IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-08-1808

LOWER TRIBUNAL No. 85-8933 CFANO

MARK ALLEN DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Mr. Davis has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural 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. Mr. Davis requests oral argument.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of a postconviction motion without an evidentiary hearing. The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R."	– record on direct appeal to this Court;
"PC-R."	– record on appeal after an evidentiary hearing;
"Def. Ex."	- defense exhibits introduced during the evidentiary hearing;
"Supp. PC-R."	– supplemental record on appeal;
"PC-R2."	- record on appeal following the summary denial of Mr. Davis' successive postconviction motion.

STATEMENT OF THE CASE

On September 18, 1985, Mr. Davis was indicted and charged with premeditated first degree murder, armed robbery and grand theft (R. 8-10). Mr. Davis pleaded not guilty (R. 68).

Mr. Davis' trial was held in January, 1987. The jury returned a verdict of guilty on each count (R. 217-19). The following week, after a brief penalty phase, the jury, by an 8 - 4 vote, recommended the death sentence and the trial court imposed death (R. 234, 265-73).

On June 1, 1990, during direct appeal, this Court remanded Mr. Davis' case for a hearing to determine whether Mr. Davis was absent from the courtroom during a critical stage of his trial, and if so, whether he waived his presence.

Circuit Judge John P. Griffin, Thirteenth Judicial Circuit of Florida, presided over the hearing and found that Mr. Davis did not make a valid waiver but that Mr. Davis was present during jury selection. This Court affirmed Mr. Davis' convictions and sentences on direct appeal. Davis v. State, 586 So. 2d 1038 (1991).

The United States Supreme Court granted certiorari, vacated judgement, and remanded to this Court for reconsideration in light of Espinosa v. Florida, 112 S.Ct. 2926 (1992). Davis v. Florida, 112 S.Ct. 3021 (1992).

This Court affirmed Mr. Davis' convictions and sentences on remand from the United States Supreme Court. Davis v. State, 620 So.

2d 152 (1993). The United States Supreme Court subsequently denied certiorari. Davis v. State, 114 S.Ct. 1205 (1994).

In July, 1995, Mr. Davis filed a Rule 3.850 motion (PC-R. 25-191). The motion was amended on May 3, 2000 (PC-R. 2044-2267). An evidentiary hearing was held on November 5-9, 2001. On March 28, 2002, the lower court entered an order denying Mr. Davis' claims (PC-R. 2898-2928). Mr. Davis filed a motion for rehearing which was denied on May 16, 2002 (PC-R. 3162-66).

Mr. Davis appealed the lower court's ruling to this Court. Simultaneously, Mr. Davis filed a petition for writ of habeas corpus. On October 20, 2005, this Court denied all relief. Davis v. State, 928 So. 2d 1089 (Fla. 2005). Mr. Davis filed a petition for certiorari in the United States Supreme Court, which was denied on October 2, 2006. Davis v. Florida, 127 S.Ct 206 (2006).

On February 28, 2006, Mr. Davis filed a successive petition for writ of habeas corpus, based on the United States Supreme Court's ruling in Roper v. Simmons, 543 U.S. 551 (2005). This Court denied relief on June 9, 2006. Davis v. State, Case No. SC06-394 (June 9, 2006).

On April 19, 2007, Mr. Davis filed a federal petition for writ of habeas corpus in the United States District Court, Middle District of Florida. That petition is currently pending.

On February 21, 2008, Mr. Davis filed a successive Rule 3.851

motion alleging newly discovered evidence (PC-R2. Vol. 1, 1-36).[1] Following a response by the State, a case management conference was held on April 11, 2008 (PC-R2. Vol III, 1-66). Thereafter, on July 3, 2008, the circuit court entered an order denying Mr. Davis' motion without an evidentiary hearing (PC-R2. Vol. II, 200-309). Mr. Davis filed a motion for rehearing (PC-R2. Vol. II, 310-19), which was denied on August 14, 2008 (PC-R2. Vol II, 320). On September 12, 2008, Mr. Davis filed a notice of appeal to this Court (PC-R2. Vol. II, 321-22). This appeal follows.

[1]In addition, Mr. Davis challenged the current lethal injection protocol that was adopted on July 31, 2007.

STATEMENT OF THE FACTS

A. INTRODUCTION

Upon his arrest in Illinois, Mr. Davis related to law enforcement the circumstances under which he had stabbed Orville Landis:

> At that point, Mark said, I guess I will tell you the truth. He started back and he told everything was true about meeting the victim earlier that day with the beer, that he had helped him unload his car, they had drank some, that he had borrowed $20 from the victim during the day and he pawned his tattoo equipment. He had a blue and white cooler with Tattoo equipment inside it and he had borrowed $20 from the equipment, gave him that as security.
>
> He then said that he and the victim drank and went to several bars, the Dave's Aqua Lounge and Golden Arrow Pub and he said about 11, somewhere around 11 o'clock, the victim went to bed.
>
> He went down – he went back over to the Golden Arrow Pub. You (sic) came back for a pair of socks from Carl Kearney, went back and knocked on the victim's door and said the victim was dressed in nothing but a pair of pants, no shirt, no shoes. He told the victim he needed to borrow – at this point Davis didn't remember whether it was $2 or $5 that he needed to borrow from him. The victim told him he would have to do something for it. He reached down and grabbed – Davis said, grabbed my nuts and I struck him at this time with my right hand somewhere around the neck or throat area, knocking him down on the floor.
>
> * * *
>
> Victim laid there grasping for breath and choking. In a little bit, he got back up and he struck him the second time. He didn't know where he struck him, whether right hand or his left hand. He hit him again. They began to fight. He walked back to the small room towards the kitchen area. Victim picked up a long butcher knife. He took the butcher knife

away from the victim and began hitting him with it.

Q: . . . At that point in time is he saying they were over by the bed?

A: On the bed.

* * *

A: He said he hit him several times with the knife, with the big butcher knife. He got a smaller knife which is over in that area and that he cut his throat with the smaller knife and stabbed him several times with it.

Then he said, he got up, washed the blood off the knives in the bathroom sink and washed his hands.

