IN THE SUPREME COURT OF FLORDIA

DANNY HAROLD ROLLING Appellant,	Indigent Defendant Court Appointed Counsel
vs. STATE OF FLORIDA	Case No. SC83638 L.C. No. 91-3832-CF-A
Appellee. ______________________________/	Defendant under Death Warrant, Execution Set For 10/25/06.

INITIAL BRIEF OF APPELLANT

On appeal from a Final Order of the Circuit Court of the Eighth Judicial Circuit, in and for Alachua County, Florida, rendered on October 9, 2006, denying Rolling's successor post conviction motion to vacate his death sentences filed per the provisions of Florida Rule of Criminal Procedure 3.851, and from an October 4, 2006 Order denying his request for Public Records.

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Issue I. Lethal Injection

A. Is Rolling entitled to a stay of his execution in order to allow him the opportunity to challenge lethal injection as cruel and unusual punishment under the Eighth Amendment?

B. Did the trial court err in denying Rolling access to state records that he claims would support his Eighth Amendment claim that lethal injection constitutes cruel and unusual punishment?

Issue II. The ABA Report

Did the trial court err in not staying Rolling's execution and in not setting aside his death sentences in light of the ABA report?

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PRELIMINARY STATEMENT

The appellant, Danny Harold Rolling, was the defendant in the lower tribunal. He will be referred to as “Rolling” or “the defendant.” The appellee, the State of Florida, was the plaintiff below and will be referred to as “the state.”

Due to the expedited briefing and filing schedules as set forth in this court’s order of September 27, 2006, the undersigned received the record on appeal at 10:00 a.m. on October 11, 2006. This brief must be filed by 3:00 p.m. on October 12, 2006. The trial court’s order denying Rolling’s successor post conviction motion was received via email at about 3:00 p.m. on October 9, 2006. Thus, the defendant must necessarily sometimes identify various parts of the record on appeal by the name of the document and appropriate page number only. In addition, we will include as many citations to the just-received five volume record on appeal as possible in the limited time left to complete this brief. In that regard, we will use the volume number and appropriate page number (appearing at the bottom middle of each page) of the record on appeal as prepared by the Clerk of the Circuit Court whenever possible. For example, the first page of the medical examiner’s response to our request for additional public records is cited as “Vol. I, R. 3.”

The trial court’s October 9, 2006 “Order Denying Successor Motion To Vacate Sentences of Death With Special Request For Leave To Amend,” which is

the final order appealed from, will be referred to, in addition to the aforementioned record on appeal citation, as the "Final Order." References to the original trial transcript will be by the letters "TR," followed by an appropriate page number. References to the earlier state court post conviction proceedings conducted per the provisions of Florida Rule of Criminal Procedure 3.850 will be by the letters "PCR," followed by an appropriate page number.

All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature Of The Case:

This is a direct appeal to the Supreme Court of Florida from the "Order Denying Successor Motion to Vacate Sentences of Death With Special Leave To Amend" (Vol. IV, R. 614-629; the "Final Order") rendered on October 9, 2006 in *State v. Danny Harold Rolling,* Case No. 91-3837-CFA, by the Circuit Court of the Eighth Judicial Circuit, in and for Alachua County, Florida, Hon. Stan R. Morris, Circuit Judge, presiding and entering the Final Order denying Rolling's successor motion for post conviction relief filed per the provisions of Florida Rule of Criminal Procedure 3.851. Rolling also appeals the trial court's October 4, 2006 Order (Vol. I, R. 550-553) that denied his requests for certain public records.

B. Jurisdiction:

This Court has jurisdiction to review the lower court Final Order denying Rolling's Florida Rule of Criminal Procedure 3.851 motion for post conviction relief. Art. V, Sec. 3(b)(1), Fla. Const.; Fla. R. App. P. 9.030(a)(1)(A)(I); Fla. R. Crim. P. 3.851.

C. Course of the Proceedings:

On November 15, 1991, Rolling was indicted by an Alachua County, Florida grand jury on five counts of first-degree murder, three counts of sexual battery, and three counts of armed burglary of a dwelling with a battery. On February 15,

1994, he changed his previously entered not guilty pleas to guilty pleas as charged on all counts. The penalty phase of the trial commenced the next day per the provisions of Section 921.141, Florida Statutes. The jury returned advisory sentencing recommendations of death as to all five homicide counts by votes of 12-0. The trial court, Hon. Stan Morris, Circuit Judge, sentenced Rolling to death as to each of the five homicides. (*See* Sentencing Order, Vol. IV, R. 630-656*; Rolling v. State*, 695 So. 2d 278 [Fla. 1997]).

Rolling appealed directly to the Supreme Court of Florida. He raised six claims of error including the claim that the trial court abused its discretion in denying his motion for a change of venue and thereby violated his Sixth Amendment right to be fairly tried by an impartial jury due to the pervasive and prejudicial pretrial publicity. *Rolling v. State*, 695 So. 2d 278 (Fla. 1997).[1] On

[1] Rolling raised the following issues on direct appeal: (1) the trial court abused its discretion in denying his motion for a change of venue and thereby violated his Sixth Amendment right to be fairly tried by an impartial jury. Because pervasive and prejudicial pretrial publicity so infected the Gainesville and Alachua County community, seating an impartial jury at this location was patently impossible; (2) the trial court erred in denying Rolling's motion to suppress his statements which were obtained in violation of his Sixth Amendment right to counsel; (3) the trial court erred in denying Rolling's motion to sever and conduct three separate sentencing proceedings; (4) the trial court erred in denying Rolling's motion to suppress physical evidence seized from his tent, because the warrantless search and seizure violated his reasonable expectation of privacy under the Fourth Amendment; (5) the trial court erred in finding as an aggravating circumstance that the homicide of Sonya Larson was especially heinous, atrocious, or cruel; and finally (6) the trial court erred by giving an invalid and unconstitutional jury

March 20, 1997, his judgments and sentences were affirmed by this court. Id. A petition for writ of certiorari was filed in the Supreme Court of the United States, but that petition was denied. *Rolling v. Florida*, 522 U.S. 984 (1997).

