IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1139

ROBERT BEELER POWER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Power's successive motion for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on 3.850 appeal to this Court following the 2001 evidentiary hearing;

"PC-R2." -- record on 3.851 appeal to this Court following the circuit court's denial of Mr. Power's successive Rule 3.851 motion;

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Power requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF CASE AND FACTS

On June 2, 1990, Robert Beeler Power was found guilty of first-degree premeditated murder, sexual battery, kidnapping, armed burglary, and armed robbery. After a delay of 5 months, the penalty phase proceeded and the jury unanimously recommended a sentence of death. (R. 3254). On November 8, 1990, the trial court imposed a sentence of death. (R. 3254).

The trial court found four aggravating circumstances: Mr. Power had previously been convicted of another violent felony; the capital offense was committed during an enumerated felony; the capital offense was especially heinous, atrocious and cruel; and the capital offense was committed in a cold, calculated and premeditated fashion. (R. 3258-3271).

The trial court found the mitigating circumstance of the comparative cost of executing Mr. Power versus life in prison to be strong and heavily weighted, however, the trial court found this mitigating circumstance to be legally inappropriate for consideration or deserved little weight. (R. 3258-3271).

On direct appeal, this Court struck the aggravating circumstances of cold, calculated and premeditated, but upheld Mr. Power's death sentence. *Power v. State*, 605 So. 2d 856 (Fla. 1996), cert. denied, *Power v. Florida*, 113 S. Ct. 1863

(1993).[1]

Mr. Power filed his initial Rule 3.850 motion on June 27, 1994. An amended motion was filed on March 17, 1995. The third and final amended motion was filed

[1] Mr. Power raised the following claims on direct appeal: 1. The evidence presented at trial was insufficient to sustain the jury=s verdict; 2. The prosecutor improperly commented on Mr. Power=s failure to testify; 3. The trial court erred in allowing the introduction of hearsay evidence that erroneously indicated that Mr. Power stole Deputy Welty=s radio; 4. The trial court erred in instructing the jury on flight and denying Mr. Power=s request for a limiting instruction; 5. Mr. Power was denied the right to a fair trial when a deputy sheriff prepared to Adraw down@ on him in full view of the jury; 6. The trial court erred in allowing Deputy Welty to testify about hearsay statements made by Frank Miller regarding how he normally picked up the victim for school and his description of the man he saw in front of the victim=s house on the morning of the murder; 7. The trial court erred in refusing to suppress certain physical evidence because (1) the affidavit upon which the search warrant was based contained misleading information or omitted material facts; (2) the officers conducting the search did not Aknock and announce@ their identities and purpose in violation of section 933.09 of the Florida Statutes; and (3) the search warrant was invalid because it contained the wrong name of the owner of the house; 8. The grand jury and its foreperson were selected discriminatorily and the grand jury was illegally constituted and improperly paneled; 9. Numerous errors during jury selection warrant a new trial; 10. The trial court abused its discretion in refusing to give two special jury instructions; 11. The trial court erred in restricting defense counsel's attempts to rehabilitate Dr. Radelet after the State impeached him regarding his personal bias against the death penalty; 12. The trial court improperly found that the killing was especially heinous, atrocious, or cruel; 13. The trial court erred in finding the murder was committed in a cold, calculated, and premeditated manner; 14. Mr. Power was denied effective assistance of counsel and a full appellate review due to inaccuracies in the trial transcript; 15. Section 921.141(5)(h), which defines the statutory aggravating circumstance of heinous, atrocious, and cruel, and the standard jury instruction on this factor, are unconstitutionally vague; and 16. Florida's capital sentencing statute is unconstitutional.

on November 23, 1998 and raised thirty-eight (38) claims.[2] After a *Huff* hearing on

[2] Mr. Power raised the following claims in his first 3.851 motion: (1) denial of public records; (2) denial of effective representation because of lack of funding; (3) denial of due process because State withheld material and exculpatory or impeachment evidence; (4) denial of reliable adversarial testing; (5) ineffective assistance of counsel at the penalty phase and sentencing; (6) court used previous violent felony aggravator and counsel did not adequately investigate; (7) law unconstitutionally shifted burden to Mr. Power to prove that death was inappropriate; (8) introduction of non-statutory aggravating circumstances and State's improper argument on those circumstances; (9) trial court failed to find statutory and non-statutory mitigation and used unconstitutional standard of proof for finding mitigating circumstances; (10) prosecutorial misconduct; (11) Florida's capital sentencing statute is unconstitutional on its face and as applied; (12) death sentence rests upon an unconstitutionally automatic aggravating circumstance; (13) Mr. Power is innocent of the offenses; (14) denial of rights under *Ake v. Oklahoma*; (15) Mr. Power did not make a knowing and intelligent waiver of his rights; (16) jury's sense of responsibility towards sentencing was unconstitutionally diluted; (17) cold, calculated, and premeditated aggravating circumstance is unconstitutionally vague; (18) FSC conducted a constitutionally inadequate harmless error analysis in considering impact of invalid CCP aggravating circumstance; (19) aggravating circumstances were overbroadly and vaguely argued by State; (20) denial of due process because penalty phase was conducted 5 months after guilt/ innocence phase; (21) trial court allowed jury to hear evidence in detail of prior felonies; (22) defense counsel abandoned duty of loyalty to Mr. Power during penalty phase closing argument; (23) trial court failed to consider and find as a mitigating circumstance the cost of executing Mr. Power versus the cost of him serving a life sentence; (24) trial court erred when it attempted to define a reasonable doubt; (25) trial court improperly instructed jury on flight; (26) trial court gave unconstitutionally deficient jury instructions on aggravating circumstance in 921.141.(5)(h); (27) trial court erroneously instructed jury on standard by which to judge expert testimony; (28) denial of effective assistance of counsel because of rules prohibiting Mr. Power's counsel from interviewing jurors; (29) denial of fair and impartial trial because trial court permitted State to introduce gruesome and shocking photographs; (30) Mr. Power is insane to be executed; (32) Mr. Power did not make a knowing, intelligent, and voluntary waiver of his right to present penalty phase evidence and trial counsel was ineffective for failing to investigate whether Mr. Power was capable of waiving this right; (33) trial court's sentencing order did not reflect an independent

May 6, 1999, the trial court granted an evidentiary hearing on eight of Mr. Power's claims. (PC-R. 568-571).