* * *

Said went through the victim's wallet. He got 80 or $85 out of the wallet and at this time, he was afraid so he took the victim's car and he went to Tampa.

(R. 1274-77).

During the trial, the State presented a different picture of Mr. Davis, a cold, calculated, premeditated murderer who was manipulating the system. The State presented evidence that Mr. Davis was not intoxicated at the time of the crime and that he told an individual of his intent before the crime to "do him [the victim] in". The State also presented evidence through a jailhouse snitch, Shannon Stevens, that Mr. Davis told him that he was "going to try for second degree murder" (R. 1206).

The jury accepted the State's version of events, as Mr. Davis was found guilty of first degree murder. Likewise, the trial court accepted the State's version of events, as the court found as an

aggravating factor that the crime was committed in a "cold, calculated and premeditated" manner.

During his initial postconviction proceedings, Mr. Davis presented evidence, either through the State's failure to disclose or trial counsel's failure to prepare, that he was in fact intoxicated at the time of the crime; and that the crime was not premeditated. And, most recently in his successive postconviction motion, Mr. Davis has asserted new evidence which, when considered cumulatively, require that Mr. Davis' conviction and sentence be overturned.

B. THE TRIAL

The State's key witnesses at trial toward establishing Mr. Davis' premeditated actions were Kimberly Rieck and Beverly Castle. Rieck and Castle were the only witnesses who testified who observed Mr. Davis and the victim on the day of the crimes.[2] At trial, Rieck and Castle described the interactions of Mr. Davis and Landis; comments that they heard Mr. Davis make both to Landis and to them; the amount of alcohol they believed Mr. Davis to have consumed and what they observed about his behavior in relation to his alcohol consumption.

Specifically, Rieck testified that a day or two before the crimes, Mr. Davis informed her that he had "problems with money" (R. 927). In addition, Rieck testified that on the day of the crimes, Mr. Davis told her: "that he was going to take the old man for what

[2]There were no witnesses to what actually occurred between Mr. Davis and the victim.

he could" (R. 927), and that "[h]e said get him drunk and see what he could get out of him." As to Mr. Davis' level of intoxication, the State inquired:

> Q: Do you know how much either one of them had to drink during the day?
>
> A: No.
>
> Q: Did you have later contact with Mark Davis that day?
>
> A: Yep.
>
> Q: Can you tell us a little about that?
>
> A: It was around four-thirty or five o'clock. We had Mark take us to get Carl's car . . .
>
> Q: Now, did Mark Davis do the driving at any point in time?
>
> A: Yes, he took us there.
>
> Q: Did he have any difficulty in driving the car when he took you there?
>
> A: No, he didn't.
>
> Q: During the course of the day when you had conversations with him, was his speech slurred or impaired in any fashion?
>
> A: No, it wasn't.
>
> Q: Was he staggering or unable to walk properly in your opinion on all other observations of the man?
>
> A: No.

(R. 930-31).

Rieck testified that at 11:30 p.m. or midnight, Mr. Davis came

to her room (R. 934). He did not appear intoxicated (R. 935).

At Mr. Davis' trial, Castle testified that she was present at the apartment complex the morning of July 1st (R. 925, 954, 957).[3] She testified that she observed Mr. Davis assist Mr. Landis move into his apartment (R. 959). Castle also testified that Mr. Davis wanted Landis to get involved in his tattooing business (R. 960). Castle described Mr. Davis as "a nervous young man" (R. 974).

When asked if she had seen Mr. Davis drinking, Castle said: "I seen him with a can of beer in his hands." (R. 960).

Later in the evening, Castle saw Mr. Davis and the victim arguing about money (R. 961). Castle testified:

> Q: What do you mean they were arguing about money? Can you tell us what that conversation was?
>
> A: Okay. I was sitting out in front of my apartment. Like I had said it was hot. There was no air conditioning. That's the reason I was even out there. And Mark was calling Skip a queer and said he was going to rip the old man off.
>
> * * *
>
> Q: He use any other words to describe how he was going to take Mr. Landis and what he was going to take if he was going to take something?
>
> A: Just said he was going to rip him off and do him in.

(R. 961-62). Later, Castle added her interpretation of what Mr. Davis said: "Well, that's young kids talk. I have a teenager you know. To do away with someone at least the way children I know talk,

[3]Rieck had previously testified that Castle was working on the day of the crimes and not present until the evening (R. 925).

was to kill them, get rid of them" (R. 972).

Castle was again asked about Mr. Davis' intoxication. She testified that at approximately 8:00 p.m., "Mark didn't seem like he was drunk . . . He wasn't stumbling around like [the victim] was anyway. He seemed coherent. He knew what he was doing" (R. 965). She also testified that Mr. Davis stopped drinking in the evening (R. 991). On cross examination, defense counsel attempted to impeach Castle with her statement that was taken on July 2nd, wherein Castle told the police that Mr. Davis got drunker and drunker throughout the day (R. 977), and that Mr. Davis and Landis drank beer and vodka (R. 979). During the statement, Detective Rhodes specifically asked Castle if they were both drunk and Castle stated: "Oh, bad, very bad.". Additionally, Castle had told the police that at 10:30 p.m., "they were both real drunk." (R. 978).

In discussing the import of Rieck and Castle's testimony, the State told the jury: "We have a man whose intent it was all day to rip this old man off. That's all he is talking about to Beverly Castle and Kimberly Rieck. He was going to rip him off. He made the statement to Kimberly Rieck. I am going to get him drunk and I am going to get his money. He made the statement to Beverly Castle. I am going to rip him off and I am going to do away with him. . . . Killed him during the course of a robbery" (R. 1394-5). The State also told the jury to believe Rieck and Castle's testimony that Mr. Davis was not intoxicated on the day of the crimes.

As to Rieck and Castle's credibility, the State argued: "They're two witnesses who were there all day. And Mr. White would have you suggest that they are for some reason coming in here or lying or minimizing or shading their testimony. . . . Did you at any point in time hear Mr. White in any way impeach those ladies on the statements this Defendant made to them?" (R. 1404).