Rolling next timely filed a motion for post conviction relief in the state trial (circuit) court per the provisions of Florida Rule of Criminal Procedure 3.850. (Vol. IV, R. 657-717). The motion was later amended. (Vol. IV, R. 718-780). Rolling proceeded on two claims: (1) That his state court trial counsel were constitutionally ineffective for failing to timely and properly seek and procure a change of venue, and (2) that trial counsel were ineffective for failing to challenge particular jurors during *voir dire*. After an evidentiary hearing, on March 5, 2001, the amended post conviction motion was denied. (PCR V, pp. 625-659) Rolling appealed to the Supreme Court of Florida, but this court affirmed. *Rolling v. State*, 825 So. 2d 293 (Fla. 2002).

On August 26, 2002, Rolling filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Florida, Gainesville, Division, per the provisions of Title 28, United States Code, Section 2254. A response was filed by the state on December 2, 2002. On August 1, 2005, the

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instruction on the heinous, atrocious, or cruel aggravating circumstance. *Rolling v. State*, 695 So. 2d 278 (Fla. 1997). The Florida Supreme Court found no error and affirmed Rolling's judgments and sentences.

district court denied the petition. On the same day, the clerk of the district court entered a clerk's judgment. After filing a timely application for certificate of appealability and notice of appeal, the district court issued the certificate. An appeal to the United States Court of Appeals, Eleventh Circuit, followed. On February 9, 2006, the Eleventh Circuit affirmed the order of the United States District Court that denied Rolling habeas corpus relief. *Rolling v. Crosby*, 438 F.3d 1296 (2006). On May 9, 2006, Rolling submitted a second petition for writ of certiorari to the United States Supreme Court. On June 26, 2006, certiorari was denied. *Rolling v. McDonough*, ___ U.S. ___, 126 S.Ct. 2943; 2006 U.S. LEXIS 5052 (2006).

On September 22, 2006, Governor Bush signed Rolling's death warrant scheduling his execution for October 25, 2006. (Vol. I, R. 2A-2B)

On September 28, 2006, Rolling filed in the lower tribunal requests for public records. He sought from the Medical Examiner of the Eighth Judicial Circuit all documents pertaining to the execution by lethal injection of the 16 persons subjected to that procedure. He also sought to be preserved and provided him serological samples and independent testing of blood samples from death row inmate Arthur Rutherford who is scheduled for execution on October 18, 2006. He sought from the Department of Corrections its records regarding the specific practices and procedures for carrying out lethal injections and certain of his

medical records. The state and the department filed responses objecting to the records requests except for Rolling's medical records.[2]

On October 5, 2006, Rolling filed a successor motion for post conviction relief seeking to vacate his death sentences per the provisions of Florida Rule of Criminal Procedure 3.851 with three exhibits. (Vol. I, R. 38-200, Vol. II, R. 201-400, Vol. III, R. 401-543) On October 6, 2006, the state filed a detailed response. (Vol. III, R. 556-594)

D. Disposition in Lower Tribunal:

On October 4, 2006, the trial court, Hon. Stan R. Morris, Circuit Judge, denied Rolling's public records requests except for his personal medical records. (Vol. III, R. 550-553) On October 9, 2006, the trial judge rendered a Final Order denying the Rule 3.851 motion. (Vol. IV, R. 614-629) On October 9, 2006, Rolling filed a notice of appeal (Vol. IV, R. 781) to this court. On October 10, 2006, he filed an amended notice of appeal (Vol. IV, R. 782, 783).

E. Statement of the Facts:

Statement of the Facts regarding the Homicides

The basic facts of the case are set forth in *Rolling v. State*, 695 So. 2d 278, 281, 282 (Fla. 1997), as follows:

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2 Rolling acknowledges that his medical records were provided him.

Rolling broke into the apartment of Sonya Larson and Christina Powell armed with a large knife. He first attacked Larson stabbing her in the upper chest. He put duct tape over her mouth then continued to stab her. She died as a direct result of her wounds. Rolling then went back downstairs where he tied Larson up with duct tape, cut her clothes off and raped her. He then stabbed her five times in the back causing her death. He posed the bodies of both victims and left the apartment.

Approximately 48 hours later, Rolling broke into the apartment of college student Christa Hoyt located about two miles away. He surprised her when she returned home, attacked and bound her, cut her clothes off, sexually battered her and stabbed her to death. He posed her body as well.

A day later Rolling entered a third apartment occupied by Manny Taboada and Tracy Paules. He first surprised and attacked Taboada. After stabbing him, Taboada attempted to fight Rolling off, to no avail. Taboada was killed in the attack. Hearing some of the struggle, Paules observed Rolling hiding in the apartment after he had killed Taboada. She ran to her room and unsuccessfully attempted to keep Rolling out. Rolling subdued Paules, bound and sexually battered her, then stabbed her to death. *Rolling v. State*, 695 So. 2d 278, 281, 282 (Fla. 1997).

Statement of the Facts regarding Rolling's Claims I-III in his Successor Rule 3.851 Motion Related to Lethal Injection (Issue I on Appeal)

As stated above, on September 28, 2006, six days after Rolling's death warrant was signed by the governor, Rolling sent public records requests to the Medical Examiner for the Eighth Judicial Circuit of Florida and to the Florida Department of Corrections. The records requests related, in part, to the autopsy and toxicology reports of those persons put to death in Florida by lethal injection and the protocols used in the lethal injection process. *See* Rolling's public records requests served on 9/28/06; the Final Order, pp. 3, 4; Vol. I, R. 20-22, R. 23-26, R. 27-33.) These records were requested pursuant to Florida Rule of Criminal Procedure 3.852(h)(3). *Id*. On or about September 29, 2006, written objections were filed by the Department of Corrections and by the Medical Examiner's Office (Vol. I, R. 3-10, R. 11-19, R. 26A-26D), and the documents have not been provided. On or about October 4, 2006, the trial court denied the motions to produce these records. *See* trial court October 4, 2006 order denying public records request; Vol. I, R. 550-553). Rolling alleges that this constituted error based upon the facts set forth below.