Before Mr. Power's evidentiary hearing, the State attempted to have Mr. Power evaluated for competency. (PC-R. 2546). Counsel for Mr. Power objected and filed an interlocutory appeal to this Court, arguing that Mr. Power's counsel had not called into question Mr. Power's competency to proceed in post-conviction. (PC-R. 2595). This Court stayed the lower court proceedings and ordered briefing, but then on September 5, 2000, this Court dismissed the interlocutory appeal without issuing an opinion. (SC96659).

The evidentiary hearing was held on January 29-31, 2001 and April 2-5, 2001. The trial court denied relief on January 25, 2002, and denied rehearing on March 11, 2002. This Court affirmed the denial of Mr. Power's 3.850 motion and denied his petition for a writ of habeas corpus on May 6, 2004. *Power v. State*, 886 So. 2d 952 (Fla. 2004). Rehearing was denied on July 8, 2004.

On July 6, 2005, Mr. Power filed a federal habeas petition in the United States District Court for the Middle District of Florida, Orlando Division. On August 22, 2006, Mr. Power's case was transferred to the United States District

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weighing or reasoned judgment; (34) denial of fair trial because of excessive security measures and shackling; (35) Mr. Power is innocent of the death penalty; (36) denial of proper direct appeal because of omissions in the record; (37) execution by electrocution is cruel and/ or unusual punishment; (38) cumulative error.

Court for the Middle District of Florida, Ft. Myers division. His federal habeas petition is currently pending there.

On November 20, 2006, Mr. Power filed a successive Rule 3.851 motion, raising three claims: (1) Florida's lethal injection statute and existing method used to carry out executions by lethal injection violates Article II, section 3 and Article I, section 17 of the Florida Constitution, as well as the Eighth Amendment to the U.S. Constitution; (2) Mr. Power is exempt from execution under the Eighth Amendment because he suffers from such severe mental illness that death can never be an appropriate punishment; and (3) newly discovered empirical evidence demonstrates that Mr. Power's conviction and sentence of death violate the Eighth and Fourteenth Amendments to the U.S. Constitution. The State filed an answer on December 1, 2006. Mr. Power thereafter filed an amended successive Rule 3.851 motion on December 28, 2006, and a case management conference/ *Huff* hearing was held on that same day. On May 7, 2007, the circuit court summarily denied Mr. Power's successive Rule 3.851 motion without an evidentiary hearing, and on June 5, 2007, Mr. Power timely filed a Notice of Appeal. This appeal follows.

SUMMARY OF THE ARGUMENTS

I. The circuit court erred in summarily denying Mr. Power's claim challenging Florida's lethal injection statute and procedures on the grounds that the statute violates the Separation of Powers clause of the Florida Constitution and the

procedures violate the Eighth Amendment's prohibition on cruel and unusual punishment, as well as the corresponding provisions of the Florida Constitution.

II. The circuit court erred in denying Mr. Power's claim that newly discovered evidence demonstrates that he is exempt from execution because he suffers from such severe mental illness that the death penalty can never be an appropriate punishment. The circuit court erred in finding that the claim was procedurally barred. This claim is based on an August 8, 2006 report and thus was previously unknown and could not have been discovered through the exercise of due diligence. The circuit court therefore erred in finding it untimely. Further, the instant argument is by no means the same as the ineffective assistance of counsel argument Mr. Power raised in his initial Rule 3.851 motion and therefore the circuit court erred in finding the instant claim "successive" and untimely.

III. The circuit court erred in summarily denying Mr. Power's claim that newly discovered evidence demonstrates that his conviction and death sentence are unconstitutional because Florida's capital punishment system does not satisfy the promise of *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (per curiam). Mr. Power's that allegation that numerous systemic problems unveiled in the American Bar Association's Florida Death Penalty Assessment Report were at play in his trial, at both the guilt and penalty phases, is not conclusively refuted by the files and record in this case.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. *See Ornelas v. U.S.*, 517 U.S. 690 (1996); *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). Since no evidentiary development was permitted, Mr. Power's factual allegations must be accepted as true. *Borland v. State*, 848 So. 2d 1288, 1290 (Fla. 2003); *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

ARGUMENT I

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. POWER'S CLAIM THAT FLORIDA'S LETHAL INJECTION STATUTE AND THE EXISTING LETHAL INJECTION PROCEDURES VIOLATE THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 17 AND ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION AS THEY CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT AND VIOLATE THE SEPARATION OF POWERS DOCTRINE.

In his successive Rule 3.851 motion, Mr. Power raised a two-pronged challenge to Florida's lethal injection statute and procedures, alleging that Florida's lethal injection statute and the procedures used to carry out executions by lethal injection, promulgated on August 16, 2006, violate the United States and Florida Constitutions. The circuit court summarily denied his claim on both

grounds without an evidentiary hearing.

A. The circuit court erred in denying Mr. Power's claim that Florida's lethal injection statute violates Article II, Section 3 and Article I, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the U.S. Constitution.

Mr. Power argued that Florida's lethal injection statute, Section 922.105, Florida Statutes, is an unconstitutional delegation of legislative authority under the separation of powers doctrine of the Florida Constitution and violates that Fourteenth Amendment due process clause because the legislature gave the Department of Corrections (hereinafter "DOC") no intelligible principle by which to create a rule of lethal injection protocol. Alternatively, Mr. Power argued that the legislature's exemption of policies and procedures relating to lethal injection from the constraints and procedural protections of Florida's Administrative Procedures Act (hereinafter "APA"), without offering alternative procedures, gives the DOC unfettered discretion to create a lethal injection protocol. The circuit court summarily denied Mr. Power's challenge to Florida's lethal injection statute:

> 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 defined 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 human dignity. Finally, the previous law relating to electrocution did not specify the manner in which it was to be applied. *Id*.

(PC-R2. 2269).

The circuit court erroneously relied on *Sims v. State*, 754 So. 2d 657 (Fla. 2000) to deny this claim. The *Sims* decision did not address Mr. Power's specific argument. This Court concluded in *Sims* that "the lethal injection statute is not so indefinite as to constitute an improper delegation of legislative power, and the lack of specific details about the chemicals to be used does not violate the Eighth Amendment prohibition against cruel and unusual punishment." *Id*. at 670. Mr. Power raises a different issue, namely, the legislature's exemption of the lethal injection protocol from the requirements of Florida's APA.

While this Court has recently addressed this argument in *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006), Mr. Power notes that this Court's reasoning was based on the methods available to challenge lethal injection procedures, not the method by which lethal injection procedures are developed. Mr. Power maintains that the legislature's exemption of the DOC's lethal injection protocol from the **rulemaking requirements** of the APA violates the Separation of Powers Clause of the Florida Constitution. The exemption of the lethal injection protocol from the APA and resulting lack of a notice and comment procedure deprived Mr. Power of the opportunity to comment on any proposed lethal injection procedure. The circuit

court erred in denying Mr. Power's claim on this ground and this Court should reverse that decision.

