IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-537

DAVID ALAN GORE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order summarily denying Mr. Gore's successive Rule 3.851 motion.

The following symbols will be used to designate references to the record in this appeal:

"R." - record on direct appeal of the resentencing proceeding;

"PC-R." - postconviction record on appeal subsequent to the resentencing proceeding;

"PC-R2." - record on appeal following the summary denial of Mr. Gore's successive postconviction motion.

REQUEST FOR ORAL ARGUMENT[1]

Mr. Gore is presently under a death warrant with an execution scheduled for April 12, 2012. This Court has not hesitated to allow oral argument in other warrant cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved, as well as Mr. Gore's pending execution date. Mr. Gore, through counsel, urges that the Court permit oral argument.

[1]Simultaneously with his brief, Mr. Gore files a more detailed request for oral argument.

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INTRODUCTION

On March 20, 2012, the United States Supreme Court handed down its groundbreaking decision in Martinez v. Ryan, – U.S. –, 2012 WL 912950 (2012). In so doing, the Supreme Court necessarily rejected the categorical rule that this Court adopted in 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")(citing Murray v. Giarrantano, 492 U.S. 1 (1989) and Pennsylvania v. Finley, 481 U.S. 551 (1987)).

In Martinez, the Supreme Court specifically recognized as an exception to its earlier ruling in Coleman v. Thompson, 501 U.S. 722 (1991),[2] that there is a right to adequate representation at initial-review collateral proceedings as to an ineffective assistance of trial counsel claim that could not be raised on direct appeal.[3] While the Supreme Court did not answer whether this right to adequate representation is constitutionally based,[4] it did recognize that the right to adequate representation by collateral counsel arose "for equitable reasons" as to ineffective assistance of trial counsel claims. See Martinez, 2012 WL 912950 at *12 (Scalia, J., dissenting) ("Instead of taking that radical step [of finding the right constitutionally mandated], the Court holds that, *for equitable reasons,* in a case such as the one before us, failing to provide assistance of counsel, or providing assistance of counsel that falls below the *Strickland* standard, constitutes cause for excusing procedural default. The result, of course, is precisely the same.") (emphasis in original).

After finding the right to adequate representation when collateral counsel raises a claim that trial counsel was ineffective in an initial-review collateral proceeding "as an equitable matter" in Martinez, the Supreme Court held that the adequacy of collateral counsel's performance is to be measured by "the standards of Strickland v. Washington, 466 U.S. 668 (1984)." Martinez, 2012 WL 912950 at *8. In other words, collateral counsel when raising an ineffective assistance of counsel claim in an initial-review collateral proceeding is obligated under Martinez to provide effective representation within the meaning of Strickland in investigating, presenting and litigating the ineffectiveness of trial counsel.[5]

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[2]The ruling in Coleman had been premised upon the principle that "[t]here is no constitutional right to an attorney in state post-conviction proceedings." Coleman, 501 U.S. at 752. For this, the Supreme Court in Coleman relied upon its even earlier decisions in Pennsylvania v. Finley, 481 U.S. 551 (1987), and Murray v. Giarrantano, 492 U.S. 1 (1989). Id.

[3]There really can be no issue that Florida is a jurisdiction that requires extra-record ineffective assistance of counsel claims to be raised in collateral proceedings. See Smith v. State, 998 So. 2d 516, 522 (Fla. 2008).

[4]"This is not the case, however, to resolve whether that exception exists as a constitutional matter." Martinez, 2012 WL 912950 at *5.

[5]The dissent in Martinez specifically argued that the majority's holding was inconsistent with its decisions in Pennsylvania v. Finley and Murray v. Giarrantano. Martinez, 2012 WL 912950 at *16. The dissent elaborated:

> Thus, in announcing a *categorical* rule in *Finley*, *see Giarrantano, supra,* at 12 (plurality opinion), and then reaffirming it in *Giarratano*, the Court knew full well that a collateral proceeding may present the first opportunity for a prisoner to

raise a constitutional claim. I would follow that rule in this case and reject Martinez's argument that there is a constitutional right to counsel in initial-review collateral proceedings.

Martinez, 2012 WL 912950 at *16.

When a violation of the right to adequate representation recognized in Martinez is proven, the prisoner is able to overcome procedural bars precluding consideration of the underlying ineffective assistance of trial counsel claims. Martinez, 2012 WL 912950 at *6. Thus, a claim under Martinez of inadequate representation in collateral proceedings as to the presentation of an ineffective assistance of trial counsel is a claim for relief from procedural bars that serve to preclude consideration or re-consideration of an ineffective assistance of trial counsel claim.

Under Florida law, a procedural bar may arise from res adjudicata principles or from a procedural default. Under res adjudicata principles, a previous denial of a collateral counsel's presentation of a trial counsel ineffectiveness claim procedurally bars revisiting the claim in a subsequent collateral proceeding. Under a procedural default, collateral counsel's failure to present the trial counsel ineffectiveness claim in the initial-review collateral proceedings procedurally bars presenting the claim at a subsequent collateral proceeding.

This Court specifically relied upon the United States Supreme Court decisions in Pennsylvania v. Finley and Murray v. Giarrantano when it found that a capital defendant did not have a claim for relief from a procedural bar based upon collateral counsel's inadequate representation in an initial-review collateral proceeding. In Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996), this Court held:

> Lambrix also argues that his collateral counsel's failure to appeal the trial court's denial of his request to represent himself constituted ineffective assistance of counsel. However, claims of ineffective assistance of postconviction counsel do not present a valid basis for relief. *Murray v. Giarratano,* 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

Following the decision in Lambrix, this Court returned to the issue in State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 407 (Fla. 1998), and explained:

> Although the United States Supreme Court has stated that death is different and although no person has been executed in this state in recent years who has not had counsel at the time of execution, that Court has determined that there is no right to counsel for postconviction relief proceedings even where a defendant has been sentenced to death. *See Murray v. Giarrantano*, 492 U.S. 1 (1989) (holding that *Finley* applies to inmates under a sentence of death as well as to other inmates). *See also Jones v. Crosby*, 137 F.3d 1279 (11th Cir. 1998). As the Supreme Court stated in *Murray*, "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case . . . are sufficient to assure reliability of the process by which the death penalty is imposed.

Not only is an exception to the categorical rule arising from Finley and Giarrantano recognized in Martinez, this Court's reliance upon the adequacy of existing safeguards to assure the reliability of the capital process was pointedly rejected in Martinez. The Supreme Court in Martinez explained:

> When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim.

* * *

> Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim.
>
> * * *
>
> Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert,* 545 U.S., at 619. **To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney**.

2012 WL 912950 at *7 (emphasis added).

Thus, according to the Court in Martinez, the existing safeguards are not adequate, contrary to this Court's reasoning in Kenny. The basis for this Court's decision in Kenny has been clearly overturned. The underpinnings for this Court's rulings in both Lambrix and Kenny as to the availability of a claim for relief from procedural bars as to trial counsel's ineffective assistance of counsel due to the inadequacy of collateral counsel's representation at an initial-review proceeding have been clearly rejected by the Supreme Court in Martinez. There is now, according to Martinez, an exception to the categorical rule that this Court lifted from Finley and Giarrantano. Mr. Gore's case fits squarely within the Martinez exception to the categorical rule that this Court adopted as its own in Lambrix and Kenny. In light of jurisprudential upheaval occasioned by Martinez, this Court must reverse the circuit court's summary denial of Mr. Gore's claim for relief from the res adjudicata procedural bar and remand for an evidentiary hearing.

STATEMENT OF THE CASE AND FACTS

Mr. Gore was indicted with one count of first-degree murder, two counts of kidnapping and three counts of sexual battery on August 10, 1983. Subsequent to a jury trial, on March 15, 1984, Mr. Gore was found guilty on all counts. He was sentenced to death on March 16, 1984.

On direct appeal, this Court affirmed Mr. Gore's convictions and sentences. Gore v. State, 475 So. 2d 1205 (Fla. 1985). A writ of certiorari was denied by the United States Supreme Court on February 24, 1986. Gore v. Florida, 106 S.Ct. 1240 (1986).

On February 24, 1988, Mr. Gore filed a motion to vacate sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. The circuit court denied the motion on April 19, 1988. On appeal, this Court affirmed the denial of relief. Gore v. Dugger, 532 So. 2d 1048 (Fla. 1988). A petition for writ of

habeas corpus was also filed, on April 4, 1988, in this Court. The petition was consolidated with Mr. Gore's appeal from the denial of his Rule 3.850 motion. On August 18, 1988, this Court denied Mr. Gore's petition. Gore v. Dugger, 532 So. 2d 1048 (Fla. 1988).

On February 14, 1989, Mr. Gore filed a federal habeas corpus petition in the district court. Mr. Gore's death sentence was vacated by the district court based on a violation of Hitchock v. Dugger, 481 U.S. 393 (1987) and Lockett v. Ohio, 438 U.S. 586 (1978). Gore v. Dugger, 763 F.Supp 1110 (M.D. Fla. 1989). The district court's ruling was affirmed by the Eleventh Circuit Court of Appeals in Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991). Certiorari was denied by the United States Supreme Court on January 21, 1992. Singletary v. Gore, 502 U.S. 1066 (1992).

A new penalty phase was conducted in the state circuit court, wherein the jury, by a vote of 12-0, recommended a sentence of death. On December 8, 1992, the trial court resentenced Mr. Gore to death. On appeal, this Court affirmed Mr. Gore's sentence of death. Gore v. State, 706 So. 2d 1328 (Fla. 1997). Mr. Gore filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 5, 1998. Gore v. Florida, 525 U.S. 892 (1998).

On September 30, 1999, Mr. Gore filed a Rule 3.850 motion. This motion was amended on January 8, 2002, and on November 22, 2002. Subsequent to an evidentiary hearing, the circuit court denied the motion on June 9, 2004. On appeal, this Court affirmed the denial of relief. Gore v. State, 964 So. 2d 1257 (Fla. 2007). Additionally, in that same opinion, this Court denied a state habeas petition that was filed on July 5, 2007. Id.

On September 27, 2007, Mr. Gore filed a federal habeas corpus petition and a supporting memorandum of law in the district court. Mr. Gore's petition was denied on April 11, 2008. On April 25, 2008, Mr. Gore filed a motion to alter or amend judgment, which was denied by the district court on June 9, 2008. On July 7, 2008, Mr. Gore filed a Notice of Appeal. On July 9, 2008, Mr. Gore filed

an application for certificate of appealability with the district court. On July 29, 2008, the district court issued an order denying Mr. Gore's application. On August 21, 2008, Mr. Gore filed an application for certificate of appealability with the Eleventh Circuit Court of Appeals. On September 12, 2008, the Eleventh Circuit denied Mr. Gore's application. Certiorari was denied by the United States Supreme Court on May 18, 2009. Gore v. McNeil, 129 S.Ct. 2382 (2009).

On February 28, 2012, the Governor signed a death warrant for Mr. Gore, stating, "WHEREAS, executive clemency, as authorized by Article IV, Section 8(a), was considered pursuant to the Rules for Executive Clemency and it was determined that executive clemency is not appropriate".

Mr. Gore filed a successive Rule 3.851 postconviction motion on March 6, 2012. Following a case management conference held on March 13, 2012, the circuit court denied relief on March 15, 2012. This appeal follows.

SUMMARY OF THE ARGUMENT

1. The United States Supreme Court's recent decision in Martinez v. Ryan establishes a claim for relief from procedural bars where collateral counsel was inadequate in initial-review collateral proceedings in which trial counsel's ineffectiveness was litigated. In so doing, the Supreme Court necessarily rejected the categorical rule that this Court adopted in Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996), that claims of ineffective assistance of postconviction counsel do not present a valid basis for relief. As such, this Court must evaluate Mr. Gore's claim that he received inadequate collateral representation under the standard set forth in Strickland.

2. The circuit court erred in summarily denying Mr. Gore's claim that newly discovered evidence establishes that he was denied the effective assistance of counsel during his resentencing proceedings.

