IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1139

ROBERT BEELER POWER,

Appellant
v.

STATE OF FLORIDA,

Appellee

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

This Court summarized the relevant facts on direct appeal:

The conviction arises from events occurring on October 6, 1987, when Frank Miller, a friend of the Bare family, arrived at the Bare home with his daughter to pick up twelve-year-old Angeli Bare for school. When he arrived, Miller honked the horn twice. He then glanced at the house where he saw a man standing inside the doorway with his back to the street. Miller assumed the man was Angeli's father because he was approximately the same build. The man made a gesture which Miller interpreted as meaning for him to wait. Miller remained in his car. When he next looked, he noticed the front door was closed with no one in sight. At approximately 8:55 a.m., Angeli came out of her house and walked down to the sidewalk to Miller's car. She approached within three feet of the passenger side of the car (the side closest to the house), and stopped. At that point, Miller noticed that Angeli appeared very nervous.

Angeli told Miller that there was a man in the house who she believed wanted to rob her. Angeli refused Miller's repeated requests to get into the car because, she said, the man in the house would kill all three of them. Miller told Angeli that he would get help and immediately drove the four blocks back to his own house and called the Bares at work and 911. Miller then drove back and parked four or five houses away from the Bares' home.

At approximately 9:10 a.m., Deputy Richard Welty received a radio dispatch and drove to the Bare home. En route, he was flagged down by Miller who related what he saw. Miller described the man he had seen as a white male with reddish hair. Mr. and Mrs. Bare, who had just arrived, stated that Angeli's biological father, who lived in California, had reddish hair.

Deputy Welty went to the Bare home and searched it but found nothing. After another officer arrived, Welty went to check the field behind the Bare home. Welty walked west into an area filled with heavy brush and trees. He followed a path with his revolver drawn in one hand and his two-way radio in the other. When the footing became treacherous, Welty

holstered his gun as a safety precaution, and proceeded down the path. Welty then noticed a white male with sandy blond hair walking casually through the field. The man, who was wearing worn blue jeans and a dungaree-style shirt, appeared to have a sandwich in his right hand and was "high-stepping" through the field toward a nearby construction site.

Because Welty was originally looking for a man with reddish hair, he called a fellow officer on the radio to ask for a better description from Frank Miller. While talking on the radio, Welty became unsure of his footing, looked down, and when he looked up again, found himself facing the man he had seen earlier now pointing a gun at him. Welty subsequently identified the man as Robert Power.

Power told Welty to hand over his sidearm. Welty thrust his hands into the air and then slowly reached for his pistol. Power then ordered Welty to put his hands into the air once again and retrieved Welty's pistol himself. Power asked Welty, "How many others are there?" Deputy Welty told Power that there were "six deputies on the scene." After a lengthy pause, Power asked for and received Welty's radio. Power then ordered the deputy to run in the direction of the construction site and warned him, "If you turn around, I will kill you." Welty jogged about thirty feet, stopped, looked back, and saw Power running west towards U.S. 441. Angeli Bare's body was found in the same general direction later that morning.

Welty ran back to the Bare home and reported that the culprit had his radio and service revolver. The police set up a perimeter but were unable to apprehend the fleeing suspect.

It was late morning or early afternoon before authorities found the body of Angeli Bare in the tall grass of the field behind her home. The body was lying on its right side, gagged and "hog-tied" by the wrists and ankles. The body was nude from the waist down. Lying nearby were her school books, jacket, purse, and an empty paper lunch bag. Officer Welty's service revolver was later found in a wooded area near the canal.

The autopsy revealed that the victim's left eye was blackened and that she had superficial contusions on her neck. In the medical examiner's

opinion, the death of Angeli Bare resulted from shock following exsanguination due to the severance of the right carotid artery. The artery was cut by a stab wound on the right side of her neck. The autopsy also revealed injuries to the vaginal and anal area. The doctor estimated that these injuries were the result of the insertion of an oversized foreign object, perhaps a human penis. The doctor approximated the time of death as within thirty minutes of 9:15 a.m. The crime lab serologist found no semen on the victim's underwear. Vaginal, rectal, and oral swabs revealed no spermatozoa. Blood stains found on the victim's underwear were the same blood type as that of the victim.