B. The circuit court erred in denying Mr. Power's claim that Florida's lethal injection procedures are unconstitutional.

Mr. Power also alleged that Florida's lethal injection procedures are unconstitutional because they will inflict upon Mr. Power cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and corresponding provision of the Florida Constitution. The circuit court also summarily denied the claim that Florida's lethal injection procedures as applied are unconstitutional:

> 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 F. 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.

(PC-R2. 2269-70). Mr. Power acknowledges that this Court has recently upheld the

constitutionality of Florida's lethal injection procedures in *Schwab v. State*, 2008 Fla. LEXIS 55 (Fla. Jan. 24, 2008), *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), and *Schwab v. State*, 969 So. 2d 318 (Fla. 2007). Mr. Power submits, however, that the circuit court erred in denying his claim without evidentiary hearing. This Court has long held that a postconviction defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.'" *Lemon v. State*, 498 So. 2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). The same standard applies to successive motions to vacate. *Lightbourne v. State*, 742 So. 2d 238, 249 (Fla. 1999). This Court, like the lower court, must accept that Mr. Power's allegations are true at this point in the proceedings. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). Mr. Power's Rule 3.851 motion pled facts regarding the merits of his claim and his diligence which must be accepted as true. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively

rebut Mr. Power's claim and that an evidentiary hearing is required. As demonstrated herein, Mr. Power is entitled to an evidentiary hearing and thereafter relief on his claim.

Furthermore, in light of the United States Supreme Court's recent grant of certiorari review of similar issues regarding the constitutionality of lethal injection, *Baze v. Rees*, (Docket No. 07-5439),[3] Mr. Power maintains that execution by lethal injection constitutes cruel and unusual punishment in violation of the Eighth

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[3] *Baze* will determine the threshold question as to what legal standard should be applied in evaluating an Eighth Amendment claim challenging the method of execution in a capital case and resolve the "current uncertainty in the exact standard" noted by this Court in *Lightbourne v. McCollum*, 969 So. 2d 326, 339 (Fla. 2007). *Baze* presented the following questions for review:

> I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?
>
> II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?
>
> III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?
>
> (*See* Pet. for Writ of Certiorari, p. ii-iii).

Amendment to the United States Constitution and corresponding Art. I, § 17 of the Florida Constitution. Florida's lethal injection procedures must be compatible with evolving standards of decency and compatible with standards that mark the progress of a maturing society. The process must also be consistent with the notions of the dignity of man, and the State must establish a procedure that is not likely to result in the unnecessary or wanton infliction of pain. *See Hudson v. McMillian*, 503 U.S. 1 (1992); *Trop v. Dulles*, 356 U.S. 86 (1958).

The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." *Weems v. United States*, 217 U.S. 349, 373 (1910). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). It forbids laws subjecting a person to "circumstance[s] of degradation," *Id*. at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. *Id*. at 370. However, the Eighth Amendment "proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). It prohibits the risk of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) ("The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the

necessary suffering involved in any method employed to extinguish life humanely.").

The scope of the Eighth Amendment in this regard is set forth in *Estelle v. Gamble*, 429 U.S. 97, 102 (1976):

> It suffices to note that the primary concern of the drafters [of the Eighth Amendment] was to proscribe "torture(s)" and other "barbar(ous)" methods of punishment. Accordingly, this Court first applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment . . . .Our more recent cases, however, have held that the Amendment proscribes more than physically barbarous punishments. The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .," against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society" or which "involve the unnecessary and wanton infliction of pain."

(citations omitted). Justice Brennan explained in *Glass v. Louisiana*, that the contours of the Eighth Amendment extend beyond whether there is conscious pain inherent in the method of execution:

> The Eighth Amendment's protection of "the dignity of man," extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. These principles explain the

> Eighth Amendment's prohibition of such barbaric practices as drawing and quartering.

471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari) (internal citations omitted). Thus, the Eighth Amendment also requires that the method of execution minimize physical violence as well as mutilation and distortion of the human body.

The Eighth Amendment does more than ban unnecessary and physical violence to the body; it imposes a duty of care upon the government officials charged with caring out the execution. In *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), the Court held that a state official's failure to prevent harm to prisoners constitutes cruel and unusual punishment in violation of the Eighth Amendment if the official shows "deliberate indifference" to the prisoners' well-being. State conduct evinces "deliberate indifference" if an official knows of and disregards a risk of unnecessary pain. In employing a method of execution, the State and its agents are not free to turn a blind eye to obvious risks of unnecessary pain.

The existing procedure for lethal injection in Florida violates the Eighth Amendment to the United States Constitution, as it will inflict upon Mr. Power cruel and unusual punishment. Mr. Power's amended successive Rule 3.851 motion was based in large part on facts that occurred during the December 2006 execution of Angel Diaz, which was carried out under procedures promulgated on August 16, 2006. Since the circuit court denied Mr. Power's successive Rule 3.851

motion on May 7, 2007, the DOC has promulgated two more lethal injection procedures. Yet the most recently promulgated procedures, effective August 1, 2007, still do not adequately address the deficiencies in the 2006 procedures that allowed the botched Diaz execution to occur. There has been no change to the most critical aspects of the lethal injection process. Specifically, provisions for the administration of the drugs, the assessment of consciousness, and the monitoring the inmate for consciousness throughout the procedure remain inadequate to protect against the foreseeable risk of the unnecessary and wanton infliction of pain. The administration of the drugs and the assessment of consciousness are being carried out by non-medical personnel, while the monitoring of consciousness and IV sites throughout the procedure is done from another room via a television monitor by personnel of unknown qualifications and background. Furthermore, there is no provision for the use of a Bispectral index (BIS) monitor to assist in monitoring the inmate's level of consciousness, and there is no requirement that anyone trained in anesthesiology and assessing and monitoring surgical depth of consciousness assist in monitoring the inmate's level of consciousness.

It is clear that Florida's procedure for carrying out executions using lethal injection carry a substantial risk of pain. Deficiencies in the protocol employed by DOC create a risk of the infliction of unnecessary pain. Additionally, without a medical determination of unconsciousness before the administration of drugs

known to produce pain, there is a deliberate indifference to the risk of the infliction of unnecessary pain in violation of the Eighth Amendment. Mr. Power's allegations were sufficient to require the circuit court to conduct an evidentiary hearing on this claim. This Court should reverse the circuit court's summary denial and remand this case for an evidentiary hearing at which Mr. Power will be able to present newly discovered evidence demonstrating that the current procedures used to carry out executions by lethal injection violates Mr. Power's Eighth Amendment rights.

