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**

REPLY BRIEF OF APPELLANT

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A. Points of Clarification/Correction

In its Answer Brief, the State either does not understand Gore's argument and the United States Supreme Court decision in Martinez v. Ryan, – U.S. –, 2012 WL 912950 (2012), or doesn't want to understand them. As a result, the State's Answer Brief is rife with mischaracterizations of both, which render the State's argument misleading and wrong.

1. The nature of Mr. Gore's claim.

In the Answer Brief, the State's asserts: "Gore alleges that the trial court's summary denial was predicated on a procedural bar. That is false." (AB at 10). To correct and/or clarify, Gore notes that Claim IV of the Rule 3.851 at issue concluded with the following: [1]

> Had Mr. Gore had competent postconviction counsel, who understood the burdens of demonstrating deficient performance and prejudice, Nickerson 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, it is imperative that Mr. Gore be allowed to present evidence in support of his ineffective assistance of counsel claim.

[1] At the time that Gore's warrant was signed and the Rule 3.851 motion was drafted and filed, Martinez v. Ryan had been argued before the United States Supreme Court, but not yet decided. Thus, the claim was drafted without the benefit of the opinion which did not issue until March 20th, after the circuit court's order summarily denying had been entered.

(PC-R2. 121). Gore in his claim in anticipation of an imminent decision in Martinez v. Ryan was arguing that due to postconviction counsel's deficiencies in litigating the resentencing ineffectiveness claim, the evidentiary hearing should be re-opened so that Nickerson's testimony could be presented in support of the ineffectiveness of resentencing counsel claim.[2]

> In responding to Claim IV of the motion, the State argued:
> Gore contends that he is entitled to a "do-over of his claim of ineffective assistance of penalty phase counsel under *Strickland* because his then postconviction counsel, Andrew Graham (Graham), was ineffective in the manner in which he litigated the claim at the evidentiary hearing.

(PC-R2. 189).[3] Later, the State argued: "In reality, what Gore is seeking is a "second tier" review of his already litigated claim." (PC-R2. 192). Clearly, the State understood that Gore's claim of inadequate representation by collateral counsel was a claim for relief from the procedural bar arising from the previous litigation, *i.e.* Gore was seeking to again litigate his ineffectiveness of resentencing counsel claim. And just as clearly, the State's contention was that Gore was barred from revisiting the resentencing counsel ineffectiveness claim by virtue of Lambrix and its progeny (PC-R2. 190-1).

The circuit court in denying Gore's claim did not address the merits of the resentencing counsel ineffectiveness claim; it addressed the merits of whether he could seek relief from a procedural bar: "And, 'claims of ineffective assistance of postconviction counsel do not present a valid basis for relief.'" (PC-R2. 229)(quoting Lambrix).

2. Is there no constitutional right to effective collateral representation?

[2]At the March 13th case management hearing, Gore's counsel noted that Martinez was still pending in the U.S. Supreme Court and asked the court to consider holding the proceedings in abeyance pending a decision in Martinez (PC-T. 54).

[3]In its response, the State relied upon Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarrantano, 492 U.S. 1 (1989); and Lambrix v. State, 698 So.2d 247 (Fla. 1996), and argued to the circuit court: "this Court is bound by such precedent and deviating from such is error of law (PC-R2. 191).

A major thrust of the State's Answer Brief is "that there is **no constitutional right** to effective postconviction counsel" (AB at 10).[4] In point of fact, the U.S. Supreme Court has made it very clear that the existence of a constitutional right to effective representation in initial-review proceedings of a claim that resentencing counsel rendered ineffective assistance is an open question. Martinez v. Ryan, Slip Op. at 5; Martel v. Clair, 132 S.Ct. 1276, 1286 (2012). Thus, it is erroneous to argue that there is no constitutional right in those circumstances because whether such a constitutional right exists has not been resolved as explained in the U.S. Supreme Court's most recent rulings.

