

IN THE SUPREME COURT OF FLORIDA

JAMES DENNIS FORD,

Petitioner,

v.

CASE NO. SC14-____

PAM BONDI,

Attorney General of the
State of Florida,

and,

MICHAEL D. CREWS,

Secretary,
Department of Corrections,
State of Florida,

Respondents.

_____ /

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, which demonstrate Mr. Ford was deprived of his right to a fair, reliable jury penalty phase trial. The proceedings which resulted in his conviction and death sentence violated fundamental constitutional imperatives. Herein, citations to Mr. Ford's record on direct appeal will be designated as "R --"; citations to Mr. Ford's first collateral record will be designated as "PC-R --"; and citations to current record on appeal of denial of Mr. Ford's current Rule 3.851 motion will be "2PC-R --".

INTRODUCTION

In a capital case, this Court held that the appointment of counsel who provided perfunctory representation would not be tolerated:

Appointment of appellate counsel for indigent defendants is the responsibility of the trial court. We strongly urge trial judges not to take this responsibility lightly or to appoint appellate counsel without due recognition of the skills and attitudes necessary for effective appellate representation. **A perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly, and zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated.**

Wilson v. Wainwright, 474 So.2d 1162, 1164-65 (Fla. 1985). Yet in Mr. Ford's case, not only was Mr. Ford provided with court-appointed registry attorneys who provided him with perfunctory representation before this Court, the perfunctory, *pro forma* representation that Mr. Ford received was tolerated, contrary to this Court's vow in *Wilson v. Wainwright*.¹

In *Spalding v. Dugger*, 626 So.2d 71, 72 (Fla. 1988), this Court explained the import of Fla. Stat. § 27.702, (1987):

We recognize that, under section 27.702, **each defendant under sentence of death is entitled**, as a statutory right, **to effective legal representation** by the capital collateral representative **in all collateral relief proceedings**.

(emphasis added). Thus, this Court advised each death row inmate that the statute established that they each had a right to effective representation "in all collateral relief proceedings." This Court observed that the promise of effective representation in all collateral relief proceedings was established, at least in part, due to the "recognition of the appropriateness for all

¹ When this Court recently adopted amendments to various court rules as they related to capital cases, Justice Lewis wrote a concurrence in which he indicated that despite concurring in the rule changes, he had multiple concerns. He then stated: "First, we must be vigilant to make certain that qualified postconviction counsel is both available and engaged in this process as the system moves forward. The process must be effectively monitored for the proper functioning of the process guided by counsel." *In re Amendments to Fla. Rules of Jud. Admin.*, 2014 WL 3555967, *7 (Fla. July 3, 2014) (Lewis, J., concurring).

death-sentenced prisoners to have counsel in collateral relief proceedings.” *Id.*

At the time that § 27.702 was adopted, the state court collateral relief proceedings available to death-sentenced prisoners were motions for post-conviction relief under the version of Rule 3.850, Fla. R. Crim. Pro., then in effect,² and petitions for a writ of habeas corpus filed as an original action directly with this Court. *Johnson v. Wainwright*, 463 So.2d 207 (Fla. 1985).³ The opinion in *Johnson* issued on January 28, 1985, before the adoption of § 27.702. In that opinion, this Court indicated a petition for a writ of habeas corpus was the means by which collateral relief could be obtained for ineffective assistance of appellate counsel in the course of the direct appeal. *Id.* at 209 (“Johnson seeks a writ of habeas corpus arguing that the lawyers who represented him on his previous

² Subsequently in 1993, this Court adopted a new Rule 3.851 to govern the procedure through which death--sentenced prisoners were able to seek collateral relief by filing a motion seeking relief in the circuit court in which the conviction had been rendered and the sentence imposed. *In re Rule of Crim. Pro. 3.851*, 626 So.2d 198 (Fla. 1993).

³ Federal relief from state court conviction and sentence of death was available by initiating federal habeas proceedings under 28 U.S.C. § 2254. In addition, § 27.702 also required the capital collateral representative to represent death row prisoners seeking collateral relief in federal court. The promise of effective representation in all collateral relief proceedings included federal habeas proceedings.

appeal to this Court rendered him ineffective assistance of counsel depriving him of a full and meaningful appeal.").

In August of 1985, this Court issued *Wilson v. Wainwright*, 474 So.2d at 1163. There, a habeas petition had been filed seeking "relief on grounds that [Petitioner's] appellate counsel was ineffective."⁴ On this claim, this Court wrote "petitioner is entitled to a new appeal." *Id.* This Court explained:

Any appellate counsel who, after being ordered to address the issue, responds with such an inadequate, unpartisan brief has failed to grasp the vital importance of his role as a champion of his client's cause. We do not approve of counsel urging frivolous claims, nor do we require that every colorable claim, regardless of relative merit, be raised on appeal. However, the basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case; in a case involving the death penalty it is the very foundation of justice.

Wilson, 474 So.2d at 1164. Wilson's appellate counsel failed to provide effective representation in the direct appeal:

[W]e will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that

⁴ At the outset of this Court's opinion, it stated: "We also have before us a petition for writ of habeas corpus. We have jurisdiction. Art. V, § 3(b)(1), (9), Fla. Const." *Wilson v. Wainwright*, 474 So.2d at 1163.

advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our confidence in the correctness and fairness of the result has been undermined.

Wilson, 474 So.2d at 1165.

It is clear that in 1985 at the time the Office of the Capital Collateral Representative (CCR) was created and § 27.702 was adopted, two collateral relief proceedings were clearly recognized as avenues for death sentenced prisoners to use in seeking relief from their convictions and sentences of death: 1) Rule 3.850 proceedings (which beginning in January of 1994 became Rule 3.851 proceedings), and 2) petitions for a writ of habeas corpus filed in this Court.

By September of 1987, this Court had also recognized that habeas petitions could be used to seek relief on the basis of new law. See *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987) (collateral relief granted on habeas petition filed on the basis of new law, e.g., *Hitchcock v. Dugger*, 481 U.S. 393 (1987)). See also *Johnston v. Moore*, 789 So.2d 262 (Fla. 2001); *Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005).

In 1993, when establishing that Rule 3.851 would govern the manner in which death row prisoners could be heard in circuit courts (and that Rule 3.850 would only apply in non-capital cases), this Court included a provision in Rule 3.851 requiring:

All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the rule 3.851 motion.

In re Rule of Crim. Pro. 3.851, 626 So.2d 198 (Fla. 1993).⁵

In 1998, the Legislature adopted Fla. Stat. § 27.710, which mandated the creation of a "statewide registry of attorneys in private practice . . . who are available for appointment by the court under this section to represent persons convicted and sentenced to death in this state in postconviction collateral proceedings." While CCR had been divided into three separate offices that continued to provided collateral representation under § 27.702, the registry was created as a second means of providing death sentenced prisoners with collateral representation. The holding in *Spalding v. Dugger* that the collateral representation provided would be effective remained

⁵ While this provision now appears in Rule 9.142(b)(4), Fla. R. App. Pro., the requirement that the habeas petition accompany the initial brief in an appeal from the denial of Rule 3.851 relief has remained in effect ever since its adoption in 1993.

intact. Section 27.711 provided the terms and conditions of the appointment of a registry attorney to serve as collateral counsel for a death sentenced prisoner. In § 27.711(8), an attorney appointed to act as registry counsel was obligated "to agree[] to continue such representation under the terms and conditions set forth in this section until the capital defendant's sentence is reversed, reduced, or carried out, and the attorney is permitted to withdraw from such representation by a court of competent jurisdiction."

