IN THE SUPREME COURT OF FLORIDA

TERRY MELVIN SIMS,

Appellant,
v. **CASE NO. SC00-295**

STATE OF FLORIDA, **Death Warrant Signed**
Execution Scheduled for
Appellee. **February 23, 2000 at 7:00 a.m.**
_____/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On February 1, 1979, Appellant, Terry Melvin Sims, was convicted of the first degree murder of Seminole County Sheriff's Deputy, George Pfeil. He was sentenced to death on July 24, 1979. Sims' convictions and sentence of death were affirmed on direct appeal by this Honorable Court in *Sims v. State*, 444 So. 2d 922 (Fla. 1984). The United States Supreme Court denied certiorari on July 11, 1984. *See Sims v. Florida*, 467 U.S. 1246 (1984).

Sims filed his first Florida Rules of Criminal Procedure 3.850 motion for postconviction relief on July 24, 1986. He supplemented and amended that motion on September 21, 1989 and again on March 23, 1990. An evidentiary hearing was conducted on the motion, and on February 18, 1991, the motion was denied. This Court affirmed that denial on June 11, 1992. *Sims v. State*, 602 So. 2d 1253 (Fla. 1992).

On February 25, 1993, Sims filed a petition for a writ of habeas corpus in this Court. That petition was denied on June 24, 1993. *Sims v. Singletary*, 622 So. 2d 980 (Fla. 1993).

On December 1, 1993, Sims filed a petition for a writ of habeas corpus in the federal district court. He amended that petition on June 27, 1994. The United States District Court for the Middle District of Florida denied the petition as to the convictions, on August 22, 1997, but vacated Sims' death sentence. The State's appeal to the Eleventh Circuit Court of Appeals

resulted in reinstatement of the death sentence. *Sims v. Singletary*, 155 F.3d 1287 (11th Cir. 1998). The United States Supreme Court denied certiorari review on June 21, 1999. *Sims v. Moore*, 119 S.Ct. 2373 (1999).

The Governor of the State of Florida signed a warrant for Sims' execution on September 23, 1999. Sims' execution was scheduled for October 26, 1999. On October 21, 1999, Sims filed a Rule 3.850 motion to vacate his convictions and/or death sentence in the State circuit court. The Honorable O.H. Eaton, Jr., conducted an evidentiary hearing on the motion, and denied all relief. The trial court's order was affirmed on appeal to this Court on October 27, 1999. *Sims v. State*, 24 Fla. Law Weekly S519 (Fla. Oct. 27, 1999).

On January 14, 2000, Governor Jeb Bush signed a second warrant for Sims' execution. Sims filed a petition for a writ of certiorari in the United States Supreme Court on January 25, 2000. He filed his third Rule 3.850 motion in the circuit court on February 7, 2000. Therein, he raised five issues, to-wit:

1. Newly discovered evidence that Mr. Sims is innocent prohibits his execution;

2. Application of Florida's lethal injection statute to Mr. Sims would violate the *ex post facto* clauses of the United States and Florida Constitutions, and the due process clause of the Fourteenth Amendment, and is prohibited by Article I, Section 17,

and Article X, Section 9 of the Florida Constitution;

3. Florida's practice of judicial electrocution violates the Eighth Amendment to the United States Constitution and Article I, Section 17, Florida Constitution;

4. The lethal injection bill violates the State Constitution and due process; and,

5. Lethal injection as planned in Florida violates the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution.

An evidentiary hearing was conducted on the third 3.850 motion before the Honorable O.H. Eaton, Jr. on February 9-10, 2000.

Evidentiary Hearing:

Sims' first witness was Michael Radelet, a sociology professor from the University of Florida. (R 11). Prof. Radelet's vitae was admitted into evidence as "Defense One." (R 15).

The State's objection to Prof. Radelet's attempt to testify regarding the medical ethics of physicians' (or their assistants) participation in a lethal injection execution was sustained. (R 16-20). The State's relevancy objection was sustained. (R 16, 18, 20). Sims later proffered the professor's opinions on this matter, after which, the judge again sustained the State's previous objection to the medical ethics issue. (R 34-39).

Prof. Radelet testified to certain opinions he has expressed regarding lethal injection executions which are included in a

proposed chapter for a book. (R 23-24). The proposed work was introduced into evidence as Defendant's Exhibit Two. (R 29-30). Prof. Radelet opined that "lethal injection is the most commonly botched means of execution in the United States today." (R 24). Although, he admitted that it is "one of the most common methods of execution," he further opined that "lethal injection ranked second to the electric chair in the proportion of executions where something has gone wrong." (R 24).

Prof. Radelet claimed that Texas and Virginia "stand out for high number of botched executions." (R 24). According to the professor, there is no evidence that the rate of botched executions has changed over time, and they "tend to occur with regularity in about five or six percent of all executions in the United States . . .." (R 24).

Prof. Radelet said that 5.2% (16 over 305) of lethal injections fall within his definition of "botched." (R 25). This figure was based on the period of time from the first lethal injection in December, 1982 through "approximately mid 1998." (R 26). He defined "botched executions as those in which there were unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner, or that reflect gross incompetence of the executioner." (R 26-27). He then identified four categories into which the allegedly "botched" lethal injections fell, to-wit:

1. "[A] break down in the drug sequence;"

2. "gasping for breath, or . . . audible distress;"

3. "violent movements or prolonged movements;" and,

4. "difficulty of finding a good vein."

