to what changes were warranted. Following this Court's decision in Lightbourne finding that there was sufficient evidence in the record to support the circuit court's conclusion that employees of the Department of Corrections with no medical training could make an unconsciousness determination, Dr. Varlotta advised the *St. Petersburg Times*: "I cannot agree that individuals without advanced medical training would have the ability to adequately assess the level of anesthetic depth." Dr. Varlotta was not called as a witness during the Lightbourne proceedings. Mr. Finney proffered that he would present Dr. Varlotta's testimony that procedures currently in place are not adequate to insure that there is no risk of unnecessary pain (PC-R. 206-207).

It is clear that Mr. Finney was deprived of his due

process rights in circuit court. Mr. Finney was denied his right to present and to be meaningfullt heard on his claim. The right to present evidence and be heard on questions of fact was afforded to Mr. Lightbourne, but were not afford to Mr. Finney. This violated the right to due process as provided the 14th Amendment to the U.S. Constitution and the corresponding provision in the Florida Constitution. The circuit court erred in refusing to grant Mr. Finney an evidentiary hearing on his challenge to Florida's lethal injection procedure in light of the Diaz execution. Schwab. The proper remedy is remand so that Mr. Finney can be provided with the same opportunity that was extended to Mr. Lightbourne - the opportunity to present the evidence supporting his facially sufficient challenge to Florida's lethal injection procedure. This Court should reverse and remand the summary denial of Mr. Finney's lethal injection claim.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING MR. FINNEY'S CLAIM THAT NEWLY DISCOVERED EMPIRICAL EVIDENCE DEMONSTRATES THAT HIS CONVICTION AND SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Introduction[7]

[7]Mr. Finney notes at the outset that this Court addressed a similar claim in Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006). In addressing the merits of the claim and denying relief, this Court said that Rutherford had failed to demonstrate how the arbitrary factors outlined by the ABA Report prejudiced him. Mr. Finnney presents this claim because he believes that he can demonstrate the prejudice that this Court found necessary, but wanting in Rutherford.

More than 30 years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam).[8] At

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Even though this Court has denied claims similar to Mr. Finney claim in other cases, Mr. Finney is obligated to present his claim to this Court in order to "exhaust" for purposes of seeking federal habeas relief. As this Court's precedent holds, Mr. Finney cannot summarily present his constitutional arguments or rely upon pleadings detailing the claim that was presented in the circuit court. By virtue of his obligation to "exhaust" his constitutional claims and his obligation to fully brief the claim before this Court in order to have the merits heard, Mr. Finney must set forth his detailed argument even though this Court has adversely decided claims like his in other cases.

[8]The previous year, the U.S. Supreme Court in McGautha v. California, 402 U.S. 183 (1971), had considered whether:

> the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.

McGautha, 402 U.S. at 196. In the majority opinion written by Justice Harlan, the Court found no due process violation. In reaching this conclusion, the majority noted the impossibility of cataloging the appropriate factors to be considered:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability . . . . For a court to attempt

issue in Furman were three death sentences: two from Georgia and one from Texas. The Petitioners relied on statistical analysis of the number of death sentences being imposed and upon whom they were imposed, and argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning.[9]

> to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

Id. at 204, 208. When Furman reached the Court the next year and the Petitioners argued that the statutory schemes for imposing a sentence of death violated the Eighth Amendment, Justice Stewart and Justice White joined the dissenters from McGautha and found that the death penalty statutes were indeed unconstitutional.

[9]Each found the manner in which the death schemes were then operating to be arbitrary and capricious. Furman, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); Id. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); Id. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); Id. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); Id. at 365-66 (Marshall, J., concurring)("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.")(footnote omitted).

Thus, Furman stands for the proposition succinctly explained by Justice Stewart in his concurring opinion: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. Id. at 310.[10]

In the wake of Furman, all death sentences were vacated. Proof of individual harm or the lack of such proof was not required. Florida and other states sought to adopt a death penalty scheme that would pass scrutiny under Furman. Florida's newly adopted scheme was reviewed by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976). In Gregg v. Georgia, 428 U.S. 153 (1976), a companion case to Proffitt, the Supreme Court explained: "the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Gregg v. Georgia, 428 U.S. at 195 (plurality opinion). Applying this principle to Florida's newly-adopted capital sentencing scheme, the Supreme Court concluded:

[10]It is important to recognize that the decision in Furman did not turn upon proof of arbitrariness as to one individual claimant. Instead, the Court looked at the systemic arbitrariness. Furman involved a macro analysis of a death penalty scheme and a determination as to whether the scheme permitted the death penalty to be imposed in an arbitrary and/or capricious manner.

> Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed.

Proffitt, 428 U.S. at 259-60. Subsequent Supreme Court decisions have explained that Furman required that a capital sentencing scheme produce constitutional reliability and "a reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 492 U.S. 302, 319, (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis deleted). See Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion). As a result, a capital sentencing scheme must: 1)"narrow" the capital sentencer's discretion, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988); and 2) permit the sentencer to consider "*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." Lockett v. Ohio, 438 U.S. 586, 604 (1978)(emphasis in original). See also Penry v. Lynaugh, 492 U.S. 302, 324 (1989).