It was at this point in time that Mr. Ford's sentence of death was affirmed on direct appeal. *Ford v. State*, 802 So.2d 1121 (Fla. 2002). Thereafter, Mr. Frederick Mercurio was appointed to serve as Mr. Ford's capital collateral registry counsel on June 24, 2002.⁶

Mr. Mercurio formally entered his appearance as Mr. Ford's registry counsel on June 26, 2002, pursuant to § 27.711(2):

⁶ At that point in time, Florida law was clear. There were two distinct collateral processes a death row prisoner to seek relief from his conviction and sentence of death. Rule 3.851 governed the manner in which collateral relief in a capital case could be sought in the circuit court; while petitions for writs of habeas corpus were to be filed with this Court seeking relief on the basis of ineffective assistance of appellate counsel, new law, or other errors in the appellate proceedings on direct appeal. It was clear that petitions for a writ of habeas corpus in capital cases were to be filed with the death row prisoners initial brief in his Rule 3.851 appeal. The law was crystal clear.

the attorney must immediately file a notice of appearance with the trial court indicating acceptance of the appointment to represent the capital defendant throughout all postconviction capital collateral proceedings, including federal habeas corpus proceedings, in accordance with this section or until released by order of the trial court.

Mr. Mercurio's agreement to represent Mr. Ford in all capital collateral proceedings was complete. Under *Spalding v. Dugger*, the State promised that the representation provided to Mr. Ford would be effective collateral representation in all collateral relief proceedings.

Unfortunately, Mr. Mercurio was unaware of the crystal clear procedural law that applied to death row prisons seeking collateral relief.⁷ After providing *pro forma*, perfunctory representation in circuit court, Mr. Mercurio managed to file a notice of appeal when his inadequately pled motion to vacate was predictably denied. On July 28, 2005, Mr. Mercurio served a

⁷ Mr. Mercurio was unaware of Rule 3.851 and the pleading requirements contained therein. When putting a motion for postconviction relief together, Mr. Mercurio used the "Model Form for Use in Motions for Postconviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850." See Rule 3.987. He did not know that capital collateral proceedings in the trial court were governed by Rule 3.851 and not by Rule 3.850. And worse, the model form for pro se 3.850 motions did not satisfy the stringent pleading requirements of Rule 3.851. Quite clearly, his use of the form developed for pro se non-capital litigant showed that Mr. Mercurio was not just unfamiliar with the capital collateral process, he did not bother to read the governing rule, let alone conduct any legal research into the capital collateral process.

twenty-two page initial brief. It included no penalty phase arguments whatsoever. *See Wilson v. Wainwright*, 474 So.2d at 1164 (appellate's counsel's failure to challenge the death sentence was cited evidence of deficient performance).

Mr. Mercurio had conceded in his closing argument in the circuit court that the State's response to his 3.850 motion (that had argued Mr. Ford's two guilt phase claims provided no basis for relief (PC-R 57)) "fairly well spelled out" the law and that he "had no law to the contrary" (PC-R 355). Despite such a concession, he made token arguments in his initial brief that the circuit court erred in denying Mr. Ford's the two guilt phase claims that he pled in his 3.850 motion.⁸

As to the first claim, his two-page argument did not include an assertion that trial counsel failed to provide effective assistance as to the voluntary intoxication issue. Instead, there was only an argument that the circuit court's use of the word "moot" to describe aspects of the claim in the order denying relief was not supported by competent, substantial evidence. Mr. Mercurio made no actual argument that Mr. Ford had in fact received ineffective assistance. *See Appellant's Initial Brief*,

⁸ The two claims were each pled in the circuit court in one sentence without any case law or legal argument. In his closing argument in the circuit court, Mr. Mercurio offered no case authority or legal argument as to why relief should issue.

Case No. SC04-1611, at 16-17.

The other ineffectiveness claim related to the waiver of the right to a speedy trial. Here, Mr. Mercurio's argument was just over two pages in length. While he cited three decisions from the District Courts of Appeal, none of them supported his position.⁹ Mr. Mercurio did not argue that the circuit court's fact findings on the claim were erroneous. Instead, he asserted without any authority that "despite the trial court's factual findings," Mr. Ford had received ineffective assistance. See Appellant's Initial Brief, Case No. SC04-1611, at 18-20. See *Wilson v. Wainwright*, 474 So.2d at 1164 (appellate ineffectiveness found where counsel's "application of case law to the facts before the Court was cursory and totally lacking in persuasive advocacy.").

When the 22-page initial brief was filed on August 1, 2005, a petition for a writ of habeas corpus did not accompany it as required. See Rule 9.142(b)(4). Mr. Mercurio's failure to file

⁹ The three cases cited addressed whether the circuit courts in those cases had erroneously denied Rule 3.850 motions without conducting an evidentiary hearing on allegations that the trial attorneys failed to file either demands for a speedy trial or notices of the expiration of the speedy trial clock. None of the three cases addressed an ineffectiveness claim in the context of a waiver of the right to a speedy trial by filing a motion for a continuance in a capital case. Moreover in Mr. Ford's case, an evidentiary hearing had in fact been conducted on the ineffectiveness claim. The three cited cases were not relevant as to whether the circuit court's order denying relief after holding an evidentiary hearing was erroneous.

such a petition was a product of 1) his ignorance of the language in Rule 9.142(b) (4); 2) his failure to read the record and the briefs filed by Mr. Ford's counsel in his direct appeal to this Court;¹⁰ 3) his ignorance of new Eighth Amendment jurisprudence, particularly the decisions in *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Roper v. Simmons*, 543 U.S. 551 (2005), that issued after the conclusion of Mr. Ford's direct appeal.

At this point, Mr. Ford filed a pro se motion asking that Mr. Mercurio's representation of him be terminated. Mr. Mercurio then sought to withdraw on the basis of a conflict. This Court granted the request in November of 2005.

The circuit court then appointed Ryan T. Truskoski as Mr. Ford's new registry counsel. Unfortunately, Mr. Truskoski's collateral representation of Mr. Ford was equally perfunctory. Without consulting with his client or reviewing the direct appeal briefs, Mr. Truskoski did not ask either for the opportunity to

¹⁰ The circuit court's sentencing order was riddled with Eighth Amendment violations, which Mr. Ford's appellate counsel failed to raise in the direct appeal. Though direct appeal counsel did include a claim that the sentencing order did not comply with state law regarding the manner in which mitigation was considered, counsel did not address the obvious violations of *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In counsel's argument, no US Supreme Court cases were cited regarding the consideration of mitigation; no Eighth Amendment jurisprudence was relied upon.

amend the initial brief nor did he seek an opportunity to submit a habeas petition challenging the effectiveness of direct appeal counsel and arguing that new law required collateral relief. All Mr. Truskoski did was serve a four-page reply brief that had only two pages of text. Truskoski's two-page argument was less than cursory and totally lacking in persuasive advocacy. See *Wilson v. Wainwright*, 474 So.2d at 1164.¹¹

¹¹ In 2006 and early 2007, Mr. Truskoski was appointed as counsel in two capital direct appeals. In those cases, Mr. Truskoski's ignorance of Eighth Amendment jurisprudence and his incompetence led to his removal from the registry. In *Smith v. State*, FSC Case No. SC06-1903, Mr. Truskoski entered his appearance on December 13, 2006. After extensions were issued, Mr. Truskoski filed the initial brief on August 6, 2007.

After his appointment in *Hunter v. State*, FSC Case No. SC06-1963, Mr. Truskoski entered his appearance on January 3, 2007. After extensions of time were issued, the initial brief was filed on October 5, 2007, with a motion to accept it as timely.

When the decisions issued in both *Smith v. State* and *Hunter v. State* on September 25, 2008, Justice Anstead wrote:

Because I find both the written and oral presentations of counsel for the appellant fundamentally lacking, I would strike the appellate briefs, discharge counsel, and direct the trial court to appoint new appellate counsel for the appellant. Capital cases represent the most serious category of cases reviewed by this Court and such cases require diligent and competent advocacy by counsel. While this Court has inherent responsibility to assure such representation, the Florida Legislature has explicitly called upon the courts to take responsibility for assuring such representation in capital litigation. We should honor that call here.