3. The clemency process and the manner in which it was determined that Mr. Gore should receive a death warrant on February 28, 2012, was arbitrary and capricious and in violation of the Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

4. The arbitrary and standardless power given to Florida's Governor to sign death warrants renders the Florida capital sentencing scheme unconstitutional under the Eighth and Fourteenth

Amendments to the United States Constitution.

5. Because of the inordinate length of time that Mr. Gore has spent on death row, adding his execution to that punishment would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution, as well as binding norms of international law.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

Additionally, the lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999).

ARGUMENT I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. GORE'S CLAIM THAT THE INADEQUATE REPRESENTATION HE RECEIVED FROM COLLATERAL COUNSEL AS TO HIS INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL DURING HIS INITIAL-REVIEW POSTCONVICTION PROCEEDING DEFEATS ANY PROCEDURAL BAR TO RECONSIDERING WHETHER PENALTY PHASE COUNSEL WAS INEFFECTIVE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States Supreme Court has now explained:

> Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert,* 545 U.S., at 619. **To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.**

Martinez, 2012 WL 912950 at *7 (emphasis added). In his first opportunity to present his ineffective assistance of penalty phase counsel claim, Mr. Gore did not have that which the Supreme Court recognized that he needed - "an effective attorney." Accordingly, he sought in the circuit court the opportunity to demonstrate that he received inadequate representation in the initial-review proceedings of his ineffective assistance of penalty phase counsel claim in order to defeat the procedural bar resting on res adjudicata principles and have his ineffective assistance of counsel claim fully and properly heard. He has alleged the inadequacy of his collateral counsel in order to obtain relief from the procedural bar that would otherwise preclude reconsideration of his ineffective assistance of trial counsel claim in light of the testimony of Jerome Nickerson, the critical witness that collateral counsel neglected to locate and call at the 2003 evidentiary hearing. However, the circuit court held that Mr. Gore could obtain no relief from the procedural bar on the basis of his claim that his collateral counsel did not provide effective or adequate assistance; this ruling was contrary to the decision in Martinez v. Ryan.

A. THE CIRCUIT COURT RULING

In denying Mr. Gore's Rule 3.851 motion, the circuit court addressed Claim IV of that motion saying:

> Gore claims that postconviction counsel was ineffective for failing to produce lead trial counsel, Jerome "Jay" Nickerson to testify at the 2003 postconviction evidentiary hearing. Gore contends that Nickerson would have testified to Udell's deficient performance in investigating and presenting mitigation evidence at the 1992 resentencing, and would have rebutted Udell's false testimony at the 2003 evidentiary hearing concerning resentencing trial strategy.
>
> This claim is without merit. Gore does not have a constitutional right to the effective assistance of postconviction counsel. *See Peterka v. McNeil*, 56 So. 3d 767 (Fla. 2010) citing *Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005) ("Under Florida and federal law, a defendant has no constitutional right to effective collateral counsel.") **And, "claims of ineffective assistance of postconviction counsel do not present a valid basis for relief." *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996)**. Consequently, Gore is not entitled to relief.

(PC-R2. 227)(emphasis added).

B. LAMBRIX V. STATE

This Court in Lambrix, 698 So. 2d at 248, did in fact adopt the categorical rule that claims that collateral counsel was not effective did not present a claim on which any relief could be granted:

> However, claims of ineffective assistance of postconviction counsel do not present a valid basis for relief. *Murray v. Giarratano,* 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

But of course, this categorical rule was premised upon this Court's understanding that the United States Supreme Court in Finley and Giarrantano had adopted such a categorical rule. This Court further understood as explained in Kenny that the United States Supreme Court had determined in Murray v. Giarrantano that there was no need for "additional safeguards" in the form of a right to effective collateral

counsel in order to insure the reliability of a conviction and sentence of death. State ex rel. Butterworth v. Kenny, 714 So. 2d at 407 ("As the Supreme Court stated in *Murray*, '[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case . . . are sufficient to assure reliability of the process by which the death penalty is imposed.'").

Following the issuance of this Court's opinion in Lambrix, that case has been cited repeatedly for the proposition that a claim of inadequate collateral representation does not present a valid claim for relief from a procedural bar. Peterka v. McNeil, 56 So. 3d 767 (Fla. 2010); Gonzalez v. State, 990 So. 2d 1017, 1034 (Fla. 2008); Hartley v. State, 990 So. 2d 1008, 1016 (Fla. 2008); Knight v. State, 923 So. 2d 387, 415 (Fla. 2005); Zack v. State, 911 So. 2d 1190, 1203 (Fla. 2005); Brown v. State, 894 So. 2d 137, 154 (Fla. 2004); Spencer v. State, 842 So. 2d 52, 72 (Fla. 2003); Vining v. State, 827So. 2d 201, 215 (Fla. 2002); Carroll v. State, 815 So. 2d 601, 609 n. 8 (Fla. 2002); Foster v. State, 810 So. 2d 910, 917 (Fla. 2002); King v. State, 808 So. 2d 1237, 1245 (Fla. 2002); Waterhouse v. State, 792 So. 2d 1176, 1193 (Fla. 2001); State v. Riechmann, 777 So. 2d 342, 346 n. 22 (Fla. 2000); Shere v. State, 742 So. 2d 215, 217 n. 6 (Fla. 1999); Downs v. State, 740 So. 2d 506, 514 n. 11 (Fla. 1999).

It is worth noting that this Court did adopt one narrow exception to the categorical rule of Lambrix in Steele v. Kehoe, 747 So. 2d 931, 932 (Fla. 1999). There, a criminal defendant alleged that an attorney had "orally agreed to file a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 on his behalf, but failed to do so in a timely manner." This Court concluded that:

> due process entitled a prisoner to a hearing on a claim 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. We hold that, if the prisoner prevails at the hearing, he or she is authorized to belatedly file a rule 3.850 motion challenging his or her conviction or sentence.

Steele, 747 So. 2d at 934.[6] This exception to the categorical rule announced in Lambrix was recognized because:

> In this Court's decision in *State v. Weeks*, 166 So. 2d 892, 896 (Fla. 1964), we 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." For example, although a prisoner has no Sixth Amendment right to postconviction counsel, in *Weeks* and *Graham v. State*, 372 so. 2d 1363 (Fla. 1979), we held that due process required the appointment of postconviction counsel when a prisoner filed a substantially meritorious postconviction motion and a hearing on the motion was potentially so complex that the assistance of counsel was needed.

Steele, 747 So. 2d at 934.[7]

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[6]Justice Wells dissented in Steele v. Kehoe on the basis of Lambrix.

[7]In Williams v. State, 777 So. 2d 947, 950 (Fla. 2000), this Court extended the exception recognized in Steele v. Kehoe to include the situation where an attorney indicates that he or she will file a timely appeal of the denial of a Rule 3.850 motion, but fails to do so. This Court explained: "We conclude that those same flexible standards of due process which compelled our decision in *Steele* prevail where a

defendant has timely requested counsel to file an appeal from the denial of a 3.850 motion and counsel fails to do so." Justice Wells again dissented on the basis of the categorical rule adopted in Lambrix.

C. MARTINEZ v. RYAN

After the circuit court entered its order summarily denying Mr. Gore's Rule 3.851 motion on March 15, 2012, the United States Supreme Court issued its opinion in Martinez v. Ryan on March 20th.[8] In Martinez, the Supreme Court recognized that a criminal defendant challenging his conviction and/or sentence in initial-review collateral proceedings[9] on grounds of ineffective assistance of trial counsel "likely needs an effective attorney." 2012 WL 912950 at *7. The Supreme Court explained:

> Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy.

Id. Thus in Martinez, the Supreme Court fashioned an exception to its earlier rulings in Pennsylvania v. Finley, Murray v. Giarrantano, and Coleman v. Thompson, 501 U.S. at 752, that "[t]here is no constitutional right to an attorney in state post-conviction proceedings," in order to provide adequate safeguards of reliability where the initial-review of ineffective assistance of trial counsel occurs in postconviction proceedings.

The Supreme Court limited the right to adequate collateral counsel to the circumstances like those found in Martinez. These circumstances included a state court requirement like the one in Arizona which "does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. Instead, the prisoner must bring the claim in state collateral proceedings." Id. at *1.

In Florida, as in Arizona, a convicted person in Mr. Gore's circumstances cannot raise an extra-record ineffective assistance of trial counsel claim on direct appeal. Indeed, this Court has explained:

> Claims of ineffective assistance of trial counsel are usually presented in a postconviction motion under Florida Rule of Criminal Procedure 3.850. Under that rule, the circuit court can be specifically presented with the claim, and apply the *Strickland* standard with reference to the full record and any evidence it may receive in an evidentiary hearing, including trial counsel's testimony. **Thus, ineffective assistance claims are not usually presented to the judge at trial, and we have repeatedly stated such claims are not cognizable on direct appeal.** *E.g., Martinez v. State,* 761 So.2d 1074, 1078 n. 2 (Fla.2000) ("With rare exception, ineffective assistance of counsel claims are not cognizable on direct appeal."); *McKinney v. State,* 579 So.2d 80, 82 (Fla.1991) ("Claims of ineffective assistance of counsel are generally not reviewable on direct appeal but are more properly raised in a motion for postconviction relief."); *Kelley v. State,* 486 So.2d 578, 585 (Fla.1986) (same); *State v. Barber,* 301 So.2d 7, 9 (Fla.1974) (holding that

[8] Mr. Gore had requested that the circuit court hold his Rule 3.851 motion in abeyance until Martinez was issued. The circuit court chose not to wait for Martinez and summarily denied Mr. Gore's claim.

[9] The Supreme Court explained that "initial-review collateral proceedings" is a proceeding in which a petitioner is provided the "first occasion to raise a claim of ineffective assistance at trial." Id. at *5.

> claims of ineffective assistance of counsel "cannot properly be raised for the first time on direct appeal" because the trial court has not previously ruled on the issue). We recognize that "[t]here are rare exceptions where appellate counsel may successfully raise the issue on direct appeal because the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue." *Blanco v. State,* 507 So.2d 1377, 1384 (Fla.1987); *see also Gore v. State,* 784 So.2d 418, 437–38 (Fla.2001) ("A claim of ineffective assistance of counsel may be raised on direct appeal only where the ineffectiveness is apparent on the face of the record."); *Mansfield v. State,* 758 So.2d 636, 642 (Fla.2000) (same). Thus, in the rare case, where both prongs of *Strickland*—the error and the prejudice—are manifest in the record, an appellate court may address an ineffective assistance claim. Not one of Smith's five claims meets these criteria, however. We therefore decline to address these claims now. Smith is free to raise them in an appropriate postconviction motion.

Smith, 998 So. 2d at 522 (emphasis added).

Thus, Mr. Gore, like Martinez, could not raise his ineffective assistance of counsel claim on direct appeal and his first opportunity arrived when this Court appointed him collateral counsel on March 26, 1999. Accordingly, the exception to the categorical rule of Finley, Giarratano, and Coleman applies in Mr. Gore's case due to the procedural set-up of the litigation process in Florida. As the Supreme Court in Martinez reasoned:

> **Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim**. *Halbert,* 545 U.S., at 619. **To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney**.
>
> The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. Cf., *e.g., id.,* at 620–621 (describing the educational background of the prison population). While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.
>
> **A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."** *Gideon v. Wainwright,* 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). **Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged**. See, *e.g., Powell v. Alabama,* 287 U.S. 45, 68–69, 53 S.Ct. 55, 77 L.Ed. 158 (1932) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence"). Effective trial counsel preserves claims to be considered on appeal, see, *e.g.,* Fed. Rule Crim. Proc. 52(b), and in federal habeas proceedings, *Edwards v. Carpenter,* 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000).

Martinez, 2012 WL 912950 at *7 (emphasis added). And, while the Supreme Court attempted to narrow its holding, characterizing it as an

"equitable matter" rather than a constitutional matter, (id. at *8), logic dictates that the same reasoning applies to a situation like Mr. Gore's where postconviction counsel's representation falls below reasonable professional norms.