Police conducted a thorough search of the Bare home. They found no signs of a struggle or forced entry. Angeli's bank had been pried open and a screwdriver was found in the kitchen sink. None of the latent prints found by the crime scene technicians matched Robert Power. Latent fingerprints found on Officer Welty's service revolver also did not match Robert Power. Police found no latent fingerprints of any kind on the victim's body. According to the State's experts, however, three pubic hairs from Angeli's bedspread were indistinguishable from Power's known pubic hairs, and one pubic hair from Angeli's fitted bed sheet was indistinguishable from Power's. Additionally, a single hair recovered during the autopsy from Angeli's pubic area was indistinguishable from Power's pubic hair.

The State's experts agreed that a number of head hairs of unknown origin found in the sheets of Angeli's bedding did not match Power's. Numerous hairs recovered from the bedding and clothing remained unidentified at the time of trial.

Approximately ten days after the murder, Officer Welty identified a photograph of Robert Power as the man who robbed him in the field. A SWAT team executed a search warrant at the residence of Robert Power, who lived at the house with his mother, her youngest daughter, her eldest son, that son's wife, and their three children. Robert Power was found hiding in the attic and was arrested. Police seized a maroon duffle bag from the attic that was close to Power. The duffle bag contained a pistol, some ammunition, a pair of tan driving gloves, a red bandanna, at least three documents with Robert Power's name on them, and a folding knife.

> Police also found a box in the front bedroom containing various electronic parts, one of which contained a serial number corresponding to the serial number of the radio that was taken from Deputy Welty. An exhaustive examination of the box revealed numerous latent fingerprints, none of which matched Robert Power's. The crime lab was unable to find any useful latent prints on the radio parts inside the box. Police seized some green, hooded sweatshirts and several denim work shirts from the front bedroom. According to the State's experts, two of three head hairs recovered from the sweatshirts were consistent with Angeli Bare's.
>
> The jury found Power guilty of first-degree murder, sexual battery, kidnapping of a child under the age of thirteen, armed burglary of a dwelling, and armed robbery. The jury recommended death for the homicide. The trial court concurred, finding no mitigating circumstances and four aggravating factors. The court considered and rejected as mitigation the defendant's age of twenty-five years at the time of the crime and the defendant's lack of future dangerousness because he was already serving a prison term of ten consecutive life sentences. The court expressly refused to consider the comparative cost of the death penalty versus life sentences as a mitigating circumstance. The court found in aggravation that (1) the defendant was previously convicted of a felony involving the use or threat of violence; (2) the homicide was committed while the defendant was engaged in the commission of the crimes of sexual battery, burglary, and kidnapping; (3) the homicide was especially heinous, atrocious, or cruel; and (4) the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court sentenced Power to consecutive life terms for the noncapital felonies. [Footnotes not cited]

Power v. State, 605 So. 2d 856, 858-62 (Fla. 1992). This Court affirmed the convictions and sentences, and Power filed a Petition for Writ of Certiorari to the United States Supreme Court. Certiorari review was denied April 19, 1993. *Power v. Florida*, 507 U.S. 1037 (1993).

Power filed a series of motions to vacate, the last of which was in November

1998, and raised thirty eight (38) claims. This Court denied Rule 3.850 relief and concurrently denied state habeas relief. *Power v. State*, 886 So. 2d 952 (Fla. 2004).

Power filed a successive Motion to Vacate Judgment and Sentence on December 1, 2006. (R30-230). The motion included attachments. (R231-1232). The State responded. (R1236-1303). The Case Management Conference was held December 28, 2006, (R1-29). Power filed an Amended successive Motion to Vacate at the Case Management Hearing. (R2184-2230). The trial court summarily denied relief on May 7, 2007. (R2267-2272). This appeal follows.