Over time, various justices of the Supreme Court have

expressed concern whether the capital sentencing schemes approved in Gregg and Proffitt actually delivered the promised and requisite reliability. Justice Scalia observed an inherent inconsistency between the narrowing requirement and the broad discretion to consider mitigation requirement. Walton v. Arizona, 497 U.S. 639, 672-73 (1990). Justice Blackmun concluded that the Furman promise could not be delivered, and the death penalty should be declared unconstitutional:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia, 408 U.S. 238 (1972),* and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman v. Georgia, supra,* can never be achieved without compromising an equally essential component of fundamental fairness -- individualized sentencing. See *Lockett v. Ohio, 438 U.S. 586 (1978).*

Callins v. Collins, 510 U.S. 1141, 1143-44 (1994)(Blackmun, J., dissenting from the denial of cert.).

Most recently, Justice Souter wrote in an opinion joined by Justices Stevens, Ginsburg, and Breyer:

> Decades of back-and-forth between legislative experiment and judicial review have made it plain that the constitutional demand for rationality goes beyond the minimal requirement to replace unbounded discretion with a sentencing structure; a State has much leeway in devising such a structure and in selecting the terms for measuring relative culpability, but a

> system must meet an ultimate test of constitutional reliability in producing "'a reasoned moral response to the defendant's background, character, and crime,'" *Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)* (quoting *California v. Brown, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987)* (O'Connor, J., concurring); emphasis deleted); cf. *Gregg v. Georgia, 428 U.S. 153, 206, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)* (joint opinion of Stewart, Powell, and STEVENS, JJ.) (sanctioning sentencing procedures that "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant"). The *Eighth Amendment*, that is, demands both form and substance, both a system for decision and one geared to produce morally justifiable results.
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> That precedent, demanding reasoned moral judgment, developed in response to facts that could not be ignored, the kaleidoscope of life and death verdicts that made no sense in fact or morality in the random sentencing before *Furman* was decided in 1972. See *408 U.S., at 309-310, 92 S. Ct. 2726, 33 L. Ed. 2d 346* (Stewart, J., concurring). Today, a new body of fact must be accounted for in deciding what, in practical terms, the *Eighth Amendment* guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."
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> We are thus in a period of new empirical argument about how "death is different," *Gregg, 428 U.S., at 188, 96 S. Ct. 2909, 49 L. Ed. 2d 859* (joint opinion of Stewart, Powell, and STEVENS, JJ.): not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases. While it is far too soon for any generalization about the soundness of capital sentencing across the country, the cautionary lesson of recent experience addresses the tie-breaking potential of the Kansas statute: the same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.

Kansas v. Marsh, 126 S.Ct. 2516, 2542, 2544, 2545-46 (2006) (Souter,

J., dissenting).

B. The ABA Report

The ABA Report issued on September 17, 2006, identified numerous defects and flaws in the Florida capital sentencing scheme that inject arbitrariness into the decision-making process. The ABA Report cited a number of the areas "in which Florida's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures" ABA Report on Florida at iii. The team cautioned that the apparent harms in the system "are cumulative" and must be considered in such a way; "problems in one area can undermine sound procedures in others." Id. at iii-iv. A review of the areas identified in the report as falling short makes apparent that Florida's death penalty scheme is deficient for many of the same reasons the schemes at issue in Furman were found to be unconstitutional. Death sentences, like Mr. Finney's, are a product of an arbitrary and capricious system, including the post-conviction process. Who is executed in Florida is determined by a myriad of factors unrelated to the facts of the crime or the character of the defendant.

In this claim, the trial court denied Mr. Finney relief, stating that he should have filed this claim within one year of his judgment and sentence, which was in 1996. The trial court followed this Court's decision in Rutherford v. State, 940 So. 2d 1112, 1118 (Fla. 2006), and found the ABA Report was not newly

discovered evidence.

The trial court clearly is confused about what is required in a newly-discovered evidence claim. The court's order suggests that Mr. Finney should have filed this claim by January, 1997, one year after his case became final, but the ABA Report was not issued until September 17, 2006. Mr. Finney properly filed his motion for post-conviction relief within one year of learning of the ABA Report, on June 21, 2007. Once Mr. Finney learned of the newly-discovered evidence, he had one year in which to file the motion. To be considered timely filed as newly-discovered evidence, the successive Rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence. Cf. Mills v. State, 684 So. 2d 801, 804-805 (Fla. 1996). Thus, this claim was timely filed.

C. Florida – An Arbitrary and Capricious Death Penalty System

1. The Number of Executions

The information and conclusions contained in the ABA Report make clear that Florida's death penalty scheme has failed to satisfy the Furman mandate. Florida's capital sentencing is still arbitrary and capricious. Since 1972, Florida has carried out a total of 67 executions; while between 1972 and 1999, there were 857 defendants sentenced to death. Since 1999, there have been more death sentences imposed. ABA Report on Florida at 7. Statistics of

the number of individuals who committed murder during that time has not been recorded. It is clear that few death sentences that are imposed are actually carried out. The percentage of murderers in Florida actually executed since 1972 is minuscule. Furman, 408 U.S. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); Id. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); Id. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"). The ABA Report on Florida demonstrates the same flaws and defects condemned in the Furman once again infect Florida's capital sentencing scheme.

