IN THE SUPREME COURT OF FLORIDA

DANNY HAROLD ROLLING,

Appellant,

v.

CASE NO. SC06-1966
EXECUTION SET
WEDNESDAY, OCTOBER
25, 2006 at
6:00P.M.

STATE OF FLORIDA,

Appellee.
_____________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Rolling is presently under an active death warrant signed by Florida Governor Bush on September 22, 2006, with an execution date set for October 25, 2006, at 6:00 P.M.

Between August 24 and August 27, 1990, five college students were found murdered in Gainesville, Florida. On February 15, 1994, Danny Harold Rolling withdrew his prior pleas of not guilty and entered pleas of guilty to the five first-degree murders of Sonia Larson, Christina Powell, Christa Hoyt, Manuel Taboada and Tracey Paules; three counts of sexual battery, and three counts of armed burglary of a dwelling with a battery. Rolling specifically acknowledged that he understood the nature of each charge and all of the possible defenses available to him; that he understood he was waiving a plethora of constitutional rights guaranteed him. On February 16, 1994, jury selection commenced for the penalty phase of Rolling's trial. On February 25, 1994, Rolling filed a motion for change of venue (TR 2388-2390(a)), and a hearing was held that day (TR 7269-7311). The trial court denied that motion, May 20, 1994 (TR 3258-3266).

Following the empaneling of the sentencing jury, the penalty phase commenced March 7-24, 1994. The jury, by a 12-0 vote, recommended the death penalty for each of the five counts of first-degree murder. On April 20, 1994, the trial court

concurred with the recommendation, finding four aggravating factors as to each murder.[1] The trial court found two statutory mitigators -- Rolling's emotional age of fifteen (15) was a mitigating factor deserving slight weight and Rolling suffered from a chronic anti-social personality disorder -- given substantial weight (TR 3216-3217).[2]

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[1] Specifically: 1) Rolling was previously convicted of another capital felony or of a felony involving the use or threat of violence; specifically that each of the other murders were contemporaneous to the others and that Rolling had a series of prior violent felonies, to-wit: a 1976 Mississippi conviction for armed robbery; a 1979 Georgia conviction for two counts of armed robbery; a 1980 Alabama conviction for robbery; a 1991 Marion County, Florida conviction for robbery with a firearm; a 1991 Hillsborough County Florida conviction for three counts of attempted robbery with a firearm and two counts of aggravated assault on a law enforcement officer, and a 1992 federal conviction for armed bank robbery (TR 3200-3202); 2) the capital murders were committed while Rolling was engaged in the commission of sexual battery or burglary (TR 3202); 3) the capital murders were cold, calculated and premeditated without any pretense of moral or legal justification (TR 3202-3209), and 4) the capital murders were especially heinous, atrocious or cruel (TR 3209-3214).

[2] As to nonstatutory mitigation, the trial court found: 1) Rolling came from a dysfunctional family and suffered from physical and emotional abuse -- significant weight was placed on these factors (TR 3219), **the court further observed Rolling's background clearly influenced his mental condition**; 2) moderate weight was assigned to Rolling's cooperation with law enforcement officers in that he confessed and pled guilty; 3) remorse existed to some degree and the court assigned slight weight to Rolling's regret; 4) **slight weight was also assigned Rolling's family's history of mental illness (TR 3220-3221)**, and 5) **Rolling's mental condition or his capacity to conform his conduct to the requirements of law was afforded moderate weight (TR 3221-3222)**: "He does not suffer from a psychosis, he is in touch with reality, he can appreciate the criminality of his conduct of his actions, he knows the difference between right

The Florida Supreme Court affirmed in Rolling v. State, 695 So.2d 278 (Fla. 1997).[3]

On April 5, 1999, Rolling filed his amended postconviction motion to vacate and set aside death sentences rendered April 20, 1994.[4] (PCR III pgs. 286-348).[5] An evidentiary hearing commenced July 11, 2000 - July 15, 2000, and on March 5, 2001, the trial court denied all relief. (PCR V 625-659).

The Florida Supreme Court affirmed the denial of all relief. Rolling v. State, 825 So.2d 293, 295-298 (Fla. 2002).

On August 8, 2002, Rolling filed his petition for writ of habeas corpus, arguing four claims.[6] Relief was denied, July 1,

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and wrong, and he does have the ability, impaired though it may be, to choose what's right and adhere to it." (TR 3222).

[3] 1) Issues were: Pretrial publicity did not require a change of venue; 2) statements to fellow inmates and to investigators were not the result of Sixth Amendment violations; 3) the inventory search of a tote bag found at the campsite was proper; 4) Rolling waived any claim of error in joinder of offenses for penalty phase; 5) **the instruction on heinous, atrocious and cruel was proper**, and 6) the death penalty for five capital murders was not disproportionate.

[4] Rolling raised two claims: (1) "trial counsel rendered ineffective assistance of counsel regarding the failure to properly seek and obtain a change of venue, and (2) trial counsel rendered ineffective assistance of counsel regarding the failure during voir dire to challenge biased and fearful venire persons who ultimately served on the jury – the fact that some of the jurors were actually prejudiced against the defendant."

[5] Hereinafter "PCR" will refer to the postconviction record.

[6] Besides rejecting Rolling's assertion that he was denied a fair trial due to the failure of the state trial court to grant

2005, without further evidentiary hearing. The Eleventh Circuit, in Rolling v. Crosby, 438 F.3d 1296 (11th Cir. 2006), cert. denied, Rolling v. McDonough, __ U.S.__, 126 S.Ct. 2943; 2006 U.S. LEXIS 5052 (2006), denied further appellate review.

As a result of the active death warrant signed on September 22, 2006, with an execution date set for October 25, 2006, at 6:00 P.M., Rolling filed, on September 28, 2006, public records requests of the Department of Corrections and the Medical Examiner, Eighth District, seeking records, et al., pertaining to the 16 lethal injection executions from 2000 through 2005. He also filed a motion to secure serological material and sought independent testing of blood drawn post-execution of Arthur Rutherford, currently set for execution on October 18, 2006. Those motions were denied on October 4, 2006.

On October 4, 2006, Rolling filed a successive postconviction motion to vacate and set aside death sentences rendered April 20, 1994, arguing four claims: (1) that he was entitled to public records under Fla.R.Crim.P. 3.852(h)(3); (2) new evidence has come to light, specifically the LANCET article

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a change of venue and trial counsel's effectiveness on that score; the federal District Court rejected Rolling Fifth Amendment claim as to the pre-trial motion to suppress incriminating statements; Rolling's Fourth Amendment claim regarding any suppression of physical evidence; and Rolling's challenge under Ring v. Arizona, 536 U.S. 584 (2002), that Florida's death penalty statute is unconstitutional.

which brings into question the validity of Florida's method of execution via lethal injection based on litigation occurring around the country; (3) that Rolling's free speech rights would be violated based on the use of pancuronium bromide, and (4) the September 17, 2006 ABA Report concerning the Florida Death Penalty, demonstrates Florida's statute violates Furman v. Georgia, 408 U.S. 238, 310 (1972)(p*er curiam).*

On October 9, 2006, the trial court denied all relief finding Rolling's claims were meritless.

SUMMARY OF ARGUMENT

The following arguments have been set forth as follows predicated on the Court's Order requiring simultaneous briefing by the parties.

Issue I: Rolling sought to obtain public records outside the scope of Rule 3.852(h)(3) Fla.R.Crim.P. The trial court's denial of the request is controlled by Hill v. State, 921 So.2d 579 (Fla. 2006).

Issue II: Based upon the 2005 LANCET research letters, Rolling argues he should be permitted to have further consideration of his claim and review in this successive postconviction motion to prove his assertions. While he acknowledged below the existence of the Hill and Rutherford cases, he contends that recent events in other cases in foreign jurisdictions have changed the validity of those two opinions. Rolling is mistaken and there is no lawful or evidentiary basis to conclude that either decision is in question.

Issue III: Rolling suggests that his First Amendment rights will be violated by the use of pancuronium bromide if the execution procedure fails in the administration of the first drug. This identical claim was found to be without merit in Rutherford v. State, 926 So.2d 1100 (Fla. 2006). Rolling is entitled to no further review on this claim.

Issue IV: Rolling's last claim as previously pled is bottomed upon the September 17, 2006, ABA Report—which finds fault with numerous aspects of the Florida death penalty scheme. None of the concerns voiced in the ABA Report are applicable to Rolling's case. For example, Rolling pled guilty (no exonerations concerns as to the five murders); the jury's recommendations were 12-0 for death and therefore, his case was not an override; he had clemency consideration of which he does not complain and he has never presented evidence to reflect either mental retardation or that he suffers from a "severe mental disability". The ABA Report is not newly discovered evidence and cannot provide the basis to authorize any additional, successive postconviction review of these otherwise valid guilty pleas and death sentences for the five Gainesville murders.