SUMMARY OF ARGUMENT

ARGUMENT I. The trial judge did not err in summarily denying Power's lethal injection claims. These issues are procedurally barred and have no merit. Power raised the constitutionality of lethal injection as Argument XI in the Initial Brief in the prior postconviction proceeding, and this Court denied relief. *Power v. State*, 886 So. 2d 952 (Fla. 2004). Insofar as the execution procedures promulgated after the Diaz execution, the case of *Lightbourne v. State*, 969 So. 2d 326 (Fla. 2007) is dispositive.

ARGUMENT II. Power is not exempt from execution due to mental illness. He is neither retarded nor insane. Whether he is incompetent to be executed is an issue he should raise after a death warrant is signed. This issue is also procedurally barred because it was raised as an issue in *Power v. State*, 886 So. 2d 952 (Fla. 2004).

ARGUMENT III. The American Bar Association report on the death penalty is not newly discovered evidence. *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006). The issue is procedurally barred and, as this Court has repeatedly held, has no merit.

ARGUMENT I

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING POWER'S LETHAL INJECTION CLAIMS; THIS ISSUE IS PROCEDURALLY BARRED

Power's first argument is that the trial judge erred in summarily denying his challenges to Florida's lethal injection procedures.[1] More particularly, Power claims:

> (1) Section 922.105 is an unconstitutional delegation of legislative authority;
>
> (2) Florida's lethal injection procedures will inflict cruel and unusual punishment.

(Initial Brief at 7, 10).

The issues are procedurally barred. The lethal injection statute was enacted January 14, 2000. Power raised the constitutionality of lethal injection as Argument XI in the Initial Brief in the prior postconviction proceeding, and this Court denied relief. *Power v. State*, 886 So. 2d 952 (Fla. 2004), finding:

> Death Penalty Challenges

[1] The following appeals are pending in this Court after summary denial on post-conviction lethal injection claims: *Ventura v. State*, Case No. SC08-60; *Marquard v. State*, Case No. SC08-148; *Melton v. State*, Case No. SC08-219; *Mann v. State*, Case No. SC08-62; *Henyard v. State*, Case No. SC08-222; *Pittman v.* State, Case No. SC08-146 and *Burns v. State*, Case No. SC08-192.

> Lastly, Power contends that Florida's death penalty unconstitutionally permits cruel and unusual punishment, and that he is insane to be executed. This Court has previously rejected similar claims regarding the constitutionality of Florida's death penalty. *See Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000) (holding execution by lethal injection does not constitute cruel punishment or unusual punishment or both); *Provenzano v. Moore*, 744 So. 2d 413, 416 (Fla. 1999) (holding execution by electrocution in Florida's electric chair does not constitute cruel or unusual punishment).

Power v. State, 886 So.2d 952, 958 (Fla. 2004).

Further, this issue has no merit and has been denied repeatedly by this Court.

The trial judge held:

> Claim I: Defendant challenges the constitutionality of Florida's lethal injection statute Section 922.105, Florida Statutes, and the existing procedure used to carry out lethal injections. In sub-section A, he argues the statute is an unconstitutional delegation of legislative authority and a violation of due process because the Legislature gave the Department of Corrections (herein 'DOC") no intelligible principle by which to create a rule of lethal injection protocol. He further argues the statute's exemption from the constraints of Florida's Administrative Procedure Act gives DOC unfettered discretion to create the protocol 'behind closed doors and by any method of its choosing,' which cannot pass constitutional muster.
>
> The Florida Supreme Court has consistently rejected this argument. See *Diaz v. State*, 945 So. 2d 1136 1143 (Fla. 2006); *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000); and *Hill v. State*, 921 So. 2d 579, 582-583 (Fla. 2006). Florida's lethal injection statute "is not so indefinite as to constitute an improper delegation of legislative power." *Sims*, 754 So. 2d at 670. The statute clearly defines the punishment to be imposed, which is death. The legislative purpose of the statute is to impose death. DOC has personnel better qualified to make determinations regarding the methodology and chemicals to be used to achieve the legislative purpose with humane dignity. Finally, the previous law relating to electrocution