Indeed, while the Supreme Court in Martinez did narrow the exception that it formally recognized, the fact of the matter is it created a claim for relief from a procedural bar where a prisoner demonstrates the inadequacy of his collateral representation using "the standards of *Strickland v. Washington*, 466 U.S. 668 (1984)", as a yardstick. Thus, whether called an equitable right or a constitutional right,[10] there is a right to adequate collateral representation in initial-review collateral proceedings of an ineffective assistance of trial counsel claim.

There can be no doubt that the reasoning and logic of the majority's opinion in Martinez establishes a claim for relief from procedural bars where collateral counsel was inadequate in initial-review collateral proceedings in which trial counsel's ineffectiveness was litigated. This Court must recognize this exception to the categorical rule adopted in Lambrix pursuant to either constitutional or equitable principles and evaluate Mr. Gore's claim that he received inadequate collateral representation under the standard set forth in Strickland. Id. at *8.

D. EVALUATING MR. GORE'S CLAIM OF INAEQUATE COLLATERAL REPRESENTATION

On March 26, 1999, Andrew Graham filed his notice of appearance on behalf of Mr. Gore in his postconviction proceedings following the resentencing proceedings.

In September, 1999, Graham filed on Mr. Gore's behalf an initial Rule 3.851 motion. Mr. Gore's motion was amended in January, 2001. Even though one of the claims raised in Mr. Gore's Rule 3.851 motion was that his resentencing counsel was ineffective under the Sixth Amendment, collateral counsel did not locate, contact, or interview Jay Nickerson, one of Mr. Gore's resentencing attorneys. The circuit court granted an evidentiary hearing on Mr. Gore's claim. On July 21, 2003, Mr. Gore's evidentiary hearing commenced.

At the evidentiary hearing, postconviction counsel presented the testimony of Robert Udell. Udell had been appointed by the trial court to represent Mr. Gore in his resentencing proceedings. During the examination, Udell indicated that Jay Nickerson, an attorney, also

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[10]The United States Supreme Court specifically left open the question of whether this right was constitutionally guaranteed, finding at a minimum it was required on equitable grounds. See Martinez, 2012 WL 912950 at *12 (Scalia, J., dissenting) ("Instead of taking that radical step [of finding the right constitutionally mandated], the Court holds that, *for equitable reasons,* in a case such as the one before us, failing to provide assistance of counsel, or providing assistance of counsel that falls below the *Strickland* standard, constitutes cause for excusing procedural default. The result, of course, is precisely the same.")(emphasis in original).

represented Mr. Gore as "volunteer" co-counsel. Udell testified:

> Q: All right. Mr. Nickerson, did you know Mr. Nickerson prior to your appointment to represent Mr. Gore in this matter?
>
> A: Neither personally or by reputation, no.
>
> Q: How did it come to pass that Nickerson became your co-counsel?
>
> A: Tell you the truth, I was thinking about that on the way up and I do not remember. He just came into my life, **took over the case**.

(PC-R. 10-11)(Emphasis added). Udell testified that he was surprised to learn that Nickerson had only been licensed to practice law since late 1989 (PC-R. 11), and that he had no idea that Nickerson had a bar grievance pending against him at the time of Mr. Gore's resentencing proceedings (PC-R. 14).

> As to Nickerson's role in the case, Udell made clear that Nickerson "took the lead" (PC-R. 12). Udell testified:
> . . . I mean, any given case some lawyers got to make up their minds as to what are we going to present in mitigation, what mitigation do we have, what witnesses are we going to call to present it, and, likewise, how are we going to rebut the aggravating evidence. Someone's got to make the decisions on how we're going to do that, Jay took the lead.

(PC-R. 14). Nickerson "made all the final decisions and this was his mitigation." (PC-R. 24). Nickerson "spent the bulk of the time with Mr. Gore and working on mitigation" (PC-R. 17). As to the issue of Mr. Gore's co-defendant's sentence, "it was an issue Jay was handling. He understood the theory. . ." (PC-R. 22). And, Nickerson presented the case to the jury. At the evidentiary hearing, Udell repeatedly invoked the mantra "you'll have to ask Mr. Nickerson" when asked why various avenues of mitigation were not explored or presented in a certain way.

Yet, despite the characterization of Nickerson's role in the representation of Mr. Gore, postconviction counsel failed to locate, contact, and/or interview Mr. Nickerson, let alone secure his attendance at the evidentiary hearing. Postconviction counsel claimed, "I'm having a little problem because I can't find him, Mr. Nickerson. . ." (PC-R. 11). However, postconviction counsel failed to present any evidence of the investigation he conducted to locate and secure Nickerson's attendance at the hearing.

> This Court was clearly troubled by collateral counsel's failure to present Nickerson as a witness at the evidentiary hearing:
> Gore never produced lead counsel Nickerson at the evidentiary hearing, which would have provided insight into his decisions with regard to witness Stone, so the available testimony is relegated to that of co-counsel Udell. Despite Udell's description of Nickerson's decision to call Stone as "surprising," we conclude that the decision could have been considered "sound trial strategy" from the perspective of Nickerson.

* * *

> Indeed, it appears that Gore's counsel should have located and presented evidence from Nickerson, as his testimony would have directly revealed his strategies in calling Stone.

Gore, 964 So. 2d at 1269.[11] Clearly, this Court found Nickerson's absence at the evidentiary hearing troubling. This Court concluded that Mr. Gore could not meet his burden of proof without presenting Nickerson's testimony:

> Udell speculated that Nickerson's reason for not speaking with or deposing Stone was that perhaps Nickerson already knew the testimony Stone would deliver. Again, Gore's claim is hindered by Nickerson not testifying at the evidentiary hearing. Speculation by co-counsel Udell as to why Nickerson did not speak to Stone prior to the hearing is insufficient to meet Gore's weighty burden on this ineffective assistance claim. Gore presented no evidence at the hearing that this failure to contact Stone prior to the hearing fell below 'prevailing professional standards'.

Id. at 1270. See also id. ("Again, because lead counsel Nickerson did not testify at the evidentiary hearing, Gore has not met his weighty burden."); id. at 1271 (Again, Gore has not met his burden on this ineffective assistance claim because Udell cannot provide evidence about what Nickerson may have been thinking in his decisions, and Nickerson was not produced as a postconviction witness.").

[11]This Court also found: "After the evidentiary hearing, the trial court found that Gore gave no explanation as to why Nickerson could not testify at the hearing or what efforts were made to secure his attendance." Id. at 1270.

This Court characterized Nickerson as the lead counsel for Mr. Gore and according to Udell, he took over the case and made all of the decisions. Therefore, in order to satisfy the legal burdens of an ineffective assistance of counsel claim, postconviction counsel was required to locate and secure the attendance of Nickerson. Postconviction counsel's failure to do so was inadequate representation by collateral counsel that prejudiced Mr. Gore.[12]

Because collateral counsel failed to adequately investigate and locate Nickerson, he failed to marshal the evidence necessary to meet Mr. Gore's burden of proof under Strickland and establish the ineffective assistance of resentencing counsel. This failure clearly implicates the Supreme Court's reasoning in Martinez:

> Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert,* 545 U.S., at 619. **To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.**

Martinez, 2012 WL 912950 at *7 (emphasis added).

As Mr. Gore pled in circuit court, there can be no valid excuse for postconviction counsel's failure to locate and secure the attendance of Nickerson. Nickerson has been and still is a practicing attorney. Though he has practiced in various states, throughout postconviction counsel's representation of Mr. Gore, Nickerson continued to practice primarily as a capital postconviction attorney. Specifically, at the time of the evidentiary hearing in 2003, Nickerson was a senior attorney at the Center for Capital Litigation in Columbia, South Carolina.

Indeed, after Mr. Gore's warrant was signed and postconviction counsel learned of Udell's disbarment, though Mr. Gore's current postconviction attorneys had never met or spoken to Nickerson and though he no longer practices criminal law, current counsel was able to locate and speak to him within a mere matter of hours of attempting to locate him. This consisted of a computer search by a licensed private investigator, who, from just Nickerson's name, found him residing in the Washington, D.C. area with his significant other of many years, who is also an attorney. Though the computer search did not generate a current cell phone number for Nickerson, it did generate a cell

[12]The failure to locate, contact, interview and then call Nickerson at the evidentiary hearing is in reality as fatal to Mr. Gore's ineffective assistance of trial counsel claim as would have been the failure to timely file the Rule 3.850 motion under Steele v. Kehoe. As to the latter, this Court has recognized a claim for relief from the resulting procedural bar. Under Martinez, this Court must recognize a claim for relief to the procedural bar as to the former where Nickerson's testimony demonstrates the prejudice from collateral counsel's inadequate representation.

phone number for his girlfriend and the name of the national law firm for which his girlfriend worked. Mr. Gore's current postconviction counsel simply left a voicemail on Nickerson's girlfriend's voicemail and sent an e-mail to her address which current counsel obtained from her employer and within a matter of hours Nickerson contacted Mr. Gore's current counsel.

During the conversation between Nickerson and Linda McDermott, Nickerson revealed that he had worked in Philadelphia and South Carolina after leaving Florida. And, in the late 1990s and early 2000s, Nickerson continued to be employed by agencies that represented indigent capital postconviction defendants. He attended conferences and maintained business and personal relationships with colleagues whom he had met while working in Florida at the Capital Collateral Representative. He was dating the same woman whom he is still dating and who appears on the computer search when looking for Nickerson. Nickerson told McDermott that he believed it would have been easy to locate him.

Nickerson also informed counsel that he had neither heard of nor spoken to Andrew Graham, though he would have spoken to Mr. Gore's postconviction counsel and provided whatever information he could have provided about Mr. Gore's case.

Nickerson also discussed Mr. Gore's resentencing proceeding with Mr. Gore's current counsel. Based on what Nickerson told current counsel, much of Udell's testimony from the evidentiary hearing appears to be false. Nickerson described how he came to be involved in Mr. Gore's resentencing, recounting that Udell had contacted Nickerson, who was practicing as a private attorney in Miami, about an unrelated first degree murder trial where the client was from Haiti. Udell requested that Nickerson assist him and Nickerson obliged. Nickerson traveled to Haiti and began to investigate the life history of the client. Ultimately the State offered a plea bargain which resolved that case. In the course of working on the unrelated case, Udell asked Nickerson to assist him with Mr. Gore's resentencing.

Udell confided that he did not understand and had little experience with mental health mitigation. Thus, initially, Nickerson agreed to assist with the mental health mitigation. However, Udell was responsible for investigating and preparing the other mitigation and rebuttal for aggravation. Nickerson recalled that when he traveled to the resentencing he arrived a day or two before the penalty phase commenced to find that Udell had done nothing to prepare for the resentencing. He had not spoken to or met with the mitigation witnesses and he had not prepared for any of the evidence the State intended to present. Udell was woefully unprepared. Based on this, Nickerson attempted to pick up the pieces and use some of the evidence with which he had learned from assisting in Mr. Gore's original postconviction proceedings.

Several avenues of mitigation were completely neglected or mishandled, including, but not limited to, the sentence that Mr. Gore

was facing and the impossibility that he could or would ever be paroled; Mr. Gore's exemplary prison record; Mr. Gore's mental health mitigation, history of drug and alcohol abuse in general and at the time of the crimes; and the background and family mitigation. Had resentencing counsel effectively represented Mr. Gore, a strong case could have been made that Mr. Gore's punishment, i.e., life in prison, was an adequate punishment and that prison provided Mr. Gore with an ideal environment where he was a model inmate. Based on the question asked by the resentencing jury there is no doubt that if this mitigation had been handled properly, it would have resulted in a life sentence.