Because the State fails to acknowledge that the U.S. Supreme Court explicitly ruled that the question of such a constitutional right is open and unresolved, the State does not address the fact that this Court's decisions in Lambrix v. State, 698 So. 2d 247 (Fla. 1996), and State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998), were premised upon this Court's understanding that the U.S. Supreme Court in Pennsylvania v. Finley and Murray v. Giarrantano had categorically found that such a constitutional right did not exist.

[4]The State also misleadingly asserts that the Supreme Court in Martinez "has refused to recognize a constitutional right to postconviction counsel" (AB at 7). In point of fact, the Supreme Court in Martinez refused to find that there was **not** a constitutional right to adequate representation in the initial-review of an ineffective assistance of resentencing counsel claim. Martinez v. Ryan, Slip Op. at 5 ("*Coleman v. Thompson, supra*, left open, and the Court of Appeals in this case addressed, a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. * * * This is not the case, however, to resolve whether that exception exists as a constitutional matter.").

It is clear from what is said in Martinez and Martel, that this Court was wrong to conclude in Lambrix and Kenny, just as the State is wrong in its Answer Brief, that there is no constitutional right to effective representation during the initial-review of a Sixth Amendment claim that resentencing counsel was ineffective. The question of whether there is such a right has specifically been left open and unresolved.[5]

3. Nonetheless, there is a recognized right to adequate representation in the initial-review of trial-level ineffective assistance claim.

[5]Gore does argue that Justice Scalia is right in his dissent in Martinez that the logic of the majority opinion means that there must be a constitutional entitlement to effective collateral representation when trial-level ineffectiveness is litigated in initial-review proceedings.

The State argues "*Martinez* is limited solely to the propriety of permitting federal review pursuant to [AEDPA] and therefore has no impact on Florida's procedural/substantive law applicable to collateral litigation" (AB at 11).[6] Besides ignoring the fact that Martinez establishes that this Court erred in definitively concluding that there was no constitutional right to effective collateral representation when collaterally litigating trial counsel's ineffectiveness, the State ignores that the U.S. Supreme Court has found on equitable grounds that there is a right to effective collateral representation. As Martinez explains: "To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney." Slip Op. at 9. A deprivation of that recognized federal equitable right means that the federal court will excuse any procedural bar to consideration of the trial-level ineffective assistance claim. And what the State completely ignores is the fact that if this Court does not recognize the equitable right in state proceedings, this Court's resolution of the trial-level ineffectiveness claim will lose the deference federal habeas courts must now accord this Court's findings under the AEDPA.[7]

The State's contention that Martinez "is limited solely to the propriety of permitting federal review" fails to acknowledge that a refusal by this Court to find that there is an equitable right to effective collateral review in Rule 3.851 proceedings on a trial-level ineffectiveness claim will deprive this Court's rejection of that trial-level ineffectiveness claim to deference in a federal court when a habeas petitioner demonstrates a violation of the federally recognized equitable right.

4. Did Gore get what Martinez found he was entitled to?

The State argues "Gore's claim has had three judicial reviews, which is obviously twice more than that which has been deemed equitable under *Martinez*. Therefore, Gore is not entitled to the relief he seeks." (AB at 17).

[6]Within its brief, the State also inconsistently argues "Gore received that which *Martinez* recognizes as an equitable entitlement" (AB at 11).

[7]This is in addition to the fact that the U.S. Supreme Court has not decided if the right to effective collateral counsel in initial-review of trial-level ineffectiveness claims is constitutionally mandated.

The State has mistakenly read Martinez to mean that all he is equitably entitled to is an initial-review of his claim that he received trial-level ineffective assistance. Yet, Martinez quite clearly holds that Gore is entitled to effective collateral representation during that initial-review of his trial-level ineffectiveness claim.[8] Under Martinez, a federal habeas petitioner is indeed entitled to "another opportunity" to present evidence in support of his trial-level ineffectiveness claim if he demonstrates that his collateral representation during his first opportunity was inadequate. The only question after Martinez is whether the "do-over" will happen in state or federal court where as here a capital defendant can show that during proceedings on an ineffectiveness claim in his initial Rule 3.851 motion his collateral counsel's performance was inadequate.