2. The Exonerated[11]

In Florida, since 1972, twenty-two (22) people have been exonerated and another individual has been exonerated posthumously, while 67 people have been executed. ABA Report on Florida at iv, 8 ("[T]he proportion exonerated exceeds thirty percent

[11]A plethora of factors contribute to an innocent individual being convicted of a capital crime. Given the number of exonerations so far, a risk that an innocent has been or will be executed in Florida is great. Such an occurrence would violate the Eighth Amendment. Also important under Furman are the systemic safeguards in place and their likely effectiveness in rescuing the innocent. This section focuses on the problems in Florida's rules and procedures that inhibit a condemned's ability to bring claims of newly discovered evidence of actual innocence, and inhibit his chances of being able to establish his innocence.

of the number executed."). "Since the reinstatement of the death penalty in 1972, Florida has led the nation in death row exonerations." Id. at 45. As noted by Justice Souter in his dissenting opinion in Kansas v. Marsh, 126 S.Ct. at 2544-45, when Illinois had 13 exonerations between 1977 and 2000, a moratorium was imposed and investigation launched. During the investigation, four more individuals were determined to be innocent. As a result, the Illinois capital sentencing scheme was reformed and all death sentences imposed under the old scheme were vacated. Yet, as the ABA Report on Florida notes, Florida has had more capital exonerations than Illinois. The staggering rate of exonerations certainly suggest that Florida's death penalty system is just as broken as Illinois' was – that politics, race, prosecutorial misconduct and deficient lawyering afflict the system. Yet in Florida, unlike in Illinois, there has been no moratorium. There has been no investigation. There has been no reform. There has been no effort to learn what defects and flaws have allowed innocent men to not just get convicted, not just have the convictions and sentences affirmed on direct appeal, but to have those convictions on at least one occasion (Juan Melendez) go all the way through a second round of state postconviction proceedings before prevailing in his third motion for postconviction relief and being released from death row after 17 years. Surely what happened to Mr. Melendez was "cruel and unusual in the same way that being struck by lightning is cruel and unusual"

Furman 408 U.S. at 309 (Stewart, J., concurring).[12] The number of exonerations in Florida alone demonstrates a broken system that violates the Furman promise.

a. The arbitrariness in the treatment of evidence of actual innocence.

While Florida passed legislation to allow capital defendants the opportunity to seek DNA testing, most of the exonerated defendants had no connection to favorable post-verdict DNA results.[13] Yet, Florida has not made any substantive or procedural improvements for those who have no DNA evidence in their case, but could show innocence through the use of other evidence. While Florida has now removed the time limitation for bringing a motion seeking DNA testing, see Fla. Stat. § 925.11 (1)(b) (2006); Fla. R. Crim. P. 3.853, capital postconviction defendants, like Mr. Finney, must prove due diligence in bringing their claims of innocence.

This Court has held that it would not consider evidence of innocence presented in a successive collateral motion where the circuit court had found that the capital defendant's

[12]The unanswered question is whether Mr. Melendez's exoneration was a second lightning strike. Did his luck finally turn so that he was able to finally demonstrate that his conviction was wrongful? Since no investigation has been conducted into how 22 innocent men ended up on death row, we have no knowledge as to whether the exonerated men simply had a remarkable change of luck which led to the exoneration.

[13]DNA testing established Frank Lee Smith's innocence posthumously. DNA testing produced evidence in Rudolph Holton's case that while assisting in establishing his innocence, was not dispositive.

attorney had not been diligent in uncovering and presenting the evidence that demonstrated innocence. Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002).[14] In yet another case, this Court, while considering some of the newly discovered evidence presented in a successive collateral motion, excluded from its consideration certain other pieces of the newly discovered evidence. This Court deferred to the circuit court's conclusion that Leo Jones[15] had failed to prove his diligence in uncovering certain pieces of newly discovered evidence, and excluded evidence of another man's confession as inadmissible hearsay. Jones v. State, 709 so. 2d 512, 519-20, 525 (Fla. 1998).[16]

[14]In Swafford, three justices dissented on the grounds that the new evidence would have probably produced an acquittal had it been presented to the jury. Id. at 978-79 (Anstead, J., dissenting) ("This case represents one of those truly rare instances where this Court has summarily brushed aside on wholly speculative grounds a colorable claim of actual innocence and a possible serious miscarriage of justice. There has been absolutely no focus here on the reality of what actually happened.").

[15]The ABA Report also notes that the Death Penalty Information Center lists the case of Leo Jones as one that may have resulted in the execution of an innocent man. ABA Report on Florida at 8.

