

IN THE SUPREME COURT OF FLORIDA

MARTIN GROSSMAN,

Appellant,

v.

Case No. SC08-564

Lower Tribunal No. CRC84-11698

STATE OF FLORIDA,

Appellee.

---

ON APPEAL FROM THE CIRCUIT COURT  
OF THE SIXTH JUDICIAL CIRCUIT,  
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

BILL MCCOLLUM  
ATTORNEY GENERAL

CAROL M. DITTMAR  
SENIOR ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 0503843  
Concourse Center 4  
3507 East Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
Telephone: (813) 287-7910  
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT.....	6
ISSUE I.....	6
WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING GROSSMAN’S CLAIM THAT FLORIDA’S LETHAL INJECTION METHOD OF EXECUTION VIOLATES THE EIGHTH AMENDMENT.	
ISSUE II.....	11
WHETHER THE TRIAL COURT ERRED IN DENYING GROSSMAN’S CLAIM THAT SECTION 27.702, FLORIDA STATUTES, IS UNCONSTITUTIONAL.	
ISSUE III.....	14
WHETHER THE TRIAL COURT ERRED IN DENYING GROSSMAN’S CLAIM THAT THE 2006 ABA REPORT DEMONSTRATES THAT FLORIDA’S DEATH PENALTY SYSTEM IS UNCONSTITUTIONAL.	
CONCLUSION.....	16
CERTIFICATE OF SERVICE.....	17
CERTIFICATE OF FONT COMPLIANCE.....	17

TABLE OF AUTHORITIES

**Cases**

Baze v. Rees,  
128 S. Ct. 1520 (2008) ..... passim

Buenoano v. State,  
565 So. 2d 309 (Fla. 1990) ..... 10

Crowe v. Donald,  
528 F.3d 1290 (11th Cir. 2008) ..... 12

Diaz v. State,  
945 So. 2d 1136 (Fla. 2006) ..... 12, 15

Griffin v. State,  
2008 Fla. LEXIS 1086 (Fla. June 2, 2008) ..... 7

Grossman v. Crosby,  
359 F. Supp. 2d 1233 (M.D. Fla. 2005) ..... 3

Grossman v. Crosby,  
880 So. 2d 1211 (Fla. 2004) ..... 3

Grossman v. Dugger,  
708 So. 2d 249 (Fla. 1997) ..... 3

Lebron v. State,  
982 So. 2d 649 (Fla. 2008) ..... 7

Lightbourne v. McCollum,  
969 So. 2d 326 (Fla. 2007) ..... passim

Marks v. United States,  
430 U.S. 188 (1977) ..... 8

McNair v. Allen,  
515 F.3d 1168 (11th Cir. 2008) ..... 13

Provenzano v. State,  
739 So. 2d 1150 (Fla. 1999) ..... 10

Rolling v. State,  
944 So. 2d 176 (Fla. 2006) ..... 14

Rubio v. State,  
967 So. 2d 768 (Fla. 2007) ..... 11, 14

Rutherford v. State,  
940 So. 2d 1112 (Fla. 2006) ..... 14

Schwab v. State,  
969 So. 2d 318 (Fla. 2007) ..... 6, 10

<u>Schwab v. State,</u> 33 Fla. L. Weekly S431 (Fla. June 27, 2008) .....	7, 9, 10
<u>Schwab v. State,</u> 982 So. 2d 1158 (Fla. 2008) .....	6
<u>Sims v. State,</u> 754 So. 2d 657 (Fla. 2000) .....	10
<u>State ex rel. Butterworth v. Kenny,</u> 714 So. 2d 404 (Fla. 1998) .....	11
<u>State v. Coney,</u> 845 So. 2d 120 (Fla. 2003) .....	6, 11
<u>Woodel v. State,</u> 33 Fla. L. Weekly S290 (Fla. May 1, 2008) .....	7