Thus, while resentencing counsel's performance was deficient, so was postconviction counsel's performance. According to this Court, the failure to locate and present the testimony of Nickerson doomed the ineffective assistance of counsel claim because Udell testified that Nickerson was lead counsel, "took over the case" and made all of the decisions. Thus, without Nickerson, this Court held that Mr. Gore could not meet his burden of demonstrating deficient performance. Because Mr. Gore's ineffective assistance of resentencing counsel claim was reviewed in an initial-review collateral proceeding, he was constitutionally entitled to effective representation. Had Mr. Gore had adequate collateral counsel, who understood the burdens of demonstrating deficient performance and prejudice, Nickerson would have been located and would have testified. Nickerson's testimony would have contradicted much of Udell's testimony and established that resentencing counsel was deficient. In light of postconviction counsel's deficiencies and Martinez v. Ryan, the circuit court erred in denying Mr. Gore's request to re-open his postconviction evidentiary hearing. Relief is warranted.

ARGUMENT II

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. GORE'S CLAIM THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. GORE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS RESENTENCING PROCEEDINGS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. INTRODUCTION

In Arbelaez v. Butterworth, 738 So. 2d 326 (Fla. 1999), this Court acknowledged it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner. . .".

Reliability of a conviction or sentence, or any proceeding thereafter rests on the reliability of the facts and evidence introduced to the fact finder. In Mr. Gore's case, the circuit court denied his initial Rule 3.851 motion in 2004, after an evidentiary hearing was conducted on Mr. Gore's allegations that re-sentencing counsel was ineffective. At the hearing, the first witness presented to the court was Robert Udell, Mr. Gore's court appointed re-sentencing attorney. Udell testified about his representation of Mr. Gore as well as commented about Jerome

Nickeron's role in the case. Thereafter, this Court affirmed the circuit court's order. Gore v. State, 964 So. 2d 1257 (Fla. 2007). In doing so, this Court cited to Udell's testimony. See Gore, 964 So. 2d at 1257, 1271, 1273, 1274, 1275.

Thus, to the extent that Udell's testimony is not reliable or not trustworthy, this Court's opinion relying on Udell's testimony in affirming the circuit court's denial of Mr. Gore's ineffective assistance of counsel claim is likewise unreliable. Given the opportunity, Mr. Gore would demonstrate that Udell's 2003 testimony is unreliable and that this Court's decision relying on his testimony is equally unreliable. The circuit court erred in denying Mr. Gore that opportunity.

B. NEWLY DISCOVERED EVIDENCE

1. Diligence.[13]

After Mr. Gore's death warrant had been signed and his execution scheduled for April 12, 2012, on March 1, 2012, his current postconviction counsel, Linda McDermott, spoke to her law partner, Martin McClain, about Mr. Gore's case. McDermott mentioned the fact that Udell was Mr. Gore's re-sentencing attorney. McClain informed McDermott that he believed that Udell had been disbarred but did not know the specifics of the disbarment. McClain believed that one of the attorneys employed by the Capital Collateral Counsel for the Southern Region represented another capital postconviction defendant who had been represented at trial by Udell and was familiar with the specifics of his disbarment. McClain offered to investigate the matter.

Later that day, McClain relayed information about Udell's disbarment, and the following day, McClain provided McDermott several documents, including the Florida Bar file, Florida Supreme Court order and depositions relating to Udell's disbarment. The

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[13]To the extent that this is the initial-review in collateral proceedings of Mr. Gore's newly discovered evidence claim based upon undisclosed or unknown impeachment evidence of Udell, Justice Scalia in his dissent in Martinez raises the question of how the Court's opinion there intersects with a newly discovered evidence claim in initial-review collateral proceedings:

> Moreover, no one really believes that the newly announced "equitable" rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised: claims of "newly discovered" prosecutorial misconduct, for example, see *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), claims based on "newly discovered" exculpatory evidence or "newly discovered" impeachment of prosecutorial witnesses, and claims asserting ineffective assistance of appellate counsel.

Martinez, 2012 WL 912950 at *12.

documents provided by McClain and obtained from Paul Kalil, an Assistant Capital Collateral Regional Counsel for the Southern Region, were unknown to McDermott or her co-counsel, John Abatecola, until March 1, 2012.

The documents revealed that on October 29, 2009, Udell was disbarred by order of this Court on approval of Udell's Disbarment on Consent. Florida Bar v. Udell, 22 So. 3d 69 (Fla. 2009).[14] Udell was charged with, and admitted to, violating several of the Rules Regulating the Florida Bar. Specifically, Udell admitted that between 2005 and 2008 he "submitted several fee affidavits to the Justice Administrative Commission which contained false information about the services he performed on behalf of at least two clients." He also admitted that between 2005 and 2008 he "filed several motions for attorney's fees which contained false information about the services he performed on behalf of at least two clients."

Subsequently, in depositions conducted in an unrelated capital postconviction case, Udell admitted that he was concerned about the possibility of criminal charges resulting from his misconduct. Indeed, the State also disclosed that a criminal investigation into Udell's conduct was being conducted. However, the State would not disclose any further information due to the investigation remaining ongoing. Thus, it is unclear what information the State knew about Udell's credibility at the time he testified in Mr. Gore's case.

Based upon this new evidence relating to Udell's credibility, Mr. Gore's postconviction counsel sought to locate and interview Nickerson. Nickerson was located and contacted Mr. Gore's counsel within a mere matter of hours from the time Mr. Gore's counsel began to search for him. And, during a phone conversation, Nickerson provided information that belies much of Udell's testimony in 2003. Nickerson described how he came to be involved in Mr. Gore's resentencing, recounting that Udell had contacted Nickerson, who was practicing as a private attorney in Miami, about an unrelated first degree murder trial where the client was from Haiti. Udell requested that Nickerson assist him and Nickerson obliged. Nickerson traveled to Haiti and began to investigate the life history of the client. Ultimately the State offered a plea bargain which resolved that case. In the course of working on the unrelated case, Udell asked Nickerson to assist him with Mr. Gore's resentencing. Udell confided that he did not understand and had little experience with mental health mitigation.

Thus, initially, Nickerson agreed to assist with the mental health mitigation. However, Udell was responsible for investigating and preparing the other mitigation and rebuttal for aggravation. Nickerson recalled that when he traveled to the resentencing he arrived a day or two before the penalty phase commenced to find that Udell had done nothing to prepare for the resentencing. He had not spoken to, or met

[14]On October 4, 2010, the United States Supreme Court suspended Udell from practice before the Court and issued an order to show cause as to why he should not be disbarred from practicing before the Court. In Re Discipline of Robert G. Udell, 2010 WL 3834711 (2010).

with, the mitigation witnesses, and he had not prepared for any of the evidence the State intended to present. Udell was woefully unprepared. Based on this, Nickerson hurriedly attempted to present some of the mitigation evidence with which he had been familiar when he assisted with the litigation in Mr. Gore's original postconviction proceedings. Needless to say, Nickerson was of the opinion that what was presented was done so inadequately and evidence was not presented due to Udell's failure to investigate and prepare for the resentencing proceeding.

Indeed, several avenues of mitigation were completely neglected or mishandled, including, but not limited to, the sentence that Mr. Gore was facing and the impossibility that he could or would ever be paroled; Mr. Gore's exemplary prison record; Mr. Gore's mental health mitigation, history of drug and alcohol abuse in general and at the time of the offense; and the background and family mitigation.

Udell's disbarment and the information and documents which supported and have come to light throughout the process as well as the interview and information provided by Nickerson was raised within one year of Mr. Gore and his counsel learning of the facts supporting it.

2. The new evidence would probably produce a different result as to Mr. Gore's ineffective assistance claim.

Udell's disbarment and his failure to be truthful is critical to the proper determination of Mr. Gore's case because it reveals Udell's inability to be truthful, even under oath. Further, the evidence supports Mr. Gore's contention that, even in 2003, Udell would have wanted to curry favor with the State should evidence of his criminal and unethical behavior surface. Such revelations gravely impact the circuit court and this Court's determinations of Udell's truthfulness, and render his entire testimony at the previous evidentiary hearing suspect and unreliable. As such, this Court's reliance on Udell's evidentiary hearing testimony when affirming the circuit court's denial of postconviction relief is undermined.

In affirming the circuit court's denial of Mr. Gore's ineffective assistance of resentencing counsel claim, this Court relied extensively on Udell's testimony. Gore v. State, 964 So. 2d 1257 (Fla. 2007). For example, as to the issue of the cross examination of the State's mental health expert, this Court held: "Udell did testify, however, that he believed questions as to financial bias are overrated as 'jurors know these people are getting paid.' Therefore, Nickerson's decision to not impeach through questions targeted at financial bias can certainly be viewed as 'sound trial strategy.'" Id. at 1271 (citation omitted).

This Court also credited Udell's testimony in reviewing Mr. Gore's claim that it was unreasonable for him (Udell) to defer to attorney Jerome "Jay" Nickerson[15]:

[15]Udell had testified that he represented Mr. Gore at his resentencing proceeding with the assistance of "volunteer" co-counsel Jay Nickerson.

> We conclude that this decision by Udell to defer to Nickerson could have been considered "sound trial strategy" at the time, because of Udell's reasonable beliefs that Nickerson had superior qualifications to take the lead in the case. At the evidentiary hearing, Udell testified that he deferred to Nickerson because Nickerson was intelligent and had better experience with capital cases and Gore had a lot of personal confidence in him. We conclude that Udell made a strategic decision to defer to Nickerson, and such was arguably "reasonable under the norms of professional conduct." . . .Udell stated that he was "surprised" by [] [the fact that Nickerson had only been practicing law for approximately three years]. Any mistaken belief that Udell had as to Nickerson's experience was reasonable, because according to Udell, Nickerson appeared to know everybody and was completely "immersed" in the area of capital litigation. Additionally, Udell was never aware that there was a bar grievance pending against Nickerson during preparation for and the actual resentencing.

Id. at 1273. Furthermore, this Court relied on Udell's testimony about the investigation into Mr. Gore's case, and the reasons for not presenting Mr. Gore's exposure to pesticides and the effects of that exposure to the jury. Id. at 1273-74.

Finally, this Court concluded that based on Udell's testimony that "all mitigation 'that seemed consistent with [Gore's] best interests' was presented at the resentencing", trial counsel was not deficient. Id. at 1275.

However, what was unknown to postconviction counsel, the circuit court and this Court was that Udell was not a credible witness. Udell's disbarment and that information that surfaced during the investigation revealed that Udell had a longstanding practice of submitting "false information" to the circuit court for his benefit. That "false information" included submissions relating to work that Udell never performed.

Subsequently, Udell has admitted that he was concerned about the possibility of criminal charges resulting from his misconduct. Indeed, during that same deposition, the State also disclosed that a criminal investigation into Udell's conduct was being conducted. However, the State would not disclose any further information due to the investigation remaining ongoing. Thus, it is unclear what information the State knew about Udell's credibility at the time he testified in Mr. Gore's case.

And, because Udell admitted to a voluntary disbarment, the investigation by the Florida Bar ceased. Indeed, the individual who originally brought the allegations to light, Lenora Quimby, began researching Udell's court appointed cases and notifying the defendants in those cases. Quimby's investigation started with Udell's representation of a defendant in 2005, but only because she had a specific interest in that case. No evidence was produced that confined Udell's false statements to only those cases he admitted to submitting false statements.

The evidence of Udell's disbarment and submission of "false information" under oath is relevant to the truthfulness of his testimony in Mr. Gore's case. And, Nickerson's statements to Mr. Gore's postconviction counsel establish that much of Udell's testimony was false.

In Mr. Gore's initial Rule 3.851 proceedings subsequent to the resentencing, he alleged that Udell's performance was deficient

under Strickland v. Washington, 466 U.S. 668 (1984). Mr. Gore identified numerous deficiencies in trial counsel's performance that demonstrated that he was entitled to relief. Specifically, Mr. Gore raised the following deficiencies in Udell's representation:

> 1) The decision to call as a defense witness the former state attorney who prosecuted the first trial rendered the result in this penalty phase unreliable.
>
> 2) Defense counsel was ineffective for failing to propose an expanded jury instruction on the cold, calculating and premeditated aggravator.
>
> 3) Defense counsel was ineffective for failing to discover on deposition and expose to the jury on cross-examination that the State's mental health expert witness charged in excess of $27,000.00 for his testimony, especially in light of the defense's two mental health experts who charged less than $14,000.00 total.
>
> 4) Defense counsel was ineffective for failing to discover and present readily available witnesses who would testify to several mitigating circumstances including the following:
>
> A. That the Defendant suffered from neurologic disorders due to life long exposure to toxic chemicals used in citrus agriculture.
>
> B. That the Defendant was physically, mentally and emotionally abused by his mother all his life and suffered from extreme emotional duress at the time of the offense.