[16]In Jones, two justices dissented. See Id. at 527 (Anstead, J. dissenting) (this case "is troubling because of the sheer volume of evidence present in the record that another person committed the murder, and, yet, none of this evidence was heard by the jury that tried and convicted Jones"); Id. at 535-36 (Shaw, J., dissenting) ("The collateral process in Florida's capital sentencing scheme is a constitutional safety net designed above all to prevent the execution of an innocent man or woman. The present case is a classic example of that safety net working properly--up to the present point. Although Jones was tried and convicted in 1981, much of the present evidence did not--could not--come to light until now, more than a decade later--after Officer Smith and Schofield's accusers came

A system that precludes the presentation of evidence of innocence in a form other that the results of DNA testing injects arbitrariness and randomness into the process in violation of Furman. It defies logic to require an innocent man to be executed because his attorney failed to prove diligence in discovering the evidence that proves his innocence.[17]

While DNA is a powerful tool in proving innocence, the recantation of witness testimony, confession by another individual to a third-party and other scientific improvement may be equally revealing. See House v. Bell, 126 S.Ct. 2064 (2006). And, while there may be a more obvious issue of credibility attached to evidence of recantations, confessions and other scientific advances than may not be present with DNA, that does not mean that there will not be credibility issues raised as to the accuracy of DNA results. It is arbitrary to place a diligence requirement when dealing with

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forward. This evidence vastly implicates Schofield and casts serious doubt on Jones' guilt. The case that stands against Leo Jones today is a horse of a different color from that which was considered by the jury in 1981. 'Fairness, reasonableness and justice'--and indeed, the integrity of Florida's capital sentencing scheme--dictate that a jury consider the complete case.").

[17]As was noted in Furman, any judicial system with procedural and substantive protections for an accused will result in errors; innocent individuals will be convicted. Furman, 408 U.S. at 366 ("Our 'beyond a reasonable doubt' burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death."). Yet, not only does empirical evidence now demonstrate that Florida has the highest exoneration in capital cases of any state, nothing has been done to investigate, find out why, and attempt to remedy the

a particular type of evidence of diligence, but not another. See Jones; Swafford.

Florida has ignored the need for an innocence exception that allows an individual to defeat procedural bars when innocence is shown, has led to a system that tolerates and accepts the risk of executing an innocent individual. As a result, Florida's capital sentencing scheme violates the principles enunciated in Furman.

b. DNA.

Florida has now decided that DNA evidence will not be subjected to the procedural bars that apply to other evidence of innocence. However, those ignored by the State are those who cannot prove their innocence through DNA testing because the State destroyed the evidence before the testing could be conducted.

As the ABA Report on Florida makes clear: "Many who have been wrongfully convicted cannot prove their innocence because states often fail to adequately preserve material evidence." ABA Report at 43. Indeed, "the State of Florida did not require the preservation of physical evidence in death penalty cases until October 1, 2001." Id. at 56. The distinction between the case where the evidence was retained and the testing demonstrates innocence and the case where the evidence would have established innocence, but was destroyed, can only be described as "wanton" or "freakish". Furman,

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matter.

408 U.S. at 310.

3. Representation

The Florida Death Penalty Assessment Team identified several problems concerning the representation of indigent capital defendants that leads to the arbitrary imposition of the death penalty and the problems effect all levels of representation. The team considered defense counsel's competence to be perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty. ABA Report on Florida at 135. See Furman, 408 U.S. at 256 n. 21 (whether counsel timely objected to error was on occasion a decisive arbitrary factor in whether a death sentence was imposed).

a. Trial level representation.

The team found that there was inadequate compensation for trial counsel in death penalty proceedings. ABA Report on Florida at iv. In addition, the administration of the funding and timing of counsel's ability to seek payment severely hamper obtaining qualified counsel who has adequate funding for a death penalty case. Florida is obligated to provide effective representation at the trial under the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984).[18]

[18]The United States Supreme Court's decision in Strickland was and is binding upon this Court as determining the meaning of the Sixth Amendment. Yet as discussed *infra*, this Court has acknowledged its failure to properly apply one aspect of Strickland in a number of cases. Stephens v. State, 748 So. 2d 1028, 1032 n. 2 (Fla. 1999). Despite this acknowledgment, this Court refused to correct its error and reconsider those cases in which the error had been committed.

As explained in Strickland, the purpose of this constitutional obligation is insure that the trial is an adequate adversarial testing that produces a reliable result. The United States Supreme Court not only recognized that the ABA had promulgated a set of guidelines devoted to setting forth the obligations of defense counsel in capital cases, but found that those guidelines served as a benchmark in further the goal of obtaining a constitutionally adequate adversarial testing. Rompilla v. Beard, 545 U.S. 374 (2005).[19] With those guidelines in mind, the team recommended that steps be taken to insure the appointment of "qualified and properly compensated counsel." Id. at 174. The team also recommended that this guarantee include "[a]t least two attorneys" with access to investigators and mitigation specialists. One member of the defense team should be trained in mental health screening. Id. at 175-76. These and the other recommendations made in the ABA Report reflect that Florida has

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Certainly, this injects arbitrariness into Florida's capital sentencing scheme that violates the principle of Furman.