5. Was Gore from his death row cell responsible for the failure to locate and call Nickerson as a witness?

The State argues that Gore cannot obtain equitable relief under Martinez because he "signed and verified the facts in the motion which contained the claim of ineffective assistance of counsel" (AB at 25). The State ignores the limitations placed upon a convicted defendant housed on death row and said defendant's dependency upon his collateral counsel to investigate and present his trial-level claim of ineffective assistance of counsel. And, the State completely disregards the language of Martinez itself:

> 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).

6. Did the inadequate collateral representation taint this Court's resolution of both prongs of its Strickland analysis?

Finally as to Argument I, the State contends that "even if Gore is able to overcome all the legal obstacles to this claim, he is still not entitled to relief." (AB at 26). According to the State, collateral counsel's inadequate representation in failing to call Nickerson as a witness does not call into question this Court's findings as to the prejudice prong of its Strickland analysis.

[8] The State's argument in this regard is like saying that Strickland, which guarantees effective representation at a criminal trial, is satisfied as long as there was a criminal trial at which the defendant was represented by an attorney.

The State's position is simply wrong. This Court relied upon Udell's testimony, which Nickerson would contradict, as to both prongs of the Strickland analysis.[9] The inadequate representation that Gore received from his collateral attorney in investigating and litigating the trial-level ineffectiveness claim tainted the Court's resolution of both of the Strickland prongs. Relief is warranted.

ARGUMENT II[10]

Initially, in defense of the circuit court's order, the State contends that Gore's allegations regarding Nickerson's statements to postconviction counsel were never presented to the circuit court as newly discovered evidence. See AB at 30, 33. The State's contention is false. In his 3.851 motion, Gore alleged that, based on the information of Udell's disbarment, postconviction counsel sought to locate and interview Nickerson:

> 12. In addition, based on this new evidence, 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.
>
> 13. 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.

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[9] For example, this Court in denying the ineffective assistance of resentencing counsel claim stated: "Moreover, even if Nickerson's performance was deficient, there was no prejudice. It still would have been reasonable to call Stone due to the aforementioned strategic reasons." Gore v. State, 964 So. 2d 1257, 1270 (Fla. 2007). This ruling was dependent upon Udell's uncontradicted testimony as to what strategic decisions had been made and the absence of Nickerson's testimony.

As to another aspect of the ineffectiveness claim, this Court ruled: "Therefore, Udell's strategic decision to defer on a limited basis to the apparent abilities of Nickerson did not constitute deficient performance." Id. at 1273. As to this aspect of the claim, there was no alternative prejudice prong analysis.

Because the Strickland prejudice prong requires a cumulative prejudice analysis of all aspects of the ineffectiveness claim, it is clear that such an analysis did not occur free from the taint of Udell's uncontradicted testimony and the absence of Nickerson's testimony refuting Udell's false assertions. See Kyles v. Whitley, 514 U.S. 419 (1995); Smith v. Secretary, 572 F.3d 1327 (11th Cir. 2009).

[10] Because the State has now clearly stated that it withdrew its argument that Gore was not diligent, Gore will not address this aspect of his claim. See AB at 38 ("The trial court did not make findings regarding the timeliness of Gore's motion or on diligence as **the State withdrew its argument**.").

> Needless to say, many of the pieces were left out of the courtroom and some were never even put in the pile left at Udell's office.
>
> 14. 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.
>
> 15. 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. . . .

(PC-R2. 107-9). Thus, the statement that Nickerson provided to postconviction counsel was presented to the circuit court as newly discovered evidence in and of itself. Gore did not limit the evidence as impeachment evidence of Udell. Nickerson was listed as a witness to testify as to the information he provided Gore's current postconviction counsel. The circuit court's analysis of Gore's claim was flawed, not Gore's claim.

In addition, Gore did not confine his claim to the disbarment of Udell, as the State argues (AB at 34-5). Rather, Gore set forth Udell's disbarment and the circumstances of his disbarment as newly discovered evidence. See PC-R2. 104 ("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 oh 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.'"). So, contrary to the State's assertion, it was not simply the disbarment that constituted the newly discovered evidence.