(R 28). Prof. Radelet acknowledged that he did not know if the sounds of distress or movements were voluntary or whether the defendant was conscious at the time. (R 53, 57). He also reluctantly admitted that in his affidavit, he characterized one lethal injection execution as "botched" because the defendant, "a drug addict[,] had to help the execution technicians find a good vein for the execution." (R 42-43).

The professor said that he has personally "given a lot of blood . . . and it seems when I do that they sometimes have problems." (R 53). The persons performing the task were physicians. (R 54). The witness opined that the problems in inserting needles and/or IVS in the medical community could not properly be compared to the problems seen in lethal injection executions because physicians and their assistants are not supposed to participate in executions due to ethical constraints. (R 66-67).

Prof. Radelet admitted that the information on which he based his conclusions and opinions was that "commonly reported in newspapers," and that with a few exceptions, he had not even talked to witnesses. (R 32, 43, 54). He declined to characterize his study of lethal injection executions as "extensive." (R 39). He

said that his proposed "book chapter" is to be included in a book to be published in London, England entitled "something like, Capital Punishment, Pathways to Abolition." (R 45). The book title listed on Defendant's Exhibit Two was "Routes to Abolition, The Law and Practice of the Death Penalty." (R 45). Prof. Radelet's proposed book chapter includes the statement - with which he agrees - that: "The above evidence of botched executions shows yet again that the death penalty involves making God-like decisions and taking God-like actions without God-like wisdom or skills." (R 63).

Prof. Radelet claimed that the "last thing" he would want to do is "report incorrect information." (R 47). Nonetheless, he admitted that he did nothing to determine the facts of the cases reported about as stated in a court order or opinion, and instead, relied on "news reports." (R 47-48). He opined that in terms of describing "what happened at an execution," a newspaper reporter would give a more reliable factual account than a court because they are "keen reporters of social reality." (R 48).

Sims' next witness was Florida State Prison [hereinafter "FSP"] Warden, James V. Crosby, Jr. (R 69, 70). Warden Crosby testified that he is the one charged with the responsibility to carry out the execution. (R 70). He said that pursuant to the new lethal injection legislation, the Department of Corrections [hereinafter "DOC"] has set up a lethal injection process at the prison. (R 72). Warden Crosby said that his involvement in the

process has been

> to insure that we have the right persons who have the science background to handle the scientific part. That we have the right persons to handle the security part and we have the right persons to handle the maintenance part and to coordinate the various elements that have to put together the project.

(R 72). He explained that although he "did not make the selection of the persons that would be used in the process," he has "directed those who have been put into those positions and coordinated their efforts in getting ready for the actual process." (R 73).

Warden Crosby identified a six-page document entitled Execution Day Procedures effective after January 28, 2000 which is also known as the protocols for lethal injection execution. (R 73, 74). That document was admitted into evidence as a defense exhibit. (R 169). The written media policy which applied to electrocutions also applies to lethal injection executions. (R 76).

The warden said that under the protocols, a single person -- the executioner -- will administer the lethal chemicals. (R 80). The executioner must be over 21, a citizen of Florida, and "have the ability to perform the function." (R 80-81). The "function" is to simply pick up the numbered syringes in order, place the needle end of each into the IV tubing which has previously been put in place, and depress the plunger. (R 81, 82, 102). This is a task that "anyone with reasonable intelligence can do . . .." (R 81).

The warden described how the defendant will be secured to the gurney. (R 82). Cushioned straps will be placed "at the feet,

across the legs, across the chest, and at the arms." (R 82, 83). DOC has "practiced with these using staff persons . . . to insure that there is no discomfort . . . of any type." (R 83). The arm restraint is only at the wrist. (R 104). There will be "a very loose head strap . . . this thin . . . that we use just whenever we are . . . putting [in] the IV." (R 82). Once the IV is properly inserted, that strap will not be used "unless he's giving difficulties with the head area." (R 82-83).

Warden Crosby testified that a single person will insert the needle or catheter for the IV, although there will be "a person on standby if the process becomes more complicated." (R 83). These persons "have been trained in that field," and have "a considerable amount of experience . . .." (R 83-84). "[N]either person is required to be a physician's assistant, but we have a physician's assistant there watching and monitoring the process." (R 84). That person "could assist if necessary, but it's not a part of the way it would normally operate." (R 84).

The person who is presently planned to insert the IV has been to Virginia and viewed an actual lethal injection execution. (R 85). The physician's assistant who is planned to observe and be available in the event of any problem has been to Texas to view a lethal injection execution. (R 86). In addition, a medical doctor will be present during the lethal injection. (R 86). The doctor's duty will be "[t]o pronounce the offender dead." (R 87). Should

there be a problem, "the physician would be available to assist . . .." (R 87). Each person "in any procedure that is required, . . . know how to perform those functions." (R 88).

Warden Crosby testified that he knows "the persons that are preparing the chemicals" and "they are qualified in that area of science." (R 90). This opinion is based on the qualifications required to hold "their present job function" at the DOC. (R 90). One of the persons responsible for this part of the process is a pharmacist. (R 91). "[T]he chemicals are laid out . . . already preset and laid out one, two, three, four, five, six, seven, eight. Start with one and go through eight." (R 91). These will be prepared and laid out by a physician's assistant and a pharmacist. (R 92). The execution room will be locked until the executioner enters to perform his part of the execution. (R 92).

Warden Crosby believes that the process of emptying the eight syringes into the IV tubing will take "somewhere between ten and fifteen minutes." (R 94). The physician will offer the defendant antianxiety medication -- probably "Valium." (R 94, 95).