See PC-R. 268-83. In denying Mr. Gore's claims, this Court relied extensively on Udell's testimony. In light of the new information relating to Udell's lack of credibility and desire to curry favor with the State, he is entitled to an evidentiary hearing where he can establish that Udell's performance was deficient and that prejudice ensued.

Given the opportunity, Mr. Gore will establish that "there is a reasonable probability that but for counsel's unprofessional errors, the results . . . would have been different." Strickland, 466 U.S. at 694. The Supreme Court has consistently held that a Strickland inquiry requires a probing and fact specific analysis. Sears v. Upton, 130 S.Ct. 3259, 3266 (2010). In conducting that probing fact-specific analysis, the court must assess the probability of a different outcome. The Supreme Court has held that "[t]o assess that probability, we consider 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding' -and 'reweig[h] it against the evidence in aggravation.'" Porter v. McCollum, 130 S.Ct. 447, 453-54 (2009) quoting Williams v. Taylor, 529 U.S. 362, 397-398 (2000).

In weighing the evidence, the credibility of the witnesses must be determined and credible evidence cannot be discounted to irrelevance in the face of incredible evidence. See Porter, 130 S.Ct. at 455. Here, because this Court relied so heavily on Udell's testimony, the prejudice analysis that was conducted is also fatally flawed. Indeed, this Court discounted the testimony of Mr. Gore's experts, in favor of Udell's incredible testimony. This is critical because Udell is now known to have virtually no credibility and to want to curry favor with the

State.

Moreover, the testimony of Nickerson is newly discovered evidence of Udell's false testimony and unreliability.

C. THE CIRCUIT COURT'S ANALYSIS

> The circuit court conducted virtually no analysis of Mr. Gore's claim. The extent of the circuit court's analysis was: The court finds this claim legally insufficient to show how Udell's 2009 disbarment for alleged conduct between 2005 and 2008 establishes deficient performance or prejudice at Gore's resentencing or his 2003 postconviction evidentiary hearing. Further, the disbarment is not admissible as impeachment evidence.

(PC-R2. 226).

The circuit court's ruling made no mention of Nickerson's statements to Mr. Gore's counsel that establish that Udell testified falsely in 2003. The circuit court's ruling also makes no mention of Mr. Gore's diligence in learning and presenting his claim for relief. Instead, the circuit court considered only the issue of Udell's "2009 disbarment", indeed, the court refused to acknowledge Udell's admissions of submitting "false information" under oath to courts, characterizing Mr. Gore's claim as concerning only "alleged conduct".[16] The circuit court's summary denial and summary analysis is flawed and must be reversed.

The circuit court's conclusion that Mr. Gore's claim is not legally sufficient because Udell's disbarment, alone, does not establish that he was ineffective during Mr. Gore's resentencing proceeding is a myopic and erroneous view of the evidence presented and the law.

Mr. Gore has shown that the evidence presented at his 2003 evidentiary hearing was unreliable. Indeed, Nickerson's testimony undermines Udell's testimony. The newly discovered evidence is relevant to the ultimate issue of whether Udell's performance at Mr. Gore's resentencing proceeding was deficient. As Mr. Gore has established, the circuit court and this Court relied on Udell's testimony at the 2003 evidentiary hearing to reject Mr. Gore's claim. However, Udell's pattern of failing to investigate and prepare yet, representing under oath that he did, is new evidence that Mr. Gore must be able to explore. Indeed, Nickerson's statement, which is also newly discovered, proves his claim.

In addition, the circuit court erred in determining that Udell's disbarment is not admissible as impeachment (PC-R2. 226). Initially, Mr. Gore submits that it was not simply Udell's disbarment that would constitute impeachment evidence, rather, the circumstances surrounding the disbarment, i.e., submitting "false information" under oath relating to Udell's preparation in other cases was admissible to demonstrate that Udell was biased and had a motive to lie. See Fla. Evid. Code § 90.608(2). Thus, the circuit court's narrow construction of

[16] Udell has admitted submitting "false information" to the courts under oath. Therefore, his conduct is not "alleged".

Mr. Gore's evidence relating to Udell's disbarment as character evidence was in error. All of the evidence, including Udell's submission of "false information" under oath, was admissible to show Udell's bias and motive to be untruthful in Mr. Gore's case.

Furthermore, in Davis v. Alaska, the United States Supreme Court recognized "that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." 415 U.S. 308, 315 (1974). Thus, in Mr. Gore's case it matters little whether Udell was disbarred. The issue is whether, at the time he testified at Mr. Gore's evidentiary hearing, he had motive to deceive the court about his performance in order to conceal his fraudulent billing practices and curry favor with the State should his fraud ever be revealed.

Additionally, Nickerson's statement and potential testimony not only impeaches Udell's testimony but would have been admissible to establish that Udell's performance in representing Mr. Gore was deficient. The circuit court wholly ignores the newly discovered evidence of Nickerson's statement to postconviction counsel which directly refutes Udell's 2003 testimony.

The circuit court erred in denying Mr. Gore an evidentiary hearing. Mr. Gore's claim is not conclusively refuted by the record. Indeed, the State, in arguing for a summary denial relied on non-record evidence (See PC-R2. 172-88). Thus, Mr. Gore is entitled to an evidentiary hearing on his claim and the claim should be evaluated cumulatively with his claim that he received inadequate collateral representation when Nickerson was not located, contacted, interviewed or called as a witness at the evidentiary hearing on Mr. Gore's ineffective assistance of resentencing counsel claim. Thereafter, Mr. Gore will be entitled to relief from his death sentence due to the ineffective assistance of counsel at his resentencing proceedings.

ARGUMENT III

THE CLEMENCY PROCESS IN MR. GORE'S CASE WAS APPLIED IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

On January 17, 2012, the Florida Parole Commission sent a letter to the Victim Advocate at the Office of the Attorney General. The letter, referencing Mr. Gore, stated in part:

> The Governor's Office has referred the above-named death row inmate (Mr. Gore) to this office **with instructions to complete an update to the full investigation that was completed in 1987 and provide a detailed report.**
>
> This notice is being provided so that you may notify the victim's family of record in the inmate's capital cases, which resulted in conviction, in accordance with Rule 15(B) of the Rules of Executive Clemency.
>
> **It would be helpful if we receive any written comments from the victim's family or representatives no later than February 6, 2012, so that they may be included in the final report to the Governor.** If any statements are received after that date they will be immediately forwarded to the Governor under separate cover.

(Emphasis added).

The following day, January 18, 2012, the Attorney General's Office sent a letter to the victims and family members of victims of Mr. Gore's crimes. The letter stated, in part:

> As a victim of crime, **you have the right to be informed, to be present and to be heard when relevant, at all crucial stages of criminal proceedings according to the Florida Constitution.** Attorney General Pam Bondi has asked me to notify you of important proceedings initiated by the Governor's office.
>
> This letter is to explain another step in the process which is known as Clemency. Clemency is an important step which is necessary prior to the signing of a death warrant and you should not be alarmed by this process. I am writing to explain how it works and your role in the Clemency process.
>
> The Florida Parole Commission has the responsibility of conducting a thorough investigation into all relevant factors of a death penalty case. The final report will be prepared by S. Michelle Gill, Capital Punishment Research Specialist with the Florida Parole Commission. **The final report is sent to the Governor and Cabinet Members who make up the Clemency Board.** The Office of the Attorney General is responsible for obtaining your written comments describing how you and your family have been impacted by this crime. These letters must be received in this office no later than February 1, 2012**.** Your comments will be forwarded to Ms. S. Michelle Whitworth to be included in the final report to the Clemency Board.
>
> After the Parole Commission sends the final report to the Board, a public hearing may be scheduled. If so, you will be notified and will have the right to be present and heard at the hearing. More details regarding the hearing will be provided to you if one is scheduled. Let me point out that the grant of clemency in a capital case is very rare because it is an act of mercy toward a person who has committed a very serious crime.
>
> Your feelings and concerns are important to the clemency board; therefore, **we are inviting you to participate in this process by providing your written comments to me at the address listed above.**

(Emphasis added).

On February 28, 2012, the Governor signed a death warrant for Mr. Gore, stating, "WHEREAS, executive clemency, as authorized by Article IV, Section 8(a), was considered pursuant to the Rules for Executive Clemency and it was determined that executive clemency is not appropriate".

Thus, during the clemency "update", numerous individuals were informed of their right to participate in this crucial stage of a criminal proceeding, yet somehow Mr. Gore was deprived of notice and opportunity to be heard. Mr. Gore did not learn of the clemency "update" until after his death warrant had been signed. He was not informed that executive clemency was considered, nor was he given the opportunity to present information on his behalf. The Florida Parole Commission sent no letters or notice to Mr. Gore or defense counsel, nor was clemency counsel appointed. While the Attorney General's Office, the opposing counsel in Mr. Gore's case, was aware of and participated in the clemency "update", it did not inform Mr. Gore that numerous and substantial ex parte communications were going on

between its office and the Florida Parole Commission as well as the Governor's office. As a result of not being notified and excluded from the process, Mr. Gore was completely unaware that a report was being compiled and sent to the Governor and Cabinet Members who make up the Clemency Board.

The Florida Parole Commission's actions were in complete disregard to its own rules. While the January 17, 2012, letter from the Florida Parole Commission noted Rule 15B of the Rules of Executive Clemency and the fact that the victims were to be notified, it completely disregarded portions of the rule which were arguably beneficial toward Mr. Gore. According to Rule 15B, Rules of Executive Clemency:

> In all cases where the death penalty has been imposed, the Florida Parole Commission may conduct a thorough and detailed investigation into all factors relevant to the issue of clemency and provide a final report to the Clemency Board. The investigation shall include, but not be limited to, (1) **an interview with the inmate, who may have clemency counsel present, by the Commission**; (2) an interview, if possible, with the trial attorneys who prosecuted the case **and defended the inmate**; (3) an interview, if possible, with the presiding judge and; (4) **an interview, if possible, with the defendant's family.** The Parole Commission shall provide notice to the Office of the Attorney General, Bureau of Advocacy and Grants, that an investigation has been initiated. The Office of the Attorney General, Bureau of Advocacy and Grants shall then provide notice to the victims of record that an investigation is pending and at that time shall request written comments from the victims of record. Upon receipt of comments from victims of record or their representatives, the Office of the Attorney General, Bureau of Advocacy and Grants shall forward such comments to the Parole Commission to be included in the final report to the Clemency Board.

(Emphasis added). Here, while the Florida Parole Commission sought and received comments from victims, Mr. Gore was not given any notice or the opportunity to be heard.[17]

In its order summarily denying this issue, the circuit court stated,

> The death warrant signed by Governor Scott provides that executive clemency was considered and determined not appropriate in Gore's case. And the Florida Supreme Court has repeatedly rejected judicial review of discretionary executive branch clemency procedures as a violation of the separation of powers doctrine. *Marek v. State*, 8 So. 2d 3d 1123, 1129-1130 (Fla. 2009). Further, Gore has no constitutional right to a clemency proceeding or commutation of his death sentence. *Marek v. McNeil*, 2009 WL 2488296 at 3. (S.D. Fla. 2009); *Ohio Adult Parole Auth. V. Woodard*, 523 U.S. 272, 280 (1998). Consequently, Gore is not entitled to relief.

(PC-R2. 224).