Furthermore, Gore's allegations that Nickerson's statements to postconviction counsel constitutes newly discovered evidence and that Gore's original postconviction counsel provided inadequate representation in his collateral proceedings as to the presentation of an ineffective assistance of trial counsel claim are not inconsistent as the State asserts (AB at 30, 34). It is because Gore's postconviction counsel provided inadequate representation that Nickerson was not located or interviewed in his initial postconviction proceedings. And, Gore's claim became cognizable based on the U.S. Supreme Court's opinion in Martinez v. Ryan, – U.S. –, 2012 WL 912950 (2012). Likewise, it was because of the newly discovered evidence of Udell's disbarment that Nickerson was located and interviewed. Thus, Gore's original postconviction counsel did provide inadequate assistance in failing to locate and interview Nickerson and his current postconviction counsel was diligent in locating and interviewing Nickerson. Both of Gore's arguments entitle him to an adequate evidentiary hearing as to his claim that his penalty phase counsel was deficient and that prejudice ensued.

The State also argues that Gore's claim should be rejected based on Kearse v. State, Fla. Supreme Court Case No. SC11-244 (Fla. Oct. 21, 2011). However, the distinction between Gore's claim and Kearse's is that Gore presented Nickerson's statement to postconviction

counsel to the circuit court. Nickerson's statement is newly discovered evidence in and of itself and also conclusively demonstrates that Udell testified falsely. When viewed in the context of the circumstances of his disbarment, there is no doubt that Udell had a pattern of presenting "false information" under oath, i.e., Udell testified falsely about his representation of his clients and the work he has done on their behalf. Because Gore has presented compelling and conclusive evidence that Udell testified falsely in 2003, this Court must realize that the proceeding and any determinations made based upon Udell's testimony and without the benefit of Nickerson's testimony, as to the issue of whether Gore's resentencing counsel was ineffective, are unreliable.

Like the circuit court, the State also refuses to recognize that a witness may be impeached by more than establishing that the witness has a felony conviction (AB at 37). Indeed, Gore is not attempting to impeach Udell based on his character, as the State suggests (AB at 37). Rather, what the State fails to grasp is that Gore would impeach Udell by demonstrating that he had motive to testify falsely. And, to the extent that Nickerson's statement conflicts with Udell's testimony, that too, would serve as valid, admissible impeachment evidence.[11]

Gore possessed a constitutionally protected right to expose Udell's motives for testifying as he did. See Davis v. Alaska, 415 U.S. 308, 315 (1974). There can be no doubt that the circumstances of Udell's disbarment and his fear of criminal charges are relevant and admissible to determining what, if any, weight to give to his testimony. The evidence of his repeated submission of "false information" to the court is not speculative, as the State suggests, but fact.

[11]Likewise, Nickerson's statements and expected testimony completely refute Udell's testimony and establish that Udell again testified falsely under oath. Thus, there is no "stacking of potentialities", as the State argues. See AB at 41.

Indeed, the State argues: "Gore has not shown that what counsel may have done in an unrelated case years after trial is relevant here." (AB at 41). First, Udell was disbarred because he admitted to submitting "false information" under oath, thus the State's suggestion that the conduct "may" have occurred is refuted by the records that Gore attempted to introduce before the circuit court.[12] Second, the core issue is that Udell submitted "false information" to the courts. That information concerned the work he allegedly performed in representing his clients. Obviously his falsities served a dual purpose – he was paid for work he did not perform and he made it appear as though he had adequately represented his clients. Thus, there can be no doubt that Udell's submission of "false information" under oath is relevant the reliability of the testimony he provided in 2003. The State attempts to revive a defense that it unsuccessfully raised in the circuit court to Gore's claim, i.e., that Gore cannot establish the prejudice prong of his claim that his penalty phase counsel were ineffective (AB at 42-50)("Although not addressed directly by the trial court in its summary denial . . ."). But, as the State reluctantly acknowledges, it raised the exact same argument in the circuit court and the circuit court rejected it when it denied Gore's claim without mention of the State's alternative argument.