ARGUMENTS

ISSUE I: PUBLIC RECORDS

On October 4, 2006, the trial court entered its Order denying Rolling's public records requests, finding that under Fla.R.Crim.P. 3.852(h)(3), he was seeking public records outside the scope of the rule. The Court further articulated that the issue, as to the lethal injection challenge upon which the public records were based, has been rejected by the Florida Supreme Court in Hill v. State, 921 So.2d 579 (Fla. 2006), cert. denied, Hill v. Florida, 126 S.Ct. 1441 (Feb. 27, 2006), and Rutherford v. State, 926 So.2d 1100 (Fla. 2006), cert. denied, Rutherford v. Florida, 126 S.Ct. 1191 (Jan. 31, 2006), reaffirming Sims v. State, 754 So.2d 657 (Fla. 2000), cert. denied, Sims v. Moore, 528 U.S. 1148 (2000).

Rolling presented no additional arguments in his successive motion for postconviction relief that would have warranted reconsideration of this claim from the public record requests. Moreover, he has failed to assert any further legal basis herein to suggest the trial court abused its discretion in finding the public records demands wanting.

The trial court ascertained as to these additional public records demands, particularly as to the Medical Examiner, Eighth

District,[7] Rolling made no representation regarding what records he believed were in the possession of the agency which would support a colorable claim for postconviction relief, nor did he demonstrate that these records could not have been requested at an earlier date. Rolling's failure to establish that he could not have timely sought production of the documents, or that the documents were previously requested but unlawfully withheld, is evident. See Buenoano v. State, 708 So.2d 941, 953 (Fla. 1998).

Rolling, like Hill and Rutherford before him, sought to secure public records regarding the autopsies from the past 16 executions, not including Hill's September 20, 2006, execution. Those records have been available since February 23, 2000 through April 5, 2005, however Rolling has provided no basis to overcome the procedural default in securing records under Rule 3.852.[8]

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[7] The trial court noted that the State had furnished an affidavit from the Medical Examiner's Office, Eighth District, stating that no prior public records requests have been made by Rolling seeking any information.

[8] Although a request for public records under Rule 3.852(h)(3) is contingent upon the signing of a death warrant, Rule 3.852(i) "allows collateral counsel to obtain additional records at any time if collateral counsel can establish that a diligent search of the records repository has been made and 'the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence.'" Sims, 753 So.2d at 70-71 (quoting Rule 3.852(i)(1)). Rolling has not sought

As the trial court held, "[D]efendant cannot now make a public records request to delay his execution, particularly when he has ample time to request these records before." (Rolling Order, October 9, 2006 p. 4). Sims v. State, 753 So.2d at 70; Tompkins v. State, 872 So.2d 230, 244 (Fla. 2003).

ISSUE II: LETHAL INJECTION

Rolling contends that new evidence has come to light which brings into question the holding in Sims v. State, 754 So.2d 657 (Fla. 2000). He asserts his right to be free from "cruel and unusual punishment under the Eighth and Fourteenth Amendments" is in jeopardy because of the "new evidence from THE LANCET article" regarding lethal injection. Similar claims were raised in Hill and Rutherford, supra, and in both cases this court found the claims meritless.

Albeit, the Sims Court rejected Professor Radelet's and Dr. Lipmann's testimony about the parade of "horribles that could happen if a mishap occurs during the execution…" Sims 754 So.2d at 668, Rolling, like Hill and Rutherford, claims to have "recent" empirical evidence of the "infliction of cruel and

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records under 3.852(i)(1), however any attempt would be groundless because, Rule 3.852 is not intended for use by defendants as . . . *nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry.* Glock v. State, 776 So.2d 243, 253 (Fla. 2001) (quotation marks omitted), *quoting* Sims v. State, 753 So.2d 66, 70 (Fla. 2000) (emphasis added

unusual punishment" of execution by lethal injection based on research letters by Dr. Davis A. Lubarsky, published in the April 16, 2005, issue of THE LANCET. Specifically, "the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed":

> "Our data suggest that anaesthesia methods in lethal injection in the USA are flawed. Failures in protocol design, implementation, monitoring and review might have led to the unnecessary suffering of a t least some of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia cannot be certain. Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injections is warranted."

Koniaris L.G., Zimmers T.A., Lubarsji D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution. Vol. 365. THE LANCET 1412-14 (April 16, 2005).

Rolling is entitled to no relief on this claim. First, although he had ample opportunity to challenge execution by lethal injection, he has failed to explain why he did not do so in his 2000 original postconviction motion which was still pending -- awaiting evidentiary hearing, at the time the method of execution became lethal injection.[9] He is procedurally barred

[9] Lethal injection became the method of execution in January 2000. There was a full-blown evidentiary hearing on this issue in Sims v. Moore, 754 So.2d 657 (Fla. 2000). After the hearing, the trial court determined that lethal injection is constitutional and that finding was upheld by the Florida

from raising this claim in this successive motion.[10] Second, the research letters of Dr. Lubarsky and colleagues are not new as far as any objections to the use of lethal injection as a method of execution. In Sims, 754 So.2d at 668 footnote 19 (Emphasis added) the testimony showed:

> n19 Professor Radelet testified that lethal injection is the most commonly "botched" method of execution in the United States, with Virginia and Texas being the two states with the highest number of mishaps. He

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Supreme Court. See also Provenzano v. State, 761 So.2d 1097, 1099 (Fla. 2000) (concluding that "execution by lethal injection does not amount to cruel and/or unusual punishment"); Provenzano v. Moore, 744 So.2d 413, 415 (Fla. 1999) (stating that "Florida's electric chair is not cruel or unusual punishment"), cert. denied, 528 U.S. 1182, 145 L.Ed.2d 1122, 120 S.Ct. 1222 (2000); Power v. State, 886 So.2d 952 (Fla. 2004) (rejecting constitutional challenge to execution by lethal injection and electrocution); Johnson v. State, 804 So.2d 1218, 1225 (Fla. 2001) (rejecting constitutional challenge to execution by lethal injection and electrocution); Jones v. State, 701 So.2d 76, 79 (Fla. 1997)(same); Medina v. State, 690 So.2d 1241, 1244 (Fla. 1997)(same), and more recently in Suggs v. State, 923 So.2d 419(Fla. 2006)(" Suggs claims that execution by electrocution or lethal injection constitutes cruel and unusual punishment. Since this claim was not raised on direct appeal, it is procedurally barred. This claim is also without merit because this Court has consistently rejected arguments that these methods of execution are unconstitutional. See, e.g., Sochor v. State, 883 So.2d 766, 789 (Fla. 2004) (rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); Provenzano v. Moore, 744 So.2d 413, 414-15 (Fla. 1999) (holding that execution by electrocution is not cruel and unusual punishment); Sims v. State, 754 So. 2d 657, 668 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment)").

[10] Under Rule 3.851, and 3.850, Fla.R.Crim.P., a defendant must present his claim within a year of the issue becoming known. Rolling certainly had the wherewithal to do so just like Sims.

claims that 5.2 percent of the lethal injections encountered unanticipated problems. He also provided examples of what could go wrong during the lethal injection, citing to specific examples throughout the country. The professor admitted, however, that the documented occurrences in his study came from newspaper accounts of the execution and did not come from first-hand, eyewitness accounts or formal findings following a hearing or investigation into the matter.

Dr. Lipman, a neuropharmacologist, provided examples of what could happen if the drugs are not administered properly or if the personnel are not adequately trained to administer the lethal substances. For example, if too low a dose of sodium pentothal is administered, the inmate could feel pain because low dosages of such drug have the opposite effect--it makes the pain more acute. In addition, if the drugs are not injected in the proper order, the inmate could suffer pain because he would not be properly anesthetized. Dr. Lipman further noted that if the drugs are not administered in a timely manner, the sodium pentothal could wear off, causing the inmate to regain consciousness. However, Dr. Lipman admitted that lethal injection is a simple procedure and that if the lethal substances to be used by DOC are administered in the proper dosages and in the proper sequence at the appropriate time, they will "bring about the desired effect." He also admitted that at high dosages of the lethal substances intended be used by the DOC, death would certainly result quickly and without sensation.

Unless Rolling can demonstrate that the latest research letters either are so new as to not be uncovered or are so unique that new light is shed on this issue, the trial court was and is bound by the rulings finding execution by lethal injection constitutional. Hill v. State, 921 So.2d 579, 583 (Fla. 2006) (This study does not require reconsideration of

Sims, 754 So.2d at 668 (Fla. 2000)). In Hill the Court reasoned:

> As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. Sims, 754 So.2d at 665 n.17. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. [N.4.] And, in Sims, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. Id. at 668.
>
> [N.4.] In Sims, we recognized that Florida's procedures address some of the reasons given in the study for finding that two grams of anesthesia "may be overly simplistic." The study attributes its results, in part, to the lack of medical training in the personnel and the inmate's high level of anxiety immediately before the execution. In Florida, both a doctor and a physician's assistant are present during the execution, and the inmate is provided with a Valium before the execution "if necessary to calm anxiety." Sims, 754 So.2d at 665 n.17.