did not specify the manner in which it was to be applied. *Id.*

> In sub-section 8, Defendant argues the lethal injection procedure that Florida uses in executions will inflict cruel and unusual punishment upon him. In support, he cites DOC's revised lethal injection protocol, an article published in the medical journal *The Lancet* in April 2005, and several United States District Court orders granting relief in similar challenges.
>
> The Florida Supreme Court has found the study published in *The Lancet* to be inconclusive and ruled that it did not warrant an evidentiary hearing. *Hill v.* State, 921 So. 2d at 853; *Rutherford v. State,* 926 So. 2d 1100, 1113-1114 (Fla. 2006). It has also ruled that the federal decisions Defendant cites, such as *Morales v. Hickman,* 415 E.Supp.2d 1037 (N.D.Cal. 2006), do not warrant relief, as the same issues had been litigated in *Sims. Diaz v. State,* 945 So. 2d at 1144. The claim regarding the DOC's revised lethal injection protocol, promulgated on August 16, 2006, is premature. On December 15, 2006, then-Governor Jeb Bush issued a Statement and Executive Order creating a Commission on Administration of Lethal Injection, which was charged with reviewing the method in which the lethal injection protocols are administered. This Commission has issued a report and made recommendations for further revision to the DOC protocol. Therefore this aspect of the claim will be denied without prejudice.

(R2268-69).

In addition to the cases cited by the trial judge, this Court has recently issued two decisions involving lethal injection, and has resolved claims surrounding any revised lethal injection procedures. *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007); *Schwab v. State*, 969 So. 2d 318 (Fla. 2007). Although the trial judge denied Power's claim regarding the August 2006 procedures "without prejudice," that issue is moot since those procedures have been superseded by the August 2007 procedures,

which this Court upheld in *Lightbourne* and *Schwab*. Power raised nothing different from *Lightbourne* in his motion, and there is no need for an evidentiary hearing. *See Schwab*. Insofar as Power cites to *Baze v. Rees,* United States Supreme Court Case No. 07-5439, this Court discussed the import of *Baze* in *Lightbourne,* and *Lightbourne* is dispositive.

ARGUMENT II

POWER IS NOT EXEMPT FROM THE DEATH PENALTY BECAUSE OF MENTAL ILLNESS

Power claims he is exempt from execution because he suffers from a severe mental illness. This issue is procedurally barred. The issue was raised in *Power v. State*, 886 So. 2d 952 (Fla. 2004), and this Court held:

> Death Penalty Challenges
>
> Lastly, Power contends that Florida's death penalty unconstitutionally permits cruel and unusual punishment, and that he is insane to be executed. This Court has previously rejected similar claims regarding the constitutionality of Florida's death penalty. *See Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000) (holding execution by lethal injection does not constitute cruel punishment or unusual punishment or both); *Provenzano v. Moore*, 744 So. 2d 413, 416 (Fla. 1999) (holding execution by electrocution in Florida's electric chair does not constitute cruel or unusual punishment). Furthermore, we reject as premature Power's claim that he is insane to be executed. As he acknowledges, this claim is not yet ripe and therefore, merits no relief from this Court.

Power v. State, 886 So. 2d 952, 958 (Fla. 2004).

In attempt to avoid the procedural bar, Power cites to a 2006 American Bar

Association resolution as newly discovered evidence. (Initial Brief at 19). This Court has previously rejected Power's argument that the report was newly discovered evidence or was dispositive of Florida cases:

> On September 17, 2006, the American Bar Association published a report on Florida's death penalty system. The report, titled Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report, analyzes Florida's death penalty laws, procedures and practices, and highlights areas in which, in the view of the assessment team, Florida "fall[s] short in the effort to afford every capital defendant fair and accurate procedures." ABA Report at iii.
>
> We agree with the circuit court's conclusion that the ABA Report is not "newly discovered evidence." The ABA Report is a compilation of previously available information related to Florida's death penalty system and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches. See ABA Report at ii ("The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty" and the assessment team's findings "are intended to serve as the bases from which [the state] can launch [a] comprehensive self-examination.").
>
> However, even if we were to consider the information contained in the ABA Report, nothing therein would cause this Court to recede from its decisions upholding the facial constitutionality of the death penalty. *See e.g., Hodges v. State*, 885 So. 2d 338, 359 & n.9 (Fla. 2004) (noting that the defendant's claim that "the death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment," has "consistently been determined to lack merit"); *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003) ("We have previously rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty."). Further, Rutherford does not allege how any of the conclusions reached in the ABA Report would render his individual

death sentence unconstitutional.