The circuit court's order is erroneous in that it fails to acknowledge that Mr. Gore has a continuing interest in his life until his

[17]Other than seeking input from individuals adverse to Mr. Gore, the only evidence that the Governor gave any consideration to clemency is the Governor's statements to the press that "I spent a lot of time praying about this. This individual is a serial murderer ... The crimes he committed were heinous crimes against individuals. It's not the first thing I wanted to do every day when I ran for governor. But it's the right thing to do for the state." Melissa Holsman, Gov. Rick Scott: Signing David Gore's death warrant in Vero Beach 'right thing to do for the state' (February 29, 2012), http://www.tcpalm.com/ news/2012/feb/29/its-the-right-thing-says-governor-after-signing/.

death sentence is carried out, as guaranteed by the Due Process clause of the Fourteenth Amendment to the United States Constitution. See Ohio Adult Parole Authority, et al. v. Woodard, 523 U.S. 272, 288 (1998)("A prisoner under a death sentence remains a living person and consequently has an interest in his life"). When the clemency process is rendered meaningless, as it was here, Florida's death penalty scheme is constitutionally defective. In Woodard, 523 U.S. at 288, Justices O'Connor and Stevens' opinions reasoned that as long as the condemned person is alive, he had an interest in his life that the Due Process Clause protects. Woodard, 523 U.S. at 288-89, 291-92. Both cited examples of behavior that would at least raise a question as to whether a defendant had received adequate clemency access under the due process clause: Justice O'Conner wrote of "a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." Id. at 289. Justice Stevens criticized Chief Justice Rehnquist's opinion because it would tolerate "procedures infected by bribery, personal or the deliberate fabrication of false evidence," Id. at 290-91, and the use of "race, religion, or political affiliation as a standard for granting or denying clemency." Id. at 292.

Justice O'Connor draws a distinction between noncapital cases, in which the clemency applicant's liberty interest in being free from confinement has been extinguished by a fair conviction and sentence, and capital cases, in which the life interest protected by the due process clause lasts as long as the condemned person is still alive. Id. at 289. Justice Stevens suggests that clemency proceedings have become "an integral part of its system for finally determining whether to deprive a person of life," id. at 292, with the effect that under Evitts v. Lucey, 469 U.S. 387, 396 (1985), a state is obliged to adhere to the Due Process Clause. He also reasons that the life interest in capital clemency proceedings requires a higher standard of due process protection than the rights of appellants, probationers, and parolees, because of the qualitative and quantitative differences between death and all other punishments. Woodard, 523 U.S. at 293-94, citing Gardner v. Florida, 430 U.S. 349, 357 (1977). Additionally, in Herrera v. Collins, 506 U.S. 390 (1995), Justice O'Connor made clear that she regarded clemency as an essential backstop to judicial remedies, both concurring with Chief Justice Rehnquist who discussed it at great length, 506 U.S. at 409-17, and specifically mentioning it in her critical two-vote concurrence. Id. at 421.

In Woodard, Justice O'Connor found that the specific flaws Mr. Woodard cited did not rise to the level which would trigger a cognizable due process challenge, i.e that he was only given 3 days notice of his interview; and that he did not have enough time to prepare a clemency petition. Id. at 289-90. Each of these criticisms dealt with the internal structuring of a hearing rather than Mr. Gore's situation where there was no actual clemency proceeding, but rather an arbitrary one sided process which excluded Mr. Gore and which was orchestrated as a result of improper external considerations (See Argument IV). Due process demands that Mr. Gore be afforded what every

other death sentenced inmate had -- a clemency proceeding that accurately reflects "a broad picture of the applicant's history and activities, which assist the Board in making informed decisions" Annual Report, Fla. Parole Commission, 2007-2008, pg. 24.[18] Here, the Clemency Board and the Governor could not have made an "informed decision" about whether to grant clemency when Mr. Gore was not even apprised of, or allowed to participate in, the clemency "update."

The Governor's consideration of clemency without conducting an investigation or proceeding as required by the Rules of Executive Clemency, does not comport with due process. As noted above, some minimal level of procedural due process applies to clemency proceedings. Accord Duvall v. Keating, 162 F.3d 1058, 1061 (10th Cir. 1998); Young v. Hayes, 218 F.3d 850, 852-53 (8th Cir. 2000); Workman v. Summers, 136 F.Supp.2d 896, 898 (M.D. Tenn. 2001). This minimal application requires that a death row prisoner receive the clemency procedures explicitly set forth by state law. See Allen v. Hickman, 407 F.Supp.2d 1098, 1103-104 (N.D. Cal. 2005)("Clemency proceedings satisfy the Due Process Clause as long as the State follows the procedures set out in State law, the State does not arbitrarily deny the prisoner all access to the clemency process, and the clemency decision is not wholly arbitrary or capricious."). Yet here, contrary to the Rules of Executive Clemency, Mr. Gore was excluded from the process and was not even aware that such proceedings occurred. The touchstone of due process has been recognized as fair 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. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment).

[18] In other recent cases in which clemency has been considered regarding warrant eligible capital defendants, clemency counsel has been appointed, defense counsel has been notified, and an actual clemency process, in which a represented defendant can present testimony and evidence in favor of clemency, has been scheduled. The treatment of similarly situated defendants is a violation of equal protection. See e.g., City of Cleburne, Texas, et al.v. Cleburne Living Center, Inc., et al., 473 U.S. 432, 439 (1985), citing to Plyler v. Doe, 457 U.S. 202, 216 (1982)("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.").

Further, the Florida Constitution provides a right to due process under Art. I, Sec. 9 and a right to clemency under Art. IV, Sec. 8. Neither section anticipated a one-sided process which relies solely on input from the State, the victims and/or the media (See Argument IV). Florida law and the Parole Commission's own reports indicate that a "quasi-judicial" investigation by the Parole Commission should comport with due process. See, Annual Report, Fla. Parole Commission 2007-2008, pg. 18.[19] Without notice, without the opportunity to be heard, without counsel, Mr. Gore's clemency "update" did not comport with due process. The Clemency Board and the Governor could not have made an informed decision about whether to grant clemency when the process excluded Mr. Gore's voice or the voice of anyone who would speak in his favor. Mr. Gore was denied the right to have counsel prepare and present his side as to why clemency should be considered.

While the Governor's Office may have considered the 2012

[19]In its annual report, the Florida Parole Commission described its function as a "quasi-judicial" body that conducts "administrative proceedings, and hearings, elicits testimony from witnesses and victims, which might otherwise be performed by a judge in a State Court System, a much costlier proceeding." Annual Report, Fla. Parole Commission 2007-2008, pg. 18.

proceedings an "update" to the "full investigation that was completed in 1987",[20] such a characterization fails to recognize that Mr. Gore's 1984 death sentence was overturned subsequent to the 1987 proceeding on the basis that the trial court refused to allow the presentation of significant mitigating evidence.[21] Mr. Gore's only valid, arguably constitutional penalty phase proceeding occurred in 1992, and no full clemency proceeding has occurred since. Thus, the clemency board's investigation in 1987 was hardly accurate, as it was devoid of mitigating information presented during Mr. Gore's subsequent, and only arguably constitutional, sentencing proceeding, and as such the board did not possess extensive information which would have made a case for mercy. For instance, during the 1992 resentencing proceeding, testimony was presented regarding Freddy Waterfield's domination over Mr. Gore. Mr. Gore was described as a follower who idolized Freddy Waterfield (R2. 2754, 2993).[22] David and Freddy hung out together mostly all their lives (R2. 2992). While David was described as quiet, shy, introverted and not having many friends (R2. 2718, 2728, 2824, 2993), Freddy was characterized as a con artist who was outgoing, more aggressive and popular (R2. 2719, 2731, 2784, 2825, 2995). Freddy was the leader of the two, and David looked up to him (R2. 2733, 3000). All his life, David would do what Freddy wanted (R2. 2782). If "Freddy would want to do something, David would go with him, and whatever Freddy was doing or going, David would go with him." (R2. 3133). As one witness stated, "In my mind to explain it picture David with Freddy as like a little puppy dog." (R2. 2785). When David and Freddy were about nine, they were in the backyard and Freddy had David stand so that Freddy could throw a knife at him, and the knife went into David's toe and he had to get stitches (R2. 2786, 2797). Even after this they continued to play together (R2. 2797). David depended on Freddy "in a pathological, sick, exaggerated way." (R2. 2875). According to mental health expert testimony, at the time of the offense, Freddy Waterfield substantially influenced David's behavior and his criminal activities (R2. 2885).

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[20] At his 1987 clemency proceeding, information was presented that Mr. Gore assisted the authorities and that he had become immersed in Christianity.

[21] As the federal district court stated in its 1989 opinion, "Since the jury did not have the opportunity to consider all mitigating evidence, the Petitioner's sentence of death was imposed in violation of the Eighth Amendment and relief must be granted on this claim." Gore, 763 F.Supp. at 1119.

[22] Waterfield had been convicted of manslaughter in this case in a separate prosecution.

There was also testimony at the 1992 resentencing relating to Mr. Gore's marital difficulties. David quit school to support his family and went back later on to get his GED (R2. 2737). David's wife, Donna, would tend to put him down, tried to make him not look quite as bright as her (she completed high school and some college) (R2. 2738). After divorcing, they tried to work it out again because both loved their children and wanted to give them a father and a mother who both cared about them (R2. 2740). Although David was very close to his first son, Michael, Donna kept him from developing a close relationship with his second son, Jonathon (R2. 2740-41). David loved doing things for Michael, like buying him a new fishing pole and teaching him to fish. He was very depressed when he couldn't see the children; when Michael was with him, "he was in seventh heaven" (R2. 2741). After another divorce, there were problems about visitation rights – Donna would come up with excuses for David not being able to see the kids (R2. 2742).[23] Once there was a big occasion for taking the kids to David's parents' home and having people over, and David came back without the kids and began crying (R2. 2743).

Donna moved to Virginia at one time and David had more visitation problems. It depressed him severely and he'd get in the car and be by himself. He'd be super depressed (R2. 2749). He had a very close bond with Michael and not seeing him "was just taking the last bit of life away from him that he really loved and cherished." (R2. 2750).[24]

Witnesses also described the effects of alcohol on Mr. Gore.[25] Usually very quiet, David would get loud and boisterous when drinking; he'd be cracking jokes and socially getting along; alcohol took away his inhibitions: "He would get to where he would almost talk your head off sometimes." (R2. 2736, 2802). One witness testified that David's personality changes from drinking was like Dr. Jekyll and Mr. Hyde (R2. 2820).

Mental health experts described David's state in the months leading up to the murder. David was abusing alcohol (R2. 2861-3), and he was also taking stimulants, uppers, pink hearts and "black beauties" (amphetamines) (R2. 2864). In adolescence, David established a

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[23]After the second divorce, David was always in court trying to see his children (R2. 2805); he was devastated when Donna denied visitation (R2. 2805).

[24]David began drinking pretty heavily and the drinking kept "getting worse and worse" (R2. 3012). He cried about not being able to see the children (R2. 3012-13).

[25]There was a history of alcoholism in the Gore family. A maternal grandfather killed himself as a result of medical problems and severe alcoholism; a brother was a heavy drinker and alcoholic (R2. 2869). A paternal uncle, Joe, was a severe alcoholic, and was committed to a hospital for 30 days to dry out (R2. 2870).

pattern of drinking, especially with Waterfield; in the 10-12 months before this offense, he drank daily, from when he got up in the morning, drinking in excess (R2. 2867). According to a psychiatrist and expert in addictive behavior, David suffers from chemical dependency (R2. 3049).[26] Further, his alcoholism grew when he lost custody of his boys. He took both amphetamines and alcohol – approximately 80% of all chemically dependent patients are multiple drug users or poly-addicted (R2. 3059). David was also suffering from depression, particularly as a result of the custody battle for his children. He has a dependent personality disorder which characterizes his way of relating to people and interacting with others (R2. 2862). His alcoholism, personality disorder and depression had a synergistic effect: each made the other worse (R2. 2879).