Rutherford v. State, 926 So.2d 1100 (Fla. 2006)(same); Suggs v. State, 923 So.2d 419 (Fla. 2006); Robinson v. State, 913 So.2d 514 (Fla. July 7, 2005) (affirming summary denial of claim that execution by lethal injection is unconstitutional, holding that Supreme Court has repeatedly rejected the claim as being without merit); Elledge v. State, 911 So.2d 57 (Fla. 2005) (affirming summary denial of claim that execution by electrocution or lethal injection is unconstitutional because it constitutes cruel and unusual punishment, noting that Supreme Court has

repeatedly rejected the claim as being without merit); Johnson v. State, 904 So.2d 400 (Fla. 2005) (holding claim that execution by lethal injection constitutes cruel and unusual punishment in violation of both the Florida and United States Constitutions is without merit and was properly denied without an evidentiary hearing); Parker v. State, 904 So.2d 370 (Fla. 2005) (upholding summary denial of claim that execution by lethal injection or electrocution is cruel and unusual punishment because the Court has repeatedly held that neither form of execution is cruel and unusual punishment).[11]

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[11] The Eighth Circuit rejected Dr. Lubarsky's LANCET research paper in Brown v. Crawford, 408 F.3d 1027 (8th Cir. May 17, 2005), cert. denied Brown v. Crawford, 162 L.Ed.2d 310, 125 S.Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005). See: Beardslee v. Woodford, 385 F.3d 1064 (9th Cir 2005) (denied challenge to California's protocols and drugs); LeGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998) (Arizona's use of lethal injection constitutional); Williams v. Bagley, 380 F.3d 932 (6th Cir. 2004).

Albeit Rolling has pointed to six cases[12] "outside" Florida reflecting hearings as to lethal injection/protocol challenges, the facts remain that Florida's process was not and is not under any scrutiny based upon the "study". See: Hill v. Crist, 2006

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[12] Morales v. Woodford, 2006 U.S. Dist.LEXIS 42153 (N.D. Cal. 2006)(Federal evidentiary hearing on California's protocols held September 2006); Taylor v. Crawford, 457 F.3d 902 (8th Cir. 2006)(Remanded in light new protocols promulgated by the Missouri); Arkansas (Davis) and Delaware (Jackson) cases where the federal district court reviewed state protocols; and Patton v. Jones, 2006 U.S. App. LEXIS 22312 (August 26, 2006)(Affirmed denial of motion to stay execution) holding:

> In light of the district court's findings and the defendants' recent revision to the protocol, we conclude that Patton has failed to establish a "significant possibility of success on the merits" of his Eighth Amendment claims. Hill, 126 S. Ct. at 2104. In reaching this conclusion, we agree with the district court that the critical question in this case "is not what is optimally desirable," as, for example, in a surgical setting, but rather "what is minimally required" to avoid a violation of the Eighth Amendment. ROA, Vol. 4 at 239; see generally Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (holding that punishments are cruel when they "involve the unnecessary and wanton infliction of pain"); In re Kemmler, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 519 (1890) (holding that "[p]unishments are cruel when they involve torture or a lingering death"). Thus, we conclude there is nothing in the record sufficient to overcome the presumption created by Patton's late filing of his § 1983 action.

And Brown v. Beck, 2006 U.S. Dist. LEXIS 60084 (E.D.N.C. 2006) (Denied Stay).

U.S. Dist. LEXIS 62831 (2006),[13] the District Court therein detailed the issue "Hill bases his original and amended complaints on the affidavit of Dr. David A. Lubarsky (doc. 2, Attachment B) who co-authored a study published in The Lancet, "Inadequate Anaesthesia in Lethal Injection for Execution,' Vol. 365, The Lancet 1412-14 (April 16, 2005) (doc. 2, Attachment C). n3 The Lancet study explained that a typical lethal injection protocol consists of administering a succession of three drugs to effect the inmate's death." (Footnotes omitted).[14]

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[13] Affirmed in Hill v. McDonough, 2006 U.S.App. LEXIS 23473 (11th Cir. Sept. 15, 2006), cert. denied, 2006 U.S. LEXIS 5412 (Sept. 20, 2006).

[14] The Court observed:

> While Florida's procedure was not examined in the study, Hill argues that Florida's practice is "substantially similar" and thus poses the same risk to inmates. He requests a preliminary injunction temporarily prohibiting his execution as well as a permanent injunction forever barring DOC from using its current lethal injection method.
>
> In his amended complaint, Hill also raises for the first time before this Court his concerns with regard to the formulation and adoption of Florida's lethal injection procedures. He contends, for example, that there is an absence of standardized procedures for the administration of the chemicals and unqualified personnel involved in the procedure as well as insufficient guidelines upon which these personnel can rely if they are required to exercise their discretion during the process of the execution. Additionally, he contends that Florida's protocol has no plan in place if the inmate requires medical assistance during the execution. (See Doc. 37 at 4). n5

The federal court denied relief in Hill, based on his failure to present a timely claim, however the court noted:

> While the Lancet study itself may be relatively new, the factual basis of Hill's claim (that the doses of the anesthetic sodium pentothal may be insufficient, thus permitting those injected to experience the feelings of being suffocated and having a heart attack, but unable to express their pain by virtue of being paralyzed by pancuronium), has been raised and disposed of in other cases. See Brown v. Crawford, 408 F.3d 1027 (8th Cir. 2005); Bieghler v. State, 839 N.E.2d 691 (Ind. 2005). This Court also held in its previous order dated January 21, 2006 that "[p]laintiff has made no showing that he could not have discovered these underlying predicates through the exercise of due diligence." (Doc. 10 at 4).

And of course as the trial court found, Florida's lethal injection methods were subjected to a full evidentiary hearing in 2000 in Sims v. State, 754 So.2d 657 (Fla. 2000), and Rolling could have challenged the procedure after the Sims decision was rendered.

> Since that time, the Court has had several opportunities to revisit its holding in Sims II and has declined to do so. In 2006, the Court was twice presented with challenges to lethal injection based upon the Lancet study, the same study Defendant relies

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n5 These same concerns were addressed in Sims. See Sims v. State, 754 So. 2d 657, 666 n.18. The Florida Supreme Court examined them collectively, stating, "Because these sub-issues concern the adequacy and sufficiency of the DOC's written protocol, we have treated these seven sub-issues together." Id. The court went on to find that DOC's procedures for administering lethal injection "do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." Id. at 668.

> upon in his motion. Rutherford, 926 So. 2d at 1113; Hill, 921 So. 2d at 582. The Court determined that the Lancet study was not sufficient to warrant reconsidering Sims II, nor did it require an evidentiary hearing on the matter. Hill, 921 So. 2d at 583; Rutherford, 926 So. 2d at 1113. Despite developments in other jurisdictions, this matter is settled law in Florida, and this Court is bound by precedent. It is not within the purview of this Court to reconsider this issue, and therefore an evidentiary hearing on this matter is not warranted and Defendant's claim is without merit.

(Rolling Order dated October 9, 2006, p. 6).

Rolling's case is controlled Hill and Rutherford, supra, hence he is entitled to no redress.

ISSUE III: ADMINISTRATION OF PANCURONIUM BROMIDE DOES NOT VIOLTE ROLLING'S FIRST AMENDMENT RIGHT TO FREE SPEECH

The trial court in denying relief as to this claim relied on the decision in Rutherford, 926 So.2d at 1114, wherein the Court held that there was no evidence via The LANCET article or the Florida procedures that the proper administration of sodium pentothal would not be administered in such a manner that a prisoner would be conscious and therefore able to feel the effects of the remaining chemicals. Rolling's "claim is without merit."

Rolling contended below that there is no "penological purpose. . . by paralyzing Rolling and preventing him from communicating that the execution process has not functioned as stated...", by the use of pancuronium bromide as part of the

three drug cocktail utilized in Florida's lethal injection procedures per Sims.