By coincidence, the Clerk of this Court scheduled oral argument in this case [*Smith v. State*] and the case of *Hunter v. State*, No. SC06-1963 (Fla. Sept. 25,

On April 12, 2007, this Court denied Mr. Ford's appeal despite the perfunctory representation he received from his

2008), for the same date. In examining the briefs for appellants in those two cases, I was struck by the similarity in approach and the facially flawed advocacy contained in the briefs in both cases. The oral advocacy was similarly lacking in both cases. Of course, the appellants are represented by the same counsel in both cases, and I have come to the same conclusion in *Hunter* as I have here.

Smith v. State, 998 so. 2d 516, 530 (Fla. 2008) (Anstead, J., dissenting) (footnote omitted). In a footnote, Justice Anstead wrote: **"the court, to its credit, has notified the Florida Bar and the Executive Director of the Legislature's Commission on Capital Cases of concerns about the performance of counsel in the *Smith* and *Hunter* cases as well as other filings by counsel in this Court."** *Id.* (emphasis added).

On November 23, 2009, this Court entered an order in *In re: Ryan T. Truskoski Order to Show Cause*, FSC Case No. AOSC09-48:

Pursuant to the Court's inherent authority to monitor the representation by counsel of capital defendants to ensure that the defendants receive quality representation, see §§ 27.40(9) and 27.711(12), Fla. Stat. (2009), and its authority to issue sanctions pursuant to Florida Rule of Appellate Procedure 9.410, Ryan T. Truskoski is hereby directed to show cause, on or before December 14, 2009, why he should not be removed from both the direct appeal list of capital conflict attorneys and the registry for postconviction capital attorneys. Specifically, counsel is directed to address his performance at oral arguments, including but not limited to the failure to make rebuttal arguments, as well as the quality of his briefs.

Thereafter, Mr. Truskoski was removed from the registry of capital collateral attorneys because of his failure to provide the requisite quality representation. While this Court decided [it](#) not tolerate Mr. Truskoski's appointment to any more capital cases, it did tolerate his appointment in Mr. Ford's case and his perfunctory representation of Mr. Ford.

registry attorneys. *Ford v. State*, 955 So.2d 550 (Fla. 2007).

Because of the perfunctory representation Mr. Ford received, a petition for a writ of habeas corpus was not filed in this Court on behalf of Mr. Ford. This Court was not presented with Mr. Ford's claim that his direct appeal counsel provided ineffective assistance in failing to raise meritorious Eighth Amendment challenges to the sentencing judge's exclusion of mitigating evidence and circumstances from her sentencing calculus. This Court was also not presented with Mr. Ford's claim that this Court's finding that the circuit court's rejection of two mitigating circumstances was harmless error failed to comply with *Sochor v. Florida*, 504 U.S. 527 (1992). This Court was not presented with Mr. Ford's claim that the sentencing judge's order violated *Tennard v. Dretke*, 542 U.S. 274 (2004). This Court was not presented with Mr. Ford's claim that under the principles outlined in *Roper v. Simmons*, 543 U.S. 551 (2005), in conjunction with *Atkins v. Virginia*, 536 U.S. 304 (2002), his death sentence violates the Eighth Amendment.

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S.578, 584 (1988).

"The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014). Here due to the perfunctory representation that he received, Mr. Ford did not receive "the fair opportunity" to which he was entitled, and an unacceptable risk of unreliability lingers. This Court should entertain Mr. Ford's claims presented herein on the merits, which, due to the perfunctory representation of his prior registry counsel, were not presented in a habeas petition that accompanied his initial brief in his Rule 3.851 appeal.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Ford respectfully requests oral argument.

**JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF**

The petition presents issues which directly concern the constitutionality of Mr. Ford's conviction and sentence of death. This Court has jurisdiction to entertain a petition for a writ of habeas corpus, an original proceeding governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P.

9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

In its jurisdiction to issue writs of habeas corpus, this Court has an obligation to protect Mr. Ford's right under the Eighth Amendment and under the Florida Constitution to be free from cruel or unusual punishment. This Court has the power to enter orders assuring that those rights are protected. *Allen v. State*, 636 So.2d 494, 497 (Fla. 1994) (holding that the Court was required under Article I, § 17 of the Florida Constitution to strike down the death penalty for persons under sixteen at time of crime); *Shue v. State*, 397 So.2d 910 (Fla. 1981) (holding that this Court was required under Article I, § 17 of the Florida Constitution to invalidate the death penalty for rape); *Makemson v. Martin County*, 491 So.2d 1109 (1986) (noting that "[t]he courts have authority to do things that are essential to the performance of their judicial functions. The unconstitutionality of a statute may not be overlooked or excused"). This Court has explained: "It is axiomatic that the courts must be independent and must not be subject to the whim of either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court."

Rose v. Palm Beach City, 361 So.2d 135, 137 n.7 (1978).

This Court must protect Mr. Ford's Sixth, Eighth and Fourteenth Amendment rights under the U.S. Constitution. Where constitutional rights - whether state or federal - of individuals are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. Instead, this Court is required to exercise its independent power of judicial review. *Ford v. Wainwright*, 477 U.S. 399 (1986).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. *Elledge v. State*, 346 So. 2d 998, 1002 (Fla. 1977); *Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985). This Court has not hesitated in exercising its inherent jurisdiction to review issues arising in the course of capital post-conviction proceedings. *State v. Lewis*, 656 So.2d 1248 (Fla. 1995). This petition presents substantial constitutional questions concerning the administration of capital punishment in this State consistent with the United States and Florida Constitutions. The fundamental constitutional errors challenged herein in the context of a capital case warrant habeas relief. See *Wilson*, 474 So.2d at 1163; *Baggett v. Wainwright*, 229 So.2d 239, 243 (Fla. 1969). The reasons set forth herein demonstrate that the Court's exercise of its jurisdiction, and of its authority to grant habeas relief, is

warranted in this action.

STATEMENT OF THE CASE

On April 30, 1997, in the Twentieth Judicial Circuit Court for Charlotte County, James Ford was indicted on first degree murder, sexual battery, and child abuse charges arising from the homicides of Greg and Kimberly Malnory in the presence of their daughter Maranda Malnory (R 13). The jury trial began on February 22, 1999, before the Honorable Cynthia A. Ellis (R 1010-3728). On March 8, 1999, the jury found Mr. Ford guilty of the first degree murders of Greg and Kimberly Malnory, guilty of sexual battery of Kimberly Malnory, and guilty of child abuse of Maranda Malnory (R 2100-2103, 3721-3722). The penalty phase was conducted on April 20-23, 1999 (R 3877-4697). After the defense called twenty-five lay witnesses and two mental health experts, the State was permitted to call over objection a mental health expert who had examined Mr. Ford for competency to testify that in his opinion Mr. Ford had not been in an alcoholic blackout at the time of the offense (R 4519).¹² Otherwise, the State did not challenge or

¹² In cross, the State's expert admitted that he did not really "know what happened with respect to the Defendant and his conduct that day" (R 4527). The defense was precluded from asking the State's expert if he had an opinion as to whether "Mr. Ford's ability to conform his conduct to the law may very well have been substantially impaired" (R 4528). The defense was precluded from asking the State's expert if "Mr. Ford is amenable to rehabilitation" (R 4528).

attempt to rebut the mitigating evidence presented by the defense. The jury then returned death recommendations as to both first degree murder convictions (R 2357-2358, 4691-4692).

A hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), was held before Judge Ellis on May 3, 1999. At that hearing, the State called three witnesses to testify to victim impact information (R 4715-24). Mr. Ford's sentencing hearing occurred on June 3, 1999 (R 4734). At that time, Judge Ellis sentenced James Ford to 19.79 years in prison for sexual battery with a firearm, with a three-year minimum mandatory, and to a concurrent sentence of five years in prison for felony child abuse (R 4741-4742). For the two first degree murder convictions, Judge Ellis imposed death sentences (R 4744-4769).