ARGUMENT II

MR. POWER IS EXEMPT FROM EXECUTION UNDER THE EIGHTH AMENDMENT BECAUSE HE SUFFERS FROM SUCH SEVERE MENTAL ILLNESS THAT DEATH CAN NEVER BE AN APPROPRIATE PUNISHMENT.

In his successive Rule 3.851 motion, Mr. Power alleged that he is exempt from execution under the Eighth Amendment to the U.S. Constitution because he suffers from such severe mental illness that death can never be an appropriate punishment. Mr. Power's claim was based on the American Bar Association's Resolution 122A (PC-R2. 768-69), which was approved on August 8, 2006 and recommends that each jurisdiction that imposes capital punishment implement policies and procedures to prevent severely mentally ill defendants from being executed. In its order denying Mr. Power's claim without an evidentiary hearing,

the circuit court stated:

> 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. *Diaz 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*. 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 Procedures 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. It is both successive and untimely. Furthermore, his own allegations demonstrated an acknowledgement 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…

(PC-R2. 2270-71)(Footnote omitted).

A. The circuit court erred in finding Mr. Power's claim procedurally barred.

The circuit court erred in finding that Mr. Power's claim is procedurally barred. The claim is not procedurally barred because it was not and could not have

been raised in Mr. Power's original Rule 3.851 motion. The basis for Mr. Power's instant claim is the American Bar Association's Resolution 122. On August 8, 2006, the American Bar Association (hereinafter "ABA") approved the resolution, which urged that:

> 2. Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

(PC-R2. 768). In his successive Rule 3.851 motion, filed on November 20, 2006, Mr. Power argued that because he suffers from severe mental illness, he falls within the class of defendants that the ABA has resolved should be categorically excluded from being eligible for the death penalty, and that his death sentence should be vacated on that basis. Mr. Power's claim was based wholly on the ABA resolution and thus could not have been raised prior to August 8, 2006. It is therefore timely under Rule 3.851(d)(2)(a) and the circuit court erred in finding that it was procedurally barred on the grounds that it could have been raised in Mr. Power's initial Rule 3.851 motion.

The circuit court further erred in finding that Mr. Power is raising the instant claim a second time. In his initial Rule 3.851 motion, Mr. Power alleged that his

trial counsel was ineffective for failing to investigate and present substantial mitigation evidence. The circuit court granted an evidentiary hearing on that claim, and Mr. Power presented the testimony of family members and mental health experts in order to meet his burden of proving trial counsel's deficient performance. The circuit court denied Mr. Power's claim and this Court affirmed that denial on the grounds that Mr. Power waived the presentation of mitigation evidence. *Power v. State*, 886 So. 2d 952, 961 (Fla. 2004)(holding that "where there is proof that counsel spent substantial effort on the case and was familiar with the mitigation, but also evidence that Power himself interfered with trial counsel's ability to obtain and present mitigating evidence, this Court will not overrule a trial court's conclusion that counsel's performance was not deficient."). This Court further concluded that:

> [T]he record supports the trial court's conclusion that counsel conducted a reasonable investigation under the circumstances, and was perfectly poised to proceed with a thorough presentation of mitigating evidence including Power's background, if Power had allowed him to do so. It appears the omission from the penalty phase of the wealth of mitigation presented at the evidentiary hearing was the result of compliance with a competent client's demands—not ineffectiveness on trial counsel's part.

Id. at 962. Mr. Power's previous claim was grounded in the Sixth Amendment's guarantee of effective assistance of counsel and premised on the argument that but for trial counsel's deficient performance in failing to investigate and present

substantial and compelling mitigation—including Mr. Power's history of severe mental illness—there is a reasonable probability that Mr. Power would not have received a death sentence. Mr. Power's instant claim is grounded in the Eighth Amendment's prohibition against cruel and unusual punishment and premised on the argument that defendants who suffer from severe mental illness fall within the class of persons who are so much less morally culpable and deterrable than the "average murderer" as to be categorically excluded from being eligible for the death penalty, no matter how heinous the crime. The circuit court erred in finding that Mr. Power's instant claim is procedurally barred because it is successive.

B. The circuit court erred in denying Mr. Power's claim that he is exempt from execution because he suffers from such severe mental illness that the death penalty can never be an appropriate punishment.

The circuit court erred in denying Mr. Power's claim that his severe mental illness places him within the class of defendants, like those who were under the age of eighteen at the time of the crime and those with mental retardation, who are categorically excluded from being eligible for the death penalty. *Cf. Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the death penalty is unconstitutional for defendants under 18 at the time of the crime); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the death penalty is unconstitutional for mentally retarded defendants). In denying Mr. Power's claim, the circuit court relied on *Diaz v. State*, 945 So. 2d at 1152, in which this Court noted that "there is currently no per se

'mental illness' bar to execution." The U.S. Supreme Court, however, has long cautioned that the Eighth Amendment's prohibition against cruel and unusual punishment is not simply a fixed ban on certain punishments, but rather depends on evolving standards of decency for its substantive application. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (noting that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); *Weems v. United States*, 217 U.S. 349, 368 (1910) (recognizing that the words of the Eighth Amendment are not precise, and that their scope is not static.). The ABA resolution urging states to exempt from the death penalty those defendants with severe mental illness at the time of their crimes as described in the resolution evinces an evolution in standards of decency which must be considered in a proper Eighth Amendment analysis.[4]

Mr. Power has suffered continuously from severe mental illness since before the time of the crime for which he was convicted and sentenced to death. He has

[4] It bears noting that prior to the U.S. Supreme Court's decisions holding that mentally retarded defendants and defendants under the age of eighteen at the time of the crime are categorically excluded from eligibility for the death penalty, the ABA passed resolutions urging the exemption of both classes of defendants from the death penalty. *See* American Bar Association, Report with Recommendations No. 107 (adopted February 1997), *available a*t http://www.abanet.org/irr/rec107.html (last visited Dec. 5, 2007); American Bar Association, Recommendation (adopted February 1989), available at http://www.abanet.org/irr/feb89b.html (last visited Dec. 5, 2007); American Bar Association, Recommendation (adopted August 1983), available at http://www.abanet.org/irr/aug83.html (last visited Dec. 5, 2007).