A recent study published in Volume 365 of the medical journal, *The Lancet*, by Dr. David A. Lubarsky (whose declaration is attached as Ex. B to the Rule 3.851 motion; Vol. I, R. 75-81) and three co-authors details the results of their

research on the effects of chemicals used for lethal injections.[3] See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., "Inadequate Anesthesia in Lethal Injection for Execution," Vol. 365, *The Lancet* 1412-14 (April 16, 2005), Ex. A attached to the Rule 3.851 motion; Vol. I, R. 71-74. This study provides, through the analysis of empirical after-the-fact data, that 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.[4] Id. The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88 percent). (*Lancet* report, p. 1414, Ex. A to Rule 3.851 motion; Vol. I, R. 71-74). Moreover, 21 of the 49 executed inmates (43 percent) had concentrations consistent with awareness, because they did not have an adequate amount of sodium pentothal in their bloodstream to provide anesthesia. (*Lancet* report, p. 1413, 1414, Ex. A to Rule 3.851 motion; Vol. I, R. 72, 73). In reality, almost half of the prisoners suffered the effects of suffocation from pancuronium bromide and the burning sensation through the veins followed

[3] The study focused on several states which conducted autopsies and prepared toxicology reports, and which made such data available to these scholars. (*Lancet* report, pp. 1412, 1413, Exhibit A to Rule 3.851 motion; Vol. I, R. 71, 72).

[4] Dr. Lubarski has noted in his affidavit that each of the opinions set forth in *The Lancet* study reflects his opinion to a reasonable degree of scientific certainty. (Lubarski affidavit, p. 3, Ex. B to Rule 3.851 motion, Vol. I, R. 77).

by the heart attack caused by the potassium chloride. (*Lancet* report, p. 1414, Ex. A to Rule 3.850 motion; Vol. I, R. 73).

As set forth in greater detail in the declaration of anesthesiologist David A. Lubarsky, M.D. (Ex. B to the Rule 3.851 motion; Vol. I, R. 75-81), the use of this succession of chemicals (sodium pentothal, pancuronium bromide and potassium chloride) in judicial executions by lethal injection creates a foreseeable risk of the unnecessary infliction of pain and suffering. (Lubarsky affidavit,, p. 5, Ex. B to Rule 3.851 motion; Vol. I, R. 79). Sodium pentothal, also known as thiopental, is an ultra-short-acting substance that produces shallow anesthesia. (Lubarsky affidavit, pp. 4, 5, Ex. B to the Rule 3.851 motion; Vol. I, R. 78, 79). Health care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the patient to a "surgical plane" of anesthesia that will last through the operation and block the painful stimuli of surgery. Sodium pentothal is intended to be defensible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia. The patient is supposed to be able to wake up and signal the staff if something is wrong.[5]

[5] Sodium pentothal is unstable in liquid form. It must be mixed and administered in a way that requires the expertise of a licensed health-care professional who cannot by law and professional ethics participate in executions.

The second chemical used in Florida's lethal injections is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic; it is a paralytic agent that stops respiration. It has two contradictory effects: first, it causes the person to suffer the effect of suffocation when the lungs cease to move; and second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Lubarsky affidavit, p. 5, Ex. B to the Rule 3.851 motion; Vol. I, R. 79). Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. Id. Its only practical function is to prevent the media and the Department of Corrections' staff from knowing when the sodium pentothal has worn off and the prisoner is suffering from suffocation or from the administration of the third chemical. *Id*.

The third chemical is potassium chloride, which is the substance that causes the prisoner's death. (Lubarsky affidavit, pp. 5,6, Ex. B to Rule 3.851 motion; Vol. I, R. 79, 80). It burns intensely as it travels through the veins toward the heart and causes massive muscle cramping before triggering cardiac arrest. *Id.* If the anesthesia has worn off while this chemical is painfully coursing through the veins, the person feels the pain of a heart attack. *Id*. However, in this case, Rolling asserts that he will not be able to express his pain because the pancuronium

bromide will have paralyzed his face, his arms, and his entire body so he will not be able to communicate by speaking or gesturing.

Statement of the Facts Re. ABA Report -- Issue II on Appeal

Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972)(per curiam).[6] At issue in *Furman* were three death sentences: two from

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[6]The previous year, the United States Supreme Court in *McGautha v. California*, 402 U.S. 183 (1971), had considered whether:

> the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.

McGautha, 402 U.S. at 196. In the majority opinion written by Justice Harlan, the Court found no due process violation. In reaching this conclusion, the majority noted the impossibility of cataloging the appropriate factors to be considered:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are

Georgia and one from Texas. The petitioners, relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death schemes were then operating to be arbitrary and capricious. *Furman*, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.") *Id.* at 293 (Brennan, J., concurring) ("It smacks of

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> beyond present human ability . . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

Id. at 204, 208. When *Furman* reached the Court the next year and the Petitioners presented an argument that the statutory schemes for imposing a sentence of death violated the Eighth Amendment, Justice Stewart and Justice White joined the dissenters from *McGautha* and found that the death penalty statutes were indeed unconstitutional.

little more than a lottery system.") *Id*. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.") *Id*. at 313 (White, J., concurring) ("There is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not,") *Id*. at 365-66 (Marshall, J., concurring) ("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.") (Footnote omitted). As a result, *Furman* stands for the proposition, most succinctly explained by Justice Stewart in his concurring opinion: The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be ". . . wantonly and . . . freakishly imposed on a capriciously selected random handful" of individuals. *Id.* at 310.[7]

[7] It is important to recognize that the decision in *Furman* did not turn upon proof of arbitrariness as to one individual claimant. Instead, the Court

In the wake of *Furman*, all death sentences were vacated. Proof of individual harm or the lack of such proof was irrelevant. Thereafter, the State of Florida (as well as other states) sought to adopt a death penalty scheme that would pass scrutiny under *Furman*. Florida's newly adopted scheme was reviewed by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242 (1976). *In Gregg v. Georgia, 428 U.S. 153 (1976*), a companion case to *Proffitt,* the United States Supreme Court explained: "The concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Gregg v. Georgia*, 428 U.S. at 195 (plurality opinion).[8]

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looked at the systemic arbitrariness. *Furman* involved a macro analysis of a death penalty scheme and a determination as to whether the scheme permitted the death penalty to be imposed in an arbitrary and/or capricious manner.