Further, a review of the record on appeal from Gore's direct appeal after being resentenced to death makes clear that the jury had one criteria by which to determine whether Gore would live or die: whether, if given a life sentence, he would ever be released from prison. During deliberations the jury asked: "Is the 10 years served go towards the 25 years?" and "The standing two (2) life sentences when and if parole can occur?" (R. 5604). In response to the jury's questions the following argument occurred which demonstrates trial counsel's ineffectiveness:

> MR. UDELL: Judge, the problem with the instruction as given is that I'm not sure that the evidence they were given on this issue is a correct statement of the law.
>
> THE COURT: Well, it was in evidence, whether it's right or wrong, it's evidence and we can't change that.
>
> MR. MORGAN: It was elicited by Defense lawyer.
>
> MR. UDELL: Had somebody said on this stand he's not eligible - he's not eligible for time served, had that been the evidence and we're in that position, and No. 2 came up, I think the State would say, Judge, tell them to rely on the evidence, they heard the law.
>
> MR. MORGAN: Object at this point.
>
> MR. UDELL: I realize that, but now you're telling them to rely on what Mr. Stone tells us the law is.
>
> THE COURT: He testified as a witness.
>
> MR. UDELL: I realize that but that's not the law. It may not be the law.
>
> MR. MORGAN: Judge, they elicited that testimony themselves.
>
> MR. NICKERSON: Judge, it's the law that he's eligible on both lifes immediately right now or because they're running consecutive that he becomes - he's eligible on the first one right now, but he would have to make parole on that one before - that

[12]Gore submits that the fact that the circuit court and the State dispute that Udell submitted "false information" to the courts and that the circuit court denied his claim based on such a characterization entitle Gore to an evidentiary hearing.

the only.

MR. MORGAN: If we checked, I think we probably find that they can release him now if they wanted to on those sentences, conditional release and everything else.

THE COURT: I honestly don't know the answer. But my point is Mr. Stone testified on this subject, and whether Mr. Stone correctly stated the law or not, I don't know. But it's evidence.

MR. UDELL: Judge, the understatement from the defense we registered our objections to that ruling and ask you to rule. [sic]

THE COURT: Any other comment?

MR. COLTON: Judge, there was testimony on this issue elicited by the Defense through a witness called by the Defense and the Jury should rely on what they heard during the testimony. They can accept it or reject it.

THE COURT: I recall testimony on this from Mr. Stone. I'm not commenting one way or the other whether it's a correct statement of the law or what the law is. But there was testimony. I'm going to answer the question by telling them they should rely on their own recollections of the evidence.

(R. 3630-3633). The trial court instructed the jurors to rely on their own recollection of the evidence (R. 3633, 5604).

During his initial review collateral proceedings, Gore averred that the decision to call Robert Stone as a witness for the defense constituted ineffective assistance of counsel.[13]

Prior to subpoenaing Stone, trial counsel was aware that Stone believed the reason that Gore's codefendant was not convicted of first degree murder was because Gore welched on his plea agreement and refused to testify against Waterfield at trial (PC-R. 827).[14] Stone later testified that he had no inkling why the defense had called him to testify at Gore's resentencing proceeding (PC-R. 827). On the same subject, Udell testified that the decision to call Stone was " ... [s]urprising then and it's probably unusual now." (PC-R. 792).

Gore's resentencing prosecutor met with Stone after he learned that Stone had been subpoenaed by the defense (PC-R. 826). The two of them agreed that the prosecutor would question Stone on cross-examination about when Gore could be released on the life sentences for kidnapping and rape (PC-R. 826). In contrast, Gore's defense counsel did no investigation and made no inquiry of Stone, by discovery deposition or even a simple witness interview, to determine what his testimony would be. Trial counsel simply and blindly called Gore's former prosecutor as a witness (PC-R. 825, 827). As a result of this flawed decision, complete absence of basic preparation and subsequent failure to make any objections during Stone's cross examination, defense counsel permitted the prosecution to impermissibly play upon the jurors' fear that Gore would be released to rape and kill again if he were only given a life sentence. This significant breach on the part of Gore's defense counsel amounted to ineffective assistance of counsel.