There will be two IVS - one in each of the defendant's arms. (R 97, 105). Saline will be hooked up to the IVS to "get it going." (R 103). There will also be two heart monitors on the defendant. (R 98).

The warden had read the lethal injection execution manual for the State of Virginia, and described that State's procedures as

"similar to ours." (R 90). He has visited Virginia and had a "talk through" of the lethal injection process with officials who administer that process there. (R 100, 101). He plans to observe, or walk through, the Texas process prior to Sims' execution.

The execution staff at Florida State Prison has "been doing walk throughs," and plan to do more as the execution date approaches. (R 105-107). As warden, Mr. Crosby will "oversee all this," similar to "a traffic cop at a busy intersection." (R 107).

Sims' next witness was Physician's Assistant, William Matthews. (R 110). Mr. Matthews has long been employed as a physician's assistant at FSP. (R 110). As such, he practices "medicine under the direction of a physician." (R 113).

Mr. Matthews has "been asked by the Warden to be an observer." (R 113). Although he has witnessed lethal injections in both Texas and Virginia, his only role in Sims' proposed lethal injection will be that of "an observer." (R 114). He has not trained anyone to carry out any role in the process. (R 114). Mr. Matthews described the medical portions of the proposed lethal injection procedure. (R 117).

In so doing, he added a couple of medical-type details which were not mentioned by Warden Crosby. For example, he explained that the port in the IV tubing into which the executioner will place the syringe is "a standard universal IV port." (R 117). Also, "[t]he blunt needle is kind of small, it's safe, and it kind

of restricts the flow or the amount of agent being pushed in at the time." (R 117). A doctor will attend the heart monitor, and when he "has deemed that the inmate has expired, at that point two witnesses, more than likely I'll be probably the first one, will examine the inmate for any signs of life . . .. In turn, a physician will examine the inmate. If, indeed, he is dead, at that point he will notify the Warden of such." (R 118).

Mr. Matthews said that should there be a problem with the execution, he did not "see how I could possibly" participate in "ensuring (sic) that it continues." (R 119). He indicated that he believed that doing so would go against his training. (R 119). He emphasized that "[m]y job at this point is to observe. That's what I'm planning on doing." (R 120). He explained that DOC will have medically trained personnel to meet the needs to insure that the lethal injection execution is completed properly. (R 121).

Mr. Matthews explained what chemicals will be used and the order of their use as follows:

> Your first agent is thiopental sodium, or sodium thiopental, pentothal is the short name for it. Second agent is pancuronium bromide, it's also called pavulon. And the third agent is potassium chloride.

(R 122). The syringes will be administered one after the other, without delay, in number sequence. (R 125). After a chemical is injected, saline will be injected, followed by the next chemical until all eight syringes are emptied into the IV. (R 126, 127-28).

Mr. Matthews explained that in the event that the needle was

pushed through the vein so that the fluid got into the muscle or tissue rather than traveling in the blood in the vein, there would be immediate swelling which would be quite noticeable. (R 138). Persons who have been trained to start an IV also know how to recognize such potential problems with an IV. (R 147). The IVS used will be standard, medical kits, and should one IV line become compromised, the one in the other arm would be used instead. (R 142).

In Mr. Matthews' experience, loss of consciousness after an injection of pentothal occurs within ten seconds. (R 140-41). In his opinion, the first dose of sodium pentothal, which would be a minimum of 2 grams, would be lethal. (R 124, 134).

Sims' next presented Dr. Jonathan Lipman, a neuropharmacologist. (R 165). The doctor explained that "[p]harmacology is not just about drugs but also the administration of drugs." (R 172).

Dr. Lipman opined that the DOC lethal injection "protocol itself . . . has room for error in it, and if error occurs, then the consequences will be very painful and will certainly involve suffering." (R 171). However, he admitted:

> [T]he drugs, if administered at the doses that I believe will be administered by DOC and by the roots (sic) administered and in the sequence administered, if administered in the appropriate time, . . . would bring about the desired affect (sic).

(R 172). Dr. Lipman said that he is "[v]ery familiar" with the

chemicals DOC will use to administer the lethal injection. (R 172). He described sodium pentothal as "an anesthetic drug . . . that . . . renders a person unconscious if taken in a large enough dose." (R 172). It is used medically "to induce a state of insensibility . . .." (R 172). It is a fast acting drug, which also dissipates fairly rapidly, depending on "dose and rate of administration." (R 173). There is no pain associated with the drug when given "at the higher anesthetic doses." (R 174). According to Dr. Lipman, this anesthetic should be given by an anesthesiologist, a CRN - the speciality's physician's assistant - or a certified nurse anesthetist. (R 175).

The second chemical the DOC plans to use in the lethal injection -- pancuronium bromide -- is also used by anesthesiologists in medicine "to paralyze the muscles, the respiratory muscles and other muscles . . .. The drug produces a state of complete immobility." (R 175). This chemical produces "suffocation if respiration isn't supported, and should it be given to a conscious patient, it would feel "as if you have a horse sitting on your chest." (R 177).

The third drug, potassium chloride, is rarely used medically, and "[i]n high doses it . . . paralyzes the rhythmical contracture of the heart and causes it to arrest . . .." (R 177). The doctor opined that should this chemical be given to a conscious person, it "would feel like a hot poker going up your arm," however, he also

admitted that was speculation as no one who had ever experienced such a thing had ever been asked about the effect. (R 178). He guessed that if anyone should ever undergo such a situation, it would feel "like a heart attack." (R 178).