C. POSTCONVICTION PROCEEDINGS

During his postconviction proceedings, Mr. Davis asserted claims based on ineffective assistance of counsel as well as a Brady/Giglio violation. Mr. Davis claimed that significant evidence not presented to the jury existed which would have established that he was intoxicated at the time of the crime, that the crime was not premeditated, and that several witnesses had been untruthful in their testimony.

This evidence included statements to the State by Jean Born and Glenda South describing Mr. Davis and Landis as being very drunk on the evening of the crime (Def. Ex. 6); a statement by George Lee to police that he encountered Mr. Davis as late as midnight in a bar on the evening of July 1st, and he observed that Mr. Davis bought quite a few drinks and was drinking (Def. Ex. 5); a statement by Castle to the prosecutor that "She also observed defendant go to the bar next door on foot at about 4:00, he was gone several hours. He went alone. When he got back at about 6 - 6:30, he wanted more beer, he appeared hyper, his eyes were glassy and glared, he stared, she believed he

was drunk" (Def. Ex. 12); a statement by Castle that she saw Mr. Davis at 10:30 p.m. and she described Mr. Davis as acting "real drunk" (Def. Ex. 13); and a statement by Rieck indicating that she never told the police that Mr. Davis had given her a ride the previous evening or that he made any statement to her during the day about getting the victim drunk "to see what he could get out of him." (Def. Ex. 6).[4]

D. SUCCESSIVE POSTCONVICTION MOTION

In his successive postconviction motion, Mr. Davis alleged newly discovered evidence that witnesses Rieck and Castle did indeed lie, minimize or shade their testimony. On November 9, 2007, Rieck signed a declaration stating:

> COMES NOW, the declarant, Kimberly Rieck Kearney, and declares under penalty of perjury all as follows:
>
> 1. My name is Kimberly Rieck Kearney and I reside in Pekin, Illinois. In 1987, I testified at the trial of Mark Davis in Pinellas County, Florida.
>
> 2. When Mark made statements about "playing the man for his money", I thought only that he planned to get some free stuff from him, not that he was going to commit any crime against him. I never heard Mark make any statement about "doing away with" anybody.
>
> 3. Mark was quite drunk the day the man was killed; he had been drinking all day. When I saw him later that night, when he came to ask for socks, he had to have been very drunk.
>
> 4. My boyfriend, Carl Kearney, was arrested before the trial as a hostile witness; the police came and got him in Virginia in the middle of the night. I was

[4]Rieck and Castle's original statements to law enforcement and Castle's statement to the State Attorney's Office contained no information that Mr. Davis had any plan to rob or harm the victim.

told that if I didn't come to Florida to testify that Carl would sit in jail. I didn't want to testify but felt I had no choice. I was uncomfortable with my testimony because I was uncertain of the facts and circumstances.

(PC-R2. Vol. 1, 35).

In a sworn affidavit dated November 9, 2007, Beverly Castle stated:

> I, Beverly Castle, having been duly sworn or affirmed, do hereby depose and say:
>
> 1. My name is Beverly Castle and I reside in Pekin, Illinois. In 1987, I testified at the trial of Marl Davis in Pinellas County, Florida. I am now concerned that my testimony at trial was less than accurate.
>
> 2. When Mark made statements about "playing the man for his money" and "ripping him off", I took that to mean that he would get him to bankroll their party by buying cigarettes and booze. I never thought that Mark intended to rob him or commit any actual crime against him.
>
> 3. Mark never said that he planned to "do away with" the man. I felt a great deal of pressure while being questioned by the police: they wanted something tangible and I knew I wasn't getting out of there until I gave it to them. As soon as I did, saying Mark said he would "do away with" the man, I was out the door.
>
> 4. During the questioning, I was physically and emotionally worn out, and just tired of the whole shebang. If Mark had really threatened to "do away with" the man, I would have gone straight to my daughter Kim and said, "This guys in danger." I'm not the type of person who would just slough off a statement like that.
>
> 5. I had worked the day the man was killed, and didn't see all the drinking, but Mark did seem drunk to me. At the trial, when I said I didn't know how drunk Mark was, I was just trying not to make a guess. If I had been asked my opinion, I would have said that Mark was probably very drunk, especially because they were drinking in the heat, and Mark was not used to

the Florida heat.[5]

[5]Castle's affidavit was attached to Mr. Davis' postconviction motion as Appendix C. However, it appears to have been inadvertently omitted from the record. Simultaneous to this brief, Mr. Davis is filing a motion to supplement the record to include this document.

SUMMARY OF ARGUMENT

1. In Mr. Davis' case, the lower court erroneously failed to grant an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claims based upon the new evidence, and Mr. Davis' diligence in attempting to unearth the new evidence. The lower court failed to take the facts as true, largely ignoring Mr. Davis' allegations in the order summarily denying relief, and applied erroneous legal standards. This Court should order an evidentiary hearing.

2. Recently discovered evidence demonstrates that Mr. Davis' capital conviction and death sentence are constitutionally unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The evidence establishes that Mr. Davis' right to due process under the Fourteenth Amendment to the United States Constitution and his rights under the Fifth, Sixth and Eighth Amendments were violated, because the State withheld evidence which was material and exculpatory in nature and/or presented false evidence, or that trial counsel was ineffective in his representation of Mr. Davis. At a minimum the new evidence constitutes newly discovered evidence.

3. The existing procedure that the State of Florida utilizes for lethal injection violates the Eighth Amendment to the United States Constitution as it constitutes cruel and unusual punishment.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's fact findings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). The lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DENYING MR. DAVIS' RULE 3.851 MOTION WITHOUT AN EVIDENTIARY HEARING.