[19]Even though the United States Supreme Court has explained that its decisions finding ineffective assistance in Rompilla v. Beard, Wiggins v. Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), were all dictated by its decision in Strickland and each of those decisions date back to Strickland, this Court has refused to re-examine its decisions predicated on its understanding of Strickland which are at least arguably in error under Rompilla, Wiggins, or Williams. Individuals on Florida's death row who have meritorious claims under any one of these three decisions do not get the benefit of those three decisions if this Court had denied a Strickland claim before the Supreme Court issued these decisions. As explained *infra*, this is the injection of an arbitrary factor into who gets executed and who does not that violates the principle of Furman.

not lived up to its obligation to minimize, if not remove, arbitrary factors from the capital sentencing process.

b. Postconviction representation

An even more substantive failure to deliver on the Furman promise arises in the context of Florida's capital postconviction representation. The quality of Florida's capital postconviction representation system has steadily declined over the past 10 years when the federal funding for resource centers was eliminated.[20] Under the current system, at that part of the capital process at which errors are sought to be caught and corrected, qualifications to be appointed to a capital postconviction case are minimal, oversight is non-existent, and funding is inadequate. Id. at v. Within the Registry system, statutorily funding is only available for 840 attorney hours for attorneys representing capital postconviction defendants on the registry when research suggests that 3,300 attorney hours are required to represent a capital

[20]The past 10 years have demonstrated a consistent pattern of turmoil and chaos in the representation of capital postconviction defendants. The state-funded agency responsible for representing postconviction defendants was overwhelmed with cases, absorbing those cases that the federally funded organization had represented, and a large number of cases in the mid-90s when death sentences spiked and rule changes caused initial motions to be filed much quicker than in previous years. The location of the agency was split into three regional offices but was still managed under the auspices of a single agency. The agency was then officially separated into three regional offices with the creation of the Registry system to handle conflict and overflow cases. A few years later, the Florida Legislature eliminated one of the regional offices and sent the Registry sixty-plus cases.

postconviction defendant. ABA Report on Florida at v. This is not the only monetary limitation, funds for investigative, expert, travel and other costs is limited. Moreover, there is no provision for compensation for successor proceedings.[21]

While Registry counsel are restricted in funding, the Capital Collateral Counsel (CCC) offices are not. Thus, CCC attorneys can exceed the 840 hours without the consequence of non-payment. CCC attorneys can hire experts, pay investigators and incur other costs associated with litigating a capital postconviction case without consequence of non-payment. There is no valid basis for distinction between death row defendants represented by Registry counsel and death row defendants represented by CCC attorneys. Undoubtedly, this disparity in funding will impact the representation and arbitrarily effect the ultimate success of capital postconviction defendants in challenging their convictions and death sentences.

In 1988, this Court recognized that the creation of CCR extend to all Florida capital defendants the right to have effective representation in all collateral proceedings in both state and federal court. Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988) ("each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings. This statutory

[21]Juan Melendez was exonerated in the course of his third motion for post-conviction relief. Yet, the funding of the registry makes no provision for even a second or third motion.

right was established to alleviate problems in obtaining counsel to represent Florida's death-sentenced prisoners in collateral relief proceedings."). Having recognized the statutorily created right, this Court has generally found that no remedy exists for a breach of the statutorily created right to effective collateral counsel. Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996) ("claims of ineffective assistance of postconviction counsel do not present a valid basis for relief").[22] This Court did recognize an exception to the Lambrix rule where state-provided collateral counsel due to neglect failed to file a timely notice of appeal. Porter v. State, 788 So. 2d 917 (Fla. 2001). Otherwise, state-provided collateral counsel's failure to exercise diligence in investigating and timely presenting evidence of innocence or of a constitutional deprivation operates as a bar to a court's consideration of the resulting claims for relief. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla.

[22]However, in the non-capital context not involving the statutory right to effective collateral counsel, this Court held that when a convicted defendant establishes that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner, due process requires that the convicted defendant be authorized to file a belated motion to vacate. Steele v. Kehoe, 747 So. 2d 931, 934 (Fla. 1999)("we [have] made clear that 'postconviction remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States.'"). Accordingly, this Court ordered that Fla. R. Crim. Pro. 3.850 that addresses post conviction motions filed by non-capital defendants be amended to provide that an untimely motion could be filed if "the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion." Fla. R. Crim. Pro. 3.851 was not amended in a corresponding fashion.

2002).

Beyond the narrow circumstance identified in Porter v. State, a capital defendant has no remedy when state-provided counsel either through negligence or a lack of diligence fails to provide effective representation, Florida's capital sentencing process fails to live up to the Furman promise. As noted in the ABA Report, the performance of Registry counsel has been openly criticized, even by members of this Court:

> This lack of appellate experience may account for the questionable performance of some registry attorneys. For example, a number of registry attorneys have missed state post-conviction and federal habeas corpus filing deadlines possibly precluding their clients from having their claims heard. Specifically, registry attorneys in at least twelve separate cases filed their clients' state post-conviction motions or federal habeas corpus petitions between two months to three years after the applicable filing deadline.
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> Performance like this has led two Florida Supreme Court Justices to publicly comment on the quality, or lack thereof, of registry attorneys. Justice Cantero stated that the representation provided by some registry attorneys is "[s]ome of the worst lawyering" he has ever seen. Specifically, "some of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven't raised the right ones." Chief Justice Barbara Pariente reiterated the concerns of Justice Cantero by stating that "[a]s for registry counsel, we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimal levels of competence." The questionable performance of these attorneys, as well as the lack of requisite qualifications, is particularly troublesome in light of the fact that death-sentenced inmates do not have a state of federal constitutional right to assert a claim of ineffective assistance of post-conviction counsel.
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> The performance of these attorneys has also led many legal experts as well as some Democratic and Republican Legislators to criticize the closure of CCRC-North Office in 2003. In fact,

> many legal experts, including Justice Cantero and the Executive Director of the Commission on Capital Cases, have cautioned against proposals to eliminate the two other CCRC Offices.