On direct appeal, this Court affirmed Mr. Ford's convictions and sentences of death. *Ford v. State*, 802 So.2d 1121 (Fla. 2001). The US Supreme Court denied certiorari review on May 28, 2002. *Ford v. Florida*, 535 U.S. 1103 (2002).

Meanwhile, following the issuance of this Court's mandate in Mr. Ford's case on December 13, 2001, proceedings pursuant to Rule 3.851 commenced. On January 11, 2002, the Office of the Capital Collateral Regional Counsel for the Southern Region filed a pleading entitled: Motion to Withdraw. This motion asserted: "Simply put, CCRC-South cannot provide effective representation

to the Defendant at this time due to its current caseload and staff shortages. CCRC-South must therefore regretfully move to withdraw and to appoint effective conflict-free counsel on behalf of the Defendant.” An order issued on this motion on February 8, 2002. Thereafter, Robert Burr was appointed to represent Mr. Ford. On June 17, 2002, a collateral hearing was held in Mr. Ford’s capital case. Robert Burr was removed as Mr. Ford’s counsel on June 17, 2002. On June 24, 2002,¹³ an order was entered apparently appointing Frederick Mercurio to serve as Mr. Ford’s registry counsel under §27.711, Fla. Stat. The record does not reveal whether Mr. Mercurio ever advised the state circuit court during his representation of Mr. Ford that on April 3, 2003, that this Court entered an order admonishing Mr. Mercurio as a result of a complaint filed by the Florida Bar. *See Florida Bar v. Mercurio*, Case No. SC02-1391 (April 3, 2003). Certainly, Mr. Ford was not advised by either Mr. Mercurio or the circuit court of this Court’s admonishment of Mr. Mercurio.

Mr. Mercurio entered his appearance as Mr. Ford’s registry counsel on June 26, 2002. Mr. Mercurio also signed a contract with the Comptroller that obligated him to represent Mr. Ford in federal court and pursue the collateral remedies available there.

¹³This was four days after the United States Supreme Court’s decision in *Atkins v. Virginia* issued.

This contractual provision mirrored the statutory obligation that appeared in Fla. Stat. § 27.711(8).

A "Motion for Post-Conviction Relief" in a five page, pro se format signed by Mr. Ford was filed on May 28, 2003, at 3:22 PM. Mr. Ford's signature was notarized as sworn on May 25, 2003, in Union County where Union Correctional Institution is located and where Mr. Ford was housed on death row at the time (PC-R 1). Mr. Mercurio used the Model Form for Use in Motions for Post-conviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850. See Rule 3.987.¹⁴

Using the pro se format, the claims and factual allegations were to appear in the paragraph numbered "14." In the motion Mr. Mercurio filed, paragraph 14 of the pleadings was as follows:

14. State concisely every ground on which you claim that the judgment or sentence is unlawful: Supporting FACTS (tell your story briefly without citing cases or law):

(a) The attorneys representing me, Paul Sullivan and Paul Alessandroni pursued the defense and Jury Instruction of voluntary intoxication over my objection and without my permission or consent.

¹⁴ One of the major differences between the jurisprudence regarding Rule 3.850 motions and Rule 3.851 motions is the fact that penalty phase ineffective assistance of counsel claims are raised in virtually every 3.851 motion, while ineffectiveness claims in sentencing proceedings in non-capital case are pretty unusual. Mr. Mercurio's clear assumption that he was appointed to help Mr. Ford complete the form for a 3.850 motion explains his complete and total failure to investigate, research and submit a penalty phase ineffectiveness claim on behalf of Mr. Ford.

(b) Over my objection and without my permission or consent defense counsel waived my right to a Speedy Trial.

(c) Defense Counsel failed to sufficiently present evidence from Dr. Mosman and Dr. Greer to support the fact that the Defendant's chronological age notwithstanding, that his mental age of at the time of the crime was 14 years of age.

Having the mental age of 14, Defense Counsel should have argued that the Death Penalty was not legally appropriate due to the Defendant's mental retardation.

Mental retardation was not presented or requested as a mitigating factor in the Defendant's Penalty Phase.

The Defendant's Counsel failed to follow the correct procedure when a defendant is possibly mentally retarded by failing to have the Court Appoint the Diagnosis and Evaluation Team of HRS to examine the Defendant pursuant to Florida Statutes §916.11(1)(d).

(PC-R 3-4).

The State filed a response on July 18, 2003. In its response, the State wrote: "Although Ford may be entitled to an evidentiary hearing in accordance with Rule 3.851(f)(5)(A), his motion as pled is clearly insufficient for the granting of any further relief." (PC-R 55). The State argued: "While it is apparent that Ford's complaint is limited to the adequacy of his attorneys' performance, he has failed to provide any legitimate framework for the granting of relief." (PC-R 56). The State then wrote: "Furthermore, some aspects of Ford's claim are clearly refuted by the trial transcripts." (PC-R 58).

Here, the State referenced the sentencing judge's rejection

of limited intellectual functioning as not mitigating: "This Court clearly considered Ford's low intelligence, finding that it was not mitigating, and this determination was upheld by the Florida Supreme Court on appeal." (PC-R 58). This was an admission that Mr. Ford's death sentence did not comport with Eighth Amendment jurisprudence. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). Yet, Mr. Mercurio, obviously unfamiliar with basic Eighth Amendment jurisprudence failed to seize upon this admission of Eighth Amendment error virtually identical to that found to have occurred in *Eddings*, 455 U.S. 113, when the sentencing judge there "did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that as a matter of law he was unable even to consider the evidence."

Pursuant to the State's assertion that Mr. Ford had a right to an evidentiary hearing regardless of the adequacy of his Rule 3.851 motion, the circuit court granted an evidentiary hearing. It was scheduled for May 12, 2004. Because Mr. Mercurio had not retained an expert to conduct an evaluation, he waived the mental retardation claim at the beginning of the evidentiary hearing. Mr. Mercurio then stated: "**Based on the unavailability of any expert** testimony that would be able to come forward, as well as my speaking to Mr. Ford, Mr. Ford has indicated that he does not

wish to pursue that avenue of post-conviction relief and is willing to waive that.”¹⁵ (PC-R 261) (emphasis added).

The circuit court then noted that only “claims 14 A and B” were left to be heard (PC-R 261). The court asked Mr. Mecurio if he was ready to proceed. He responded, “Yes.” (PC-R 261).

After abandoning the mental retardation claim that he did not investigate, Mr. Mercurio explained that the extent of the claims that he was pursuing at Mr. Ford’s initial collateral review of his death sentence:

We’ve raised two grounds in the motion, two remaining grounds, and those are essentially that over Mr. Ford’s objection his right to a speedy trial was waived by defendant’s counsel without consultation and without any expressed agreement to waive speedy trial. It is his position that all times relevant to his case he wished to have a fast and speedy trial.

And in addition to that, that the defense counsel, Mr. Sullivan and Mr. Alessandronio, pursued the defense of voluntary intoxication over Mr. Ford’s expressed objection to them doing so.

Based on those errors we believe that there’s

¹⁵ It is doubtful that an individual whose execution is precluded by *Atkins v. Virginia* and *Hall v. Florida* can waive the Eighth Amendment ban on execution of an intellectually disabled individual. *Hall v. Florida*, 134 S.Ct. at 1992 (“No legitimate penological purpose is served by executing a person with intellectual disability. *Id.*, at 317, 320, 122 S.Ct. 2242. To do so contravenes the Eighth Amendment, for **to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.** “[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.””) (emphasis added).

ineffective assistance of counsel and the Court should reverse - or, excuse me, set aside his conviction and remand to a new proceeding.