The law attendant to the granting of an evidentiary hearing in a postconviction proceeding is often stated and well settled: "[u]nder 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). *Accord* Patton v. State, 784 So. 2d 380, 386 (Fla. 2000); Arbelaez v. State, 775 So. 2d 909, 914-15 (Fla. 2000). The rule is the same for a successive postconviction motion, where allegations of previous unavailability of new facts, as well as diligence of the movant, warrant evidentiary development if disputed or if a procedural bar does not "appear[] on the face of the pleadings." Card v. State, 652 So. 2d 344, 346 (Fla. 1995).[6] Factual

[6]Successive Rule 3.850 petitioners have received evidentiary hearings based on newly discovered evidence and merits consideration. State v. Mills, 788 So. 2d 249, 250 (Fla. 2001)(the Florida Supreme Court affirmed the circuit court's grant of sentencing relief on a third Rule 3.850 motion premised upon a testifying co-defendant's inconsistent statements to an individual while incarcerated); Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); Melendez v. State, 718 So. 2d 746 (Fla. 1998)(noting that lower court held an evidentiary hearing on defendant's allegations that another individual had confessed to committing the crimes with which defendant was charged and convicted); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce an acquittal); Roberts v. State, 678 So. 2d 1232, 1235 (Fla.

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). In Mr. Davis' case, the lower court erroneously failed to grant an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claims based upon the new evidence, and Mr. Davis' diligence in attempting to unearth the new evidence.

Claim I of Mr. Davis' postconviction motion asserted that Rieck and Castle's statements constitute newly discovered evidence establishing a Brady/Giglio violation and/or that trial counsel was ineffective in failing to inform the jury of the witnesses' true motive for testifying. In addition, Mr. Davis asserted that at a minimum, the recently disclosed information established newly discovered evidence that entitles him to a new trial.

The claim specifically pled the new facts upon which it was based, as well as Mr. Davis' statement that, "Despite previous efforts

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1996)(remanding for evidentiary hearing because of trial witness recanting her testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]"); Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)(remanding for an evidentiary hearing on allegations that another individual confessed to the murder with which Jones was charged and convicted and was seen in the area close in time to the murder with a shotgun).

to locate and interview Rieck and Castle, Mr. Davis was only recently able to interview the witnesses." (PC-R2. Vol. I, 7). During the case management conference in this case, collateral counsel elaborated as to diligence:

> I was counsel at the time we were preparing his final amended 3.850. I was counsel at his evidentiary hearing in 2000, and I can tell you that we certainly looked for these witnesses. We had our investigators doing whatever they could in terms of computer searches.

(PC-R2. Vol. II, at 9).

* * *

> Judge, what I'm trying to do is let the Court know if we're given the opportunity to have an evidentiary hearing in this case, which I think under the case law we would certainly have at least the opportunity to show that we were diligent in the case, what I would present to the Court is that we did make a concerted effort at the time of said preparation of the initial 3.850 and the evidentiary hearing to find these two people and were unable to do that. And I would be putting on the investigator at the time and also the investigator who investigated the case for me most recently to discuss - -

(PC-R2. Vol. II, at 10).

* * *

> And really his case started getting into a factual investigation in about 1999 and 2000. And his hearing was in, I believe, November of 2000. Those witnesses were certainly - - we wanted to speak to them and were not - - we were just not able to find them. We took reasonable efforts to find them. We went to Pekin, Illinois. Two investigators went to Pekin, Illinois, and they were not found.

(PC-R2. Vol. II, at 27).

Without accepting Mr. Davis' allegations as true, the lower

court summarily denied the claim. As to diligence, the court stated:

> The Defendant fails to provide an explanation as to why he would have trouble locating the witnesses. The record shows that Kimberly Rieck, Beverly Castle's daughter, testified at trial that they were originally from Pekin, Illinois, the Defendant's home town. See Exhibit A: Jury Trial Transcript, pp. 336, 360, 392 (RAC 917, 941, 973). Furthermore, Kimberly Rieck testified at trial that she had met the Defendant twice in Pekin, Illinois, through her boyfriend Carl Kearney, a friend of the Defendant's. See Exhibit A: Jury Trial Transcript, pp. 336-340 (RAC 917-921). And the Defendant testified during the penalty phase that his home town is Pekin, Illinois, and that he had two brothers and two sisters from there. See Exhibit B: Penalty Phase Trial Transcript, pg. 33 (RAC 1518). In addition, at the rule 3.850 evidentiary hearing held on November 5 - 9, 2001, the Defendant's sisters, Shari Uhlman and Candace Lonus, testified that they still lived in Pekin, Illinois. See Exhibit C: 3.850 Evidentiary Hearing Transcript, pp. 208, 237 (RAC 3981, 4010).

(PC-R2. Vol. II, 204)(fn omitted). The lower court concluded that the information was not presented within one year of when the information could have been acquired with due diligence (PC-R2. Vol. II, 204).

Additionally, without accepting the statements of Rieck and Castle as true, the lower court instead rejected them on the basis that they conflicted with the witnesses' previous testimony and statements. With regard to Castle, the court stated that her "July 2, 1985 statement refutes her instant claim that she was in a hurry to get out of the interview or to say whatever they wanted to hear from her. Her affidavit, made more than twenty-two years after trial, fails to explain why she testified consistently at trial, under

oath, if she knew her interview statement was not true." (PC-R2. 208). Similarly, as to Rieck, the court stated, "She does not explain why now, over twenty-two years after her July 2, 1985 statement to Detective Rhodes, she can recall better than she claimed she could at trial in January, 1987." (PC-R2. Vol. II, 209).[7]

The lower court's ruling is erroneous. The court did not accept the statement of Rieck and Castle as true, nor did the court accept Mr. Davis' claim of diligence as true. Rather, the court dismissed Mr. Davis' allegations not because they were refuted by the record, but because they were in conflict with what was already in the record. The court failed to recognize that the conflict exists because there were disputed issues of fact, thereby necessitating the need for an evidentiary hearing.

As this Court has repeatedly indicated, factual allegations as to the merits of a constitutional claim as well as to issues of diligence set forth in a Rule 3.851 motion 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). Here, the lower court erred in summarily denying Mr. Davis' motion.

[7]As to Rieck, the lower court also made the following findings, "The declaration of Kimberly Rieck attached to the Defendant's motion now claims that the Defendant 'had to have been very drunk' when he came to get the socks around 11:30 or midnight because 'he had been drinking all day.' However, she does not mention riding with the Defendant who drove her and Carl to pick up Carl's car about 4:30 to 5:00 p.m., or giving him money to get dinner for them at McDonald's, or eating with the Defendant at around 6:00 p.m." (PC-R.2, Vol II, 209).