Dr. Lipman said that the amount of pentothal necessary to render a person unconscious varies from as little as "two or three hundred milligrams" to as much as "two thousand, which is very unusual." (R 179). He said that if someone had eaten within several hours before being given pentothal, it might cause them to "vomit the stomach contents, and if they were laying on their back, then those contents would go down into their lungs and drown them." (R 183). However, he admitted that even if this occurred, the injected person would not feel it because he would be unconscious. (R 224).

The doctor said that a potential problem in injecting sodium pentothal is that if the needle passes through the vein, the drug is released into the tissue instead of traveling in the vein. (R 186). He said that the area "would start to balloon out physically and immediately . . .." (R 186). Judge Eaton asked: "[I]f the needle . . . is not in the vein, then the person that is responsible for that procedure should be able to tell when the saline solution is going through the tube, right?" (R 188). The doctor replied: ". . . yes." (R 188). The judge followed up: "And so if everything is going well with the saline solution, then

it's pretty safe to assume that the needle has been properly placed in the vein, right?" (R 188). Dr. Lipman replied: "Yes." (R 188).

He also identified a potential problem if the tubing into which the pentothal is administered has been used previously and contains some residue of an "acidic drug . . .." (R 186-87). Dr. Lipman said that "[p]ancuronium is acidic." (R 187). Secretary Moore made it clear DOC will use all new syringes and tubing. (R 264). Dr. Lipman confirmed that there was no possibility of a chemical reaction with the sodium pentothal following the saline solution. (R 188). Further, as long as the saline is injected between each drug, a chemical reaction of this type will not happen. (R 189, 231).

Sims' counsel conceded that human error often occurs in the medical arena. (R 193). The judge observed: "But human error which infrequently occurs in executions doesn't render the method of execution invalid." (R 194). Noting that in its best light, the defense evidence indicated a 5.2 percent chance of a human error problem with a lethal injection execution, he pointed out that there was no evidence before him showing that the rate of error in the medical field for this type of procedure was lower. (R 196). In fact, Dr. Lipman testified that the rate of problems with IVS in the medical field is "surprisingly high unfortunately." (R 222).

Dr. Lipman conceded that if "all the drugs are administered," to the person, it cannot happen that "the person still isn't deceased." (R 203). He reluctantly admitted that five milligrams per kilogram of body weight of sodium thiopental will produce a barbiturate coma. (R 212-13). He conceded that two grams (2000 milligrams) of pentothal is a lethal dose, and rapid unconsciousness would result "[w]ay before it reached that dose." (R 214, 224). Indeed, unconsciousness would occur within no more than 30 seconds. (R 214). This loss of consciousness would be such that he would have "no further sensation of anything." (R 215).

Dr. Lipman also conceded that 50 milligrams of pavulon is far more than the amount necessary to cause complete skeletal muscle paralysis. (R 216). Moreover, 150 milliequivalents of potassium chloride, given in an IV push would stop the heart. (R 217, 218).

Dr. Lipman said that even though he had not started a human IV for "a long time," and had not done "many," he could easily spot the potential problem where the needle has been pushed through the vein and fluid is going into the tissue. (R 219). He affirmed this to be true even though he had done no human IVS in "at least five years," and has no formal training or instruction in starting an IV. (R 220). The doctor admitted that "a medically trained person can establish and properly monitor an IV line." (R 230). Moreover, the act of injecting the drugs into the IV port is easily

accomplished. (R 230).

The last live witness presented at the evidentiary hearing was Secretary of the DOC, Michael Moore. (R 242). Secretary Moore was with the "South Carolina Department of Corrections as a director" for many years prior to coming to the Florida DOC, about "thirteen months" ago. (R 243). In his position in South Carolina, Secretary Moore had considerable experience with lethal injection executions, including personal involvement with 11 of them. (R 244, 245, 259).

In formulating the protocol for Florida's lethal injection procedure, Secretary Moore was primarily concerned with making sure that the process was "humane" and "dignified." (R 244). Secretary Moore said that the final protocols were formulated "from what other states do" and his "experience . . . in South Carolina." (R 248). He signed the protocols on January 28, 2000. (R 248).

Secretary Moore has personally walked through the procedure which will be used at FSP to effect lethal injection executions in Florida. (R 250). He described it for the court. (R 250-52). He specified that the minimum amounts of the three drugs used will be as follows: Sodium pentothal, two grams, pavulon, fifty milligrams, and potassium chloride, 150 milliequivalents. (R 251, 260).

The secretary testified that medically trained personnel will be involved, and that a physician and physician's assistant will be

there and available should problems arise. (R 255, 256, 257). The physician and assistant will not be assisting in the execution, but will take care of any "problem that we have to take care of medically." (R 256). In choosing, or confirming, the persons selected, the secretary looked at what "the staff told me those people were and what their qualifications were and what their license[s] were." (R 257).

Secretary Moore said that he authorized the purchase of the equipment to be used, and it is standard medical equipment. (R 261). A training program is set up at FSP, and the persons involved are well aware of their role in the process. (R 263). The warden at FSP is the one who directs all of the participants and "makes all the parts work." (R 270).

The State agreed to the admission of four affidavits into evidence in lieu of live testimony, reserving all objections and legal arguments regarding the evidence which would be available if the witnesses testified live. (R 239, 275, 282). The defense stipulated that Joyce Gray has been convicted of two federal crimes, one involving an escape attempt. (R 240). The State objected to the statements in the affidavit of Scott Milliken, primarily on double hearsay grounds. (R 276-280).