ABA Report on Florida at 183-84.

A system that knowingly provides capital defendants with "some of the worst lawyers" that a Justice of this Court has ever seen, and strips the defendant of the right to complain and seek redress, simply does not comport with the Furman promise that states with capital sentencing schemes must seek to eliminate the risk that an execution will be as random as a bolt of lightning. Undeniably with 22 exonerations, Florida's trial system warrants "a constitutional safety net." Jones v. State, 709 So. 2d. at 535-36 (Shaw, J., dissenting). Yet, it is well-recognized in Florida, as the ABA Report documents, that the "safety net" has been stripped away. Those capital postconviction defendants who receive "some of the worst lawyering" that a Florida Supreme Court justice has ever seen and who may have meritorious claims for relief and who in fact may be innocent, have been arbitrarily denied any real chance of obtaining relief by Florida's knowing willingness to provide incompetent counsel. The situation "smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring).

4. Issues Related to the Jury's Role in Sentencing

a. Jury Instructions.

The Florida Death Penalty Assessment Team found that

capital jurors, i.e., those largely involved in the decision of whether a defendant receives the death penalty, do not understand "their role or responsibilities when deciding whether to impose a death sentence." ABA Report on Florida at vi. "In one study, over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt." Id. The same study found that over thirty-six percent (36%) "believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be 'heinous, vile or depraved'" beyond a reasonable doubt. Id. (emphasis in original). Over twenty-five percent (25%) considered future dangerousness, even though such a factor is not a legitimate sentencing factor under Florida law. Id. The presence of an identified arbitrary factor, *i.e.* juror confusion, warrants action. This violates the promise of Furman.

b. Unanimity.

"Florida is now the only state in the country that allows a jury to find that aggravators exist *and* to recommend a sentence of death by a mere majority vote." State v. Steele, 921 So. 2d 538, 548-49 (Fla. 2005)(emphasis in original). The ABA Report on Florida cites a study which permitting capital sentencing recommendations by a majority vote reduces the jury's deliberation time and may diminish the thoroughness of the deliberation. ABA Report on Florida at vi-vii.

The question of the constitutionality of permitting a jury to recommend a death sentence on the basis of a majority vote has been upheld. Spaziano v. Florida, 468 U.S. 447 (1984). But in Florida where death recommendations have been permitted on less than a unanimous vote, 22 exonerations of death sentenced individuals has occurred since 1972. The cause for the highest rate of capital exonerations in the nation has not been investigated. It is recognized that Florida has held that a sentencing jury is precluded from consideration of residual or lingering doubt as to guilt as a mitigating factor that may warrant a life sentence. ABA Report on Florida at 311 ("the Florida Supreme Court has consistently rejected 'residual' or 'lingering doubt' as a non-statutory mitigating circumstance"). It is certainly logical that an innocent man or woman may have less to argue in the way of mitigation than a guilty one. See Cheshire v. State, 568 So. 2d 908, 912 (1990) ("Events that

result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court."). Where the defendant is innocent, the reality is that there were no "events" that led to a murder that he did not commit. There is only the mitigation inherent in any individual's life story. Thus, the exclusion of lingering doubt as a basis for a sentence of less than death clearly increases the odds that an innocent defendant will receive a sentence of death.

The coupling of a simple majority verdict with the preclusion of consideration of lingering doubt as a basis for a sentence of less than death add to the risk that an innocent will be sentence to death. Given that Florida is the only state to have coupled these things together and given that Florida leads the nation in capital exonerations, provides a basis for arguing the synergistic effect of the choices made in structuring Florida's capital scheme has produced a system that "smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring).

c. Judicial Overrides.

In Florida, the judge who presides over a capital sentencing proceedings has the ability to override a jury's sentencing recommendation. ABA Report on Florida at 31. This Court adopted the standard to be employed when reviewing a judicial override in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Justice Shaw

opined in 1988 that the Tedder standard had created Furman error:

> This presents a serious *Furman* problem because, if *Tedder* deference is paid, both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation and, thus, cannot rationally distinguish between those cases where death is imposed and those where it is not.

Combs v. State, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring) (footnote omitted). In 1989, a majority of this Court held that the vigorousness of the Tedder standard had waxed and waned over the years:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that *Tedder* has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to *Grossman v. State*, 525 So.2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring):
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> > During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation. . .
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> > Clearly, since 1985 the Court has determined that *Tedder* means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So.2d at 910.

Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). A clearer confession that arbitrariness had infected the decision making process is hard to imagine.

But not just members of this Court have been troubled

by the jury override and this Court's erratic treatment of the Tedder standard. In Parker v. Dugger, 498 U.S. 308 (1991), the United States Supreme Court reviewed this Court's application of the Tedder standard. In reversing, the U.S. Supreme Court explained:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. * * * The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all.

Parker, 498 U.S. at 321. The sporadic use of the judicial override and the erratic application of the Tedder standard has again injected arbitrariness into Florida's capital process.