In Rutherford 926 So.2d at *8-9 the Court held:

> Rutherford concedes that if the sodium pentothal is administered properly, he will be unconscious and therefore unable to feel the effects of the administration of the remaining two chemicals. Therefore, according to Rutherford, he will have nothing to communicate concerning the execution procedures. The State maintains that no evidence exists that the sodium pentothal will be administered improperly in this case. In fact, in response to Rutherford's motion for discovery, the Department of Corrections (DOC) presented the affidavit of William Matthews, a physician's assistant employed by the DOC. According to Matthews' affidavit, he has been "at Florida State prison during each of the executions carried out by lethal injection." Matthews stated that "all executions by lethal injection have been carried out under the same procedures and protocols that were reviewed by the Florida Supreme Court in Sims."
>
> Based on the fact that two grams of sodium pentothal is sufficient to result in a loss of consciousness, and because Rutherford has failed to demonstrate that the sodium pentothal will be administered improperly or that he will be conscious when the pancuronium bromide and potassium chloride are administered, we conclude that the motion, files, and record conclusively show that Rutherford is not entitled to relief on this claim.

Rolling has not cited either case law or an argument that would suggest that the holding in Rutherford is no longer binding. See Beardslee v. Woodford, 395 F.3d 1064, 1076 (9th Cir 2005) (Rejecting similar contention).

ISSUE IV: ABA REPORT

The trial court, in denying review as to this matter, found:

> "The ABA Report is divided into thirteen chapters specifically directed to problem areas of Florida's capital scheme in need of reform. The Court agrees with the response of the State; this report itself is not newly discovered evidence, but a compilation and organization of previously existing "facts," organized in support of the recommended reforms. The Court finds that the majority of these recommended reforms are simply inapplicable to the case before the Court or are matters not within the purview of the Court. These points are listed in the Executive Summary, and addressed more specifically in the 400 pages that constitute the ABA Report itself. See American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report (2006) [hereinafter ABA Report]; American Bar Association, Executive Summary of the Florida Death Penalty Assessment Report (2006) [hereinafter ABA Executive Summary]."

(Rolling Order, October 9, 2006, p. 8.)

Citing Furman v. Georgia, 408 U.S. 238 (1972), as the basis for his contention the Florida death penalty statute is facially unconstitutional, Rolling points to a September 17, 2006, report entitled Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report,[15]

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[15] The ABA Report is a product of the Death Penalty Moratorium Implementation Project tasked with collecting and monitoring death penalty developments to " encourage government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms." (ABA Report -Executive Summary p. i). While the report has just been released, a fair assessment of the information collected reflects that much of the data is dated or

(hereinafter ABA Report), provides the "newly discovered evidence" entitling him to file a successive postconviction motion.[16]

Initially, Rolling is procedurally barred from asserting this claim since he did not specifically argue the facial constitutionality of the death penalty on direct appeal.[17] Elledge v. State, 911 So.2d 57,78 (Fla. 2005).

Second, the ABA Report is "not newly discovered evidence" because, while it is of recent vintage, having been published on September 17, 2006, the content of the 404 page report is

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no longer apropos and in many instances the recommendations are contrary to well-established state and federal statutes and decisional law. Moreover, there is no indication that, other than the individuals who drafted the report, the ABA membership as a whole, have endorsed any portion of the report. And it is also interesting to note that the Death Penalty Moratorium Implementation Project has invaded other states, not just Florida, and have likewise found that much of other states' death penalty procedures fall short of any ABA standards.

[16] In Jones v. State, 591 So.2d 911, 916 (Fla. 1991), the Court held: "The Hallman definition of newly discovered evidence remains intact. That is, the asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.' Hallman, 371 So.2d at 485."

[17] Rolling argued on direct appeal that the death sentences for these five murders were not proportional. Rolling v. State, 695 So.2d 278, 296 (Fla. 1997).

nothing more than a historical recounting of the death penalty in Florida since 1975, in essence it is just "a report".

The ABA Report is not evidence at all. Rather, it is an overview of the personal opinions of selected individuals comprising the ABA's Death Penalty Moratorium Implementation Project's Florida contingency, utilizing as a "benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States" to access Florida death penalty practices, procedures and caselaw.[18]

Personal opinions of Florida's death penalty scheme do not tend to prove or disprove Rolling's guilt or innocence or whether his death sentence is appropriate. Note: Payne v. Tennessee, 501 U.S. 808, 830 n2 (1991)(citing Booth v. Maryland, 482 U.S. 496 (1987)). And, of course, these personal opinions would not be admissible at trial or a penalty phase, and are in fact forbidden in Florida capital cases, §921.141(7) Fla. Stat. See: Perez v. State, 919 So.2d 347, 377 (Fla. 2005)(Emphasis added):

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[18] These personal opinions are not facts as envisioned by the concept of "newly discovered evidence" because they are not "a fact" in the sense of evidence which is anything which tends to prove or disprove a material fact.

Section 921.141(7), Florida Statutes (2001), provides:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and *opinions* about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

> § 921.141(7), Fla. Stat. (2001) (emphasis supplied). This Court has expressly held that witness testimony during the presentation of victim impact evidence should not include testimony with regard to witnesses' opposition to the death penalty. See Floyd v. State, 569 So. 2d 1225, 1230 (Fla. 1990) (holding trial court did not abuse its discretion when it prevented victim's daughter from testifying to her preference that defendant should not receive the death penalty); see also Card v. State, 803 So. 2d 613 (Fla. 2001) (noting witness's testimony concerning proper punishment was outside the bounds of proper impact evidence). (Footnote omitted).

See also Martin v. Wainwright, 770 F.2d 918, 936-37 (11th Cir.1985) (barring the admissibility of testimony concerning whether the death penalty has a deterrent effect because such evidence is designed to persuade the sentencer that the legislature erred when it enacted a death penalty statute); Thompson v. State, 619 So.2d 261, 266 (Fla. 1993)(finding no abuse of discretion in trial court's refusal to allow defense witnesses to express their personal opinions concerning the

appropriateness of the death penalty, citing Floyd v. State, 569 So.2d 1225, 1230 (Fla. 1990) (finding no abuse of discretion in the trial court's refusal to allow the victim's daughter from expressing her opinion regarding the death penalty).

Newly discovered evidence must be admissible to warrant granting a new trial or penalty phase and the ABA Report clearly is not. Huffman v. State, 909 So.2d 922, 923 (Fla. 2d DCA 2005) (newly discovered evidence must be admissible); Jones v. State, 709 So.2d 512, 521 (Fla. 1998) (the trial court is to "consider all newly discovered evidence which would be admissible" at trial). And there is nothing presented herein, that would entitle Rolling to further evidentiary consideration when there is neither a nexus with the ABA concerns or deficiency in the sentences imposed in his case. See Glock v. Moore, 776 So.2d 243, 249-50 (Fla. 2001) (rejected a newly discovered evidence claim based on an interim report by the New Jersey Attorney General's Office regarding racial profiling on the New Jersey Turnpike where Glock was stopped in the murder victim's stolen car. The trial court rejected any newly discovered evidence claim and also found the claim untimely because it was an "eleventh hour exercise in speculation".)[19]

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[19] In Glock, the Court affirmed the trial court's conclusions regarding the denial of the newly discovered evidence claim on both prongs of Jones. The claim that minorities were subject to a disproportionate number of traffic

Here, as in Glock, Rolling cannot meet either prong of Jones. Like Glock, many of the matters discussed in the ABA Report, and raised by Rolling in his second successive motion, have been known for years. For example, any discussion in the ABA Report regarding jury unanimity in death recommendation, is of no moment in Rolling's case since the jury's recommendations in "all five murders" was 12-0. However, even if that were not the case, allowing a jury to recommend death by a majority vote has been authorized by statute since 1972, and has been discussed in numerous Florida cases,[20] and approved by the United

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stops on the New Jersey Turnpike was a claim that has been known for a number of years, as indicated by reported cases addressing that issue and therefore, they found the claim procedurally barred. The Court also concluded that the motion was insufficiently pled because it did not present evidence that would probably produce an acquittal or result in a successful motion to suppress. The Court also found nothing that Glock asserted in his successive motion contradicted the "established fact" that the trooper stopped the victim's car because the license plate was improperly displayed. The Court also noted that Glock was white. Glock, 776 So.2d at 252. The Court concluded even assuming that an official policy of racial profiling existed in New Jersey in 1983, it is mere speculation that the stop was connected to such a policy.

[20] Butler v. State, 842 So.2d 817, 834 (Fla. 2003)(Wells, J., concurring) (noting that a non-unanimous jury is that this is what has been mandated by Florida statute since 1972 . . . and "has been applied for twenty-eight years."); Parker v. State, 904 So.2d 370, 383 (Fla. 2005) (observing: "[t]his Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote."); Alvord v. State, 322 So.2d 533, 536 (Fla. 1975) (rejecting a contention that a jury recommendation by non-unanimous vote violates the Sixth Amendment right to a jury trial).