[8] The plurality in *Gregg* noted:

> In view of *Furman, McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause. We note that *McGautha*'s assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience. In view of that experience and the considerations set forth in the text, we adhere to *Furman*'s determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

Gregg at 195 n. 47.

Applying this principle to Florida's newly-adopted capital sentencing scheme, the Supreme Court concluded:

> 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 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.
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> *Proffitt*, 428 U.S. at 259-60. Subsequent Supreme Court decisions have explained that *Furman* required that a capital sentencing scheme produce constitutional reliability and "a reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319, (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis deleted). *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion). As a result, a capital sentencing scheme must: 1) narrow the capital sentencer's discretion, *see Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988); and 2) permit the sentencer to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604 (emphasis in original). *See also Penry v. Lynaugh,* 492 U.S. 302, 324 (1989).

However over time, various Justices of the United States Supreme Court have expressed concern as to whether the capital sentencing schemes approved in *Gregg* and *Proffitt* actually delivered the promised and requisite reliability. Justice

Scalia observed an inherent inconsistency between the narrowing requirement and the broad discretion to consider mitigation requirements:

> My initial and my fundamental problem, as I have described it in detail above, is not that *Woodson* and *Lockett* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*. It is that which led me into the inquiry whether either they or *Furman* was wrong. I would not know how to apply them -- or, more precisely, how to apply both them and *Furman* -- if I wanted to. I cannot continue to say, in case after case, what degree of "arrowing" is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett*. And I cannot continue to say, in case after case, what sort of restraints upon sentencer discretion are unconstitutional under *Woodson-Lockett* when I know that the Constitution positively *favors* constraints under *Furman. Stare decisis* cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.

Walton v. Arizona, 497 U.S. 639, 672-73 (1990).

Thereafter, Justice Blackmun soon concluded that the *Furman* promise could not be delivered, and accordingly the death penalty should be declared unconstitutional:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia, 408 U.S. 238 (1972),* and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are

> identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman v. Georgia, supra,* can never be achieved without compromising an equally essential component of fundamental fairness -- individualized sentencing. See *Lockett v. Ohio, 438 U.S. 586 (1978).*

Callins v. Collins, 510 U.S. 1141, 1143-44 (1994) (Blackmun, J., dissenting from the denial of *cert.*).

Most recently, Justice Souter wrote in an opinion joined by Justices Stevens, Ginsburg, and Breyer:

> Decades of back-and-forth between legislative experiment and judicial review have made it plain that the constitutional demand for rationality goes beyond the minimal requirement to replace unbounded discretion with a sentencing structure; a State has much leeway in devising such a structure and in selecting the terms for measuring relative culpability, but a system must meet an ultimate test of constitutional reliability in producing "a reasoned moral response to the defendant's background, character, and crime" *Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)* (quoting *California v. Brown, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987)* (O'Connor, J., concurring); emphasis deleted); cf. *Gregg v. Georgia, 428 U.S. 153, 206, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)* (joint opinion of Stewart, Powell, and Stevens, JJ.) (sanctioning sentencing procedures that "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant"). The *Eighth Amendment*, that is, demands both form and substance, both a system for decision and one geared to produce morally justifiable results.

* * *

> That precedent, demanding reasoned moral judgment, developed in response to facts that could not be ignored, the kaleidoscope of life and death verdicts that made no sense in fact or morality in the random sentencing before *Furman* was decided in 1972. See *408 U.S., at 309-310, 92 S. Ct. 2726, 33 L. Ed. 2d 346* (Stewart, J., concurring). Today, a new body of fact must be accounted for in deciding what, in practical terms, the *Eighth Amendment* guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."

* * *

> We are thus in a period of new empirical argument about how "death is different," *Gregg, 428 U.S., at 188, 96 S. Ct. 2909, 49 L. Ed. 2d 859* (joint opinion of Stewart, Powell, and Stevens, JJ.): not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases. While it is far too soon for any generalization about the soundness of capital sentencing across the country, the cautionary lesson of recent experience addresses the tie-breaking potential of the Kansas statute: the same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.

Kansas v. Marsh, 126 S.Ct. 2516, 2542, 2544, 2545-46 (2006) (Souter, J., dissenting).

In 2002, *Atkins v. Virgina*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) declared that the mentally retarded are excluded from the death penalty. In his opening remarks, Justice Stevens stated the basis for their holding: "Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."

On September 17, 2006, five days before Governor Bush signed Mr. Rolling's warrant for execution, the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team published its comprehensive report of Florida's death penalty system. *See American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006* (Vol. I, R. 84-200, Vol. II, R. 201-400, Vol. III., R. 401-543), hereinafter, "*ABA Report on Florida*").[9] The information, analysis and ultimate conclusions

[9] Appendix 1 to the ABA Report is a letter dated September 1, 2006, to Mark Schlakman, a member of the ABA's team, from Raquel Rodriguez, the Governor's General Counsel. (Vol. III, R. 539-541) This letter indicates that the Governor in a letter dated July 20, 2006, was advised that a draft of the report had been compiled. In fact, a portion of the draft report was provided to the Governor for comment. The September 1st letter from Ms. Rodriguez

contained in the ABA Report make clear: Florida's death penalty system is so seriously flawed and broken that it does not meet the constitutional requisite of being fair, reliable or accurate. *Id*. at iii, Vol. I, R. 92) ("The team has concluded, however, that the State of Florida fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial.")