Additionally, in its order summarily denying relief, the lower court noted that Mr. Davis' pleading failed to conform with Rule 3.851(e)(2)(c) (PC-R2. Vol II, 203).[8] While the lower court did not strike Mr. Davis' motion nor did the court indicate this was the reason for denying Mr. Davis' motion, Mr. Davis will address this issue in an abundance of caution.

Mr. Davis offered to cure any of the alleged deficiencies both during the case management conference (PC-R2. Vol III, 11-13, 23)[9] and in his motion for rehearing. During the case management conference, counsel for Mr. Davis elaborated on his basis for diligence (PC-R2. Vol III, 9, 10, 27). Counsel further explained that Rieck and Castle were in Illinois, and that if they refused to attend the hearing, counsel would ask the court to issue a certificate of materiality and ask the judge there to force the witnesses to come (PC-R2. Vol. III, 23-24). In his motion for rehearing, Mr. Davis supplied information as to any of the remaining deficiencies noted by the court in its order.[10]

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[8]In its order, the lower court noted that Mr. Davis did not supply the phone numbers for his witnesses; he did not explain the relevance of several witnesses; he did not provide a statement as to why the witnesses were previously unavailable; and he did not state that the witnesses would be available to testify at an evidentiary hearing (PC-R2. Vol II, 203).

[9]The State objected to Mr. Davis supplementing his motion during the hearing (PC-R2. Vol II, 14-17).

[10]Mr. Davis provided the following information:

> [2]Mr. Davis has obtained the following phone numbers for the witnesses listed in his successive

Mr. Davis submits that to the extent the lower court denied an evidentiary hearing due to a pleading defect, the court's finding was erroneous. Any defects in the pleading should not result in a summary denial of Mr. Davis' claims. See Spera v. State, (971 So. 2d 754, 755 (Fla. 2007)("Accordingly, to establish uniformity in the criminal postconviction process, we hold that in dismissing a first postconviction motion based on pleading deficiency, a court abuses

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> Rule 3.851 motion: Beverly Castle and Kimberly Rieck Kearney (309) 346-1593; Rosa Greenbaum (850) 322-1058; Mark McKeown number not listed; Jeffrey Walsh (850) 510-8897; John White (727) 530-4400.
>
> [3]Rosa Greenbaum is Mr. Davis' investigator who was able to locate and interview Rieck and Castle. Thus, her testimony would be relevant to the efforts made in again searching for and interviewing Rieck and Castle.
>
> [4]Mary McKeown is the trial prosecutor in Mr. Davis' case. Her testimony is relevant as to what initial statements were taken from Rieck and Castle and what statements were disclosed to defense counsel, as well as her knowledge of Carl Kearney's arrest and how she used that in forcing Rieck and Castle to testify.
>
> [5]Jeffrey Walsh is Mr. Davis' former investigator who originally attempted to locate Rieck and Castle prior to the filing of Mr. Davis' initial amended motion for Rule 3.851 relief. Obviously, his testimony is necessary to establish Mr. Davis' diligence in locating and interviewing Rieck and Castle.
>
> [6]John White is Mr. Davis' trial attorney. His testimony is relevant as to what statements and information were disclosed to him by the State.

(PC-R2. Vol. II, 311 fn 2-6).

its discretion in failing to allow the defendant at least one opportunity to correct the deficiency unless it cannot be corrected."); Bryant v. State, 901 So. 2d 810, 818 (Fla. 2005)("We understand that postconviction motions differ from civil complaints in significant respects. Postconviction motions cannot be 'dismissed' as complaints can. Nevertheless, the same principles apply. **Although a trial court may 'strike' a postconviction motion where a civil complaint would be 'dismissed', the trial court, like the court in the civil context, should grant leave to amend the motion to cure the defects that led the court to strike the original motion**. In the civil context, dismissing a complaint without granting at least one opportunity to amend is considered an abuse of discretion unless the complaint is not amendable.")(emphasis added).

Here, any alleged defects were corrected by Mr. Davis, and his claims were properly presented. Yet, despite the fact that Mr. Davis pled facts regarding the merits of his claims and regarding his diligence, these facts were not accepted as true. These facts are set forth in the Statement of the Facts, *supra*, and in the discussion contained elsewhere in this brief. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively rebut Mr. Davis' claims and that an evidentiary hearing is required.

ARGUMENT II

RECENTLY DISCOVERED EVIDENCE DEMONSTRATES THAT MR. DAVIS' CAPITAL CONVICTION AND DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE EVIDENCE ESTABLISHES THAT MR. DAVIS' RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE EVIDENCE OR THAT TRIAL COUNSEL WAS INEFFECTIVE IN HIS REPRESENTATION OF MR. DAVIS.[11]

Mr. Davis has recently discovered evidence that entitles him to relief. Further, the recently discovered evidence corroborates the allegations of the claims he made in his previous postconviction proceedings. Specifically, the evidence corroborates his claims that the State violated Brady v. Maryland, 373 U.S. 83, 87 (1963), and Giglio v. United States, 405 U.S. 150 (1972), at his capital trial.

This Court has held that in assessing allegations of newly discovered Brady evidence or simply newly discovered evidence, a reviewing court must consider the evidence cumulatively. Lightbourne v. State, 742 So. 2d 238, 247 (Fla. 1999). Thus, the court is required

[11]Mr. Davis pleads his claim in the alternative. Mr. Davis asserts that the circumstances under which Rieck and Castle testified establish a Brady violation or establish that trial counsel was ineffective in failing to inform the jury of the witnesses true motive for testifying. However, in addition, Mr. Davis asserts that at a minimum, the recently disclosed information establishes newly discovered evidence that entitles him to a new trial.

to consider all evidence which would be admissible at trial. Id. This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Lightbourne, 742 So. 2d at 247.

At Mr. Davis' capital trial, the State presented the testimony of Kimberly Rieck and Beverly Castle. Witnesses Rieck and Castle were critical to the State's prosecution of Mr. Davis in that they were the only witnesses who testified who observed Mr. Davis and the victim on the day of the crimes.[12] Thus, at trial, Rieck and Castle described the interactions of Mr. Davis and Landis; comments that they heard Mr. Davis make both to Landis and to them; the amount of alcohol they believed Mr. Davis to have consumed and what they observed about his behavior in relation to his alcohol consumption.