States Supreme Court in Spaziano v. Florida, 468 U.S. 447 (1984). Rolling's claim is procedurally barred for the same reasons as the claim in Glock was procedurally barred. Rolling's motion is also insufficiently pled, just as Glock's was, because it does not present evidence that would probably produce an acquittal in any retrial, and Rolling, having pled guilty, cannot present evidence regarding innocence of the murders or the death penalty.[21] Rolling's claim, like Glock's, is merely an "eleventh hour exercise in speculation."[22]

Assuming *arguendo*, that there is some logical basis to further analyze the ABA Report herein, Rolling must identify those provisions where some relevance accrues to his

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[21] Rolling has never suggested that his guilty pleas to the crimes charged were ever questionable or that he is innocent of the crimes or penalty imposed. In fact, the record is to the contrary. He has not complained of postconvictions counsel's actions nor argued that in postconviction he has been thwarted from raising claims because of funding. The jury in his case was unanimous as to their recommendations and his case has been processed for executive clemency. Race or geographic disparity have never been an issue and albeit Rolling has presented evidence in mitigation as to his mental health status, that evidence falls far short of the severe mental disability contemplated by the ABA Report.

[22] Certainly, any generalized, systematic challenge to Florida's death penalty system, highlighting "alleged problems", constitutes a last minute attempt to delay further proceedings.

circumstances.[23] He is limited to challenges or problems that occurred in his particular case.[24] The ABA Report discusses racial disparity in imposing death in Florida capital cases, however, Rolling is a white male, who murdered five white people in Gainesville, Florida.[25] The ABA Report discusses mental disabilities, however Rolling has made no argument that he

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[23] To the extent Rolling may attempt to argue that he is not required to show a nexus between the circumstances of his case and the recommendations spewed forth by the ABA Report identifying perceived deficiencies, he is wrong. Sabri v. United States, 541 U.S. 600, 608-09 (2004)("We add an afterword on Sabri's technique for challenging his indictment by facial attack on the underlying statute, and begin by recalling that facial challenges are best when infrequent. See, e.g., United States v. Raines, 362 U.S. 17, 22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960) (laws should not be invalidated by "reference to hypothetical cases"); Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-220, 57 L. Ed. 193, 33 S. Ct. 40 (1912) (same). Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of "premature interpretatio[n] of statutes" on the basis of factually bare-bones records. Raines, supra, at 22, 4 L. Ed. 2d 524, 80 S. Ct. 519."

[24] For example, the ABA Report discusses the use of judicial overrides under Florida capital scheme. Rolling's case is not an override case; his jury recommended 12-0 for death in each of the five murders.

[25] While instances exist where a third-party standing exists for white defendants to assert the rights of racial minorities as jurors, as the court did in Powers v. Ohio, 499 U.S. 400, 410-11 (1991), and Campbell v. Louisiana, 523 U.S. 392 (1998), it is quite another matter to permit a white defendant standing to argue for a moratorium based on racial disparities that do not, and can not, affect a particular case.

suffers from "mental retardation or severe mental illness". Rolling simply has no standing to raise these types of issues.[26]

The ABA Report is a collection of information drawn from public sources in areas both well-litigated and extensively analyzed by law review articles and task forces. However much of the recommendations of the Report is also seriously dated or biased, and/or contrary to state law and federal and state court decisions. The ABA Report suffers a time-warp -- repeatedly referring to a time span between 1973 through 1995, with only superficial recognition and acknowledgment of significant changes in the past decade making most of the Report's findings factually inaccurate or legally insignificant.[27]

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[26] See Burch v. Louisiana, 441 U.S. 130, 132 n4 (1979) (noting that because one of the defendants was convicted by a unanimous jury, it lacks standing to challenge the constitutionality of the provisions of Louisiana law allowing conviction by a non-unanimous jury). See: Kowalski v. Tesmer, 543 U.S. 125, 127 (2004)("The attorneys here claim standing based on a future attorney-client relationship with as yet unascertained Michigan criminal defendants who will request, but be denied, appellate counsel under the statute. In two cases in which this Court found an attorney-client relationship sufficient to confer third-party standing -- Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 105 L.Ed.2d 528, 109 S.Ct. 2646, 109 S.Ct. 2667, and Department of Labor v. Triplett, 494 U.S. 715, 108 L.Ed.2d 701, 110 S.Ct. 1428 -- the attorneys invoked known clients' rights, not those of the hypothetical clients asserted here.").

[27] See Justice Scalia's special concurrence in Marsh v. Kansas, 548 U.S.___, 126 S.Ct. 2516, 2531-39 (2006), wherein he discusses a 1987 article that "has been highly influential in the abolitionist world" which allegedly identified 23 individuals who were executed despite their innocence. Hugo

The ABA Report does identify a number of areas where the "Florida death sentencing scheme" is purportedly "defective", not "unconstitutional." Interestingly none of those areas of deficiency apply to Rolling. And most importantly, none of the areas listed are "new" or "newly evolving", which means that any claim as to the ABA Report's information was available and could have been previously raised by Rolling in his previously filed postconviction litigation. Therefore, the context of the Report at the eleventh hour cannot overcome any bar.[28]

Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 STAN. L.REV. 21 (1987). The article's "obsolescence began at the moment of publication." The most recent executions the article considered were in 1984, 1964, and 1951; the rest predated World War II. The article's conclusions are "unverified" and unworthy of credence. He explained that mischaracterization of reversible error as actual innocence is endemic. Marsh, 126 S.Ct. at 2537 (Scalia, J., concurring).

[28] To the extent Rolling's theme is that Furman, supra, continues to be violated by the practices and case law governing Florida's death penalty, Rolling is wrong. Many of the grumbling predicated on the ABA Report resurrect issues that were the attacks addressed in Proffitt v. Florida, 428 U.S. 242 (1976), and subsequent decisions upholding the statute:

> Florida, like Georgia, has responded to Furman by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide

Some of the ABA Report perceived deficiencies entail –

1. Exonerations – In fact, in 2002 the Florida Commission on Capital Cases prepared a report entitled Case Histories, A Review of 24 Individuals Released from Death Row, which reviewed the circumstances of almost all of the 22 exonerated individuals identified in the ABA Report. In that report, the Commission was acting in response to yet another "recent study claiming that Florida has the highest rate of death row releases...." In researching in-depth the 24 cited cases therein, the Commission found –

> jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed. See Furman v. Georgia, 408 U.S., at 310 (STEWART, J., concurring). Accordingly, the judgment before us is affirmed.

Since that decision, 30 years ago, the Florida death penalty has weathered a plethora of challenges "chronicled" in the ABA Report. Unsurprisingly, the ABA Report chooses to ignore the decisions during this period that approve of the Florida procedures. For example, the Supreme Court has previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Hildwin v. Florida, 490 U.S. 638, 640-641, 104 L.Ed.2d 728, 109 S.Ct. 2055 (1989) (*per curiam*)). See other examples, State v. Dixon, 283 So.2d 1 (1973); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981)(Challenge to the means the Florida Supreme Court undertakes appellate review in capital cases.).

> "The guilt of *only* four defendants, however, was subsequently doubted by the prosecuting office or the Governor and Cabinet members: Freddie Lee Pitts and Wilbert Lee were pardoned by Governor Askew and the Cabinet, citing substantial doubt of their guilt; Frank Lee Smith died before the results of DNA testing excluded him as the perpetrator of the sexual assault, and the State chose not to retry James Richardson due to newly discovered evidence and the suspicion of another perpetrator. An analysis of the remaining 20 inmates can be divided into three categories that account for their releases: (1) seven cases were remanded due to evidence issues, (2) an additional seven were remanded in light of witness issues, and (3) the remaining six were remanded as a result of issues involving court officials."

(Emphasis added).

On October 13, 2006, the Commission on Capital Cases, as part of the oversight commission in capital cases will release yet another report entitled Truly Innocent? A Review of the 22 Case Histories of Inmates from Florida Death Row, prepared in material part to respond to the ABA Report, -- again disputing this "latest study of exonerees".