The United States Supreme Court has recognized that the

[26] David's DOC file shows a 1981 diagnosis of chemical dependency made by a psychologist (R2. 3055).

importance of the clemency process in a capital case cannot be understated: "Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" Harbison v. Bell, 129 S.Ct. 1481, 1490 (2009). A clemency proceeding conducted prior to a constitutional sentencing hearing in no way serves the purposes for which clemency is intended. In Harbison, 129 S.Ct. at 1494, the Supreme Court explained that federal habeas counsel may develop in the course of his representation "the basis for a persuasive clemency application" which arises from the development of "extensive information about his [client's] life history and cognitive impairments that was not presented during his trials or appeals." This analysis presupposed that the clemency proceeding is conducted not just after trial, not just after direct appeal, but after the federal habeas proceedings have been concluded.[27] This would insure that clemency consideration would fulfill the "fail safe" function for which it is intended, allowing the arbiter of clemency to consider all of the information that was uncovered in the course of the collateral litigation which may warrant serious clemency consideration. Here, not only were the mitigating aspects of Mr. Gore's character and life developed in postconviction proceedings not considered for clemency, but the evidence from his only constitutional sentencing hearing was not even considered, as there was no actual clemency proceeding subsequent to Mr. Gore's convictions and sentence becoming final. This Court has recognized that a clemency proceeding is "part of the overall death penalty procedural scheme in the state." Remeta v. State, 559 So. 2d 1132, 1135 (Fla. 1990). Where that critical proceeding is not conducted, the death penalty procedural scheme is obviated. Here, Mr. Gore submits that his death sentence should be vacated and a life sentence imposed.

ARGUMENT IV

THE ARBITRARY AND STANDARDLESS POWER GIVEN TO FLORIDA'S GOVERNOR TO SIGN DEATH WARRANTS RENDERS THE FLORIDA CAPITAL SENTENCING SCHEME UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Over thirty years ago, the United States Supreme Court

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[27]The Florida Rules of Executive Clemency contemplate a similar process. According to Rule 15C, Rules of Executive Clemency:

> The investigation by the Parole Commission shall begin at such time as designated by the Governor. If the Governor has made no such designation, the investigation shall begin immediately after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals, so long as all post-conviction pleadings, both state and federal, have been filed in a timely manner as determined by the Governor.

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). At issue in Furman were three death sentences: two from Georgia and one from Texas. Relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, it was 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. 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, as explained by Justice Stewart, Furman means that: "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.

In Florida, the Governor has the absolute discretion and unconstrained power to schedule executions.[28] The decision by a Florida governor to sign a death warrant is just as necessary as the sentencing judge's decision to sign his name to a document imposing a sentence of

[28]Unlike Florida, most states have the judicial branch in charge of scheduling execution dates. Either the trial court or the highest appellate court to hear death appeals determines when an execution date is ready and should be set. At that point, the condemned can petition for clemency before those charged with considering clemency applications. Only Florida, New Hampshire, see N.H. Rev. Stat. Ann. § 630:5, and Pennsylvania, see 61 Pa. Cons. Stat. Ann. § 4302, vest the governor with such unconstrained discretion.

death. In Florida, no death sentence can be imposed unless the judge signs the sentencing order imposing a sentence of death. Similarly, no individual who receives a sentence of death will in fact be executed until or unless the Governor exercises his discretion to sign a death warrant. Yet, there are absolutely no governing standards as to how the Governor should exercise his warrant signing power. In fact, the Governor's discretion is absolute and subject to no review at all. All the judicial system's checks, safeguards, constitutional protections, review, and scrutiny is lost because, at the end of it all, the Governor decides who is executed in Florida.

The Governor's absolute discretion to decide who lives and who dies must be compared with the standards and limits placed upon a sentencing judge's decision to impose a death sentence. The Eighth Amendment requires there to be a principled way to distinguish between who is executed by a state and who is not. It is this constitutional principle that has required the sentencing judge to specifically address what aggravating and mitigating circumstances are present. It is because of the Eighth Amendment that Florida requires the sentencing judge to weigh the aggravating circumstances against the mitigating circumstances when deciding whether to impose a sentence of death.

In the past, the State contested whether a Florida jury who recommends a sentence to the judge in a capital case is subject to the Eighth Amendment principles that constrain the judge's sentencing discretion in a capital case. For years the State contended that because the jury merely made a recommendation to the judge, and because it was the judge who actually decided whether to impose a sentence of death, the penalty phase jury was not subject to the same Eighth Amendment requirements that were placed upon the sentencing judge. However in 1992, the United States Supreme Court found that because the jury's role in making a sentencing recommendation was an essential step in the Florida capital scheme, the jury should be viewed as a co-sentencer and its decision making process should be subject to the same Eighth Amendment constraints that had been imposed upon the sentencing judge in a capital case in Florida. Espinosa v. Florida, 505 U.S. 1079 (1992).

There is no principled way to distinguish between the individual who signs a document entitled "the sentence" which imposes a death sentence, a necessary step before an individual in Florida can be executed, and the individual who signs a document entitled "death warrant" which is an equally necessary step before an individual in Florida can be executed. Most death sentenced individuals in Florida are not executed. More Florida death row inmates die from natural causes than from execution. According to information provided to PolitiFact by the Florida Department of Corrections ("DOC")), 30 of the 55 inmates who have died on death row since January 1, 2000 have died of casues other than execution. PolitiFact, What's killing inmates on Florida's death row? (January 25, 2011), http://www.politifact.com/florida

/statements/2011/jan/25/dean-cannon/whats-killing-inmatesfloridas-death-row/. That means that death sentences being imposed by the judicial system are in the majority of cases not the punishment imposed upon Florida's death row inmates. The actual punishment for the majority of death row inmates is life on death row. Thus, the Governor of Florida is the ultimate sentencer, as he chooses the minority of death-sentenced inmates who will be punished by execution and the majority of death-sentenced inmates who will be punished by life on death row.

In its order summarily denying this issue, the circuit court

found that Mr. Gore is not entitled to relief on the basis that he was eligible for a death warrant, and the Governor has the discretion to determine when to sign a death warrant on any given eligible capital defendant (PC-R2. 225). However, the order ignores the crux of Mr. Gore's argument, that without any meaningful standards constraining the Governor's otherwise absolute discretion, Florida's capital sentencing scheme violates the Eighth Amendment principles set forth in Furman v. Georgia.

For the same reasons that the United States Supreme Court determined that the Florida penalty phase jury's recommendation was just as much an essential component to the death penalty scheme as the judge's decision to impose a death sentence and found the Eighth Amendment constraints applicable to the penalty phase jury, the Governor's absolute power to sign or not sign a death warrant must be subject to the Eighth Amendment. Without the Governor's signature upon a death warrant, an individual housed on Florida's death row will never be executed. There must be enforceable standards placed upon the Governor's otherwise limitless power to decide amongst the approximate 400 individuals on Florida's death row who lives and who dies. The Eighth Amendment requires that there must be a principled way to distinguish between those who receive a death warrant (which is necessary to authorize a death sentence to be carried out) and those who do not receive a death warrant and are thus not subject to execution until or unless the Governor decides to sign a death warrant authorizing their execution.

Without any meaningful standards, death warrants in Florida are signed based on any number of subjective whims or outside influences. In Mr. Gore's case, there were at least 42 death row inmates whose cases were as ready for a warrant. And, prior to January, 2012, Mr. Gore's case was not even being considered for a death warrant.[29] According to one news account, Governor "Scott said he signed off on

[29]Certiorari was denied by the United States Supreme Court on May 18, 2009. Gore v. McNeil, 129 S.Ct. 2382 (2009). Yet, for over two and a half years, the Governor deemed execution inappropriate.

Gore's death warrant after first hearing about Gore's 1980s reign of terror in Indian River County during a January editorial board meeting with Scripp Treasure Coast Newspapers." Melissa Holsman, Gov. Rick Scott: Signing David Gore's death warrant in Vero Beach 'right thing to do for the state' (February 29, 2012), http://www.tcpalm.com/ news/2012/feb/29/its-the-right-thing-says-governor-after-signing/. It was during this referenced editorial board meeting on January 5, 2012, when Mr. Gore's case was pushed to the front of the line[30]:

Unidentified voice: I, we, got this e-mail today, our columnist Russ Lemmon did, and it comes from a man and he says: "You know this July will mark 29 years for us. The pain never goes away. I see it in the faces of my aunt and uncle. They have never been the same and never will be. His death", and he's talking about a guy named David Alan Gore, who killed I think 5 people, at least, that we know of. "His death will not bring her back, we all know that. Nothing will. And for those who don't believe in the death penalty, that was the sentence that was given by the law of the land and needs to be carried out. Maybe our families will have some closure."

I don't know if you're familiar with that case (Governor Scott shakes his head "no"), but, um how do you, if you're not, is that something you could look into?

Gov. Scott: I'll look into it.

Unidentified voice: And, then what is the, how are you doing with death warrants?

Gov. Scott: We did 2 last year and I did 1 last night, before, um, it was announced at the end of the day yesterday. And, so, these numbers will be off, but my understanding of the numbers are when I came into office there was right under 400, about 402 people on death row. But, there were about 42 people who had gone through all of the appeals. So, there's a, there's a whole process ongoing through the death penalty.

First, it's no fun to do, it's not what I ran for Governor on, but it's the law of the land. So, we will, I'll continue to do those that are, you know, death ready in a manner that I can because it's a whole process how long it takes to do each one. So ...

But, what year did it, it says 29 years ago?

Unidentified voice: 29 years was, was the murder. I think he was first sentenced in 1984.

Gov. Scott: So, that's what, '81, '82?

Unidentified voice: Yeah.

Gov. Scott: Okay. All right. Do you know if he's gone through all of the appeals?

Unidentified voice: Yes.

[30]The meeting was videotaped and is currently being shown on various internet sites, including YouTube and Facebook.

Unidentified voice: What's the name of the case?

Unidentified voice: David Alan Gore.

Gov. Scott: Are there any issues on sanity?

Unidentified voice: No. He's admitted to doing it. There's guys, I wrote a column today.

Gov. Scott: What's the issue?

Unidentified voice: There's a book out next week that I would encourage you to read. It's called Serial Killer Whisperer. It's gonna be coming out next week.

Gov. Scott: So, why, what is, why, what's the issue that he hasn't gone through, been executed? You don't know. I'll find out.

Unidentified voice: There's no, there's no reason for it.

Gov. Scott: You want me to call you back?

Unidentified voice: Ahh, if you want. Or you can e-mail me or something.

(Emphasis added).[31]

Twelve days after the meeting, on January 17, 2012, the Florida Parole Commission sent a letter to the Victim Advocate at the Office of the Attorney General, stating:

> The Governor's Office has referred the above-named death row inmate (Mr. Gore) to this office with instructions to complete an update to the full investigation that was completed in 1987 and provide a detailed report.
>
> This notice is being provided so that you may notify the victim's family of record in the inmate's capital cases, which resulted in conviction, in accordance with Rule 15(B) of the Rules of Executive Clemency.
>
> It would be helpful if we receive any written comments from the victim's family or representatives no later than February 6, 2012, so that they may be included in the final report to the Governor. If any statements are received after that date they will be immediately forwarded to the Governor under separate cover.

Less than eight weeks after Governor Scott's meeting with the editorial board of Scripps Treasure Coast Newspapers, the Governor signed Mr. Gore's death warrant.

[31] Undersigned counsel transcribed this video to the best of their ability. While there were several instances where the words were difficult to discern, undersigned submits that any errors are minor and that the transcript accurately reflects the content of the conversation.

The decision to authorize an execution should not turn on the partial interests of those with special access to the Governor, in this case a newspaper editorial board, or on one sided advocacy where the condemned is not even notified of the process.[32] The signing of Mr. Gore's death warrant was nothing more than a rigged lottery. There were at least 42 death row inmates who have presented federal habeas petitions to the federal courts and who have had the federal courts refuse to grant any habeas relief. There is no principled way to distinguish between Mr. Gore and the decision to sign his death warrant and authorize his execution from the decision to not sign a death warrant on these individuals who completed one round of collateral review of their convictions and sentences of death.