Defense counsel argued that the affidavits were newly discovered because the affidavits were not received until after the close of the October evidentiary hearing. (R 284-86). They also

claimed that they learned of Joyce Gray through a police report they received in response to public records demands. (R 286). The State contended that the evidence was not newly discovered. (R 294). Joyce Gray testified at trial, and there was no showing that she, and her subject statements, could not have been found earlier. (R 294). At the time of trial, Scott Milliken was the 6 year old son of trial witness, Gail Milliken, and there was no showing that his evidence could not have been found and presented earlier. (R 294-95).

On February 12, 2000, Judge Eaton issued his order denying the motion to vacate and motion for a stay of execution. On claim I, the court concluded that the evidence presented in the affidavits "would not result in a different verdict upon retrial since the evidence is inadmissible." (Order at 4). He also reaffirmed his prior conclusion that even in the absence of any testimony from Baldree and Halsell, "there was substantial competent evidence to convict Sims of the murder . . .." (Order at 2-3).

The judge rejected the claim that the lethal injection statute does not apply to Sims. (Order at 4-9). The law which merely changes the method of execution is not an *ex post facto* application. Id. "Lethal injection may be substituted as an alternative means of execution because Sims was on notice of the severity of the punishment attributable to his crime at the time of the offense." (Order at 9).

The judge rejected the claim that electrocution is unconstitutional based on *Provenzano v. State*, 744 So. 2d 413 (Fla. 1999). (Order at 9). Thus, he denied claim III. *Id.*

Taking claims IV and V together, Judge Eaton denied relief. The court concluded that "[d]uring the evidentiary hearing . . . the Department of Corrections provided sufficient information on the specifics of the lethal injection procedure to be used to allow the court to determine whether it constitutes cruel and unusual punishment . . .." (Order at 12-13). The court said that "[l]ethal injection as a means of execution has been around for sufficient time for it to be generally known." (Order at 13). Judge Eaton determined that "the procedure is well rehearsed and the team is competent to perform its function." (Order at 17). The court concluded

> the manner and method of execution to be carried out by lethal injection in Florida is neither cruel nor unusual and that the Department of Corrections is both capable and prepared to carry out executions in a manner consistent with evolving standards of decency.

(Order at 18).

SUMMARY OF THE ARGUMENT

The newly discovered evidence claim is not a basis for relief because Sims cannot make the required showing of due diligence with regard to the evidence at issue, as well as because, as the trial court found, that evidence is inadmissible, unreliable hearsay. Sims has failed to demonstrate the exercise of due diligence, and,

moreover, cannot establish that the evidence in question is reasonably likely to produce an acquittal on retrial.

Sims' *ex post facto* challenge to the application of the lethal injection statute fails because a change in the method of execution of a sentence of death is not an increase in punishment. There are no *ex post facto* implications associated with a change in method of execution.

Sims' claim concerning judicial electrocution is foreclosed by binding precedent.

Sims' claim that execution by lethal injection is unconstitutional is contrary to prior decisions on the issue, as well as being contrary to the facts. The evidence presented to the trial court established that execution by lethal injection results in rapid unconsciousness without pain.

ARGUMENT

I. THE "NEWLY DISCOVERED EVIDENCE" CLAIM.

The "Newly Discovered Evidence" Claim contained in Sims' *Florida Rule of Criminal Procedure* 3.850 Motion, which was denied by the Circuit Court in an order issued on February 12, 2000, is a continuation of the same claim that was contained in the prior proceedings before this Court that concluded in October of 1999. This Court affirmed the Circuit Court's denial of post-conviction relief in that proceeding, and, for the reasons set out below, should likewise affirm the Circuit Court's most recent denial of

relief.

The “Newly Discovered Evidence” Claim contained in the most recent *Florida Rule of Criminal Procedure* 3.850 proceeding is, for all practical purposes, the same claim as the one that was previously decided adversely to Sims. To the extent that there is a *Brady v. Maryland* component to this claim, the trial court decided that issue adversely to Sims in October of 1999, and this Court affirmed on appeal therefrom. *Sims v. State,* 24 Fla. Law Weekly S519 (Fla. Oct. 27, 1999). In respect to the “Newly Discovered Evidence” claim[1] contained in the most recent petition, the Circuit Court stated as follows:

> The first affidavit is from a witness who testified at trial whose name is Joyce Gray. From the outset of this case, the defense has attempted to prove that the true culprit is a person known as Terry Gayle and not Terry Sims. In her affidavit, Joyce Gray states that she was present with Terry Gayle shortly after another codefendant, Curtis Baldree, was arrested and overheard Gayle say "something to the effect that 'it must have been the Longwood job.'" She also claims that Baldree told her that he lied at trial "to protect himself and the others that were actually involved." On another occasion Joyce Gray claims that Baldree was "very high" and stated to a person named Jerry Lawrence "that he did what he had to do." Baldree, of course, is dead. And Joyce Gray is a convicted felon. But in any event, this court ruled on October 24, 1999, in the last post conviction relief proceeding that "there was substantial competent evidence to convict Sims of the murder even if the jury totally rejected the testimony of Halsell and even if they rejected the testimony of Baldree." *See,*

[1]The evidence in support of Sims' newly discovered evidence claim consisted of four affidavits which, as the trial court noted, were stipulated into evidence in lieu of live testimony. *Order*, at 2.