Indeed, Stone testified on direct examination that Gore's two life sentences for kidnapping were to be served concurrently, and the

[13]Stone was the former state attorney who had personally handled the prosecution of Gore in 1984.

[14]Trial counsel was well aware that Stone held a grudge against Gore (PC-R. 791).

three life sentences for sexual battery were to run consecutively to the other two life sentences (R. 3200-02). Without objection from defense counsel, Stone testified during cross-examination by the State:

> Q. Let's break that down, Mr. Stone. Basically you are saying that of the life sentence it adds up to basically one life sentence followed by another life sentence?
> A. That's correct.
> Q. Two live [sic] sentences?
> A. Two life sentences.
> Q. And he is subject to parole; is that correct?
> A. Yes.
> **Q. When could he receive parole?**
> **A. I guess any time.**
> Q. Who is that up to?
> A. Probation and Parole Commission.
> Q. All right. People in Tallahassee?
> A. Seven member board in Tallahassee.

(R. 3203)(emphasis added).

Gore's counsel failed to object to this factually and legally incorrect testimony. This error was further compounded by the fact that Stone's inaccurate and false testimony was the only testimony presented to the jury with regard to parole eligibility. Stone later testified at the postconviction evidentiary hearing that he did not know what the rules, regulations or guidelines of the Parole Commission were, either at the time of the original trial or at the time of the penalty phase retrial (PC-R. 829, 830). However, resentencing counsel failed to call any witness who could correctly testify as to Gore's actual parole eligibility in this case (R. 1335).

Had Gore's counsel called a qualified witness from the Parole Commission, the defense could have established that Gore was ineligible for parole consideration until he served 50 years, and he would not even have been granted a parole interview until at least eighteen months prior to the expiration of those 50 years. Thus, Stone's testimony, which was never objected to or rebutted by Gore's counsel, unduly prejudiced the jury

There is no doubt that Gore would not have been eligible for parole in 1994 had the jury recommended life. There is also no doubt that the jury's deliberations were focused on whether or not Gore would ever be released from prison. Resentencing counsel, without strategy, botched the singular piece of mitigation that would have caused Gore's jury to recommend life.

Gore is entitled to an evidentiary hearing in order to present the testimony of Nickerson and demonstrate that Udell's 2003 testimony was false. Nickerson and Udell were woefully ineffective in representing Gore at his resentencing proceedings. Gore suffered prejudice. Relief is warranted.

ARGUMENT III

In responding to Gore's argument, the State relies extensively on Bundy v. State, 497 So. 2d 1209 (Fla. 1986), and Marek v. McNeil, 2009 WL 2488296 (S.D. Fla. Aug. 13, 2009), to argue that this Court cannot review the issues raised by Gore relating to the "update" of his clemency proceedings. See AB at 51-52. However, as to Marek, the State is well aware that the federal district court had no jurisdiction to entertain Marek's claims, therefore the order issued by the district court as to any issue, other than the jurisdictional issue, is not law and cannot be relied on to argue that Gore's claim was properly denied. Indeed, in Marek, the district court held that the court had no jurisdiction to entertain Marek's petition for writ of habeas because the petition was a successive petition under 28 U.S.C. 2244 (b)(3)(A). Marek v. McNeil, 2009 WL 2488296 at *2. After the district court issued Marek a certificate of appealability as to the issues, the State moved to strike the certificate and the Eleventh Circuit vacated the certificate of appealability holding: "we conclude that Marek's petition did not fall within the narrow exception enunciated in *Panetti*, and the district court properly dismissed it for lack of jurisdiction." Marek v. McNeil, Eleventh Circuit Court of Appeals Case No. 09-14120P (August 18, 2009). Thus, the State's reliance on the federal district court's order in Marek as to the substantive issue presented to this Court is clearly misplaced.