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contained the views of the Governor regarding the portion of the draft report that had been provided to him.

SUMMARY OF THE ARGUMENT

Issue I: Florida's method of execution by lethal injection violates Rolling's constitutional right to free speech and not to be subjected to cruel and unusual punishment as protected by the First, Eighth and Fourteenth Amendments to the Constitution of the United States. The trial court erred in denying Rolling relief on this ground. Newly discovered empirical evidence as set forth in the *Lancet* (attached as Ex. A to Rolling's Rule 3.851 motion for post conviction relief ; Vol. I, R. 71-74)) report authored by Dr. David A. Lubarsky and others, dated April 16, 2005, makes clear that Florida's procedures and protocol for performing lethal injection almost certainly will result in causing Rolling great pain and suffering to the extent that Eighth Amendment principles are violated. This information casts serious doubt on the findings to the contrary in *Sims v. State*, 754 So. 2d 657 (Fla. 2000). A stay of execution is necessary in order to allow Rolling the opportunity to obtain the autopsy reports and serological information in the state's possession in order to demonstrate this fact.

Issue II: The trial court erred in rejecting Rolling's claim that the ABA Report on Florida (Vol. I, R. 84-200, Vol. II, R. 201-400, Vol. III, R. 401-543) should serve as a reason for halting his execution until the problems in Florida's death penalty procedures are fully addressed and corrected. The report points out that the problems in Florida are systemic, not just specific to any single issue or

defendant. They are interrelated and should be viewed in that light. The trial court did not review the report in that context, but dissected each point only as it pertained to Rolling. Most importantly, the order makes no finding, one way or the other, as to whether the ABA report shows that Florida's death penalty scheme is constitutional, other than to say it has been previously upheld.

ARGUMENT

Standard of Appellant Review Generally

This is a successor post conviction capital case involving mixed questions of law and fact and a request for public records. As such, the Circuit Court Order of October 9, 2006 denying Rolling's Florida Rule of Criminal Procedure 3.851 motion appealed from (Vol. IV, R. 614-629) is subject to plenary, *de novo* review except that deference is given to the trial court's findings of fact so long as there is competent and substantial evidence to support same. *Johnson v. Moore*, 789 So. 2d 262 (Fla. 2001); *Porter v. State*, 788 So. 2d 917 (Fla. 2001) *Rose v. State*, 675 So. 2d 567 (Fla. 1996).

Issue I. Lethal Injection

A. Rolling is entitled to a stay of his execution in order to allow him the opportunity to challenge Florida's lethal injection procedure as cruel and unusual punishment under the Eighth Amendment and as a violation of his right to free speech under the First Amendment. The trial court erred in denying his request for a stay in this regard.

B. The trial court erred in denying Rolling access to state records that he claims would support his First and Eighth Amendment claims as referenced above.

Standard of Appellate Review Re. Issue I on Appeal

Rolling's entitlement to a stay of execution, based upon his claim that the lethal injection procedure to be used to cause his death violates the First, Eighth and Fourteenth Amendments to the United States Constitution, is a mixed question

of law and fact. As such, the Circuit Court Order of October 9, 2006 denying Rolling's Florida Rule of Criminal Procedure 3.851 motion related to these claims is subject to plenary, *de novo* review except that deference is given to the trial court's findings of fact so long as there is competent and substantial evidence to support same. *Johnson v. Moore*, 789 So. 2d 262 (Fla. 2001); *Porter v. State*, 788 So. 2d 917 (Fla. 2001) *Rose v. State*, 675 So. 2d 567 (Fla. 1996). The standard of appellate review of the trial court's decision not to grant Rolling's public records requests (Vol. IIII, R. 550-553) in connection with the lethal injection issue is one based upon whether the lower tribunal, in so doing, abused its discretion. *Parker v. State*, 904 So. 2d 370 (Fla. 2005).

Merits

Rolling's attack on Florida's lethal injection procedure and his request for public records related thereto are intertwined and, therefore, argued in concert here.

Since *Sims v. State*, 754 So. 2d 657 (Fla. 2000), there have been substantial developments on the issue of whether lethal injection causes such extreme pain and suffering that it violates the Eighth Amendment. Executions have been postponed pending extensive hearings about the lethal injection issue in California. *See Morales v. Hickman*, Case No. C06-219-JF & C06-926-JF-RS (N.D. Cal. 2006). Similarly, in Missouri, a federal district judge has ordered a new lethal injection protocol and halted executions in that state until at least October 27, 2006. *Taylor*

v. Crawford, Case No. 2:05-cv-04173-FJG (W.D. Mo.), Docs. 195, 213. Federal judges in Arkansas and Delaware have also halted executions in those states. *Nooner, et al. v. Norris, et al.*, Case No. 5:06-cv-110 (USDC, E.D. Ark.); see also *Terrick Nooner v. Larry Davis, et al*., Case No. 06-2748 (USCA, 8th Cir.). In South Dakota, the governor halted an execution at the last minute amid concerns regarding the state's lethal injection procedure and asked the state legislature to amend the statute on lethal injections. Likewise, in Oklahoma, the state voluntarily changed its execution protocol in response to the litigation in *Patton v. Jones*, Case No. CIV-06-591-F (U.S. Dist. Ct., W.D. Okla.), which exposed serious problems inherent in that state's procedures.[10] Similarly, North Carolina revised their lethal injection procedures in response to a 1983 challenge. *See Brown v. Beck*, 2006 U.S. Dist. LEXIS 60084 (E.D. N.C. 2006). In most of these states, the procedures used to carry out the death of the inmate by lethal injection are similar to the procedures used in Florida.