Specifically, Rieck testified that a day or two before the crimes, Mr. Davis informed her that he had "problems with money" (R. 927). In addition, Rieck testified that on the day of the crimes, Mr. Davis told her: "that he was going to take the old man for what he could" (R. 927), and that "[h]e said get him drunk and see what he could get out of him." As to Mr. Davis' level of intoxication, the State inquired:

> Q: Do you know how much either one of them had to drink during the day?
>
> A: No.
>
> Q: Did you have later contact with Mark Davis that day?

[12]There were no witnesses to what actually occurred between Mr. Davis and the victim.

A: Yep.

Q: Can you tell us a little about that?

A: It was around four-thirty or five o'clock. We had Mark take us to get Carl's car . . .

Q: Now, did Mark Davis do the driving at any point in time?

A: Yes, he took us there.

Q: Did he have any difficulty in driving the car when he took you there?

A: No, he didn't.

Q: During the course of the day when you had conversations with him, was his speech slurred or impaired in any fashion?

A: No, it wasn't.

Q: Was he staggering or unable to walk properly in your opinion on all other observations of the man?

A: No.

(R. 930-31).[13]

Rieck testified that at 11:30 p.m. or midnight, Mr. Davis came to her room (R. 934). He did not appear intoxicated (R. 935).

[13]Rieck testified that Mr. Davis gave them a ride in his car. However, Mr. Davis' car had been previously impounded because it was reported stolen from Illinois.

At Mr. Davis' trial, Castle testified that she was present at the apartment complex the morning of July 1st (R. 925, 954, 957).[14] She testified that she observed Mr. Davis assist Landis move into his apartment (R. 959). Castle also testified that Mr. Davis wanted Landis to get involved in his tattooing business (R. 960). Castle described Mr. Davis as "a nervous young man" (R. 974).

When asked if she had seen Mr. Davis drinking, Castle said: "I seen him with a can of beer in his hands." (R. 960).

Later in the evening, Castle saw Mr. Davis and the victim arguing about money (R. 961). Castle testified:

> Q: What do you mean they were arguing about money? Can you tell us what that conversation was?
>
> A: Okay. I was sitting out in front of my apartment. Like I had said it was hot. There was no air conditioning. That's the reason I was even out there. And Mark was calling Skip a queer and said he was going to rip the old man off.
>
> * * *
>
> Q: He use any other words to describe how he was going to take Mr. Landis and what he was going to take if he was going to take something?
>
> A: Just said he was going to rip him off and do him in.

(R. 961-2). Later, Castle added her interpretation of what Mr. Davis said: "Well, that's young kids talk. I have a teenager you know. To do away with someone at least the way children I know talk, was to kill them, get rid of them" (R. 972).

[14]Rieck had previously testified that Castle was working on the day of the crimes and not present until the evening (R. 925).

Castle was again asked about Mr. Davis' intoxication. She testified that at approximately 8:00 p.m., "Mark didn't seem like he was drunk . . . He wasn't stumbling around like [the victim] was anyway. He seemed coherent. He knew what he was doing" (R. 965). She also testified that Mr. Davis stopped drinking in the evening (R. 991). On cross examination, defense counsel attempted to impeach Castle with her statement that was taken on July 2nd,[15] wherein Castle told the police that Mr. Davis got drunker and drunker throughout the day (R. 977), and that Mr. Davis and Landis drank beer and vodka (R. 979). During the statement, Detective Rhodes specifically asked Castle if they were both drunk and Castle stated: "Oh, bad, very bad.". Additionally, Castle had told the police that at 10:30 p.m., "they were both real drunk." (R. 978).

In discussing the import of Rieck and Castle's testimony, the State told the jury: "We have a man whose intent it was all day to rip this old man off. That's all he is talking about to Beverly Castle and Kimberly Rieck. He was going to rip him off. He made the statement to Kimberly Rieck. I am going to get him drunk and I am going to get his money. He made the statement to Beverly Castle. I am going to rip him off and I am going to do away with him. . . . Killed him during the course of a robbery" (R. 1394-5). The State also told the jury to believe Rieck and Castle's testimony that Mr. Davis was not intoxicated on the day of the crimes.

[15]Defense counsel did not depose Castle or Rieck prior to trial.

As to Rieck and Castle's credibility, the State argued: "They're two witnesses who were there all day. And Mr. White would have you suggest that they are for some reason coming in here or lying or minimizing or shading their testimony. . . . Did you at any point in time hear Mr. White in any way impeach those ladies on the statements this Defendant made to them?" (R. 1404).

However, postconviction counsel has now discovered that Rieck and Castle did indeed lie, minimize or shade their testimony. In a declaration recently provided by Rieck she stated:

> 2. When Mark made statements about "playing the man for his money", I thought only that he planned to get some free stuff from him, not that he was going to commit any crime against him. I never heard Mark make any statement about "doing away with" anybody.
>
> 3. Mark was quite drunk the day the man was killed; he had been drinking all day. When I saw him later that night, when he came to ask for socks, he had to have been very drunk.
>
> 4. My boyfriend, Carl Kearney, was arrested before the trial as a hostile witness; the police came and got him in Virginia in the middle of the night. I was told that if I didn't come to Florida to testify that Carl would sit in jail. I didn't want to testify but felt I had no choice. I was uncomfortable with my testimony because I was uncertain of the facts and circumstances.

(PC-R2. Vol. 1, 35).

In addition, Castle recently attested that her trial testimony was "less than accurate". Specifically, Castle has now stated: "Mark never said that he planned to do away with" the man. I felt a great deal of pressure while being questioned by the police; they wanted something tangible and I knew I wasn't getting out of there until I

gave it to them. As soon as I did, saying Mark said he would "do away with" the man, I was out the door (Postconviction motion, Appendix C).

Castle also stated: "If I had been asked my opinion, I would have said that Mark was probably very drunk . . ." (Postconviction motion, Appendix C). Furthermore, Castle stated: "If Mark had really threatened to 'do away with' the man, I would have gone straight to my daughter Kim and said, 'This guys in danger.' Im not the type of person who would just slough off a statement like that." (Postconviction motion, Appendix C).