Likewise, in arguing that the governor has unlimited discretion as to the issue of clemency the State demonstrates a fundamental misunderstanding of the Supreme Court's opinion in Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998). In Woodard, the controlling plurality opinion makes clear that there is indeed a limit to the governor's discretion: "... some *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might ... be warranted ..." Id. at 289 (emphasis in original). Thus, the cases preceding Woodard, upon which the State relies to assert that judicial intervention is precluded in the executive function of clemency, were overruled by Woodard.

Furthermore, the State quoted portions of the majority's opinion in Woodard suggesting that "[s]ince the Governor retains complete discretion to make the final decision [regarding clemency] . . . the State has not created a protected interest." (AB at 53). But, a review of the opinion demonstrates that the language the State quotes was Chief Justice Rehnquist's statement regarding what the Court of Appeals had concluded prior to the grant of *certiorari*. While the State either advertently or inadvertently attempts to mislead this Court – this was not the holding of the Supreme Court. Indeed, Justice O'Connor's controlling plurality opinion, which is the Court's majority opinion as to this issue, held just the opposite, i.e., that death sentenced inmates had a right to some minimal due process in clemency proceedings.

Later, the State again cites to Chief Justice Rehnquist's opinion asserting: "clemency proceedings are conducted by the Executive

Branch, independent of judicial review" (AB at 57). However, this is not the controlling opinion and is the opposite of what Justice O'Connor stated in her controlling, plurality opinion.[15] The State has repeatedly demonstrated that it does not understand how to read a plurality opinion or has intentionally misrepresented Woodard to this Court, in either case the State's actions should not be tolerated, particularly when an individual's life is at stake.

[15]The State inexplicably dismisses the cases cited by Gore (see AB at 58), which explain that Justice O'Connor's plurality opinion presents "the Court's narrowest majority holding" thus, "some minimal level of procedural due process applies to clemency proceedings." Duvall v. Keating, 162 F.3d 1058, 1061 (10th Cir. 1998).

The State also fails to address the specific circumstances in Gore's case that require judicial intervention – circumstances that were not present in the cases cited by the State.[16] Here, Gore was never provided with a clemency hearing as to his current death sentence. Additionally, here, as to the clemency "update", the Rules of Executive Clemency were followed only to the extent that the victim's family members were asked to submit information.[17] Gore, his family and his counsel were not. There is no doubt that the fact that Gore never received a clemency proceeding as to the only allegedly constitutional death sentence he received and the one-sided nature of the "update" did not provide Gore the minimal due process to which he was entitled. The facts of Gore's case distinguish his case from any of the cases upon which the State relies, including Valle v. State, 70 So. 3d 530 (Fla. 2011); Johnston v. State, 37 So. 3d 11 (Fla. 2010); Marek v. State, 8 So. 3d 1123 (Fla. 2009). See AB at 53-6.

Instead of addressing the specific facts and circumstances of Gore's case, the State attempts to distort Gore's argument claiming that he is simply complaining that he did not have an adequate opportunity to present his case for clemency because further mitigation was developed in postconviction (AB at 56). The State asserts that Gore's argument is the same as David Johnston's argument (AB at 56-7). It is not.

While Gore agrees that the better practice would be to consider clemency after a death sentenced inmate has unsuccessfully challenged his conviction and sentence in the courts because, as the United States Supreme Court recognized in Harbison v. Bell, 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." 129 S.Ct. 1481, 1494 (2009). 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, including any legal issues that the courts could not or did not fairly adjudicate.

Yet, Gore is not simply complaining that additional mitigation was developed in postconviction. Gore has asserted that he never received a clemency proceeding as to his current death sentence, and that the "update" that was conducted in January, 2012, was completely

[16]The State's assertion that this Court has rejected "the same issue raised here" (AB at 54), is false.

[17]The State relies on the Rules of Executive Clemency to assert that the Governor has "unfettered discretion to deny clemency" (AB at 52). Apparently, the State wants this Court to follow the rules which the Governor did not. Further, the issue is not whether the Governor retains the absolute discretion to deny clemency but whether the rules obligate him to consider it with some minimal due process being afforded the inmate.

one-sided. As such, Gore was denied the minimal due process to which he was entitled.