Rolling is not challenging the statutory provision which allows for lethal injection as a method of execution. Rather, he is challenging the use of specific chemicals and the quantity of chemicals employed, based upon recent scientific evidence that indicate that the Florida Department of Corrections' procedures are

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[10] Significantly, Florida's lethal injection procedure was modeled upon Oklahoma's, which was altered in response to the lethal injection challenge in *Patton. Id.*

constitutionally flawed. Vol. I, R. 41-52) Under the present circumstances, the state will violate Rolling's right to be free from cruel and unusual punishment granted to him by the Eighth Amendment to the U.S. Constitution, by executing him using the sequence of three chemicals (sodium pentothal a/k/a thiopental, pancuronium bromide, and potassium chloride) which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton pain, contrary to contemporary standards of decency.

In rejecting Rolling's Eighth Amendment lethal injection claim, the trial court determined that this issue had been resolved once and for all in Florida in favor of the state in *Sims v. State*, 754 So. 2d 657 (Fla. 2000). (The Final Order, pp. 3, 4; Vol. IV, R. 616, 617) Furthermore, according to the trial court, an attack on lethal injection via the *Lancet* report has been rejected by this court in *Hill v. State*, 921 So. 2d 579 (Fla. 2006) and *Rutherford v. State*, 926 So. 2d 1100 (Fla. 2006) *Id*. But this begs the question: Why, if Florida's lethal injection process does not inflict the kind and degree of pain that constitutes cruel and unusual punishment, did the authors of the *Lancet* report arrive at the conclusions they did regarding intense suffering that apparently resulted during an inordinate number of executions when condemned persons were put to death in other states by procedures very similar to Florida's? Stated differently, the decisions reached in

Sims and/or its progeny are based upon testimony from prison officials and medical personnel regarding how the process is carried out in theory and in a best case scenario. Admittedly, if that is what actually happened in real life, then Rolling would not have an Eighth Amendment argument. But what the *Lancet* report strongly suggests is that the devil is in the details and that some very serious malfunctions are occurring far too often.

Specifically, the report notes for example that "the assumption that 2 g (grams of) thiopental assures anesthesia is overly simplistic." (*Lancet* report, p. 1412, Ex. A to Rule 3.851 motion; Vol. I, R. 73). For a variety of reasons, the quantity of this drug is not necessarily sufficient to ensure unconsciousness during the time that it takes to cause the inmate's demise, according to the report. For example, an inmate "with histories of chronic substance misuse problems might have high tolerance to sedative hypnotics and would need increased doses of anesthetic." *Id*. The authors also found, as stated above, that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88 percent). (*Lancet* report, p. 1414, Ex. A to Rule 3.851 motion; Vol. I, R. 73). Moreover, 21 of the 49 executed inmates (43 percent) had concentrations consistent with awareness, because they did not have an adequate amount of sodium pentothal in their bloodstream to provide anesthesia. The report states in

this regard, “most worryingly, 21 inmates had concentrations less than the Cp50 for repression of movement in response to a vocal command. In view of these date, *we suggest that it is possible that some of these inmates were fully aware during their executions.*” (*Lancet* report, p. 1414, Ex. A to Rule 3.851 motion; Vol. I, R. 73). In reality, almost half of the prisoners suffered the effects of suffocation from pancuronium bromide and the burning sensation through the veins followed by the heart attack caused by the potassium chloride. (*Lancet* report, p. 1414, Ex. A to Rule 3.850 motion; Vol. I, R. 73).

It should be emphasized in this regard that the *Lancet* findings are based, not on how Florida prison officials *claim* they are carrying out the executions, but on the actual *scientific findings* of autopsies conducted on inmates put to death using similar methodologies. (The *Lancet* report, pp.1412-1414, Ex. A to Rule 3.851 motion, Vol. I, R. 71-74). Those findings, as described above, are alarming to say the least. Under these circumstances, a stay of execution is necessary and proper.

The Request for Public Records

As noted above, on September 28, 2006, Rolling sent public records requests to two agencies: the Florida Department of Corrections and the Medical Examiner for the Eighth Judicial Circuit of Florida. (Vol. I, R. 20-22, 23-26, 27-33). The records requests relate to the autopsy and toxicology reports of those persons put to death in Florida by lethal injection and the protocols used in the lethal injection process. These records were requested pursuant to Florida Rule of Criminal Procedure 3.852(h)(3). On or about September 29, 2006, written objections were filed by the Department of Corrections and by the Medical Examiner's Office (Vol. I, R. 3-10, 11-19), and the documents have not been provided. On October 4, 2006, the trial court denied the motions. (Vol. III, R. 550-553).

Rolling's requests for public records were, in fact, narrowly tailored and fall squarely within the confines of Rule 3.852 (h)(3). Rolling only made requests to two agencies for records which he had not previously received.[11] Solely on this basis, he is entitled to records production.

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[11] This situation is unlike those argued by the attorney general in its "Global Objection" *See, e.g., Glock v. Moore*, 776 So.2d 243, 253-4 (Fla. 2001) (Defendant made at least 20 records requests of various persons or agencies. The Court stated, "It is clear from a review of the record and the hearing that most of the records are not simply an update of information previously requested but entirely new requests"). *See also* "Global objection" at 5, where the state acknowledges that in *Sims*, 753 So.2d 66 (Fla. 2000), the court affirmed the denial of public records requests of twenty-three agencies or persons, most of whom had not been the recipients of prior requests for public records.

As far as not seeking public records related to lethal injection before Rolling's death warrant was signed, we would most certainly have been met with an objection from the state to the effect that the request would be frivolous in light of *Sims v. State*, 754 So. 2d 657 (Fla. 2000). In fact, this was one reason used by the trial court to deny our request. (*See* The Final Order, pp. 3, 4; Vol. IV, R. 616, 617). As we have attempted to show above, however, forensic issues related to lethal injection are constantly evolving, and new and important information is becoming available at the present time. This phenomenon has resulted in the very recent federal court decisions where lethal injections have been put on hold in a number of jurisdictions until the theory of how it is supposed to work relatively painlessly is properly tested against emerging reality. The need for this information became critical once Rolling's death warrant was signed. Finally in this regard, the fact that Rolling had not previously filed a public records request under this rule should be of no consequence. Rolling pled guilty at trial. The files and records regarding the post conviction claims raised were available to post conviction counsel from the Public Defender's Office and other sources. There was no need to seek more in the way of public records during those proceedings.