5. Racial and Geographic Disparities

Racial and geographic disparities still plague Florida's death penalty scheme as noted in the ABA Report.

a. Racial Disparities.

The ABA Report relied on three previous studies about race and the death penalty. It also analyzed of current statistical discrepancies concerning race and the death penalty. In 1991, this Court's Racial and Ethnic Bias Commission found that "the application of the death penalty is not colorblind." ABA Report on Florida at vii-viii. In 1991, a defendant in a capital case was 3.4 times more likely to get the death penalty if the victim is white that if the victim is African American. Id. 7-8.[23]

[23]This statistic has not changed. "[A]s of December 10, 1999, of the 386 inmates on Florida's death row, 'only five were whites condemned

The statistics relied on in the ABA Report on Florida make clear that race is a factor in Florida's death penalty scheme. Such a factor causes the death penalty to be arbitrary and capricious. Furman, 408 U.S. at 364-66 (Eighth Amendment violated where racial prejudices and/or classism and/or sexism infected sentencing decisions).

b. Geographic Disparities.

Geographic disparities add to the arbitrariness of Florida's capital scheme. In 2000, 20 percent of the death sentences imposed that year came from the Panhandle, while in 2001, 30 percent of the death sentences imposed that year came from the Panhandle. ABA Report on Florida at 9. The imposition of death sentences is dependent upon by the county where a crime occurred. Geographic disparities show that a factor unrelated to the circumstances of the crime or the character of the defendant affect the decision to impose a death sentence.

6. Prosecutorial Misconduct

"The prosecutor plays a critical role in the criminal justice system." ABA Report on Florida at 107. And, even more so in a capital case, where the prosecutor had "enormous discretion" in

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for killing blacks. Six were condemned for the serial killings of whites and blacks. And three other whites were sentenced to death for killing Hispanics.' Additionally, since Florida reinstated the death penalty there have been no executions of white defendants for killing African American victims." Id. at viii.

determining whether to seek the death penalty. Id. [24] On numerous occasions, this Court has found the prosecutorial misconduct was only sufficiently prejudicial at the penalty phase to warrant the grant of penalty phase relief. Young v. State, 739 So. 2d 553 (Fla. 1999); Garcia v. State, 622 So. 2d 1325 (Fla. 1993). And on a number of occasions, this Court has determined that the prosecutor acted improperly, but prejudice was insufficiently established to warrant relief from either the conviction or the death sentence. Guzman v. State, 941 So. 2d 1045 (Fla. 2006); Smith v. State, 931 So. 2d 790 (Fla. 2006); Ventura v. State, 794 So. 2d 553 (Fla. 2001); Duest v. Dugger, 555 So. 2d 849 (Fla. 1990).

Despite the numerous instances of prosecutorial misconduct in Florida capital cases, no investigation has been launched nor a program instituted to address the prevalence of such

[24]This Court regularly orders new trials in capital cases because of prosecutorial misconduct. Floyd v. State, 902 So. 2d 775 (Fla. 2005); Mordenti v. State, 894 So. 2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Huggins, 788 So.2d 238 (Fla. 2001); State v. Gunsby, 670 so. 2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988); Arango v. State, 497 So. 2d 1161 (Fla. 1986).

New trials on the basis of prosecutorial error have been ordered by the federal courts in course of federal habeas proceedings. Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1993); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). New trials have also been ordered on prosecutorial misconduct for which there is no reported decision. Ernest Miller and William Jent both received new trials from the federal district court in light evidence that the State withheld exculpatory information from the defense. Similarly, Juan Melendez received a new trial from the state circuit court on the basis of his claim that the State improperly withheld exculpatory information.

misconduct. The ABA's assessment team stated that to stop prosecutorial abuses, "there must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct." ABA Report on Florida at 108. In fact, the United States Supreme Court has recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).[25]

Time and time again, prosecutors violate the rules – the rules of discovery, the rules of evidence, the rules of due process. This Court often identifies capital cases where the prosecutor went too far, or was guilty of a discovery violation, yet, refuses to grant relief because the defense failed to object and/or the error was "harmless" or insufficiently prejudicial. The failure to do anything about the numerous instances of prosecutors not following the rules, or excusing the misconduct because of an apparent "no harm no foul" rule encourages prosecutors to convert the Berger

[25]There should be a higher ethical obligation because the prosecutor carries with him power derived from his job which must be held in check, just as each branch of government is subject to checks and balances. Without such checks and balances, Florida's death penalty scheme "smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring).

limiting principle into a self-righteous justification that because winning is justice, winning is everything, and therefore, the ends justify the means. This creates a violation of Furman that turns the capital process not into a search for truth or justice but into a game, where all that matters is winning a conviction and sentence of death.

7. The Direct Appeal Process

This Court reviews all the death sentences imposed and has the duty to determine whether death is a proportionate penalty. Because this Court only reviews cases "where the death penalty was not imposed in cases involving multiple co-defendants", the proportionality is skewed. ABA Report on Florida at xxii. "Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment system will function in an arbitrary and discriminatory manner." Id. at xxii, 208.[26]

[26]The limited scope of the proportionality review, only looking at other cases in which death has been imposed, skews the review in favor of death and undercuts its "meaningfulness". The Court's shift in its affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends upon what year the appellate review was or is conducted. This variable has nothing to do with the facts of the crime or the character of the defendant. This can only be describe as arbitrary. It is not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not". Furman, 408 U.S. at 313 (White, J., concurring).