The State also argues that because the Governor said he considered clemency for Gore and rejected it by signing Gore's death warrant that the Governor's discretion is unchallengeable (AB at 58). However, the warrant actually states: "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". It is indisputable that the Rules of Executive Clemency were not followed here. And, the State cannot make it so because the warrant incorrectly referenced the rules.

Finally, the State argues that Gore could have presented information in 1987 or could have pursued another clemency proceeding thereafter to present evidence to the Governor (AB at 59). The obvious flaw in the State's argument that Gore should have presented evidence in 1987 because it relates to "his life experiences", is that the State neglects the recognition in Harbison that an inmate's federal habeas counsel is in the best position to prepare 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." 129 S.Ct. at 1494. Furthermore, clemency encompasses a plethora of issues, including but not limited to, legal issues that the courts could not or did not fairly adjudicate, as well as issues relating to an inmate's age, health, prison record and conduct. Many of these issues simply did not exist or were not germane until the Governor decided to consider Gore for a potential warrant.

Furthermore, the Rule of Executive Clemency delineate that the investigation regarding clemency "shall begin at such a time as designated by the Governor." The rules do not contemplate a scenario under which Gore could have requested clemency. Thus, the State's argument to the contrary is misplaced. Relief is warranted.

ARGUMENT IV

The State essentially ignores the facts and circumstances surrounding Gore's argument and simply argues that the Governor has absolute discretion to initiate the execution process, therefore Gore has not presented a cognizable claim for relief (AB at 61-2). Indeed, the State has to ignore the circumstances surrounding Gore's argument because they indisputably demonstrate that the Governor's actions are arbitrary and capricious.

Here, Gore has established that the Governor's act of signing a death warrant is the last step in the process of carrying out a death sentence. In addition, the Governor's discretion is unfettered. Because this is so, there must be some standards imposed to ensure that death sentences are carried out fairly and that they are not arbitrary or capricious.

Gore has established that in his case an arbitrary factor was injected into the death penalty scheme, i.e., that a newspaper editorial board which had special access to the Governor could call for a single individual's death sentence to be carried out. Relief is warranted.

ARGUMENT V

The State asserts that the circuit court was correct in finding that Gore's claim was procedurally barred because a similar claim was raised in his appeal from the denial of his Rule 3.851 motion. However, as Gore explained in his initial brief, five more years have passed since this Court considered whether the eighth amendment prohibited a prolonged stay on death row in Gore's case. Thus, because Gore is not asserting the same issue, it cannot be procedurally barred.

Additionally, the State blames Gore for his prolonged stay on death row claiming that Gore's "continued attempts to prohibit his execution have led to what he considers his prolonged stay on death row." (AB at 65). However, the State neglects to address the fact that Gore has been eligible for execution for nearly three years and the fact that it was due to a trial court error at Gore's original penalty phase proceeding that led to a fourteen year delay to obtain and affirm his death sentence. That delay cannot be attributed to Gore.

Furthermore, the State characterizes Gore's argument as "insincere" because he has now raised other issues and requested relief from his death sentence. See AB at 65. However, a review of the issues Gore has raised all demonstrate that the facts and circumstances upon which they are based occurred within the past few months and/or were unknown to his postconviction counsel until his execution was scheduled. Thus, the fact that Gore has requested this Court to review his prior postconviction proceeding and the flaws of the Governor's so-called clemency "update" is in no way detrimental to his eighth amendment claim.

Furthermore, it must be noted that no court has ever found Gore to have filed a frivolous claim. Therefore, the fact that Gore has challenged his conviction and sentence, and successfully litigated an issue in his initial postconviction proceedings cannot be held against him in determining whether a twenty-eight year delay in carrying out his death sentence constitutes cruel and unusual punishment. The delay in carrying out Gore's sentence is not attributable to him. Relief is warranted.

CONCLUSION

Mr. Gore respectfully urges the Court to reverse the circuit court, order a new trial and/or resentencing, 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 on April 2, 2012.

CERTIFICATE OF FONT

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

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