Rieck and Castle's recently disclosed information would undermine the outcome of the verdict, or would be information that would probably lead to Mr. Davis' acquittal of the charge of first-degree murder. The recently disclosed information impacts the intent of Mr. Davis on the day of the crimes. Indeed, neither Rieck nor Castle believed that Mr. Davis intended to commit any crime. The two witnesses who observed Mr. Davis and the victim simply believed that Mr. Davis wanted to get the victim to buy him cigarettes and alcohol throughout the day. And, Mr. Davis never said that he planned "to do away with" the victim as Castle had told the jury.

Rieck and Castle's motive for testifying as they did was information that was necessary for the jury to hear in assessing whether or not the witnesses were truthful. In Davis v. Alaska, 415 U.S.308, 315 (1974), the United States Supreme Court recognized "that

the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Thus, a critical issue in evaluating Mr. Davis' claim was whether Rieck and Castle believed that they needed to testify in the manner they did in order to have Carl Kearney released from jail. If pressure was placed on the witnesses to testify in a particular manner, then it was necessary that trial counsel be provided with such information so that he could effectively represent Mr. Davis.

Similarly, both Rieck and Castle minimized Mr. Davis' alcohol consumption and the effect that the alcohol had on him. Mr. Davis' level of intoxication was a feature of his initial postconviction proceedings. Thus, the evidence presented at Mr. Davis' initial postconviction proceeding must be considered along with the recently disclosed information from Rieck and Castle. See State v. Gunsby, 670 So. 2d 920 (Fla. 1996).[16]

In addition, Rieck and Castle's testimony was also considered by the jury and sentencing judge in determining whether Mr. Davis should live or die. (R. 716). During the State's argument, the State relied on Rieck and Castle's testimony to support three aggravating circumstances: committed in the course of a robbery; committed for

[16]In Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violation, ineffective assistance of counsel and/or newly discovered evidence. Specifically, this Court found that a new trial was required because the evidence presented at the evidentiary hearing undermined the credibility of key State witnesses. Id. at 923.

financial gain; and cold, calculated and premeditated. As to the cold, calculated and premeditated aggravator, the State argued:

> First, look at his earlier statement during the day, initially, I'm going to get him drunk and roll him. I'm going to take him for what I can. By later in the day he was no longer thinking about getting him drunk and taking his money, later in the day he made a statement to Beverly Castle, I'm going to rip him off and do away with him.

(R. 1559). In sentencing Mr. Davis to death, the trial court found four aggravating circumstances and no mitigation.[17]

Mr. Davis had a constitutional right to present accurate information to his capital jury concerning Rieck and Castle's motives for testifying and the evidence against him. The State thwarted Mr. Davis' rights in failing to disclose material, exculpatory evidence. When Rieck and Castle's statements are considered cumulatively with the mitigation introduced in the previous proceedings, it is clear that Mr. Davis would have received a life sentence.

To the extent that trial counsel failed to obtain the truth from Rieck and Castle about their observations or motives for testifying as they did, Mr. Davis asserts that the evidence must be considered

[17]Rieck and Castle's statement must be considered cumulatively with the mitigation introduced during the postconviction evidentiary hearing, where lay witness testimony established evidence of Mr. Davis' impoverished upbringing, his physical, mental and sexual abuse as a child, as well as his drug and alcohol abuse starting at an early age. Mental health testimony was presented that Mr. Davis suffers from chronic post-traumatic stress disorder, polysubstance abuse and depression (PC-R. 4169); that Mr. Davis was under the influence of an extreme mental or emotional disturbance at the time of the crime (PC-R. 4186); and that Mr. Davis' capacity to appreciate the criminality of his conduct or to conform his conduct with the requirements of law was substantially impaired (PC-R. 4186).

as newly discovered evidence of a Brady violation and an ineffective assistance of counsel claim, or at a minimum the evidence establishes newly discovered evidence that would probably produce an acquittal on retrial.

Mr. Davis is entitled to an evidentiary hearing. Thereafter, relief should issue.

ARGUMENT III

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.[18]

Following the imposition of Mr. Davis' sentence of death, Florida adopted lethal injection as its method of execution. In Sims v. State, 754 So. 2d 657 (Fla. 2000), this Court first addressed an Eighth Amendment challenge to the then newly adopted method of execution, *i.e.* lethal injection. The chemical process utilized in executions in Florida that was at issue in Sims provided as explained by this Court:

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Sims, 754 So. 2d at 666 (footnote added). This Court rejected the

[18]Mr. Davis raised this claim in his postconviction motion prior to the issuance of the United States Supreme Court's decision in Baze v. Rees, 128 S. Ct. 1520 (2008), and this Court's decision in Tompkins v. State, Case No. SC08-992 (Fla. November 7, 2008). Mr. Davis acknowledges those decisions foreclose relief on this claim. Mr. Davis raises this claim for preservation purposes.

claim that Florida's lethal injection procedure violated the Eighth Amendment to the United States Constitution because it constituted cruel and unusual punishment. The Court explained:

> Sims' reliance on Professor Radelet and Dr. Lipman's testimony concerning the list of horribles that could happen if a mishap occurs during the execution does not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner. Other than demonstrating a failure to reduce every aspect of the procedure to writing, Sims has not shown that the DOC procedures will subject him to pain or degradation if carried out as planned. Sims' argument centers solely on what may happen if something goes wrong. From our review of the record, we find that the DOC has established procedures to be followed in administering the lethal injection and we rely on the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Id. at 668 (note omitted).

Events have occurred which have demonstrated that the promises made by DOC in Sims have not been kept. The basis for this Court's conclusion that "Sims has not shown that the DOC procedures will subject him to pain or degradation if carried out as planned" is now outdated. Evidence does now exist to show that the DOC procedures will prevent the infliction of unnecessary pain or degradation. Moreover, this Court's reliance upon "the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below" has now been demonstrated to have been misplaced.