been diagnosed with major recurrent depression, neurological impairments, and post traumatic stress disorder. (PC-R. 798-814, 1584-1585, 1631-1667, 1772-1774). He falls within the class of persons who are so much less morally culpable and deterrable than the "average murderer" as to be categorically excluded from being eligible for the death penalty, no matter how heinous the crime. *Cf. Simmons, supra; Atkins, supra*. The post-conviction court acknowledged Mr. Power's severe mental illness after his 2001 evidentiary hearing in its finding that Mr. Power's mental health experts were "much more compelling and credible than those presented by the State" (PC-R. 3731). [5] Given his severe mental illness, Mr. Power is constitutionally protected from execution because the death penalty is an unconstitutionally excessive punishment for Mr. Power for the same reasons delineated in *Atkins* and *Simmons.*

In *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), the U.S. Supreme Court identified retribution and deterrence of capital crimes by prospective offenders as the social purposes served by the death penalty. In *Atkins*, the U.S. Supreme Court

[5] While the post-conviction hearing court conceded that "a great deal of compelling information [was available] which the jury should indeed have heard prior to rendering its sentence recommendation, and its [defense] experts were much more compelling and credible than those presented by the State," (PC-R. 3731), the hearing court erroneously held 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." (PC-R. 3731).

stated that A[u]nless the imposition of the death penalty on a mentally retarded person measurably contributes to one or both of these goals, it >is nothing more than the purposeless and needless imposition of pain and suffering,= and hence an unconstitutional punishment.@ 526 U.S. at 320, *quoting Enmund v. Florida*, 458 U.S. 782, 798 (1982). The *Atkins* Court ultimately found that neither justification for the death penalty was served by its imposition on mentally retarded individuals.

As to the first justification, retribution, the court concluded that the legislative trend against imposition of the death penalty on mentally retarded offenders Aprovides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.@ *Id*. at 316. The *Atkins* Court opined that AIf the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.@ 526 U.S. at 319. The court explained some reasons for the lesser culpability of mentally retarded offenders:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. Y [T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are

> followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318.

Similarly, in *Simmons*, the U.S. Supreme Court listed several reasons for juveniles= diminished culpability:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, Y@[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.@ It has been noted that Aadolescents are overrepresented statistically in virtually every category of reckless behavior.@
>
> * * *
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.
>
> * * *
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Simmons, 543 U.S. at 569-570 (internal citations omitted).

The reasoning in *Atkins* and *Simmons* applies with equal force to severely mentally ill offenders such as Mr. Power, as some judges across the county have

begun to recognize.[6] Mr. Powers severe mental illness and neurological impairments cause him to suffer from the very same deficits in reasoning, judgment, and control of impulses that lessen his culpability and render the penological justification of retribution ineffective against him.

As to the deterrence justification for capital punishment, the *Atkins* Court also found that as a result of the limitations on the ability of a person with mental retardation to reason and control himself, the death penalty would have no deterrent effect on his actions. *Id*. at 2251. Specifically, the court found that a

[6] In a concurring opinion in *State v. Ketterer*, 855 N.E. 2d 48 (Ohio 2006), Justice Stratton recently addressed the ABA resolution and noted that "[t]here seems to be little distinction between executing offenders with mental retardation and offenders with severe mental illness, as they share many of the same characteristics." *Id*. at ¶ 245. He concurred in the courts judgment upholding the death sentence of a severely mentally ill offender, however, because "while [he] personally believe[s] that the time has come for our society to add persons with severe mental illness to the category of those excluded from application of the death penalty, [he] believe[s] that the line should be drawn by the General Assembly, not by a court." *Id*. at ¶ 247. *See also Corcoran v. State*, 774 N.E. 2d 495, 502 (Ind. 2002) (Rucker, J., dissenting) ("I respectfully dissent because I do not believe a sentence of death is appropriate for a person suffering a severe mental illness. Recently the Supreme Court held that the executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment of the United States Constitution. There has been no argument in this case that Corcoran is mentally retarded. However, the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency.") (internal citations omitted); *State v. Scott*, 748 N.E. 2d 11 (Ohio 2001) (Pfeifer, J., dissenting) ("As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so¶. I believe that executing a convict with severe mental illness is a cruel and unusual punishment.").

mentally retarded individual=s Adiminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses@ makes it less likely that he will conform his conduct to avoid the possibility of execution. *Id*. Similarly, in *Simmons*, the court noted that Athe same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.@ 543 U.S. at 571. In particular, the court opined, A[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.@ *Id*. at 572, *quoting Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988).

Likewise, the justification of deterrence is not served by executing severely mentally ill individuals, as severe mental illness can impair an individual=s ability to control impulses or understand long-term consequences. At his 2001 evidentiary hearing, Mr. Power presented evidence of his severe mental illness through the testimony of several experts. The court found Mr. Power=s experts to be Amuch more compelling and credible than those presented by the State.@ (PC-R. 3731).

Dr. Thomas Hyde, a behavioral neurologist, concluded that Mr. Power suffers from significant neurological impairment. He found:

> several abnormalities on examination that suggest some degree of frontal lobe dysfunction. It=s important for abstracting actions, reasoning, impulse control. Also elements of behavior, particularly his religious

> preoccupation and propensity towards voluminous writing is significant with telling me he has frontal lobe dysfunction on the basis of my examination and history from Robert, correlated with events in his life that frontal lobe and/or temporal lobe damage.

(PC-R. 1772). Dr. Hyde also opined that Mr. Power suffered from a Amajor recurrent depression@ and Apost traumatic stress disorder (PTSD).@ (PC-R. 1773).

Dr. James Merikangas, a board certified psychiatrist and neurologist, explained that depression is a serious medical condition which has a profound effect on a person's ability to function. In particular, he said, depression A...interferes with processing, with attending, with figuring out what's going on, with making judgments, interferes with their whole cognitive electoral process.@ (PC-R. 1584-85).

Dr. Barry Crown confirmed the results of doctors Hyde and Merikangas. Dr. Crown, a psychologist who practices in clinical psychology, forensic psychology and neuropsychology, testified that Mr. Power had significant neuropsychological deficits and impairments, and that pattern was indicative of brain damage. (PC-R. 798-811). Dr. Crown said that Mr. Power=s brain damage resulted in him having difficulties in reasoning and judgment and that his understanding of long term consequences was impaired. (PC-R. 814).