> Order dated October 24, 1999. While it may be entirely true that Baldree made the statements claimed, his motivation for making them is suspect. The statements are hearsay, lack credibility and trustworthiness and are inadmissible in evidence. (FN1)
>
> The second affidavit is from Steven Scott Milliken. He was about six years of age at the time of the events to which he relates. He states that his mother, now deceased, was the girlfriend of B.B. Halsell[2]. He claims his mother told him that B.B. Halsell shot her accidently when he was trying to shoot Terry Sims because he caught them having sex. The witness also claims that his mother told him that "Terry Sims was on death row for something he didn't do." The statements contained in the affidavit are either expressions of opinion without foundation about the case or are hearsay. In either case, they lack trustworthiness and are inadmissible in evidence. (FN2)
>
> FN1. F.S. 90.804(2)(c)
>
> FN2. Id.

Order, at 2-3. The other two affidavits submitted in support of this claim are from two Georgia attorneys who state that they were requested to locate Joyce Gray on October 23, 1999, and did so. *Order,* at 4. The trial court concluded discussion of this claim, stating:

> These two affidavits are submitted to establish that Joyce Gray's affidavit and Steven Scott Milliken's affidavit are "newly discovered evidence." *See, Jones v. State,* 591 So.2d 911 (Fla. 1991). The court gives the defense the benefit to the doubt on that issue. However, the court concludes that Joyce Gray's testimony and Scott Milliken's testimony would not result in a different verdict upon retrial since the evidence is inadmissible. *Woodard v. State,* 579 So.2d 875, 887 (Fla. 1st DCA 1991); *Jackson v. State*, 421 So.2d 15 (Fla. 3d DCA 1982).

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[2]Milliken's mother was Gail Milliken, who testified at Sims' trial as a defense witness.

Order, at 4. Those findings of fact by the trial court are supported by competent substantial evidence, are not an abuse of discretion, and should be affirmed in all respects.

To the extent that further discussion of this claim is necessary, the Joyce Gray component of this claim was before this Court in the October, 1999, proceedings, but was unaddressed therein. Gray testified at Sims' trial in 1979 as a defense witness, and, from all that appears from these proceedings, is friendly to the defense. The disposition of the Gray component of this claim is controlled by this Court's decision in *Mills v. State*, where this Court denied relief on a similar claim of "new evidence" arising from a witness who testified at trial. This court stated:

> However, Tina Partain testified at trial and was available at that time for examination concerning any connection between Fredrick and the victim or between Fredrick and Mock, or concerning any other persons or who had connection with either of them. Nor is there sufficient showing that Tina Partain was not available to through due diligence during the time required by the rule.

Mills v. State, 684 So.2d 801, 805 (Fla. 1996). The situation presented by the Gray affidavit is no different from the circumstances of *Mills*. That case controls the result in this case, and, moreover, to the extent that other discussion of the Gray affidavit is necessary, the Circuit Court's finding that Sims would have been convicted even had the jury rejected the testimony of

Baldree (which is the subject of the Gray affidavit), is dispositive of the issue.

With respect to the Milliken affidavit, the affiant is the **son** of Gail Milliken who testified as a defense witness at Sims' 1979 trial. This Court's decision in *Mills* is dispositive of this component of the newly discovered evidence claim, as well.

In addition to the foregoing reasons for the denial of relief, the following procedural grounds are independently adequate grounds for denial of all relief on this claim[3].

The "new evidence" claim contained within Sims' Rule 3.850 motion is untimely, successive, and an abuse of procedure. Sims cannot establish the due diligence component of *Florida Rule of Criminal Procedure* 3.850(d)(1), and, for that reason, is not entitled to relief. The evidence actually shows that, once Sims decided to try to find Joyce Gray, he succeeded almost immediately -- that demonstrates a lack of due diligence, not the exercise of it. Sims has failed to make the necessary threshold showing that would allow the court to consider these claims. In fact, the only evidence before the trial court, and before this Court, consists of affidavits which in no way establish that the affiants could not have been previously discovered through the exercise of due

[3]As is discussed herein, Sims presented two affidavits in a futile attempt to establish due diligence as to Gray. He made no such effort with respect to Milliken, and that "evidence" could and should be disposed of based upon that failure of proof.

diligence.[4] Moreover, the "new evidence" claims fail because, as the trial court found, none of that evidence is admissible because it is hearsay (or compound hearsay) that is being offered for the truth of the matters asserted therein. *Stano v. State*, 708 So.2d 271 (Fla. 1998).

To the extent that further discussion of the due diligence component is necessary, Florida law is clear that, because this is a successive motion for post-conviction relief filed more than one year following finality of the judgment and sentence, Sims has the burden of demonstrating that he has exercised due diligence. *See, Mills v. State*, 684 So.2d 801, 804-05 (Fla. 1996); *Stano v. State,* 708 So.2d 271 (Fla. 1998); *Buenoano v. State,* 708 So.2d 941, 952 (Fla. 1998); *Remeta v. State,* 710 So.2d 543, 546-48 (Fla. 1998); *Davis v. State*, 24 Fla. Law Weekly S345 (Fla. July 1, 1999). The murder in this case occurred in 1977, and Sims' convictions and sentences of death have been final since 1984. This claim could and should have been brought years ago[5].