Thus, the trial court abused its discretion in denying Rolling the requests for these public records.

Issue II: The trial court erred in not staying Rolling's execution and in not setting aside his death sentences in light of the ABA Report.

Standard of Appellate Review

Since the ABA report would constitute evidence in a requested post conviction proceeding, the standard of appellate review to consider whether the trial court was correct that it was not relevant is one of abuse of discretion.

The Merits

The flaws and defects identified by the ABA Report demonstrate that Florida's capital sentencing scheme does not deliver on the *Furman* promise. The identified flaws and defects inject arbitrariness into the capital sentencing process. Who in fact gets executed in Florida does not always depend upon the facts of the crime or the character of the defendant, but sometimes upon the flaws and defects of the capital sentencing process.[12] Thus, the imposition and carrying out of the death penalty in Rolling's cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman*, 408 U.S. at 239-40.

[12] Who gets executed in Florida turns upon such factors as who represented the condemned; what objections he did or did not make; what investigation he did or did not undertake; whether counsel was diligent in finding evidence demonstrating that the condemned was innocence; at what point in time did the Florida Supreme Court review the case; did the condemned get the benefit of new law identifying constitutional or statutory error in his case; did the State preserve the physical evidence containing DNA material that would prove innocence; what procedural bars were applied by the courts to preclude consideration of meritorious claims; etc.

The ABA has always believed that "[f]airness and accuracy together form the foundation of the American criminal justice system" and that "these goals are particularly important in cases in which the death penalty is sought." ABA Report on Florida at 1. (Vol. I, R. 134) In 1997, the ABA responded to the growing concern that the capital jurisdictions did not provide fairness and accuracy in the administration of justice and called for a moratorium on executions until the states had an opportunity to study and implement changes to their systems. *Id*. Florida did not heed the ABA's advice and no moratorium was imposed, nor any comprehensive study conducted. Instead, Florida continued to impose the death penalty and carry out executions.

In 2001, the ABA created the Death Penalty Moratorium Implementation Project to, among other things, collect and monitor data on death penalty developments, as well as to analyze responses from government and courts to death penalty issues. *Id.* Furthermore, "[t]o assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process." Id. Florida was one such jurisdiction. Along with individuals from the ABA, a state assessment team was assembled. *Id.* at 2, Vol. I, R. 135). Those comprising Florida's assessment team

were: the Chair, Professor Christopher Slobogin, Judge O.H. Eaton, Jr., Dr. Mark R. Fondacaro, Michael J. Minerva, Mark Schlackman, Justice Leander J. Shaw, State Attorney Harry L. Shorstein, Sylvia Walbolt and students who assisted with research from the University of Florida College of Law. *Id*. at 3-6 (Vol. I, R. 136-139.[13]

The state assessment team in Florida was charged with "collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty." *Id.* As set forth in the report's table of contents, the team concentrated on thirteen distinct areas: (1) death row demographics: (2) DNA testing and the testing and preservation of biological evidence; (3) law enforcement tools and techniques; (4) crime laboratories and medical examiners; (5) prosecutorial professionalism; (6) defense services; (7) the direct appeal process; (8) state post conviction proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) racial and ethnic minorities; and (13) mental retardation and mental illness.

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[13] Most of the assessment team members are easily recognizable as individuals with a vast experience in Florida's death penalty system. *See* ABA Report on Florida at 3-6 (Vol. I, R. 136-139). Many of the members are in favor of the death penalty. Specifically, State Attorney for the Fourth Judicial Circuit, Harry Shorstein, made clear in a comment that he is "a proponent of the Death Penalty." *Id*. at 5; Vol. I, R. 138).

The team identified a number of the areas discussed in the report "in which Florida's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures." (ABA Report on Florida at iii; Vol. I, R. 92). In the report, recommendations were made to assist Florida in fixing what the report contends is an impaired system. But, the team cautioned that the apparent problems in the system "*are cumulative and must be considered in such a way . . . problems in one area can undermine sound procedures in others*." *Id*. at iii-iv. (Vol. I, R. 92-93) A review of the areas identified in the report as falling short makes apparent that Florida's death penalty scheme is deficient for many of the same reasons the procedures at issue in *Furman* were found to be unconstitutional.[14]

In denying Mr. Rolling's Successor Motion to Vacate Judgment and Sentence, the trial court attempted to review each specific category listed by the

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[14] For example, the various opinions written in *Furman* noted the same evidence of arbitrary factors unrelated to the crime or the defendant's character that were at work in the sentencing process that is set forth in the ABA Report on Florida. *Furman*, 408 U.S. at 256 n. 21 (whether counsel timely objected to error was on occasion a decisive, albeit arbitrary factor in whether a death sentence was imposed); *Id*. at 290 (the manner in which retroactivity rules operate injected arbitrariness); *Id*. at 293, 309-10, 313 (the number of executions in comparison to the number of murders suggested a lottery); *Id*. at 364-66 (evidence that racial prejudices and/or classism and/or sexism infected sentencing decisions); *Id*. at 366-67 (likelihood that an innocent may be executed suggested arbitrariness); *Id*. at 368 n. 158 (the failure to apply scientific developments in criminal cases fast enough to enhance reliability of outcome of process created arbitrary results).

ABA report, and found each either not applicable or no error. However, the court failed to review the issues as a systemic problem, wherein each element affected the other.

The argument below is an example of the flaws that have denied Mr. Rolling of his constitutional safeguards.