Dr. Faye Sultan, a clinical psychologist, diagnosed as Mr. Power suffering from major depression, severe recurrent without psychotic features. (PC-R. 1631-

36). His symptoms significantly impaired his functioning, his reasoning, his judgment, and his emotional state. (PC-R. 1656-58). Dr. Sultan testified that severely depressed people **cannot** make rational decisions. (PC-R. 1666). Dr. Sultan also testified that Mr. Power=s ability to conform his conduct to the requirements of law was substantially impaired based on his history of mental illness. (PC-R. 1667).

Capital punishment=s twin goals of retribution and deterrence would not be served by executing Mr. Power. The extensive and compelling evidence of Mr. Power=s severe mental illness presented at his 2001 evidentiary hearing demonstrates that his significant impairments in reasoning, judgment, and understanding of consequences puts him in the same class as mentally retarded and juvenile offenders in terms of diminished culpability.

Additionally, mental illness, like mental retardation and youth, can impair a defendant's ability to consult with and assist counsel at trial. *Cf. Atkins v. Virginia*, 536 U.S. 304, 321 (2002) ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel…"). Such was certainly the case with Mr. Power. At the 2001 evidentiary hearing, Dr. Hyde opined that Mr. Power suffered from a "major recurrent depression" and "post traumatic stress disorder (PTSD)." (PC-R. 1773). He explained the severity of Mr. Power's depression:

> It's characterized by impaired reasoning and judgment. . . He's had chronic depression throughout adolescence and

> adult life. He received treatment on several occasions for that disorder and he's had several, at least one major suicide attempt of hanging while incarcerated in California. He's previously been diagnosed with mood disorder, either major recurrent depression or bipolar disorder.
>
> * * *
>
> In summary I would say that there is significant evidence of depression throughout his adolescence and adulthood including incarceration and trial that would cloud his judgment, impair reasoning ability, and have significant effect upon how he made assessments during the course of his life both before incarceration and after incarceration.

(PC-R. 1773-1774). Dr. Hyde found that Mr. Power was severely depressed at the time of his capital trial in 1990-1991 and "showed significant signs of irritability, poor judgment, reasoning, distrust in certain aspects of his case, paranoid ideation approaching delusional thinking during the time of his trial." (PC-R. 1783). Mr. Power's depression affected his decision making capacity "in a profound way." (PC-R. 1775). In particular, the experience of being found guilty of first-degree murder would have been a "major stressor" and extremely likely to have triggered a major depressive episode. (PC-R. 1818). Mr. Power's mental condition made it impossible for him to make a rational choice to instruct his counsel not to investigate available mitigation, resulting in the circuit court determining that Mr. Power had waived mitigation—an issue which Mr. Power has pursued throughout his postconviction proceedings.

Furthermore, because severely mentally ill defendants, mentally retarded defendants, and juvenile defendants are similarly situated with respect to the goals served by capital punishment, and because there is no rational basis for distinguishing severely mentally ill defendants from mentally retarded and juvenile defendants, executing Mr. Power would not comport with equal protection under the United States and Florida Constitutions.

Mr. Power=s severe mental illness and neurological impairments render him ineligible for the death penalty under the Eighth Amendment and the U.S. Supreme Court=s reasoning in *Atkins* and *Simmons.*

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. POWER'S CLAIM THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE FLORIDA'S DEATH PENALTY SYSTEM DOES NOT SATISFY THE PROMISE OF *FURMAN v. GEORGIA*.

In his successive Rule 3.851 motion, Mr. Power alleged that newly discovered empirical evidence demonstrates that his conviction and sentence of death constitute cruel and unusual punishment. The basis of his claim was a comprehensive report of Florida's death penalty system, published September 17, 2006 by the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team. *See* American Bar Association, *Evaluating Fairness and Accuracy in the State Death*

Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006 (PC-R2. 772-1232) (hereinafter "ABA Report").

Mr. Power acknowledges that this Court has recently addressed similar claims in *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006), *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006), and *Rolling v. State*, 944 So. 2d 176 (Fla. 2006). In those cases, the Court determined that the ABA Report was not "newly discovered evidence." In *Rutherford* and *Rolling*, this Court also found that no relief was warranted because the defendants failed to allege how any conclusion from the ABA Report would render the death sentences imposed in those cases unconstitutional. *Rutherford*, 940 So. 2d at 1118; *Rolling*, 944 So. 2d at 181. In *Diaz*, this Court acknowledged that Diaz had alleged that many of the failures of the Florida death penalty system cited in the ABA Report were applicable in his case, but that the failures he cited as applying to his case either have been or could have been litigated by him in his direct appeal and postconviction proceedings. *Diaz*, 945 So. 2d at 1146. Like Diaz, Mr. Power has specifically alleged that many of the failures of the Florida death penalty system cited in the ABA Report were applicable in his case. Unlike Diaz, the failures cited by Mr. Power as applying to his case either could not have been litigated before now or were not afforded any meaningful attention by the courts, in a classic example of how failures of the system have further perpetuated the injustice of Mr. Power's conviction and

sentence.

In less than one page in its order, the circuit court summarily denied Mr. Power's claim, relying on this Court's decision in *Rutherford*:

> 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.

(PC-R2. 2272).

As to the conclusion that the ABA Report is merely a compilation of previously available evidence and therefore not newly discovered, Mr. Power submits that this Court has, in the past, recognized that "reports" issued by governmental or other bodies that affect the integrity of a defendant's trial or penalty phase can constitute newly discovered evidence. *See Trepal v. State*, 846 So. 2d 405 (Fla. 2003) (relinquishing jurisdiction in Trepal's pending appeal in order to permit him to file an amended Rule 3.850 based on the newly discovered information contained in the Department of Justice's Inspector General's Report). *Trepal*, 846 So. 2d at 409-10. Indeed, Mr. Power's case is no different from the situation in *Trepal*. Mr. Power made additional argument with regard to his claim

that the ABA Report is newly discovered evidence in pointing out to the court that the newly discovered evidence is not the individual instances of error, but the totality of the empirical data and the conclusions drawn by the committee. (PC-R2. 18-20). At a minimum, the ABA Report should be considered newly discovered evidence.

Furthermore, any finding that Mr. Power's claim based on the ABA Report is procedurally barred evinces a fundamental misunderstanding of the argument; Mr. Power's claim is that his death sentence is the result of egregious flaws and defects in Florida's capital sentencing process. Over 30 years ago, the U.S. 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). In *Furman*, 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. 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]

The information, analysis, and ultimate conclusions contained in the ABA Report make clear that 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. (PC-R2. 779). Who in fact gets executed in Florida does not depend upon the facts of the crime or the character of the defendant, but upon the flaws and defects of the capital sentencing process. Thus, "the imposition and carrying out of the death penalty in [Mr. Power's] case[] constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman*, 408 U.S. at 239-40. 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 schemes at issue in *Furman* were found to be unconstitutional.