(PC-R 266).¹⁶

The only witness that Mr. Mercurio had to present at the evidentiary hearing as to the two one-sentence ineffectiveness assertions in the Rule 3.851 motion, indeed the only witness that Mr. Mercurio ever talked to in preparing the Rule 3.851, was Mr. Ford, himself (PC-R 268). Mr. Mercurio wrote those two sentences pled as Claims 14A and 14B based upon his correspondence with Mr. Ford.¹⁷ Mr. Mercurio did no research of his own; he did not even read the record in Mr. Ford's case. He merely took two legally insignificant concerns that Mr. Ford, a learning disabled layman functioning developmentally at most at the level of a 14 year-old, and pled them as two one-sentence ineffectiveness claims.

After presenting testimony from Mr. Ford, Mr. Mercurio

¹⁶ In the motion to vacate filed by Mr. Mercurio, a claim of penalty phase ineffective assistance was not presented. Indeed, Mr. Mercurio did not investigate any penalty phase issues, let alone raise any challenge in the initial collateral review of Mr. Ford's death sentences as to the effectiveness of trial counsel at the penalty phase of Mr. Ford's trial.

¹⁷ During Mr. Mercurio's brief, very brief, closing argument at the conclusion of the evidentiary hearing that occurred only because the State advised the circuit court that a hearing had to be conducted, Mercurio acknowledged that the claims he raised were based solely upon information provided by Mr. Ford (PC-R 102). That was the extent of his efforts, serving as Mr. Ford's scrivener.

announced that "we don't have any other witnesses to present" (PC-R 294). At that point, the State called Mr. Ford's trial attorneys, Paul Sullivan and Paul Alessandronio, to testify regarding the ineffectiveness claims that Mr. Mercurio pled: 1) counsel over Mr. Ford's objection waived his right to a speedy trial; and 2) counsel failed to present a voluntary intoxication defense at the guilt phase.

When the trial attorneys's testimony concluded, Mr. Mercurio presented his closing argument. It occupied less than one full transcription page (PC-R 355-56). It included no reference to any case law, although Mr. Mercurio noted that the law presented in the State's response was correct and that he "had no law to the contrary" (PC-R 355).

On July 14, 2004, the circuit court entered its order denying Mr. Ford's Rule 3.851 motion (PC-R 359). On August 11, 2004, Mr. Mercurio served a notice of appeal (PC-R 378).

On July 28, 2005, Mr. Mercurio served a twenty-two page initial brief that he had prepared on behalf of Mr. Ford. Mr. Mercurio's two-page argument that trial counsel did not provide effective representation as to the voluntary intoxication issue, only argued that the circuit court's order denying relief on the claim was not supported by competent, substantial evidence. Mr. Mercurio quibbled with the court's use of the word "moot" to

describe aspects of the claim. However, Mr. Mercurio made no argument that Mr. Ford had in fact received ineffective assistance on the voluntary intoxication issue. See Appellant's Initial Brief, Case No. SC04-1611, at 16-17.

As to the ineffectiveness claim relating to the waiver of the right to a speedy trial, Mr. Mercurio's argument was a little over two pages in length. Though Mr. Mercurio did cite three decisions from the District Courts of Appeal, none of which supported his position. The three cases were not relevant as to Mr. Ford's claim. As to whether the circuit court's order denying relief on the claim was erroneous, Mr. Mercurio made no argument. See Appellant's Initial Brief, Case No. SC04-1611, at 18-20.

When he filed the 22-page initial brief on August 1, 2005, Mr. Mercurio did not also file a petition for a writ of habeas corpus on Mr. Ford's behalf as provided for in Rule 9.142(b)(4). Mr. Mercurio's failure to file such a petition was a product of 1) his ignorance of Rule 9.142(b)(4); 2) his failure to read the record and the briefs filed by Mr. Ford's counsel in his direct appeal to this Court; 3) his ignorance of Eighth Amendment jurisprudence, particularly the 2004 decision in *Tennard v. Dretke* and the March of 2005 decision in *Roper v. Simmons*.

Meanwhile on July 5, 2005, Mr. Ford had served a pro se pleading in which he sought Mr. Mercurio's removal as his

collateral counsel.¹⁸ While the pro se pleading's certificate of service is dated July 5, 2005, it was not filed by the clerk of this Court until October 10, 2005. In the motion, it was noted that in preparing the motion Mr. Ford received "help [from] an institutional law clerk, i.e. 'Jailhouse Lawyer.'"¹⁹

On October 17, 2005, this Court requested a response to the motion. The State served its response on October 25, 2005. That same day, it served its answer brief. In it, the State pointed out the deficiencies in the two brief arguments that Mr. Mercurio presented in the initial brief.

On November 3, 2005, Mr. Mercurio served his response to Mr. Ford's motion disputing the factual assertions. Also on November 3, 2005, Mr. Mercurio served a motion to withdraw from representation of Mr. Ford before this Court. This motion

¹⁸ When Mr. Mercurio served the initial brief that he submitted on behalf of Mr. Ford on July 28, 2005, he apparently had already received Mr. Ford's motion, a motion he later indicated placed him in an adversarial position with Mr. Ford. Nevertheless, he proceeded to serve and file the initial brief despite this adversarial position.

¹⁹ The motion alleged that Mr. Mercurio had refused to investigate his case and had failed to have Mr. Ford "examined by a qualified professional psychiatrist" as to whether he was mentally retarded. The motion also alleged that Mr. Mercurio had threatened to "'throw the case and see to it that the defendant is executed" if Mr. Ford did not waive his mental retardation issue. The motion also alleged that Mr. Mercurio had advised Mr. Ford that his two trial attorneys were "good friends of his" and that would not pursue claims that would hurt them.

asserted that Mr. Ford's motion and Mr. Mercurio's response had put them "in an adversarial position."

On November 16, 2005, this Court granted Mr. Mercurio's motion and relinquished jurisdiction to the circuit court for the appointment of new registry counsel for Mr. Ford.

On January 5, 2006, the circuit court appointed Ryan T. Truskoski as Mr. Ford's new registry counsel. He filed a notice of appearance in this Court on January 12, 2006.

On March 24, 2006, Mr. Truskoski was given until May 29, 2006, to file a reply brief on behalf of Mr. Ford.²⁰

Eleven days before the reply brief was due, Mr. Truskoski served a four-page reply brief on May 16, 2006.²¹ No request was made to amend the initial brief that Mr. Mercurio had filed, nor was a request made to file a petition for writ of habeas corpus.

After receiving Mr. Truskoski's May 18th letter, Mr. Ford on June 2, 2006, served a pleading in the Florida Supreme Court entitled: "Motion to Consider and Seek Mercy for Fairness, of an Emergency Nature." On June 23, 2006, Mr. Truskoski filed a

²⁰ This Court also stated in the March 24, 2006, order that "the briefs already filed in the above styled case will be considered absent a motion from counsel." Mr. Truskoski did not file a motion subsequently seeking the opportunity to strike or amend the 22-page initial brief that Mr. Mercurio had served on July 28, 2005.

²¹ Though the reply brief was four pages in length, it contained only two pages of text.

response, in which he asserted that "the previous attorney raised all meritorious arguments and I saw no reason to file a new initial brief." He did not discuss Mr. Mercurio's failure to file a habeas petition in this Court with the initial brief pursuant to Rule 9.142(b)(4), nor his own failure to do so despite the existence of numerous meritorious issues. On August 22, 2006, this Court denied the pro se motion.

On October 30, 2006, this Court heard oral argument in Mr. Ford's appeal. On April 12, 2007, this Court denied Mr. Ford's appeal. *Ford v. State*, 955 So.2d 550 (Fla. 2007).

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Ford asserts that his sentence of death was obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the US Constitution and the corresponding provisions of the Florida Constitution. Mr. Ford also asserts that he was deprived of his right to seek habeas review of a number of claims in this Court because he received perfunctory collateral representation from his court-appointed registry counsel who were not aware that Mr. Ford could file a habeas petition in this Court, let alone what claims could be presented in the petition.