In addition to a complete failure of proof as to the due diligence component of the new evidence standard, Sims has also completely failed, as the trial court found, to establish that the evidence at issue is reasonably likely to produce an acquittal on

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[4]In fact, Sims made no effort to establish the due diligence component. That is fatal to any claim for relief.

[5]Sims made no effort to establish "due diligence" with respect to Scott Milliken.

retrial. Under settled Florida law, that is the standard that Sims must meet. *See, Stano, supra; Remeta, supra; Jones v. State,* 591 So.2d 911, 915 (Fla. 1991). The circuit court's denial of relief should be affirmed.

II. THE APPLICATION OF THE LETHAL INJECTION STATUTE

Sims also claims that he cannot be executed by lethal injection because "the lethal injection statute does not apply to him." The circuit court denied relief on this claim, finding, *inter alia*, that:

> Lethal injection may be substituted as an alternative means of execution because Sims was on notice of the severity of the punishment attributable to his crime at the time of the offense. The change in the means of execution does not criminalize or punish conduct which was innocent when committed, enhance a prior punishment for the same crime, or abrogate a previously valid defense to a crime.

Order, at 9. That resolution of Sims' *ex post facto* claim is correct, and should be affirmed.

Article I, § 17 of the *Florida Constitution* provides that the method of carrying out a sentence of death shall be determined by the legislature. In pertinent part, that provision reads as follows:

> **Methods of execution may be designated by the Legislature, and a change in any method of execution may be applied retroactively.** A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

[emphasis added]. Article 10, § 9[6] of the *Florida Constitution* provides:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.[7]

Finally, in *Provenzano v. Moore*, a majority of the Florida Supreme Court expressed the opinion that Florida could lawfully change the method through which a sentence of death is carried out from electrocution to lethal injection without running afoul of the State or Federal Constitutions. *Provenzano v. Moore,* 744 So.2d 413 (Fla. 1999).[8] It is against that backdrop that Sims' claim that "the State of Florida cannot execute him by lethal injection as a matter of state and federal constitutional law" is presented. For the reasons set out below, this claim is not a basis for relief.

When the pretensions of Sims' pleading are stripped away, nothing remains save an attempt to avoid execution by asserting a "claim" that has no legal basis under either the State or Federal Constitutions. Regardless of Sims' claims, the true facts are that

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[6]This provision is referred to as the "Savings Clause". *Dobbert v. State,* 375 So.2d 1069, 1071 (Fla. 1979)(application of death penalty statute to defendant did not violate Article 10 § 9); *Dobbert v. Florida*, 432 U.S. 282 (1977).

[7]As Justice Shaw pointed out in *Provenzano*, the Savings Clause does not exist to allow on offender to evade punishment. *Provenzano, supra*, at 440 n.53.

[8]Chief Justice Harding, as well as Justices Lewis, Shaw, Anstead and Pariente agreed that the State could change the method of execution without compromising any pre-existing sentence of death.

this claim was rejected by the United States Supreme Court in 1915, when that Court held, in *Malloy v. South Carolina,* 237 U.S. 180 (1915), that there was no *ex post facto* issue presented by applying the electrocution statute to a crime that had been committed at a time when the statute called for a sentence of death to be carried out by hanging. *See, Dobbert. See also, Holden v. Minnesota,* 137 U.S. 483, 491 (1890); *Vickers v. Stewart,* 144 F.3d 613 (9th Cir. 1998). Section 922.105 of the *Florida Statutes* expressly adopts *Malloy* as the law in this State, and specifically provides that a change in the **method** of execution "does not increase the punishment or modify the penalty of death for capital murder." § 922.105(3), *Fla. Stat.* That statutory definition is in accord with the constitutional "definition" of an *ex post facto* law as settled by the United States Supreme Court and reaffirmed in *Collins v. Youngblood*, 497 U.S. 37 (1990).[9]

Moreover, the United States Supreme Court addressed a similar *ex post facto* challenge in the context of Florida's death penalty act when it was re-enacted following *Furman v. Georgia,* 408 U.S. 238 (1972). The Court held that a defendant who committed a capital offense prior to the effective date of the new death penalty act

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[9]The *Collins* Court cited to *Beazell v. Ohio*, 269 U.S. 167 (1925), in defining an *ex post facto* law as one which criminalizes previously allowed conduct, increases punishment of a crime, or removes a defense which was available when the crime was committed. None of those criteria exist in the context of a change in the procedure for carrying out a sentence of death.

could be sentenced to death without violating the *ex post facto* clause of the Constitution. The Court stated:

> Petitioner's second ex post facto claim is based on the contention that at the time he murdered his children there was no death penalty "in effect" in Florida. This is so, he contends, because the earlier statute enacted by the legislature was, after the time he acted, found by the Supreme Court of Florida to be invalid under our decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Therefore, argues petitioner, there was no "valid" death penalty in effect in Florida as of the date of his actions. **But this sophistic argument mocks the substance of the Ex Post Facto Clause.** Whether or not the old statute would in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.

Dobbert v. Florida, 432 U.S. 282, 297 (1977) [emphasis added]. See also *Dobbert v. State*, 375 So.2d 1069, 1071 (Fla. 1979) (where the Court rejected on the merits without specific opinion the savings clause challenge re: "*Ex Post Facto*" "Article X, Sec. 9, Florida Constitution.") Finally, as set out above, the *Florida Constitution* explicitly provides that methods of execution of sentences of death may be designated by the Legislature and applied "retroactively". Article I, § 17. Because that is the law, Sims' claim that the lethal injection statute does not apply to him is meritless. Sims is not entitled to any relief.