On December 13, 2006, Angel Diaz was executed by the State of

Florida. The execution was carried out under a revised lethal injection protocol adopted in secret on August 16, 2006. This new protocol was not made public until counsel for a condemned inmate learned on October 17, 2006, of the protocol on the eve of that inmate's execution.

Newspaper accounts of the execution described it as follows:

> [Mr. Diaz] was executed by lethal injection Wednesday, grimacing in pain before dying 34 minutes after receiving the first dose of chemicals.

Ron Word, "Man Executed for Miami bar slaying takes 34 minutes to die," *Gainesville Sun*, December 13, 2006 (emphasis added).

> He appeared to move for 24 minutes after the first injection. His eyes were open, his mouth opened and closed and his chest rose and fell.

The Associated Press, "Connecticut Escapee Executed in Florida," *The Hartford Courant*, December 13, 2006.

> What happened to him next looked agonizing. Grimacing, Diaz took 34 minutes to die from the drugs pumped through him. At times he seemed to be squinting and at other times he appeared to be flexing his jaw.

Phil Long and Marc Caputo, "Lethal injection takes 34 minutes to kill inmate," *Miami Herald*, December 14, 2006.

> Angel Diaz winced, his body shuddered and he remained alive for 34 minutes, nearly three times as long as the last two executions.
> Department of Corrections officials said they had to take the rare step of giving Diaz a second dose of drugs to kill him.
>
> * * *
>
> Twenty-six minutes into the procedure, Diaz's body

> suddenly jolted.
>
> * * *
>
> Corrections officials acknowledged that 34 minutes was an unusually long time but said no records are kept that would tell if it's the longest ever in state history.
>
> They were not sure how many other times a second dose was needed.
>
> Gretl Plessinger, a DOC spokesperson, said it's unknown at what times the first and second doses were given because those records are not kept.

Chris Tisch and Curtis Krueger, Executed Man Takes 34 Minutes To Die, *St. Petersburg Times*, December 14, 2006.

On December 15, 2006, the medical examiner who performed an autopsy of the body publicly made preliminary findings. He found that the IV's were not inserted properly:

> The doctor who performed Diaz's autopsy refused to say if he thought Diaz was in pain. Alachua County Medical Examiner William F. Hamilton said the needles in both arms punctured straight through his veins, dissipating the lethal chemicals.
>
> "The main problem with the conduct of this execution procedure was that the fluids to be injected were not going into a vein, but were going into small tissues in the arm," Hamilton said. His examination found "evidence of chemical damage" at the injection wound for six inches above and below the right elbow, and nearly the same pattern around the left elbow.

Gary Fineout and Marc Caputo, "Governor Bush Orders Hold on Executions," *Miami Herald*, December 16, 2006 (emphasis added). As a result of the medical examiner's findings, the Governor suspended all executions in Florida:

> Gov. Jeb Bush has once again suspended all executions in Florida after an autopsy showed needles tore through an inmate's veins Wednesday night, causing

> chemicals to severely burn his flesh.
>
> Angel Diaz took 34 minutes to die, an unusually long time, because the drugs weren't circulating in his blood.
>
> Corrections officials initially attributed Diaz's slow death to liver disease, but the preliminary autopsy results showed no outward signs of damage to the organ.
>
> The problems prompted Bush to form a four-person team to investigate the execution. On Friday, Bush ordered the assembly of a second team to study whether the lethal injection protocols used in Florida should be revised.

Chris Tisch, "Governor Bush Halts Executions," *St. Petersburg Times*, December 16, 2006 (emphasis added).

In the wake of the botched Diaz execution, the Department of Corrections completed its own internal investigation of the botched Diaz execution on December 20, 2006. This internal investigation clearly revealed that the protocol was not followed as had been promised; Mr. Diaz was neither rendered unconscious nor paralyzed.

The medical examiner who performed the autopsy on Diaz's body has issued his final report. According to it, the IV needles inserted into Diaz's arms tore through his veins and sprayed the three drug cocktail into his flesh. "None of the materials went to the right place." Chris Tisch, "Doctor: Execution flawed at start," *St. Petersburg Times*, February 13, 2007. As a result, footlong blisters were found on both of Diaz's arms during the autopsy. Dr. Hamilton "said one of the chemicals used in the process is known for its caustic effect." Nathan Crabbe, "Experts testify on botched execution,"

Gainesville Sun, February 13, 2007.

In May of 2007, a new protocol was adopted for carrying out executions in Florida. However, this protocol failed to correct the problem with the lethal injection procedure revealed by the Diaz execution. The protocol provides that a lay member of the execution team will make a determination of the condemn's consciousness following the administration of sodium pentothal. However, the determination of consciousness is a medical one requiring a medical doctor to make the diagnosis. The protocol does not provide for a medical doctor to make the determination nor provide the medical guidance obtained by a doctor's years of medical training necessary for making the medical diagnosis that the condemned is unconscious. As a result, the risk of unnecessary pain remains. In fact, as former Secretary Singletary said, "We know for sure that this is going to happen again."

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 (1909). "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 (emphasis added). 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, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari), that the contours of the Eighth Amendment extend beyond simply whether there is conscious pain inherent in the method of execution:

> The Eighth Amendment's protection of "the dignity of

> man," Trop v. Dulles, *supra*, at 100, (plurality opinion), 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. See, e.g., Royal Commission on Capital Punishment, 1949-1953 Report P 732, p. 255 (1953) (hereinafter Royal Commission Report). Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. Ibid. These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering. See, e.g., Wilkerson v. Utah, *supra*, at 135.

Thus, the Eighth Amendment also requires that the method of execution minimize physical violence as well as mutilation and distortion of the human body.

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 risk of the infliction of unnecessary pain, a risk that DOC was aware of in August of 2006, but which it decided to ignore. Even now in the most recent protocol, there is no provision for a medical determination of unconsciousness. 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.

CONCLUSION

In light of the foregoing arguments, Mr. Davis requests that this matter be remanded to the circuit court for a full and fair evidentiary

hearing and for other relief as set forth in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Candance Sabella, Senior Assistant Attorney General, Concourse Center #4, 3507 E. Frontage Rd., Tampa, Florida 33607, on January 13, 2009.

CERTIFICATE OF FONT

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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