CLAIM I

MR. FORD DEPRIVED OF HIS RIGHT TO PETITION THIS COURT FOR HABEAS RELIEF WHEN HIS REGISTRY ATTORNEYS IN 2005 AND 2006 WERE UNAWARE OF THE COLLATERAL RELIEF THAT COULD BE OBTAINED IN A HABEAS PROCEEDING IN WHICH APPELLATE INEFFECTIVE ASSISTANCE CLAIMS, NEW LAW CLAIMS, AND CLAIMS OF ERROR IN THE APPELLANT PROCESS ARE COGNIZABLE.

A. Mr. Ford's Court-Appointed Registry Counsel Failed To File For Habeas Relief In Violation Of His Obligation Under *Spalding v. Dugger*.

This Court's jurisdiction to hear habeas petitions in capital cases is and has been well-established. Claims of error that occurred during the appeal, such as ineffective assistance of direct appeal counsel, can be presented in a petition seeking habeas relief. *Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985). Claims of error in the direct appeal that constitute manifest injustice may also be presented and reviewed by this Court on the merits. *White v. Dugger*, 565 So.2d 700 (Fla. 1990). Also cognizable in a habeas proceeding are claims premised upon new law. *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987) (collateral relief granted on habeas petition filed on the basis of new law - *Hitchcock v. Dugger*, 481 U.S. 393 (1987)). See also *Johnston v. Moore*, 789 So.2d 262 (Fla. 2001); *Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005).

A habeas proceeding in this Court constitutes a collateral relief proceeding within the meaning of *Spalding v. Dugger*, 526 So. 2d at 72 ("each defendant under sentence of death is

entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings."). As such, Mr. Ford was entitled to representation in a habeas proceeding before this Court. However, because his registry attorneys in 2005 and 2006 did not file a habeas petition with the initial brief, Mr. Ford did not have a habeas proceeding in which this Court considered 1) whether he received ineffective assistance during his direct appeal, 2) whether this Court's finding of harmless error in his direct appeal complied with the Eighth Amendment requirements set forth in *Sochor v. Florida*, 504 U.S. 527 (1992), and 3) whether decisions issued after his direct appeal concluded constituted new law that demonstrated error in this Court's affirmance of his conviction and/or sentence of death.

Registry counsel is statutorily obligated under § 27.711(2) "to represent the capital defendant throughout all postconviction capital collateral proceedings, including federal habeas corpus proceedings, in accordance with this section or until released by order of the trial court." A capital habeas proceeding in this Court is one of the "postconviction capital collateral proceeding[]" in which registry counsel has an obligation to represent his death sentenced client. This obligation is no different than the one at issue 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 v. Kehoe, 747 So. 2d at 934. This Court explained:

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 v. Kehoe, 747 So. 2d at 934. *Kehoe* has been regularly followed. *Williams v. State*, 777 So.2d 947, 948-49 (Fla. 2000) (holding that post-conviction petitioners may file belated appeals from the denial of their post-conviction motions under Fla. R. of Crim. Pro. 3.850); *Johnson v. State*, 813 So.2d 230 (Fla. App. 2002) (recognizing the statutory right to pursue post-

conviction relief where collateral counsel has inadvertently missed an appellate deadline); *Swaim v. State*, 803 So.2d 797 (Fla. App. 2001) (same); *Demaria v. State*, 814 So.2d 444, 445 (Fla. App. 2001) (noting that “*Williams* mandates that **the client should not suffer the consequences of counsel’s neglect** under these circumstances and that the client is entitled to a belated appeal if it is established that an untimely filing of the notice to review the postconviction order was occasioned through not fault of the criminal defendant”) (emphasis added).

Registry counsel’s failure to file a habeas petition in this Court and institute a postconviction capital collateral proceeding in which he was obligated to represent Mr. Ford under § 27.711(2) is no different than a retained attorney’s agreement to file a timely Rule 3.850 motion. The logic and reasoning of *Steele v. Kehoe* and *Williams v. State* apply. Whether it is the failure to timely file a Rule 3.850 motion, a Rule 3.851 motion, a notice of appeal, or habeas petition, it is all the same thing. Neglect or error by an attorney obligated to timely institute court proceedings or process should not prejudice the client. Registry counsel’s neglect in failing to file a habeas petition should not cause Mr. Ford to suffer and lose his right to obtain in habeas review of those claims cognizable in a habeas proceeding. This Court should conduct merits review of the habeas

claims that registry counsel should have included in a habeas petition filed on Mr. Ford's behalf with the initial brief in his Rule 3.851 appeal.

B. Mr. Ford Received Ineffective Assistance Of Appellate Counsel During His Direct Appeal.

A first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The two prong test set forth in *Strickland v. Washington* applies equally to allegations of ineffectiveness of both trial counsel and appellate counsel. See *Orazio v Dugger*, 876 F.2d 1508 (11th Cir. 1989). Mr. Ford's appellate counsel failed to act as a "zealous advocate" and raise the Eighth Amendment error that permeated the judge's sentencing order. It was unreasonable to not raise this Eighth Amendment error. As a result, Mr. Ford was deprived of his right to effective representation on direct appeal as guaranteed by the Sixth Amendment. Under *Wilson v. Wainwright*, 474 So. 2d at 1165, the appropriate remedy is to "grant [Mr. Ford] a new direct appeal" on the claims that appellate counsel unreasonably failed to raise.

1. appellate counsel unreasonably failed to challenge the sentencing order error under *Eddings v. Oklahoma*.

In *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982), a sentencing judge addressed some established mitigation and "found

that as a matter of law he was unable even to consider the evidence." As the US Supreme Court explained on appeal:

The Court of Criminal Appeals took the same approach. It found that the evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility. Thus the court conceded that Eddings had a "personality disorder," but cast this evidence aside on the basis that "he knew the difference between right and wrong ... and that is the test of criminal responsibility." 616 P.2d, at 1170. Similarly, the evidence of Eddings' family history was "useful in explaining" his behavior, but it did not "excuse" the behavior. From these statements it appears that the Court of Criminal Appeals **also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability.**

Eddings, 455 U.S. at 114 (emphasis added). This was identified by Supreme Court as Eighth Amendment error:

We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*.

Eddings, 455 U.S. at 115. The US Supreme Court ordered that on remand "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." *Id.* at 117.

The *Eddings* rule is simple. It is not permissible for "the sentencer [to] refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114. The sentencer "may not give [the mitigating evidence] no weight" and exclude it the sentencing calculus. *Id.* at 115. However, that is

precisely what the sentencing judge did here. In her sentencing order, the judge found that it was “proven” that Mr. Ford was “learning disabled” and “proven” that he had a “developmental age of fourteen” (R 2728). But she concluded that the circumstances lacked mitigating value and wrote that “the Court affords [these circumstances] no weight whatsoever.” (R 2728). This is precisely what the Supreme Court ruled was Eighth Amendment error.

While Mr. Ford’s appellate counsel in Argument VI of his initial brief argued that the sentencing order’s assessment of the mitigating circumstances did not comport with Florida law, appellate counsel did not cite *Eddings*, the Eighth Amendment, or any federal law in Argument VI of the initial brief.²² *Eddings* is directly on point and clearly establishes that assigning these two mitigators no weight violated the Eighth Amendment.

2. appellate counsel unreasonably failed to challenge the

²² This Court in addressing appellate counsel’s Argument VI based on state law, found no error in sentencing order:

However, based on extensive testimony by other witnesses showing that Ford functions well as a mature adult, the court concluded that **these factors are not mitigating under the facts in the case at hand** and accorded them no weight. Our review of the record shows that this ruling is supported by competent substantial evidence. We find no error.

Id. at 1135 (emphasis added). This analysis was virtually identical to state appellate court’s analysis in *Eddings* which also found to violated the Eighth Amendment.

sentencing order error under *Hitchcock v. Dugger*.