III. THE JUDICIAL ELECTROCUTION CLAIM

To the extent that Sims may argue that execution by electrocution violates the Eighth Amendment of the United States Constitution, that claim is foreclosed by binding precedent, as the trial court found. *Provenzano v. State,* 744 So.2d 413 (Fla. 1999).

IV. EXECUTION BY LETHAL INJECTION IS CONSTITUTIONAL

To the extent that Sims argues that execution by lethal injection is violative of the Eighth Amendment of the United States Constitution and of Article I, Section 17 of the Florida Constitution, that claim is foreclosed by binding precedent as well as being without merit. Numerous courts have addressed the constitutionality of execution by lethal injection, and have uniformly found that that method of carrying out a sentence of death comports with prevailing constitutional and societal norms.[10] *See, LaGrand v. Lewis,* 883 F.Supp. 469 (D. Ariz. 1995) (collecting cases); *Poland (Michael) v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997), *cert. denied,* 118 S.Ct. 1533 (1998). *Woolls v. McCotter,* 798 F.2d 695, 697-98 (5th Cir. 1986).

To the extent that Sims' brief includes a claim that the lethal injection statute somehow violates the separation of powers doctrine by authorizing the Department of Corrections to determine the drug or drugs to be employed in carrying out an execution by lethal injection and the means of their administration, that claim

[10]To the extent that Sims may refer to the Radelet testimony, the trial court rejected it. That testimony is probative of nothing. *Poland v. Stewart, supra*.

is, as the trial court found, based upon a misrepresentation of the controlling statute. The applicable statute provides:

> (6) Notwithstanding any law to the contrary, a person authorized by state law to prescribe medication and designated by the Department of Corrections may prescribe the drug or drugs necessary to compound a lethal injection. Notwithstanding any law to the contrary, a person authorized by state law to prepare, compound or dispense medication and designated by the Department of Corrections may prepare, compound, or dispense a lethal injection. Notwithstanding chapter 401, chapter 458, chapter 459, chapter 465, or any other law to the contrary, for purposes of this section, prescription, preparation, compounding, dispensing, and administration of lethal injection does not constitute the practice of medicine, nursing, or pharmacy.
>
> (7) The policies and procedures of the Department of Corrections for execution of persons sentenced to death shall be exempt from Chapter 120.

§ 922.10, *Fla. Stat.* (2000). Nothing in the statute violates separation of powers principles because the individual "prescribing" the lethal drugs must be authorized **under state law** to prescribe medications. The responsibility of the Department of Corrections is to select a licensed individual to "prescribe" the drugs necessary -- there is no waiver of such licensing, and there is no "separation of powers" component to this claim.

To the extent that Sims' claim is that the Florida procedure for carrying out an execution by lethal injection is deficient in some way, there is no factual support for such a claim. The trial court found, as fact, that the dosage levels of the drugs employed in carrying out an execution by lethal injection are individually

lethal, and that the first drug administered, sodium pentothal[11], is used surgically as an anaesthetic and will take effect (and render Sims unconscious) in a matter of seconds. *Order*, at 16-17. As set out above, the evidence at the evidentiary hearing demonstrated that the lethal chemicals employed, and the procedures for administration of them, will bring about rapid loss of consciousness without pain. Moreover, the evidence unequivocally established that the procedures to be employed in carrying out an execution by lethal injection are in accord with the procedures employed in other states employing that method of execution, and are commonly accepted and utilized. The dosages of the drugs used, the procedure for their administration, and the manner in which an execution is carried out by lethal injection is in compliance with the Eighth Amendment to the Constitution, and, as the Department of Corrections Secretary Michael Moore testified, "will be carried out in a humane and dignified manner." As Sims' own expert witness testified, the drugs that will be employed in carrying out an execution by lethal injection, Pentothal, Pavulon, and Potassium Chloride, will, in the dosages anticipated, cause painless and

[11]Sodium pentothal is, at various points in the record, also referred to as "sodium thiopental" and "pentothal." The terms are interchangeable references to the same drug. Likewise, "pancuronium bromide" is referred to as "pavulon" -- those terms are also interchangeable references to the same drug.

rapid death[12]. *Order,* at 17-18. That is clearly within the parameters of the Eighth Amendment and there is no basis for relief. The Rule 3.850 trial court found that "the manner and method of execution to be carried out by lethal injection in Florida is neither cruel nor unusual and that the Department of Corrections is both capable and prepared to carry out executions in a manner consistent with evolving standards of decency." *Order*, at 18. Competent substantial evidence supports that conclusion, and it should be affirmed in all respects.

[12]The three drugs are administered, in sequential order, by inserting a numbered syringe into the medication port in the IV tube. *Order*, at 16. Syringes one and two contain an individually lethal dose of pentothal. *Id*. Syringe three contains normal saline which is used to flush the IV tube. Syringes four and five contain a lethal dose of pancuronium bromide (pavulon), which paralyzes the skeletal muscles. Syringe six contains another saline flush. Syringes seven and eight contain a lethal dose of potassium chloride, which causes the heart to stop beating. *Order,* at 16.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the State submits that the order of the circuit court denying all relief, and denying a stay of execution, should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by Fax and by U.S. Mail to Steven H. Malone, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401; and Timothy P. Schardl and Mark E. Olive, Law Offices of Mark E. Olive, P.A., 320 West Jefferson Street, Tallahassee, Florida 32301, on this _____ day of February, 2000.

Of Counsel