**Other Authorities**

§ 27.702, Fla. Stat.....	11, 13
42 U.S.C. §1983.....	13

STATEMENT OF THE CASE AND FACTS

This is an appeal from the summary denial of a successive motion for postconviction relief in a capital case challenging the constitutionality of Florida's procedures for execution by lethal injection. Appellant Grossman was convicted of murder and sentenced to death in 1985. The facts of the case are summarized in this Court's opinion on direct appeal, Grossman v. State, 525 So. 2d 833, 835-36 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989):

Appellant and a companion, Taylor, drove to a wooded area of Pinellas County on the night of December 13, 1984, to shoot a handgun which appellant had recently obtained by burglarizing a home. Appellant lived in neighboring Pasco County at his mother's home and was on probation following a recent prison term. Wildlife Officer Margaret Park, patrolling the area in her vehicle, came upon the two men and became suspicious. She left her vehicle with the motor, lights, and flashers on, and took possession of appellant's weapon and driver's license. Appellant pleaded with her not to turn him in as having a weapon in his possession and being outside of Pasco County would cause him to return to prison for violation of probation. Officer Park refused the plea, opened the driver's door to her vehicle and picked up the radio microphone to call the sheriff's office. Appellant then grabbed the officer's large flashlight and struck her repeatedly on the head and shoulders, forcing her upper body into the vehicle. Officer Park reported "I'm hit" over the radio and screamed. Appellant continued the attack, and called for help from Taylor, who joined in the assault. Officer Park managed to draw her weapon, a .357 magnum, and fired a wild shot within the vehicle. Simultaneously, she temporarily disabled Taylor by kicking him in the groin. Appellant, who is a large man, wrestled the officer's weapon away and fired a

fatal shot into the back of her head. The spent slug exited her head in front and fell into a drinking cup inside the vehicle. Blood stains, high velocity splatters, the location of the spent slug, and the entry and exit wounds show that the victim's upper body was inside the vehicle with her face turned inward or downward at the moment she was killed. Appellant and Taylor took back the seized handgun and driver's license, and fled with the officer's weapon. They returned to the Grossman home, where they told the story of the killing, individually and collectively, to a friend who lived with the Grossmans. The friend, Brian Hancock, and Taylor buried the two weapons nearby. Appellant, who was covered with blood, attempted unsuccessfully to burn his clothes and shoes which Taylor later disposed of in a nearby lake. Approximately a week later appellant and Taylor, individually and collectively, recounted the story of the murder to another friend, Brian Allan. Approximately eleven days after the murder, Hancock told his story to the police and appellant and Taylor were arrested. Taylor, upon his arrest, recounted the story of the murder to a policeman and, later, appellant told the story to a jailmate, Charles Brewer. Appellant and Taylor were tried jointly over appellant's objection. At trial, the state introduced the testimony of Hancock, Allan, and Brewer against appellant. The state also introduced Taylor's statement to the policeman against Taylor only. In addition, the state introduced the charred shoes, the two weapons, prints taken from the victim's vehicle, testimony from a neighbor who observed the attempted burning of the clothes, appellant's efforts to clean the Grossman van, and the changing of the van tires. Expert testimony as to the cause of death and the significance of blood splatter evidence was also introduced by the state. The jury was instructed that Taylor's admissions to the policeman could only be used against him, not appellant. The jury was instructed on premeditation and felony murder based on robbery, burglary, and escape. A general verdict of first-degree murder was returned against the appellant and Taylor was found guilty of third-degree murder. The judge followed the jury's twelve-to-zero recommendation that the appellant be sentenced to death.

Grossman's sentence is supported by four aggravating circumstances: (1) the murder was committed during the course of a robbery or burglary; (2) the murder was committed for the purpose of avoiding arrest; (3) the murder was committed to disrupt or hinder law enforcement; and (4) the murder was especially wicked, evil, atrocious, or cruel.