In her order, the judge also found that the defense had "proven" a "a family history of alcoholism," "a medical history of diabetes," "the lack of sociopathic or psychopathic tendencies," and "the absence of antisocial tendencies." But, she then ruled that these four factors "do[] not serve as valid mitigation." (R 2728-30). In the Argument VI of his brief, appellate counsel challenged the order ruling these four circumstances did not constitute "valid mitigation," but only on the basis of state law. This Court ruled that as to these four non-statutory mitigating circumstances, the sentencing judge erred in her legal analysis:

The trial court held that the following proposed nonstatutory factors are present in the instant case but are not mitigating in nature: (a) a family history of alcoholism; (b) a medical history of diabetes; (c) the lack of sociopathic or psychopathic tendencies; and (d) the absence of antisocial tendencies. We disagree. Each of these factors is mitigating in nature in that each relates to a defendant's character or record or the circumstances of the offense and reasonably may serve as a basis for imposing a sentence less than death.

Id. at 1135-36. However as to the exclusion of these four mitigators from the sentencing calculus, this Court wrote:

[W]e find any error harmless in light of the following: (a) These factors occupy a minor and tangential position in the present record; (b) the present case contains vast aggravation, including multiple execution-style murders; and (c) the trial court

recognized and gave weight to numerous other mitigators.

Ford v. State, 802 So.2d at 1136. Of course, this justification is contrary to Eighth Amendment jurisprudence. After *Hitchcock v. Dugger*, 481 U.S. 393 (1987) issued, this Court in *Downs v. Dugger*, 514 So.2d 1069, 1071 (Fla. 1987), found:

Hitchcock rejected a prior line of cases issued by this Court, which had held that the mere opportunity to present nonstatutory mitigating evidence was sufficient to meet *Lockett* requirements. Under this "mere presentation" standard, **we routinely declined to consider whether the judge or jury actually weighed the evidence in question.**

* * *

We thus can think of no clearer rejection of the "mere presentation" standard reflected in the prior opinions of this Court, and conclude that this standard no longer can be considered controlling law. Under *Hitchcock*, **the mere opportunity to present nonstatutory mitigating evidence does not meet constitutional requirements if the judge believes, or the jury is led to believe, that some of that evidence may not be weighed during the formulation of an advisory opinion or during sentencing.**

(Emphasis added). However, Mr. Ford's appellate counsel did not cite *Hitchcock* or the Eighth Amendment and did not argue that "mere presentation" was sufficient to render any error in not weighing the mitigation harmless.

3. **appellate counsel unreasonably failed to argue that for the sentencing order error to be harmless this Court had to comply with *Sochor v. Dugger*.**

As noted above, the judge found that the defense had

"proven" a "a family history of alcoholism," "a medical history of diabetes," "the lack of sociopathic or psychopathic tendencies," and "the absence of antisocial tendencies." But, she then ruled that these four factors "do[] not serve as valid mitigation." (R 2728-30). This Court ruled that as to these four non-statutory mitigating circumstances, the sentencing judge erred in her legal analysis. This Court also found error in the sentencing judge's rejection as a matter of law of the non-statutory mitigator that the alternative sentence was life imprisonment without the possibility of parole. The sentencing judge wrote: "The Court finds that it does not serve as a valid mitigating circumstance" (R 2730). This Court found these error harmless because "the trial court recognized and gave weight to numerous other mitigators." *Ford v. State*, 802 So.2d at 1136. That other mitigation was present does not make the exclusion of more mitigation less harmful; it makes it more harmful under proper Eighth Amendment analysis. *Stringer v. Black*, 503 U.S. 222, 232 (1992) ("When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.").

This Court's analysis in Mr. Ford's case was contrary to the Eighth Amendment requirements set forth in *Sochor v. Florida*, 504

U.S. 527, 540 (1992) ("Since the Supreme Court of Florida did not explain or even "declare a belief that" this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained," *Chapman, supra*, 386 U.S., at 24, 87 S.Ct., at 828, the error cannot be taken as cured by the State Supreme Court's consideration of the case.").

While finding error as to five separate non-statutory mitigators, this Court made no mention of the sentencing judge's determination that the statutory mitigator of no history of criminal activity. Indeed, the sentencing judge wrote: "The Defendant has no such history and the Court affords this mitigator great weight." (R 2722). Also not mentioned in this Court's harmless error analysis was the sentencing judge's finding of a second statutory mitigator: the defendant's age. The sentencing judge found this statutory mitigator present because of the expert testimony regarding Mr. Ford's mental age. The judge wrote: "While ... this statutory mitigating circumstance has been proven, the Court affords it very little weight." (R 2727) (emphasis in original).

This Court also made no reference to the four non-statutory mitigators that the sentencing judge found were "proven." These "proven" non-statutory mitigators included: "The Defendant was a devoted son"; "The Defendant was a loyal friend"; "The

Defendant's excellent jail record and jail conduct"; and "The Defendant's self-improvement while in jail" R 2727-29).

This Court also made no mention of the two non-statutory mitigating circumstances that the sentencing judge found were "proven," but which she refused to consider in the sentencing calculus because she required the defense to establish a "nexus" between mitigating circumstances and "the commission of these offenses." (R 2728). The two non-statutory mitigator that the judge rejected because of the failure to establish such "a nexus" were "The Defendant's own chronic alcoholism" and "The lack of intervention by the school system on the Defendant as a child for his developmental impairments" (R 2728-29).

4. appellate counsel unreasonably failed to argue that factual error in the sentencing order demonstrate Eighth Amendment like that in *Parker v. Dugger*.

On direct appeal, Mr. Ford also challenged the judge's rejection of a mitigator premised upon his mild organic brain damage. See Initial Brief, Case No. 95,972, at 61-62. In justifying her rejection of this mitigator, the judge falsely asserted "that there has been no evidence, no tests, no proof submitted to substantiate this mitigating circumstance" (R. 2728). Apparently, the judge was not listening to Dr. Mosman's testimony that he had conducted a Bender-Gestalt on Mr. Ford (R 4304). The Bender-Gestalt is a standard screening test for brain

damage. "Mr. Ford, this test indicates, does have some collateral damage in some areas of the brain, that it is probably a processing problem" (R 4304). Dr. Mosman testified that the organic brain damage that his testing showed provided "one of the most potent explanations for why we've got the learning disabilities." The school records showed that Mr. Ford "is seriously learning disabled and has been all of his life" (R 4305). Dr. Mosman administered the Denman Verbal Memory Scale to Mr. Ford who received "scores that he is serious[ly] disabled in that area. * * * So he's way off the board on here" (R 4305). "[T]he only explanation is, once again, we've got a guy here who's got some minimal brain damage" (R 4306). On yet another test used to measure organic brain damage, "[t]he scores are pretty clear on that, mildly impaired" (R 4306). The sentencing judge's false representation that "no evidence, no tests, no proof" had been presented to establish mild organic brain damage was contrary to the record. *See Parker v. Dugger*, 498 U.S. 308, 321 (1991). Contrary to the Eighth Amendment, Mr. Ford's organic brain damage was not included in the sentencing calculus.

This Court also did not address Mr. Ford's challenge to the judge's rejection of the statutory mitigator of "substantial impairment." *See* Initial Brief, Case No. 95,972, at 57-60. The defense had called two mental health experts who both evaluated

Mr. Ford and testified to the presence of statutory mitigating circumstances. Dr. Bill Mosman, a psychologist, testified that:

Mr. Ford was under the influence of extreme mental and also emotional disturbance" at the time of the offense (R 4286). He also testified that "Mr. Ford's capacity to appreciate - to know and understand - to appreciate the criminality of his conduct at the instant the crimes were committed or to conform his conduct to the - - to what we expect him to do, those two factors were substantially impaired.

(R 4287). The State did not rebut this evidence and the defense was not precluded asking the State's expert if this mitigator was present in his opinion.