Funding Problems Regarding Post Conviction Representation

According to the ABA report, there has been a failure to deliver on the *Furman* promise in the context of Florida's capital post conviction representation. The past ten years have demonstrated some turmoil in the representation of capital post conviction defendants. The state agencies designated to handle capital post conviction cases are separated into three regional offices, with the creation of the Registry system to handle conflict and overflow cases. The Florida Legislature eliminated one of the regional offices and sent the Registry sixty-plus cases.[15] Under the current capital post conviction registry system funding is inadequate. *Id*. at v. Compensation is capped. Though the Florida Supreme Court has recognized that the cap may be breached in extraordinary circumstances, the fact that the determination of whether the cap was properly breached is made after the fact. *Fla. Dept. of Financial Services v. Freeman*, 921 So.2d 598 (Fla. 2006).

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[15] The state assessment team recommends the reinstitution of the Capital Collateral Counsel for the Northern Region. (ABA Report on Florida at x; Vol. I, R. 99).

Within the registry system, statutory funding is only available for 840 attorney hours when research suggests that 3,300 attorney hours are required to represent a capital post conviction defendant. ABA Report on Florida at v. (Vol. I, R. 94)[16] This is not the only monetary limitation. More importantly, funds for investigative, expert, travel, and other costs are seriously limited. Moreover, there is no provision for compensation for successor proceedings beyond those provided in Rule 3.851.[17]

While Registry counsel is restricted in funding, the Capital Collateral Counsel (CCC) offices are not. Thus, CCC attorneys can and have exceeded the 840 hours without the consequence of non-payment. CCC attorneys can hire experts, pay investigators, and incur other costs associated with litigating a capital post conviction case without consequence of non-payment. There is no valid basis for a distinction between death row defendants represented by Registry counsel and death row defendants represented by CCC attorneys.

In addition to the lack of funding for the Registry, the one-year rule provided in Florida Rule of Criminal Procedure 3.851 creates an unrealistic burden for counsel to complete full investigation. This is even more prominent in

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[17] Juan Melendez was exonerated in the course of his third motion for post conviction relief. Yet, the funding of the Registry makes no provision for even a second motion, let alone a third.

Rolling's case which contains an enormous amount of records which required review, investigation, and analyses within a one-year period or he would be barred from state appeals, as well as lose his federal appellate rights. No reasonable logic can be ascribed in providing only one year to file a state post conviction motion in a capital case, as compared to two years for non-death cases. Further, due to this short time constraint, it is impossible to determine whether post conviction counsel would have been able to uncover beneficial evidence of constitutional violations in Rolling's case. A system that strips the capital defendant of the right to complain and seek redress, simply does not comport with the *Furman* promise that states capital sentencing procedures must affirmatively take steps to eliminate the risk that an execution will be random. Undeniably with 22 exonerations, Florida's trial system warrants "a constitutional safety net." *Jones v. State*, 709 So. 2d. at 535-36 (Shaw, J., dissenting). Yet, it is well-recognized within the State of Florida, as the ABA Report documents, that the "safety net" has been stripped away.[18]

Mental Disabilities

In *Atkins v. Virgina*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the court found that the mentally retarded are excluded from the death

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[18] As Justice Marshall explained in *Furman*, "the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours." 408 U.S. at 371

penalty. In his opening remarks, Justice Stevens stated: "Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." The same disabilities apply to the mentally ill.

The ABA assessment team concluded: "The State of Florida has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence." ABA Report on Florida at ix. And, while Florida has recently excluded individuals suffering from mental retardation from the death penalty, it has not extended that exclusion to those such as Rolling who suffer from severe mental disabilities. (*Id*. at xi, Vol. I, R. 98). The ABA assessment team recommends that the logic regarding those with mental retardation be extended to those with severe mental disabilities, noting that mental illness can affect every stage of a capital trial. *Id* at xxxviii (Vol. I, R. 129). Certainly, the distinction between the mental impairment of the mentally retarded and the mental impairment of the mentally ill appears to be

arbitrary. A stay should be entered in order for the court to consider the ABA report in this regard.

The trial court's order acknowledges that Rolling and the ABA report, seek to expand the application of *Atkins* to exclude the mentally ill from execution. However, the trial court does not suggest that the court could not find that executing the mentally ill amounts to cruel and unusual punishment. Although the trial court explained that five mental health experts found that Rolling could conform his conduct to the requirements of the law, if he chose to, the court's statement fails to acknowledge that having a severe personality disorder affects the sufferer's impulse control and rational judgment, especially during emotional stress.

Conclusion Re. ABA Report

When all of the arbitrary factors present in the Florida death penalty system identified herein, as well as the arbitrary factors explained more fully in the ABA Report on Florida (incorporated herein by specific reference), are considered together when analyzing the system's ability to deliver and/or produce a reliable result, the conclusion is that it still lacks reliability. "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" *Furman,* 408 U.S. at 313 (White, J., concurring). The Florida death penalty process cannot "assure consistency, fairness, and rationality" and it

cannot "assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." *Proffitt*, 428 U.S. at 259-60. Accordingly, Florida's death penalty scheme stands in violation of the Eighth Amendment.

CONCLUSION

For the reasons set forth above, Rolling requests that this Court stay his execution, remand this cause to the lower tribunal for an evidentiary hearing regarding the claims asserted in his successor post conviction motion to vacate his death sentences, order that his death sentences should be vacated and that he should be afforded a new penalty phase trial and grant him such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Initial Brief of Appellant has been provided to counsel for the appellee, the State of Florida, c/o Chief Deputy Attorney General of Florida Carolyn Snurkowski, the Florida Department of Legal Affairs, the Florida Capitol, Plaza Level One, Tallahassee, FL 32399-1050 by prepaid United States mail, hand delivery and electronic mail delivery; and to the Hon. Bill Cervone, State Attorney, Eighth Judicial Circuit of Florida, 120 West University Avenue, Gainesville, FL32601, this 12th day of October , 2006, by prepaid United States mail.

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Baya Harrison

CERTIFICATE OF COMPLIANCE

I certify that that this Initial Brief of Appellant was prepared using a Times New Roman Font, 14 point, not proportionally spaced, in conformity with the rules of this Court.

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Baya Harrison