Furthermore, Mr. Power has shown how the system's flaws are demonstrated within his case. Specifically, the ABA Report's findings in its subsections on the problems associated with trial level representation, the lack of unanimity in jury's sentencing decision in capital cases, prosecutorial misconduct, and the inadequacy of the direct appeal process in Florida bear directly on the

[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 looked at the **systemic arbitrariness**.

propriety of the imposition and affirmance of Mr. Power's death sentence.

Trial level representation: Mr. Power has argued throughout postconviction that his trial counsel was ineffective for failing to investigate and/or present mitigating evidence during his penalty phase. Blindly following his mentally ill client's wish not to present mitigation, trial counsel failed to even conduct an investigation, in violation of Guideline 10.7(A)(2), American Bar Association Guidelines for the Appointment and Performance of Counsel in Capital Cases. This Court described the mitigation evidence presented by postconviction counsel at an evidentiary hearing as "substantial." *Power v. State*, 886 So. 2d 952, 959 (Fla. 2004).

At the postconviction evidentiary hearing, Dr. James Merikangas, a board certified psychiatrist and neurologist, testified that in preparation for Mr. Power's Osceola County trial, he had conducted a preliminary evaluation of Mr. Power at the Osceola County Jail in 1987 for competency.[8] Dr. Merikangas prepared a full report of his findings. Dr. Merikangas testified that the evaluation was "a very brief, preliminary evaluation to direct the course of a further examination" (PC-R. 1577), but that in fact, he was never asked to conduct the follow-up examination on Mr. Power.

[8] Given that Mr. Power's Osceola County case was tried three years before his Orange County capital case, the information generated by Dr. Merikangas was clearly available to trial counsel.

Dr. Merikangas testified that at the time of his evaluation, Mr. Power appeared "quite depressed." (PC-R. 1583). Dr. Merikangas explained that depression has a profound effect on a person's ability to function. (PC-R. 1585). Dr. Merikangas further noted that while depression is typically episodic (PC-R. 1586), the more previous episodes experienced by an individual, the worse the prognosis for further depressive episodes. (PC-R. 1587). This is further exacerbated in cases such as Mr. Power's in which the individual experienced depression during childhood. (PC-R. 1588).

As a result of his evaluation, Dr. Merikangas recommended a Magnetic Resonance Image (MRI) and neuropsychological testing to be performed. He further explained that a normal MRI result would not necessarily rule out the presence of organic brain damage (PC-R. 1591) and that neuropsychological testing was necessary to detect brain dysfunction. (PC-R. 1593).

Dr. Merikangas stressed the need for all medical, school and jail records, and deposition testimony. He also said there was a need to conduct interviews of family members, and other people who have observed Mr. Power. This was particularly so in this case, because:

> there was a lot of child abuse, sexual abuse and probably mother abuse in this family. And getting them from different members of the family, and getting their viewpoints, and having heard Russell [Power] speak today it's very important to know what were the formative things that went into the creation of the

> personality and what burdens of post traumatic stress and depression may have existed and might help to explain the behavior.

(PC-R. 1595). However, despite having laid out a detailed road map for trial counsel to follow regarding the necessary mental health investigation into Mr. Power's case, Dr. Merikangas was never contacted by trial counsel. (PC-R. 1597). Dr. Merikangas testified that he would have made himself available to testify at Mr. Power's penalty phase. (PC-R. 1596). He said that even if Mr. Power had preferred him not to have testified, he would have been able to share his data and consult with other mental health professionals.

At the postconviction evidentiary hearing, Dr. Thomas Hyde, a behavioral neurologist testified that the combination of Mr. Power's neurological impairment, his depression, and his PTSD[9] caused "his behavior leading up to the crimes directly influenced by his neurological psychological impairments on his relationship with his lawyers and legal proceedings after his incarceration." (PC-R. 1778). Dr. Hyde concluded within reasonable medical probability that Mr. Power's impairments are long standing, and support both statutory mental health mitigating circumstances enumerated in Florida law.[10] (PC-R. 1782).

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[9] This disorder is caused by "severe emotional and physical trauma" earlier in life including the rape by an adult male at age twelve, according to Dr. Hyde. (PC-R. 1777).

[10] That Mr. Power was under extreme mental or emotional disturbance at the

Dr. Crown, a psychologist who practices in clinical psychology, forensic psychology and neuropsychology, testified that after evaluating Mr. Power, he found a history of perinatal problems, poly-substance abuse that began at a young age, which included huffing gasoline, and severe incidents of brain trauma. The result was that Mr. Power had significant neuropsychological deficits and impairments, and that pattern was indicative of brain damage. (PC-R. 798-811). Dr. Crown said that Mr. Power's brain damage resulted in him having difficulties in reasoning and judgment and that his understanding of long term consequences was impaired. (PC-R. 814).

Dr. William Anderson, a physician and deputy medical examiner in Orlando, testified that in 1990, he was contacted by a State Attorney investigator who asked him about the toxicology and pathological findings that can result from huffing gasoline and other chemicals, as Mr. Power purportedly had. He was specifically asked what impact those chemicals would have on a person's behavior. (PC-R. 1897). Dr. Anderson testified that toxic agents can alter the workings of the brain, change behavior patterns and cause psychosis. He also talked with the State investigator about the impact of drugs and alcohol during pregnancy and referred the State investigator to a psychiatrist to discuss the effects of toxic agents on the

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time of the crime and that his ability to conform his conduct according to the law was substantially impaired. (PC-R. 1781-82).

brain. (PC-R. 1899). Presumably, the State considered Mr. Power's mother's pre-natal activities as significant and potentially mitigating.

Dr. Faye Sultan, a clinical psychologist, testified that she spent 15-16 hours evaluating Mr. Power and reviewed his extensive background materials. (PC-R. 1631-1636). Dr. Sultan testified that she found the statutory mitigating factors that Mr. Power was under the influence of neurological impairment and severe depression at the time of the offense. His ability to conform his conduct to the requirements of law was substantially impaired based on his history of mental illness. (PC-R. 1667). She also testified that she found non-statutory mitigating factors and would have testified to these factors in 1990 had she been given the background materials and medical records of Mr. Power. She found brain damage; depression; use of solvents, illegal drugs and alcohol; chaotic family life; physical and mental abuse by father; neglect by mother; mother's exposure to toxic chemicals during pregnancy; no structure in life; scattered enrollment in school; inadequate education; placed in foster care; poverty and hunger; abandonment by father; and sexual abuse. (PC-R. 1668-1669). The hearing court found Dr. Sultan to be "compelling and credible."