Interestingly, in Kansas v. Marsh, __ U.S. __, 126 S.Ct. 2516, 2535-38, 2006 U.S. LEXIS 5163 (2006)(Upholding Kansas' death penalty on a challenge that equipoised mitigation and aggravation should not permit imposition of the death penalty), Justice Scalia, concurring, took issue with the notion of courts embracing articles proclaiming "innocent exonerees." Pointing to the Tibbs case from Florida, he observed:

> In its inflation of the word "exoneration," the Gross article hardly stands alone; mischaracterization of

reversible error as actual innocence is endemic in abolitionist rhetoric, and other prominent catalogues of "innocence" in the death-penalty context suffer from the same defect. Perhaps the best-known of them is the List of Those Freed From Death Row, maintained by the Death Penalty Information Center. See http://www.deathpenaltyinfo.org/article.php?scid=6&did=110. This includes the cases from the Gross article described above, but also enters some dubious candidates of its own. Delbert Tibbs is one of them. We considered his case in Tibbs v. Florida, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982), concluding that the Double Jeopardy Clause does not bar a retrial when a conviction is "reversed based on the weight, rather than the sufficiency, of the evidence," id., at 32, 102 S. Ct. 2211, 72 L. Ed. 2d 652. The case involved a man and a woman hitchhiking together in Florida. A driver who picked them up sodomized and raped the woman, and killed her boyfriend. She eventually escaped and positively identified Tibbs. See id., at 32-33, 102 S. Ct. 2211, 72 L. Ed. 2d 652. The Florida Supreme Court reversed the conviction on a 4-to-3 vote. 337 So.2d 788 (1976). The Florida courts then grappled with whether Tibbs could be retried without violating the Double Jeopardy Clause. The Florida Supreme Court determined not only that there was no double-jeopardy problem, 397 So.2d 1120, 1127 (1981) (*per curiam*), but that *the very basis on which it had reversed the conviction was no longer valid law,* id., at 1125, and that its action in "reweighing the evidence" in Tibbs' case had been "clearly improper," id., at 1126. After we affirmed the Florida Supreme Court, however, the State felt compelled to drop the charges. The State Attorney explained this to the Florida Commission on Capital Cases: "'By the time of the retrial, [the] witness/victim . . . had progressed from a marijuana smoker to a crack user and I could not put her up on the stand, so I declined to prosecute. Tibbs, in my opinion, was never an innocent man wrongfully accused. He was a lucky human being. He was guilty, he was lucky and now he is free. His 1974 conviction was not a miscarriage of justice.'" Florida Commission on Capital Cases, Case Histories: A Review of 24 Individuals Released From Death Row 136-137 (rev. Sept. 10, 2002) http:// www.floridacapitalcases.state.

> fl.us/Publications/innocenceproject.pdf. Other state officials involved made similar points. Id., at 137.

Beyond per adventure, Rolling is not in a position to gain succor from the fact that exonerations have occurred in some capital cases in Florida. Rolling pled guilty to five capital murders and has never challenged the validity of those pleas.

The fact that some other death row inmates have had their convictions overturned and/or could not be retried does not stand as an obstacle regarding the appropriateness of Rolling's pleas and sentences.

2. **Inadequate Compensation for Conflict Trial Counsel in Death Penalty Cases** – The trial court did address the issue of conflict counsel in capital cases albeit Rolling did not have conflict counsel but rather was represented by the Alachua County Public Defender at all trial proceedings. The trial court noted:

> First, Defendant was represented by the public defender throughout this cause, and, as stated in his initial Rule 3.850 motion filed with this Court, Alachua County and the State of Florida provided the public defender with additional funds in excess of his normal budget. In his Amended Post Conviction Motion to Vacate and Set Aside Death Sentences with Appendix, filed April 9, 1999, specifically in paragraphs 56 through 64, Defendant set forth the amount of additional funds allocated and expended by the public defender from sources other than the public defender=s primary budget, which amounted to $150,800.00. (Am. Post Conviction Mot. to Vacate and Set Aside Death Sentences with App. P. 58a) The State of Florida=s Violent Crime Emergency Account Fund allotted an additional $900,000.00 for the prosecution and defense

> of this case. (Id. at p. 59) The public defender expended $255,837.00 for Defendant's defense. (Id. at p. 59a) The concern of under funding of the trial counsel is simply inapplicable to Defendant's case.

(Rolling Order, October 9, 2006 p. 9).

Rolling has neither standing nor any legal basis to suggest he was denied effective assistance of counsel at trial.[29] See Rolling v. State, 825 So.2d 293 (Fla. 2002).

3. Lack of Qualifications and Monitoring of Registry Counsel - The Commission on Capital Cases, created in 1985, is authorized by statute to regulate the actions of registry counsel. Fla. Stat. 27.709(2), provides in material part:

> (2) (a) The commission shall review the administration of justice in capital collateral cases, receive relevant public input, review the operation of the capital collateral regional counsel and private counsel appointed pursuant to ss. 27.710 and 27.711, and advise and make recommendations to the Governor, Legislature, and Supreme Court.
>
> (b) As part of its duties, the commission shall compile and analyze case-tracking reports produced by the Supreme Court. In analyzing these reports, the commission shall develop statistics to identify trends and changes in case management and case processing, identify and evaluate unproductive points of delay, and generally evaluate the way cases are progressing. The commission shall report these findings to the Legislature by January 1 of each year.
>
> (c) In addition, the commission shall receive complaints regarding the practice of any office of

[29] The record below reflects that Rolling had two of the most experienced capital defense attorneys in the state, the Public Defender Rick Parker and Assistant Public Defender John Kearns, plus a number of other assistant public defenders representing him at trial and at the penalty phase of his trial.

> regional counsel and private counsel appointed pursuant to ss. 27.710 and 27.711 and shall refer any complaint to The Florida Bar, the State Supreme Court, or the Commission on Ethics, as appropriate.

The ABA Report provides no basis for relief in Rolling's case. In the Assessment Team's recommendation on this score, they merely urge the State of Florida embrace the qualification standards of the ABA guidelines for defense attorneys. (See Recommendation 3). Even this Court in promulgating guidelines for regulation of the Bar membership has not embraced ABA standards.

The trial court specifically found that there was no "evidence of any deficiencies in the performance of Defendant's assigned counsel during post conviction proceedings in the trial court, including those being currently adjudicated.[30]

4. Inadequate Compensation for Registry Counsel - The Florida Legislature likewise has authorized reimbursement for registry counsel in the representation of capital defendants.

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[30] In fact in the Rutherford case also currently under active warrant, Rutherford's counsel likewise raised the issue of the ABA Report, to no avail. "Here Defendant fails to establish how the information gathered by the ABA assessment team regarding death penalty procedures falls within the consideration of 'newly discovered evidence' as contemplated by Rule 3.851 or Jones. See also, Trepal v. State, 846 So. 2d 305, 424 (Fla. 2004), receded from on different grounds, Guzman v. State, 868 So. 2d 498 (Fla. 2003)(holding an OIG report to be inadmissible hearsay). Thus, this claim is denied."

(Rutherford Order, October 6, 2006, Case No. 85-I-476, Santa Rosa County, County.)

§27.711(4)(a)-(h), Fla. Stat. (2006). Albeit Rolling has registry counsel for his postconviction litigation, there has been no claim that there is a lack of funding or compensation in the presentation of his litigation.[31] Moreover, the most the Assessment Team can report about compensation is that any compensation scheme should adopt ABA Guidelines.

5. Jury Confusion Predominantly Based on Instructions as to the Jury's Role and How to Determine the Appropriate Sentence - On direct appeal, Rolling argued that the HAC instruction was improper. The Florida Supreme court held in Rolling, 695 So.2d at 296-97:

> As the State correctly explains, the instant instruction, which is similar in all material aspects to the instruction upheld by this Court in Hall v. State, 614 So. 2d 473, 478 (Fla. 1993), has been

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[31] See: Fla. Dept. of Financial Services v. Freeman, 921 So.2d 598, *5 (2006):

> This Court has held that it is within the trial judge's discretion to grant fees beyond the statutory maximum to registry counsel in capital collateral cases when "extraordinary or unusual circumstances exist." Olive v. Maas, 811 So. 2d 644, 654 (Fla. 2002). In Olive, this Court held that fees in excess of the statutory cap are not always awarded to registry counsel in capital collateral cases; however, registry counsel is not foreclosed from requesting excess compensation "should he or she establish that, given the facts and circumstances of a particular case, compensation within the statutory cap would be confiscatory of his or her time, energy and talent and violate the principles outlined in Makemson and its progeny." Id.; see also Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986).

> reaffirmed on numerous occasions. See Geralds v. State, 674 So. 2d 96 (Fla. 1996); Merck v. State, 664 So. 2d 939, 943 (Fla. 1995). Consequently, we reject Rolling's claim that the trial court's instruction to the jury on the HAC aggravator was unconstitutional. We find that the jury in Rolling's penalty phase trial received a specific instruction which fairly apprised the jurors of the definition of each term as well as the surrounding circumstances the State had to prove to support this aggravating factor.

Whether there is any confusion regarding specific jury instructions depends upon court decisions, not whether the ABA approves of an instruction used in a given state. Rolling certainly raised his complaint about the application of the HAC instruction as to **one** of the murders, however he is not authorized to reargue any complaint in postconviction where the claim has been adversely decided on the merits.[32]

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[32] There is nothing in the ABA Report that reflects the recency of the report would have any impact on Rolling's claim.