The lack of standards here resulted in the Governor engaging in a one-sided process influenced by outside interests.[33] This constitutes the very kind of system that the United States Supreme Court in Furman v. Georgia said would no longer be allowed. Here, Florida's death penalty scheme stands in violation of the Eighth Amendment. As a result, Mr. Gore's death sentence cannot stand.

ARGUMENT V

BECAUSE OF THE INORDINATE LENGTH OF TIME THAT MR. GORE HAS SPENT ON DEATH ROW, ADDING HIS EXECUTION TO THAT PUNISHMENT WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND BINDING NORMS OF INTERNATIONAL LAW.

Mr. Gore is set to be executed 28 years after his

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[32] Adding to the fact that the Governor arbitrarily allowed others to influence his decision, he also excluded Mr. Gore from participating in this process. A one-sided process that allows partial outside influences to dictate the Governor's decisions of life and death without any input from the condemned cannot comport with the Eighth Amendment's requirement that there be a principled way to distinguish between who is to be executed and who is not. Of course, 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). "[Flundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). In addition to violating the Eighth Amendment, Mr. Gore's execution has been approved without providing him any notice or opportunity to be meaningfully heard as to why the Governor should not sign a warrant.

[33] In every death penalty case there is a victim and presumably family members, friends and others who want the sentence of death to be carried out. However, arbitrariness is injected into the process when the signing of a death warrant is based on which victim has the most well-connected and vocal supporters.

conviction was returned and a sentence of death was imposed.[34] The Eighth Amendment's prohibition on cruel and unusual punishment precludes the execution of a prisoner who has spent so much time on death row.[35] This conclusion is derived from the fact that the Eighth Amendment requires that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976). Punishments that entail exposure to a risk that "serves no 'legitimate penological objective'" and that results in gratuitous infliction of suffering violate the Eighth Amendment. Farmer v. Brennan, 511 U.S. 825, 833 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part).[36]

> In Lackey v. Texas, Justice Stevens wrote:
>
> Though novel, petitioner's claim is not without foundation. In *Gregg v. Georgia*, this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers and (2) the death penalty might serve "two principal social purposes: retribution and deterrence".It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley, 134 U.S. 160, 172, 33 L. Ed. 835, 10 S. Ct. 384 (1890).* If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, that description should apply with even greater force in the case of delays that last for many years. Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

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[34]Mr. Gore was convicted on March 15, 1984, and he was sentenced to death on March 16, 1984.

[35]In its order denying relief, the circuit court found that the claim is procedurally barred because it was previously raised in 2007 (PC-R2. 227-8). However, the circuit court's order is erroneous in that almost five more years have passed since that claim was raised. Thus, the issue here, which was not raised or considered previously, is whether Mr. Gore's execution 28 years after his conviction was returned and a sentence of death was imposed, constitutes cruel and unusual punishment.

[36]Where, as here, the inherent cruelty of living under a sentence of death is prolonged for 28 years, such suffering cannot be considered incidental to the processing of the appeals. It is unnecessary and thus unconstitutional. Such long-term suffering becomes a separate form of punishment, which is equivalent to or greater than an actual execution. See Coleman v. Balkom, 45 1 U.S. 949, 952 (1981)(Stevens, J., concurring in denial of certiorari); cf. In re Medley, 134 U.S. 160, 172 (1890).

514 U.S. 1045 (1995) (J. Stevens, memorandum respecting denial of certiorari) (citations omitted).[37]

In a subsequent denial of certiorari review in another case, Justice Breyer echoed the concerns voiced by Justice Stevens in Lackey. Justice Breyer wrote in a case involving a defendant who had been on Florida's death row over 23 years that: "After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise may provide a necessary constitutional justification for the death penalty." Elledge v. Florida, 119 S. Ct. 366 (1998) (J. Breyer, dissenting). In yet another case involving an extended stay on Florida's death row, Justice Breyer stated:

> Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades. See *Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc)* (Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence).

Knight v. Florida, 528 U.S. 990, 995 (1999) (J. Breyer, dissenting from the denial of certiorari). Justice Breyer described the psychological impact of a long stay on death row:

> It is difficult to deny the suffering inherent in a prolonged wait for execution -- a matter which courts and individual judges have long recognized....The California Supreme Court has referred to the "dehumanizing effects of . . . lengthy imprisonment prior to execution." In *Furman v. Georgia, 408 U.S. at 288-289* (concurring opinion), Justice Brennan wrote of the "inevitable long wait" that exacts "a frightful toll." Justice Frankfurter noted that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."

Knight, 528 U.S. at 994-995.

> More recently, in a concurring opinion denying certiorari review, Justice Stevens explained:
>
> In sum, our experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out an execution after the lapse of so much time, reinforces my opinion that contemporary decisions "to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process."

Thompson v. McNeil, 129 S.Ct. 1299, 1300 (2009)(Stevens, J., concurring in judgment)(citation omitted).

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[37] Certainly, the Framers of the United States Constitution would not have envisioned that a condemned man would spend 28 years awaiting execution. The Eighth Amendment's prohibition on cruel and unusual punishment in the 1776 Virginia Declaration of Rights was based on the 1689 English Bill of Rights. Harmelin v. Michigan, 501 U.S. 957, 966 (1991). The English Bill of Rights said "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" when executions took place within weeks of a death sentence, and if a delay in carrying out the execution was unduly prolonged, it could be commuted to a life sentence. Riley v. Attorney Gen. of Jamaica, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarsman, dissenting); Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc) .

Additionally, a review of international law strongly suggests that the execution of a condemned individual after 28 years on death row is not consistent with evolving standards of decency. For example, in 1993 two Jamaican death row inmates challenged their death sentences on the basis that their 14 year incarceration on death row violated the Jamaican Constitution's prohibition against inhuman punishment. The Privy Council of the United Kingdom invalidated their death sentences and indicated that a stay on death row of more than five years would be excessive, and commuted their sentence from death to life in prison. Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc). As a result of the prolonged stays on death rows in the United States, combined with the inhumane conditions typical of death row, some foreign jurisdictions have refused extradition of criminal suspects to the United States where it was likely that a death sentence would result, on the grounds that the experience of years of living on death row would violate international human rights treaties. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989). In Soering, the European Court of Human Rights held that the extradition of a capital defendant, a German national, to the United States would violate Article 3 of the European Convention on Human Rights, which bars parties to the Convention from extraditing a person to a jurisdiction where they would be at significant risk of torture or inhumane punishment. The Court cited the risk of delay in carrying out the execution, which in Virginia averaged between six and eight years. The Court found that "the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." Id. at §106. Since the U.S. government could not assure that the death penalty would not be sought in the Virginia courts, extradition was barred by the United Kingdom.

Moreover, a proscription against "torture or cruel, inhuman, or degrading treatment or punishment," is contained in both the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treament or Punishment. Since the early 1990s, the United States has been a signatory of both treaties. Under the Supremacy Clause, those two treaties are binding on the states as well as the federal government. See Missouri v. Holland, 252 U.S. 416 (1920).[38] Numerous leading

[38]The U.S. has filed "reservations" with respect to both treaties, which contend that the U.S. understands the language "torture or cruel, inhuman or degrading punishment or treatment" to mean the same thing as the phrase "cruel and unusual punishments" in the Eighth Amendment. See David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DePaul L. Rev. 1183 (Summer 1993). No other signatory nation has filed a "reservation" or otherwise objected to that particular language in the treaty. Michael H. Posner & Peter Shapiro, Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1209, 1216 (Summer 1993). Numerous signatory nations have lodged objections to the U.S. "reservations" in the United Nations. The fact that well over 100 nations are signatories of the International Covenant on Civil and Political Rights, see id. at 1212, means that the language in Article VII of the Covenant has assumed the status of a

international law tribunals have held that the prohibition against "cruel, inhuman or degrading punishment or treatment" prohibits a state from keeping a condemned person on death row for an inordinate period of time. See, e.g., Pratt & Morgan v. Attorney General of Jamaica, 2 A.C. 1 (British Privy Council 1993) (en banc) (citing numerous decisions of courts around the world); Soering v. United Kingdom, 11 European Human Rights Reporter 439 (1989)(extradition to U.S. to face capital murder charges refused because of time on death row if sentenced to death); Vatheeswarren v. State of Tamil Nadu, 2 S.C.R. 348 (India, 1983)("dehumanizing character of delay"); Sher Singh v. State of Punjab, 2 SCR 582 (India 1983)(Prolonged delay in the execution an important consideration in considering whether sentence should be carried out); Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimbabwe 1993) [reported in 14 Human Rights L. J. 323 (1993)].

"peremptory norm" of international law, or jus cogens. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715-16 (9th Cir. 1992). Such a fundamental norm of international law is binding on the federal government and the states even in the absence of a treaty. See The Paquete Habana, 175 U.S. 677, 700 (1900).

Here, to execute Mr. Gore after he has already had to endure 28 years of incarceration under sentence of death, would be unconstitutionally cruel and unusual punishment.[39] See, e.g., Schabas, Execution Delayed, Execution Denied, 5 Crim. L. Forum 180 (1994); Lambrix, The Isolation of Death Row in Facing the Death Penalty, 198 (Radelet, ed. 1989); Millemann, Capital Postconviction Prisoners' Right toCounsel, 48 MD. L. Rev. 455, 499-500 (1989)("There is little doubt that the consciousness of impending death can be immobilizing... this opinion has been widely shared by [jurists], prison wardens, psychiatrists and psychologists, and writers.")(Citing authorities); Mello, Facing Death Alone, 37 Amer. L. Rev. 513, 552 and n. 251 (1988)(same)(citing studies); Wood, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U. L. Rev. 35, 37-39 (1986)("The physical and psychological pressure present in capital inmates has been widely noted... Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself or is an element in making the death penalty cruel and unusual punishment.")(citing authorities); Stafer, Symposium on Death Penalty Issues: Volunteering for Execution, 74 J. Crim. L. 860, 861 & n.10 (1983)(citing studies); Holland, Death Row Conditions: Progression Towards Constitutional Protections, 19 Akron L. Rev. 293 (1985); Johnson, Under Sentence of Death: The Psychology of Death Row Confinement, 5 Law and Psychology Review 141, 157-60 (1979); Hussain and Tozman, Psychiatry on Death Row, 39 J. Clinical Psychiatry 183 (1979); West, Psychiatric Reflections on the Death Penalty, 45 Amer. J. Orthopsychiatry 689, 694-695 (1975); Gallomar and Partman, Inmate Responses to Lengthy Death Row Confinement, 129 Amer. J. Psychiatry 167 (1972); Bluestone and McGahee, Reaction to Extreme Stress: Impending Death By Execution, 119 Amer. J. Psychiatry 393 (1962); Note, Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L. Rev. 814, 830 (1972); G. Gottlieb, Testing the Death Penalty, 34 S. Cal. L. Rev. 268, 272 and n. 15 (1961); A. Camus, Reflections on the Guillotine in Resistance, Rebellion and Death, P. 205 (1966)("As a general rule, a man is undone waiting for capital punishment well before he dies."); Duffy and Hirshberg, Eighty-Eight Men and Two Women, P. 254 (1962) ("One night on death row is too long, the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.")(Quoting former warden of California's San Quentin Prison). Here, Mr. Gore submits that his death sentence should be vacated and a life sentence imposed.

[39]The delay in carrying out Mr. Gore's execution is not attributable to him. Rather, over fourteen years of the delay resulted from the trial court's refusal to allow the presentation of significant mitigating evidence at Mr. Gore's original penalty phase, in violation of the Eighth Amendment.

CONCLUSION

Based upon the record and his arguments, Mr. Gore respectfully urges the Court to reverse the lower court, order a resentencing, and/or impose a sentence of life imprisonment, and/or remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic transmission to Celia Terenzio and Ryan Butler on March 26, 2012.

CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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