Unanimity in jury sentencing: As Mr. Power pointed out in his Rule 3.851 motion, Florida is now the only state in the country that allows a jury to find that aggravators exist and to recommend a sentence of death by a mere majority vote.

State v. Steele, 921 So. 2d 538, 548-49 (Fla. 2005) (emphasis in original). The ABA Report cites a study which concluded that permitting capital sentencing recommendations by a majority vote reduces the jury's deliberation time and may diminish the thoroughness of the deliberation. ABA Report at vi-vii (PC-R2. 782-83). Florida precludes sentencing juries from considering residual or lingering doubt as to guilt as a mitigating factor that may warrant a life sentence. ABA Report at 311 (PC-R2. 1129). The coupling of a simple majority verdict with the preclusion of consideration of lingering doubt certainly adds to the risk that an innocent will be sentenced to death. The fact that Florida is the only state to have coupled these things together and also leads the nation in capital exoneration certainly provides a basis for arguing the synergistic effect of the choices made in structuring Florida's capital scheme has produced a system that smacks of little more than a lottery system. *Furman*, 408 U.S. at 293 (Brennan, J., concurring).

Because Florida law does not require all jurors agree that the State has proved any aggravating circumstance beyond a reasonable doubt or to agree on the same aggravating circumstances beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that sufficient aggravating circumstances exist to recommend a death sentence, there is no way to say that the jury rendered a verdict as to an aggravating circumstance or the sufficiency of them. In Mr. Power's case, the trial court found the cold calculated and

premeditated aggravating circumstance. This was later struck by this Court on direct appeal. However, it is impossible to tell how many of the jurors relied on this aggravating circumstance in determining that their sentencing recommendation would be for death, leaving open the possibility that Mr. Power should not have received a death sentence.

Prosecutorial misconduct: "The prosecutor plays a critical role in the criminal justice system." ABA Report on Florida at 107. This is especially true in capital cases, where the prosecutor had "enormous discretion" in determining whether to seek the death penalty. *Id*. Yet, this Court regularly orders new trials in capital cases because of prosecutorial misconduct.[11] On occasion, this Court has found the prosecutorial misconduct was only sufficiently prejudicial at the penalty phase to warrant the grant of penalty phase relief. *Young v. State*, 739 So. 2d 553 (Fla. 1999); *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993). Additionally, on a number of occasions, this Court has determined that the prosecutor acted improperly, but prejudice was insufficiently established to warrant relief from

[11] *Floyd v. State*, 902 So. 2d 775 (Fla. 2005); *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004); *Cardona v. State*, 826 So. 2d 968 (Fla. 2002); *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *State v. Huggins*, 788 So. 2d 238 (Fla. 2001); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Gorham v. State*, 597 So. 2d 782 (Fla. 1992); *Roman v. State*, 528 So. 2d 1169 (Fla. 1988); *Arango v. State*, 497 So. 2d 1161 (Fla. 1986).

either the conviction or the death sentence.[12] Florida=s willingness to tolerate prosecutorial misconduct violates the promise of *Furman*. The ABA Report recommends that each prosecutor=s office have written polices governing the exercise of prosecutorial discretion. ABA Report at 125 (PC-R2. 943). Without such policies or guidelines, Florida=s death penalty scheme "smacks of little more than a lottery system." *Furman*, 408 U.S. at 293 (Brennan, J., concurring).

The prosecutor in Mr. Power=s case made repeated inflammatory, improper, and prejudicial comments during his guilt/innocence and penalty phase closing arguments. (R. 1943-1987; 2047-2076). These comments constituted a comment on evidence not introduced at trial or the penalty phase; were expressions of the prosecutor's personal opinion or belief; and served no useful purpose other than to play upon the prejudices and sympathies of the jury.

Direct appeal review: This Court reviews all cases in which a death sentence is imposed to determine whether death is a proportionate penalty. However, because this Court only reviews cases "where the death penalty was not imposed in cases involving multiple co-defendants," the proportionality is skewed.

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[12] *Guzman v. State*, 2006 Fla. LEXIS 1398 (Fla. June 29, 2006); *Smith v. State*, 931 So. 2d 790 (Fla. 2006); *Ventura v. State*, 794 So. 2d 553 (Fla. 2001); *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990). The cases cited herein as examples of instances were prosecutorial misconduct was present are not an exhaustive listing. The listing of the cases is meant to demonstrate the prevalence of prosecutorial misconduct in capital cases in Florida.

ABA Report at xxii (PC-R2. 798). But in addition to this, the ABA assessment team noted a disturbing trend in this Court=s proportionality review: "Specifically, the study found that this Court=s average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." ABA Report at 212 (PC-R2. 1030). The ABA Report noted "that this drop-off resulted from the Florida Supreme Court=s failure to undertake comparative proportionality review in the >meaningful and vigorous manner= it did between 1989 and 1999." ABA Report at 213 (PC-R2. 1031). The shift in the affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends in part upon what year the appellate review was or is conducted. It is not a "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).

This Court=s proportionality review of Mr. Power=s death sentence was flawed because, as noted in Mr. Power=s initial brief appealing the denial of his Rule 3.850 motion, substantial and compelling mitigation existed. However, due to Mr. Power=s alleged waiver, which Mr. Power submits was not knowing, intelligent, or voluntary, these mitigating circumstances were presented neither to the jury, the trial court nor to this Court. Thus, it was impossible to compare the

aggravating and mitigating circumstances in this case to those present in other death penalty cases and conduct a proper proportionality review.

In conclusion, the circuit court erred in summarily denying Mr. Power's claim that the ABA Report is newly discovered evidence that Florida's death penalty system does not satisfy the mandates of *Furman v. Georgia* and is therefore unconstitutional.

CONCLUSION AND RELIEF SOUGHT

In light of the foregoing arguments, Mr. Power submits that he is entitled to have the lower court's order reversed and his case remanded to the circuit court for an evidentiary hearing on his claims. Based on his claims for relief, Mr. Power is entitled to a new trial and/or sentencing proceeding. Finally, Mr. Power submits that he should not be executed in a manner that constitutes cruel and unusual punishment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Barbara C. Davis, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, and Chris Lerner, Assistant State Attorney, Office of the State Attorney, 415 N. Orange Avenue, Orlando, Florida 32802, this _____ day of February, 2008.

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