Moreover see, Reynolds v. State, 934 So.2d 1128, 1156 (Fla. 2006), wherein the Court held, citing Rolling and the correctness of the trial court's finding that the HAC aggravator applied:

> This Court has repeatedly upheld the HAC aggravating circumstance in cases where a victim was stabbed numerous times. See, e.g. Guzman v. State, 721 So.2d 1155 (Fla. 1998); Mahn v. State, 714 So.2d 391 (Fla. 1998); Rolling v. State, 695 So.2d 278 (Fla. 1997); Williamson v. State, 681 So.2d 688, 698 (Fla. 1996); Finney v. State, 660 So.2d 674, 685 (Fla. 1995); Barwick v. State, 660 So.2d 685, 696 (Fla. 1995); Pittman v. State, 646 So.2d 167, 173 (Fla. 1994); Campbell v. State, 571 So.2d 415 (Fla. 1990); Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988); Nibert v. State, 508 So.2d 1 (Fla. 1987); Johnston v. State, 497 So.2d 863, 871 (Fla. 1986); Peavy v. State, 442 So.2d

6. Lack of Unanimity - The jury's recommendations for the five murders herein were all 12-0. The fact that other death row inmates may be on death row due to non-unanimous recommendations in their respective death penalty cases does not impact the recommendation here.[33] Moreover the trial court also notes that the Florida death penalty scheme has been upheld in Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984) and Proffitt v. Florida, 428 U.S. 242 (1976). And noteworthy, is that the United States Supreme Court neither in Ring v. Arizona, 536 U.S. 584 (2002) nor any subsequent case has determined Florida's scheme is suspect.

7. Judicial Override of a Jury's Recommendation (not including a life sentence if death is recommended)- Florida's death penalty scheme allowing the trial court to override a jury recommendation of life, if Tedder v. State, 322 So.2d 908 (1975), is satisfied, as approved in Proffitt, supra, has been

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> 200 (Fla. 1983). In Francis v. State, 808 So.2d 110 (Fla. 2001), we noted that we have upheld the application of HAC even when the "medical examiner determined that the victim was conscious for merely seconds." Id. at 135. In Rolling, we upheld the application of the HAC aggravating circumstance even when the medical examiner testified that the "victim would have remained alive for a period of thirty to sixty seconds." Rolling, 695 So.2d at 296.

[33] Moreover, albeit Rolling challenged Florida's death penalty statute in light of Ring v. Arizona, 536 U.S. 584 (2002), the Florida Supreme Court rejected, in his prior postconviction motion, that issue.

reaffirmed in Hildwin v. Florida, 490 U.S. 638 (1989)(*Per Curiam*), and Spaziano v. Florida, 468 U.S. 447 (1984); Marshall v. Crosby, 911 So.2d 1129, 1135 (Fla. 2005).

The fact that Rolling's case is not an override is all that needs to be said, however, the fact that the ABA Report urges eradication of the jury override is contrary to a plethora of case law and contrary to an otherwise valid statute.[34]

8. Transparency in Clemency Proceedings - Rolling had his opportunity to be considered for executive clemency. Of course, it should not surprise anyone that clemency was not forthcoming in light of the nature of the crimes admitted to and the unfettered prerogative of the Executive to deny clemency.[35] The

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[34] It is, of course, of no importance to the argument that overrides based on the court's decisions have not been aplenty.

[35] Justice Scalia, in his concurrence in Kansas v. Marsh, 126 S.Ct at 2539-39, succinctly places the ABA's hue and cry here into perspective:

> The dissent's suggestion that capital defendants are especially liable to suffer from the lack of 100% perfection in our criminal justice system is implausible. Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed. And of course capital cases receive special attention in the application of executive clemency. Indeed, one of the arguments made by abolitionists is that the process of finally completing all the appeals and reexaminations of capital sentences is so lengthy, and thus so expensive for the State, that the game is not worth the candle. The proof of the pudding, of course, is that as far as anyone can determine (and many are looking), none of cases included in the .027% error

fact that the ABA Report seeks more transparency in the Florida clemency process is contrary to the right of the Executive to

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rate for American verdicts involved a capital defendant erroneously executed.

Since 1976 there have been approximately a half million murders in the United States. In that time, 7,000 murderers have been sentenced to death; about 950 of them have been executed; and about 3,700 inmates are currently on death row. See Marquis, The Myth of Innocence, 95 J. Crim. L. & Criminology 501, 518 (2006). As a consequence of the sensitivity of the criminal justice system to the due-process rights of defendants sentenced to death, almost two-thirds of all death sentences are overturned. See ibid. "Virtually none" of these reversals, however, are attributable to a defendant's "'actual innocence.'" Ibid. Most are based on legal errors that have little or nothing to do with guilt. See id., at 519-520. The studies cited by the dissent demonstrate nothing more.

Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free. The American people have determined that the good to be derived from capital punishment -- in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes -- outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.

bestow clemency in a measured manner. Connecticut Board of Pardons et al. v. Dumschat et al., 452 U.S. 458 (1981); Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 284-85 (1998), wherein the Court observed:

> An examination of the function and significance of the discretionary clemency decision at issue here readily shows it is far different from the first appeal of right at issue in Evitts. Clemency proceedings are not part of the trial -- or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process. They are conducted by the Executive Branch, independent of direct appeal and collateral relief proceedings. Greenholtz, 442 U.S. at 7-8. And they are usually discretionary, unlike the more structured and limited scope of judicial proceedings. While traditionally available to capital defendants as a final and alternative avenue of relief, clemency has not traditionally "been the business of courts." Dumschat, 452 U.S. at 464. Cf. Herrera v. Collins, 506 U.S. 390, 411-415, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993) (recognizing the traditional availability and significance of clemency as part of executive authority, without suggesting that clemency proceedings are subject to judicial review); Ex parte Grossman, 267 U.S. 87, 120-121, 69 L. Ed. 527, 45 S. Ct. 332 (1925) (executive clemency exists to provide relief from harshness or mistake in the judicial system, and is therefore vested in an authority other than the courts).
>
> Thus, clemency proceedings are not "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," Evitts, supra, at 393. Procedures mandated under the Due Process Clause should be consistent with the nature of the governmental power being invoked. Here, the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges. Respondent is already under a sentence of death, determined to have

> been lawfully imposed. If clemency is granted, he obtains a benefit; if it is denied, he is no worse off than he was before. n5
>
> > n5 The dissent mischaracterizes the question at issue as a determination to deprive a person of life. Post, at 1. That determination has already been made with all required due process protections.

And in Sullivan v. Askew, 348 So.2d 312, 315 (Fla.), cert. denied, 434 U.S. 878 (1977), the court held:

> An executive may grant [or deny] a pardon for good reasons or bad, or for any reason at all, and his act is final and irrevocable. Even for the grossest abuse of this discretionary power the law affords no remedy; the courts have no concern with the reasons which actuated the executive. The constitution clothes him with the power to grant [or deny] pardons, and this power is beyond the control, or even the legitimate criticism, of the judiciary. Whatever may have been the reasons for granting [or denying] the pardon, the courts cannot decline to give [the decision] effect . . . and no court has the power to review grounds or motives for the action of the executive in granting [or denying] a pardon, for that would be the exercise of the pardoning power in part, and any attempt of the courts to interfere with the governor in the exercise of the pardoning power would be manifest usurpation of authority, no matter how flagrant the breach of duty upon the part of the executive, unless granted the power by competent authority or unless fraud has entered into the case.

See also: Roberts v. Butterworth, 668 So.2d 580 (Fla. 1996); Parole Comm'n v. Lockett, 620 So.2d 153 (Fla. 1993); §14.28, Fla. Stat. (1993). "All records and documents generated and gathered in the clemency process . . . are confidential and shall not be made available for inspection to any person except members of the Clemency Board and their staff. The Governor has

the sole discretion to allow records and documents to be inspected or copied." Fla. Admin. Code R. 27-app. (Rule 16 of the Rules of Executive Clemency).

In In re Advisory Opinion to the Governor, 334 So.2d 561 (Fla. 1976), the Court opined that the legislatively enacted Administrative Procedure Act, Chapter 120, Florida Statutes (1975), would not apply to the exercise of the executive branch's clemency power, stating:

> No aspect of clemency powers exist by virtue of a legislative enactment, and none could. These powers are "derived" solely from the Constitution. The exclusivity of the exercise of clemency powers by the executive branch is further buttressed in the areas under consideration by the procedural requirements of the Constitution itself. Where that document sufficiently prescribes rules for the manner of exercise, legislative intervention into the manner of exercise is unwarranted.

334 So.2d at 562 (footnote omitted). In Sullivan, 348 So.2d at 316, we stated that we would not "intrude on the proper execution of the executive [clemency] power." See: Turner v. Wainwright, 379 So.2d 148 (Fla. 1st DCA), aff'd, 389 So.2d 1181 (Fla. 1980).