Rutherford v. State, 940 So. 2d 1112, 1118 (Fla. 2006).

Power also attempts to avoid the procedural bar by stating he previously raised this claim as a Sixth Amendment claim, but is now raising it as an Eighth Amendment claim. (Initial Brief at 21). The logic of this argument is baffling, to say the least. This claim was previously raised and is procedurally barred. The fact that counsel has now couched the argument in different terms hardly serves to rewind the clock and breathe new life into this claim.

The trial court held:

> Claim II: Defendant asserts he is exempt from execution because he suffers from such severe mental illness that death could never be an appropriate punishment. In support, he argues he has been diagnosed with major recurrent depression neurological impairments, and post-traumatic stress disorder. He cites, inter alia, American Bar Association Resolution 1 22A, which recommends that each jurisdiction that imposes capital punishment implement policies and procedures to prevent severely mentally ill defendants from being executed. He also argues that he falls within the class of persons who are so much less morally culpable than the average murderer as to be categorically excluded from eligibility for the death penalty. Here, he cites *Roper v. Simmons,* 543 U.S. 551 (2005), and *Atkins v. Virginia,* 536 U.S. 304 (2002).
>
> Mental illness may be a statutory or non-statutory mitigating circumstance, but neither the Florida Supreme Court nor the United States Supreme Court has recognized it as a per se bar to execution. *Din v.* State, 945 So. 2d at 1150-1151. It is merely one of many factors to be considered and weighed by a trial court when imposing a sentence. *Id.*[2]

[2] 'In the *Diaz* case, there was no evidence of mental illness presented at trial, but

The only factors that 'exempt" an individual from the death penalty are age, mental retardation and insanity. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Florida Rule of Criminal Procedure* 3.811(d). None of these factors apply in the instant case. Defendant was not under 18 at the time of the crime, and he has not been diagnosed with either mental retardation or insanity. Therefore, these factors simply do not apply to him, and this Court is aware of no controlling Florida case law that renders mental illness equivalent thereto for purposes of evaluating eligibility for the death penalty.

In addition, this claim is procedurally barred. Defendant fails to allege or establish why he could not have raised it in his original Rule 3.851 motion or why he is raising it again for a second time. Fn 1.

> Fn 1. In the Diaz case, there was no evidence of mental illness presented at trial, but collateral counsel did present experts during the postconviction proceedings.

It is both successive and untimely. Furthermore, his own allegations demonstrate an acknowledgment that the issue of mental illness was presented at the 2001 evidentiary hearing. Despite the court's finding of the 'compelling" nature of the testimony presented by Drs. Hyde, Merikangas, Crown, and Sultan, it did not find that testimony to be a basis for relief:

> Nevertheless, this court also finds that Mr. Power was firm and unwavering in his decision to refuse to allow counsel to present mitigation, and that he was capable of making this decision in a reasoned, well-informed manner. While the experts indicated his history and psychological problems may have affected his ability to make rational decisions, that retrospective diagnosis appears to be belied by the record, particularly the transcripts of the July and October 1990 in camera hearings, in which Mr. Power shows himself to be an active participant in his defense team, insistent upon proclaiming his innocence, and capable of

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collateral counsel did present experts during the postconviction proceedings

> articulating his preferred strategy and his rationale for that strategy.
>
> Finally, throughout the course of the evidentiary hearings conducted in January and April 2001, this court had the opportunity to observe Mr. Power in person. At all times, he appeared to be alert and intelligent, he was engaged in the proceedings and frequently communicated with his attorneys. Granted, many years have passed since the date of the trial, but this court adds its own observations to those of the doctors who have also recently examined Mr. Power to arrive at a final conclusion on his overall competence. While he was certainly must have been affected by the trauma of his childhood and by his psychological impairments, he was still reasonably capable of making an informed waiver of mitigation. In the final analysis, it was not a wise decision he made when he chose to waive mitigation, but it was his to make and counsel was not ineffective for following his instructions. *See Koon v. Dugger,* 619 So. 2d 246 (Fla. 1993).