Even the United States Supreme Court has noted deficiencies in this Court's appellate review. See Parker v. Dugger, 498 U.S. 308, 320 (1991)("What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings."). In Parker, this Court's failure to accurately read the record was itself a violation of the Eighth Amendment. In granting Mr. Parker relief, the Supreme Court explained:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. * * * The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all.

Parker, 498 U.S. at 321.

8. Retroactivity

The United States Supreme Court has explained that its decisions finding ineffective assistance in Rompilla v. Beard, Wiggins v. Smith, and Williams v. Taylor, were all dictated by its decision in Strickland, and each of those decisions, while issued between 2000 and 2005, date back to Strickland in 1984. Between 1984 and 2000, this Court addressed ineffective assistance of counsel claims under Strickland in virtually every capital post conviction case that it heard. It is clear from analyzing those opinions that this Court did not read Strickland the way it was read and applied

in Rompilla, Wiggins, and Taylor.[27] Yet, this Court has refused to re-examine its decisions predicated upon its understanding of the meaning of Strickland which was arguably in error under Rompilla, Wiggins, or Williams. Florida's death row inmates who have meritorious claims under any one of these three decisions and who presented those claims to this Court before these opinions were issued, will not get the benefit of those three decisions, stripping those inmates of their Sixth Amendment rights.[28] This defeats the purpose of Strickland (and of Rompilla, and of Wiggins, and of Williams), to insure that a constitutionally adequate adversarial testing occurred which produced a constitutionally reliable result.

[27]The lower courts in each of those cases had also not read Strickland in the fashion that the U.S. Supreme Court said it was meant to be read. In Williams, the issue addressed by the Supreme Court was the failure of the Virginia Supreme Court to properly read and apply the standards in Strickland. The ruling in Williams was quite simply that Strickland meant what the Supreme Court said in Williams it meant, and any court who did not read and apply Strickland in the fashion explained Williams had erroneously applied the constitutional principle at stake.

[28]Many of those who submitted an ineffectiveness claim to this Court prior to 2000 have also submitted the ineffective assistance claim to the federal courts. Just as the federal courts in Rompilla, Wiggins, and Williams, had failed to properly to read Strickland or failed to recognize that the state court reading was in fact contrary to Strickland, the Eleventh Circuit denied many ineffective assistance of counsel arguable meritorious under Rompilla, Wiggins, and Williams. But by virtue, the Anti-Terrorism and Effective Death Penalty Act of 1996, the ability to file a second habeas and obtain review of the previously, albeit wrongly, denied ineffective assistance claim. Thus, numerous individuals are now stuck with a meritorious claim in light of Rompilla, Wiggins, or Williams, but with no court in which to have the claim properly evaluated.

It injects arbitrariness into Florida's death penalty system.[29]

9. Procedural Default

This Court frequently relies upon procedural defaults to create procedural bars that preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002); Jones v. State, 709 So. 2d 512, 519-20, 525 (Fla. 1998). The refusal to consider issues that go to the reliability of the conviction and/or the sentence of death increase the risk that the innocent or the legally undeserving will be executed. It decreases a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not". Furman, at 313 (White, J., concurring).

10. Clemency

Clemency is a critical stage of the capital scheme. It is the only stage permitting correction for the arbitrary factors that infect the system. See Herrera v. Collins, 506 U.S. 390, 412 (1993). Yet, Florida's clemency process was found to be inadequate: "Given the ambiguities and confidentiality surrounding Florida's clemency decision-making process and that fact that clemency has not been granted to a death-sentenced inmate since 1983, it is difficult

[29]The manner in which the retroactivity rules operate currently has as at least as much to do with who gets executed and who does not, than the facts of the crime and the character of the defendant does. The manner in which this Court applies its retroactivity rules is arbitrary and violates Furman.

to conclude that Florida's clemency process is adequate." ABA Report on Florida at vii.

D. The Circuit Court's Ruling Denying the Claim.

In denying Mr. Finney's claim, the circuit court relied upon this Court's decision in Rutherford v. State, 940 So. 2d 1112 (Fla. 2006). However, there this Court indicated that Mr. Rutherford had failed to demonstrate how the arbitrary factors outlined by the ABA Report prejudiced him. In denying Mr. Finney's claim, the circuit court failed to look at the arbitrary factors infecting Mr. Finney's sentence of death.

Within the meaning of the Eighth Amendment, Mr. Finney was struck by lightning when this Court chose to treat him differently from the other capital defendants with the same claim. This Court failed to apply the law equally to him as it had been applied to the others who had obtained relief on the same claim. As a result, Mr. Finney's sentence of death stands in violation of Furman and the Eighth Amendment. The circuit court erred when it denied Rule 3.850 relief.

CONCLUSION

For the reasons stated herein, Mr. Finney requests that this Court remand this case to allow him to present his arguments in the circuit court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by U.S. Mail, postage prepaid, to Carol Dittmar, Office of the Attorney General, Concourse Center #4, 3507 E. Frontage Road, #200, Tampa, 33607 on February 16, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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