While Rolling did not "receive clemency", he did receive the due process contemplated by Ohio Adult Parole Authority, supra. as part of the clemency proceedings. And of course the trial court correctly concluded that "there is no allegation

that Defendant did not receive minimal due process in his clemency proceedings." (Rolling Order, October 9, 2006, p. 12)

Neither he nor the ABA Report should be permitted to encroach upon the Executive's powers derived solely from the Constitution of Florida to dole out its largess.

9. Racial and Geographic Disparity - Rolling, of course, has no basis upon which to take succor from the ABA Report's criticism of alleged racial or geographic disparity in the death penalty.[36] Indeed, while there may be instances where such a claim may be made in a particular case, the fact remains the predominant recommendation from the Report is that at a minimum a "study" be undertaken to "determine the existence or non-existence of unacceptable disparities, racial, socio-economic, geographic, or otherwise in the death penalty system...."

Another study will not change the fact that more than 30 years ago the same type studies[37] were being done asserting the same flawed premises. Foster v. State, 614 So.2d 455 (Fla. 1993) (emphasis added):

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[36] Indeed, one of the issues discussed at trial and on appeal was the belief that Gainesville, Florida was one of, if not the most liberal communities in Florida - having had a dirth of death cases prosecuted successfully.

[37] The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's.

In support of his claim, Foster proffered a study conducted by his counsel of some of the murder/homicide cases prosecuted by the Bay County State Attorney's Office from 1975 to 1987. Analyzing the raw numbers collected, Foster concluded that defendants whose victims were white were 4 times more likely to be charged with first-degree murder than defendants whose victims were black. Of those defendants charged with first-degree murder, white-victim defendants were 6 times more likely to go to trial. Of those defendants who went to trial, white-victim defendants were 26 times more likely to be convicted of first degree murder. The court refused to hold an evidentiary hearing, finding that the alleged facts did not make out a prima facie claim of discrimination.

The United States Supreme Court rejected a similar challenge in McCleskey v. Kemp, 481 U.S. 279, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987). McCleskey claimed that the imposition of Georgia's death penalty was racially discriminatory in violation of the Eighth and Fourteenth Amendments. He relied on a statistical study, the Baldus study, which purported to show a disparity in the imposition of Georgia's death penalty based on the race of the victim and the race of the defendant. The raw figures collected by Professor Baldus indicated that defendants charged with killing white victims received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. Baldus further found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; and 3% of cases involving white defendants and black victims. The figures indicated that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims, 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.

After accounting for numerous variables that could have explained the disparities on other than racial grounds, the Baldus study found that defendants

charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing black victims. Black defendants were 1.1 times as likely to receive a death sentence as other defendants. As a black defendant who killed a white victim, McCleskey argued that the Baldus study demonstrated that he was discriminated against because of his race and the race of his victim.

The Court held that McCleskey "must prove that the decisionmakers in his case acted with discriminatory purpose." McCleskey, 481 U.S. at 292. **The Court rejected McCleskey's claim because he offered no evidence specific to his own case to support an inference that racial considerations played a part in his sentence. The Court found the Baldus study to be insufficient to support an inference that the decisionmakers in McCleskey's case acted with purposeful discrimination.**

Foster's claim suffers from the same defect. He has offered nothing to suggest that the state attorney's office acted with purposeful discrimination in seeking the death penalty in his case. See Harris v. Pulley, 885 F.2d 1354, 1375 (9th Cir. 1988), cert. denied, 493 U.S. 1051, 107 L. Ed. 2d 848, 110 S. Ct. 854 (1990); Byrd v. Armontrout, 880 F.2d 1, 10 (8th Cir. 1989), cert. denied, 494 U.S. 1019, 108 L. Ed. 2d 501, 110 S. Ct. 1326 (1990); Kelly v. Lynaugh, 862 F.2d 1126, 1135 (5th Cir. 1988), cert. denied, 492 U.S. 925, 106 L. Ed. 2d 608, 109 S. Ct. 3263 (1989). The trial court was not required to hold an evidentiary hearing on this claim. Harris, 885 F.2d at 1375 (defendant not entitled to evidentiary hearing where he offered no proof that decisionmakers in his case acted with discriminatory purpose).

The trial court again correctly found the ABA Report to be "not applicable to Defendant's case."

10. Death Sentences for Persons with Severe Mental Disabilities - The ABA Report seeks to expand Atkins v. Virginia, 536 U.S. 304 (2002), to those individuals who have

severe mental disability as an extension of the mental retardation claim. Clearly, Rolling does not fall within this perceived defect in Florida's system. In Hill v. State, 921 So.2d at *10, an argument was made that Hill's mental age fell below his actual age of 23 and therefore, under Roper v. Simmons, 543 U.S. 551 (2005), the bar for imposing the death penalty for minors should be extended to Hill's mental age claim. The court rejected that argument – stating that the United States Supreme Court meant what it said, Roper prohibits execution "only applies to those defendants whose chronological age is below eighteen." Application of Atkins is no different. In fact, much of the Report ignores the advances the Florida judiciary,[38] the Florida Bar[39] and the legislature[40] have

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[38] Fla.R.Crim.P. 3.203. Defendant's Mental Retardation as a Bar to Imposition of the Death Penalty; Fla.R.Crim.P. 3.851. Collateral Relief After Death Sentence Has Been Imposed and Affirmed on Direct Appeal.

See: Zack v. State, 911 So.2d 1190 (Fla. 2005) (Since defendant's mental health was explored at his trial and nothing in the evidence established that he was mentally retarded under Fla. Stat. ch. 916.106(12), which included an IQ of 70 or below as a factor in mental retardation and defendant's IQ was 79, and since there was no new or different evidence presented in post-trial proceedings under Fla.R.Crim.P. 3.851 than that presented at trial, defendant's motion for post-trial relief from a death sentence on the grounds that he was mentally retarded was properly denied.)

[39] Committees of the Florida Bar have undertaken efforts to draft rules governing criminal rule for the Florida Supreme Court regarding mental retardation and the death penalty.

undertaken to ensure that individuals who fall within the scope of mental retardation are not exposed to the death penalty.[41] To the extent that the ABA Report seeks more, there is no clear evidence that current Florida practices violate any constitutional rights or that more "protections" are needed.

As the trial court noted, "...Although three of the five mental health experts that testified at the penalty proceeding opined that Defendant (Rolling) suffered a severe personality disorder, all five agreed that Defendant understood the criminality of his acts, knew the difference between right and wrong, and could, if he so chose, conform his conduct to the requirements of law. (Sentencing Order 18-25). That was the

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[40] The Florida Legislature **in 2001**, pre-Atkins, barred the imposition of the death penalty for those individuals found to be mentally retarded. Fla. Stat. Ch. 921.137(1) (statute prohibiting the execution of mentally retarded defendants).

[41] Note Schriro v. Smith, __ U.S. ___, 126 S.Ct. 7, (2005)("The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim. Atkins stated in clear terms that 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' 536 U.S., at 317, 122 S. Ct. 2578, 153 L. Ed. 2d 762 (quoting Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 416-17, 91 L.Ed.2d 335 (1986); modifications in original). States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition.")

finding of the Court in its sentencing order, and nothing has been shown to in anyway to repudiate that finding. No case or statute has been cited binding the Court to find a bar to his execution on mental health grounds.” Rolling Order, October 9, 2006, p. 14.

Rolling is entitled to no further consideration as to this sub-claim.

Lastly, as the trial court noted, there are other aspects of the ABA Report that have no bearing on Rolling case. And, therefore:

> In summary, the Court finds nothing in the ABA Report that merits an evidentiary hearing, because nothing discussed in the ABA Report would lead to colorable claim for Defendant. The ABA Report is not newly discovered evidence, but is just a compilation of preexisting information. Florida’s death penalty scheme has been continually upheld as constitutional, and policy decisions as to changes of the current capital scheme are properly left to the Legislature. The Florida Supreme Court has already requested that the Legislature revisit the current capital scheme, and they have yet to do so. State v. Steele, 921 So. 2d 538, 548-50 (Fla. 2005).
>
> In consideration of the foregoing, the Court finds that there is no need for an evidentiary hearing, and the request for a stay is denied.

Rolling Order, October 9, 2006 p. 15-16.

This claim should be summarily denied because Rolling is procedurally barred from raising an issue with multiple

components, many of which have been available and discernable for years.[42]

[42] To the extent there are numerous aspects of the ABA Report not discussed herein - those portions of the report do not have any relevance as to this case. For example, questions pertaining to DNA testing and other issues have not been raised by Rolling.

Conclusion

Based on the foregoing, the trial court's denial of successive postconviction relief should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email and U.S. Mail to Mr. Baya Harrison, 310 N. Jefferson Street, Monticello, Florida 32344, this 12th day of October, 2006.

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CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

This brief was produced in Microsoft Word, using Courier New 12 point, a font which is not proportionately spaced.

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Assistant Deputy Attorney General