(R2270-2271). As the trial court found, this issue has no merit.

ARGUMENT III

THE ISSUE REGARDING THE AMERICAN BAR ASSOCIATION REPORT IS PROCEDURALLY BARRED AND HAS NO MERIT.

Power's last argument is that the September 17, 2006, resolution of the American Bar Association is newly discovered evidence and demonstrates the unconstitutionality of Florida's death penalty procedures. Power acknowledges that this Court has held differently. (Initial Brief at 32). *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006); *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006); *Rolling v. State*, 944

So.2d 176 (Fla. 2006). This Court has previously rejected Power's argument that the report was newly discovered evidence or was dispositive of Florida cases:

> On September 17, 2006, the American Bar Association published a report on Florida's death penalty system. The report, titled Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report, analyzes Florida's death penalty laws, procedures and practices, and highlights areas in which, in the view of the assessment team, Florida "fall[s] short in the effort to afford every capital defendant fair and accurate procedures." ABA Report at iii.
>
> We agree with the circuit court's conclusion that the ABA Report is not "newly discovered evidence." The ABA Report is a compilation of previously available information related to Florida's death penalty system and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches. See ABA Report at ii ("The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty" and the assessment team's findings "are intended to serve as the bases from which [the state] can launch [a] comprehensive self-examination.").
>
> However, even if we were to consider the information contained in the ABA Report, nothing therein would cause this Court to recede from its decisions upholding the facial constitutionality of the death penalty. *See e.g., Hodges v. State*, 885 So. 2d 338, 359 & n.9 (Fla. 2004) (noting that the defendant's claim that "the death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment," has "consistently been determined to lack merit"); *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003) ("We have previously rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty."). Further, Rutherford does not allege how any of the conclusions reached in the ABA Report would render his individual death sentence unconstitutional.

Rutherford v. State, 940 So. 2d 1112, 1118 (Fla. 2006). This issue is procedurally barred, the procedural bar cannot be avoided, the evidence is not newly discovered, and the issue has no merit.

Power's final arguments are a hodge-podge of the claims which either were, or should have been, raised on direct appeal or the prior postconviction proceeding. (Initial Brief at 36-45). These issues are procedurally barred, and many of them were resolved in *Power v. State*, 886 So. 2d 952, 960-961 (Fla. 2004).

The trial court held:

> Claim III: Defendant cites 'newly discovered empirical evidence" demonstrating that his conviction and death sentence constitute cruel and unusual punishment. He cites a report published in September 2006 by the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team. He summarizes that the information, analysis, and conclusions contained in the report indicate that Florida's system is "so seriously flawed and broken that it does not meet the constitutional requisite of being fair, reliable, or accurate."
>
> The Florida Supreme Court has held that the ABA Report is merely "a compilation of previously available information related to Florida's death penalty system and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches" and that "nothing therein would cause this Court to recede from its decisions upholding the facial constitutionality of the death penalty." *Rutherford v. State*, 940 So. 2d 1112, 1117-1118 (Fla. 2006). The report does not stand as conclusive evidence that Florida's death penalty system is irretrievably broken or flawed.

(R2271-72). Although the trial judge did not address the detailed arguments made in

the postconviction motion, those arguments are simply splintered subcategories from the ABA report and are so clearly procedurally barred and without merit that no ruling is necessary.

CONCLUSION

Based on the foregoing arguments and authorities, the Appellee respectfully requests this Honorable Court deny relief and affirm the trial court order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of the Appellee was furnished by U. S. Mail to: **Rachel Day**, CCRC-South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301 on this _____ day of February, 2008.

_____
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Answer Brief of the Appellee was generated in Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

_____
Attorney for Appellee