The sentencing judge's rejection of the "substantially impaired" statutory mitigator rested on palpably false findings and representations. This was Eighth Amendment error which should have considered in the harmless error analysis. See *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (Eighth Amendment error found because "[t]he Florida Supreme Court did not conduct an independent review here[;] [i]n fact, there is a sense in which the court did not review Parker's sentence at all."). Though Mr. Ford's appellate counsel pointed out the judge's factual errors in his direct appeal to this Court, he failed to rely on the Eighth Amendment and *Parker v. Dugger*, 498 U.S. at 321. Moreover, the error was not included in any harmless error analysis.

C. The Decision In *Tennard v. Dretke* Established That The Judge Violated The Eighth Amendment When She Required Proof Of A

Nexus Between Mitigation And The Offense.

Mr. Ford also challenged on direct appeal the sentencing judge's employment of "a nexus" requirement as to mitigating circumstances. See Initial Brief, Case No. 95,972, at 61. In her sentencing order, the judge rejected Mr. Ford's chronic alcoholism, which she found "proven," as a mitigating circumstance because "[n]o nexus was established between the Defendant's alcoholism and the commission of these offenses" (R 2728). Similarly, she rejected the failure of the school system to provide help to Mr. Ford when he was child with his developmental impairments as mitigating because "there is no nexus between any development impairments in the commission of these offenses" (R 2729). However, Eighth Amendment law clearly did not include a requirement that for a circumstance to qualify as mitigation to be included in the sentencing calculus, the defense must establish "a nexus" between the circumstance and the offense. Though reference was made in Mr. Ford's briefing to this Court on direct appeal to the "nexus" requirement imposed by the judge, this Court on direct appeal did not address the issue or acknowledge any error. See *Parker v. Dugger*, 498 U.S. at 321.

On June 24, 2004, the United States Supreme Court rendered its decision in *Tennard v. Dretke*, 542 U.S. 274 (2004). There, the Supreme Court found that the Fifth Circuit Court of Appeals

had failed to follow controlling Eighth Amendment jurisprudence when it concluded that mitigating evidence could be found to be not "constitutionally relevant" and thus properly excluded from the sentencing calculus in a capital case. *Id.* at 284. The Supreme Court found the "nexus" requirement employed by the Fifth Circuit contrary to the Eighth Amendment explaining:

In *Atkins v. Virginia*, 536 U.S., at 316, 122 S.Ct. 2242, we explained that impaired intellectual functioning is inherently mitigating: "[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal." **Nothing in our opinion suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered. Equally, we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence -and thus that the *Penry* question need not even be asked-unless the defendant also establishes a nexus to the crime.**

Tennard v. Dretke, 542 U.S. at 287 (emphasis added). The Supreme Court further explained:

Evidence of significantly impaired intellectual functioning is obviously evidence that "might serve 'as a basis for a sentence less than death,' " *Skipper*, 476 U.S., at 5, 106 S.Ct. 1669; see also, e.g., *Wiggins v. Smith*, 539 U.S. 510, 535, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (observing, with respect to an individual with an IQ of 79, that "Wiggins['] ... diminished mental capacitie[s] further augment his mitigation case"); *Burger v. Kemp*, 483 U.S. 776, 779, 789, n. 7, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (noting that petitioner "had an IQ of 82 and functioned at the level of a 12-year-old child," and later that "[i]n light of petitioner's youth at the time of the offense, ... testimony that his 'mental and emotional development

were at a level several years below his chronological age' could not have been excluded by the state court" (quoting *Eddings*, 455 U.S., at 116, 102 S.Ct. 869)).

Reasonable jurists also could conclude that the Texas Court of Criminal Appeals' application of *Penry* to the facts of Tennard's case was unreasonable. The relationship between the special issues and Tennard's low IQ evidence has the same essential features as the relationship between the special issues and Penry's mental retardation evidence. **Impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately.**

Tennard, 542 U.S. at 288 (emphasis added).

This Court affirmed Mr. Ford's death sentence even though the sentencing judge in her order (1) specifically rejected two non-statutory mitigators on the basis of a failure to demonstrate "a nexus" between the mitigation and the offense and (2) implicitly rejected Mr. Ford's learning disability and "developmental age of fourteen" as valid and proper mitigating circumstances. The judge's belief in and reliance upon "a nexus" requirement before mitigation could be included in the sentencing calculus was Eighth Amendment error, as *Tennard* clearly held. Yet even after the issuance of *Tennard* on June 24, 2004, Mr. Ford's registry counsel did nothing to bring this Eighth Amendment error to this Court's attention. Had a claim premised on *Tennard* been presented in a habeas petition, this Court would have been required to acknowledge the Eighth Amendment. When the error is considered with the mitigation that was not included in the

sentencing calculus in violation Eighth Amendment, habeas relief is required. Mr. Ford's death sentence must be vacated.

D. The Decision In *Roper v. Simmons*, In Conjunction With *Atkins v. Virginia*, Established A Basis To Argue That Because Mr. Ford Had The Mind Of A 14-Year-Old, His Blameworthiness Was Diminished And A Death Sentence Not Proportional.

On March 1, 2005, the United States Supreme Court issued *Roper v. Simmons*, 543 U.S. 551, 575 (2005). There, the Supreme Court held that "the death penalty cannot be imposed upon juvenile offenders" under the Eighth Amendment. It explained:

Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and **whose extreme culpability makes them "the most deserving of execution."** *Atkins, supra*, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence.

Roper v. Simmons, 543 U.S. at 568 (emphasis added). The Supreme Court wrote:

From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Id. at 570. The Supreme Court turned to the penological rationale for the death penalty (retribution and deterrence) and wrote:

As for retribution, we remarked in *Atkins* that "[i]f **the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State**, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." 536 U.S., at 319, 122 S.Ct. 2242. The

same conclusions follow from the lesser culpability of the juvenile offender. Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. **Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.**

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for petitioner acknowledged at oral argument.

Id. at 571 (emphasis added).²³

In Mr. Ford's case, the judge found that Mr. Ford's developmental age was the equivalent of a fourteen year-old, even though the testimony was that Mr. Ford's mental intellectual age [was] 11 to 14[,] [a]nd the emotional impairment is a different

²³ The Supreme Court noted in *Roper*, 541 U.S. at 573, that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course." This occurred in Mr. Ford's case. The sentencing judge here clearly permitted her feelings about the crime to "overpower" the plethora of mitigation presented which demonstrated and continues to demonstrate that Mr. Ford is not "among the worst offenders." *Roper v. Simmons*, 543 U.S. at 569. Indeed just as in *Roper*, the judge in Mr. Ford's case turned mitigation into aggravation finding the fact that he had no criminal history, that he had never been seen to be violent, and that he was not diagnosed as having an antisocial personality disorder, deprived Mr. Ford of a means "to explain seemingly unexplainable crime" (R 2224, 2227, 2230). The judge ignored the fact that it "is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571.

factor that emotional and developmentally, probably in the area at about 9" (R 2728, 4289). However after ignoring that the developmental age was actually lower than what she stated, the judge refused to accept Mr. Ford's immaturity as mitigating under the Eighth Amendment or to include it in her sentencing calculus. She did not address at all the fact that in January of 1999, Mr. Ford's reading level "was equivalent to about an 11-year-old," while he ability to spell at the level of "a 10-year-old," and his math skills were at the level of "a 12-year-old" (R 4303). And this was nearly two years after the offense, and after Mr. Ford had "heavily invested in learning how to read and improving those skills" while in jail (R 4303-04). Under *Roper v. Simmons*, moral culpability is diminished by immaturity. The judge even found that Mr. Ford, despite his chronological age, was developmental on the level of a 14 year-old, but refused to consider this fact as mitigating, and gave the age mitigator "very little weight." This was error. Under *Roper*, mental and emotional immaturity reduces moral culpability and removes a defendant from the category of offenders who are "the most deserving of execution." 543 U.S. at 568. Relief is warranted.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Ford respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by email, to Carol Dittmar, Assistant Attorney General, Office of the Attorney General, at her primary email address CapApp@myfloridalegal.com on October 15, 2014.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

/s/ Martin J. McClain

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