Grossman's prior attacks on his conviction and death sentence have been consistently rejected. See Grossman, 525 So. 2d at 846; Grossman v. Dugger, 708 So. 2d 249 (Fla. 1997) (postconviction appeal and habeas petition); Grossman v. Crosby, 880 So. 2d 1211 (Fla. 2004) (successive habeas petition); Grossman v. Crosby, 359 F. Supp. 2d 1233 (M.D. Fla. 2005) (federal habeas petition); Grossman v. McDonough, 466 F.3d 1325 (11th Cir. 2006), cert. denied, 127 S. Ct. 2430 (2007); Grossman v. State, 932 So. 2d 192 (Fla. 2006) (successive postconviction appeal).

On September 12, 2007, Grossman filed a successive motion for postconviction relief, alleging that the execution of Angel Diaz in December, 2006, demonstrated that Florida's procedures for judicial execution by lethal injection violate the Eighth Amendment's prohibition against cruel and unusual punishment (V1/2-28). The State filed a Response (V1/98-146), and case management conferences were held on October 26, 2007 and

February 1, 2008 (V1/154-163; V2/218-232). Thereafter, on February 27, 2008, the circuit court denied the motion (V2/192-194). This appeal follows.

## SUMMARY OF THE ARGUMENT

The court below properly denied Grossman's successive motion for postconviction relief alleging that Florida's procedures for judicial execution by lethal injection violate the Eighth Amendment proscription against cruel and unusual punishment. The court applied binding precedent to reject this claim. Grossman's claim that an incorrect standard was applied is refuted by the case law.

Grossman's challenges to the constitutionality of Section 27.702, Florida Statutes, and to capital sentencing in Florida based on a 2006 American Bar Association report are procedurally barred and without merit.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING GROSSMAN'S CLAIM THAT FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION VIOLATES THE EIGHTH AMENDMENT.

Grossman's primary claim asserts that the court below should not have rejected his argument that Florida's current procedures for judicial execution by lethal injection violate the Eighth Amendment prohibition against cruel and unusual punishment. The summary denial of Grossman's motion is a legal issue, which is reviewed *de novo*. State v. Coney, 845 So. 2d 120, 137 (Fla. 2003) (holding pure questions of law discernible from the record to be subject to *de novo* review).

The court below rejected Grossman's claim that Florida's current procedures for judicial execution violate the Eighth Amendment, citing to Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), cert. denied, 128 S. Ct. 2485 (2008), and Schwab v. State, 969 So. 2d 318 (Fla. 2007) (V2/192). Grossman requests that this Court revisit the issue, asserting that the United States Supreme Court decision in Baze v. Rees, 128 S. Ct. 1520 (2008), conflicts with the "inherent cruelty" standard applied by this Court in Schwab v. State, 982 So. 2d 1158 (Fla. 2008) (Appellant's Initial Brief, p. 31). A review of the relevant

cases demonstrates that no reconsideration of this issue is warranted.

The January 24, 2008 Schwab decision cited by Grossman was an intermediate opinion issued prior to Baze. However, this Court has considered the issue since Baze and has continued to uphold Florida's current procedures. See Schwab v. State, 33 Fla. L. Weekly S431 (Fla. June 27, 2008), cert. denied, 2008 U.S. LEXIS 5284 (July 1, 2008); Griffin v. State, 2008 Fla. LEXIS 1086 (Fla. June 2, 2008); Woodel v. State, 33 Fla. L. Weekly S290 (Fla. May 1, 2008); Lebron v. State, 982 So. 2d 649, 666 (Fla. 2008). Grossman's reliance on Judge Burge's Order issued in the Ruben Rivera case attached to his brief is similarly misplaced; in that Order, Judge Burge finds that the Ohio protocols violate Ohio state law which requires a judicial execution to be "quick" and "painless." The Order provides no basis for finding Florida's procedures to be unconstitutional.

Grossman does not identify a particular standard from Baze to be applied, instead noting it is a split decision and declaring that "no clear standard was affirmatively adopted by a majority" and discussing the opinions of different justices. However, there is one standard to be taken from Baze; when the Court is split, the holding of the Court "may be viewed as that position taken by those Members who concurred in the judgments

on the narrowest grounds.” Marks v. United States, 430 U.S. 188, 193 (1977). This principle means that the appropriate standard to be applied from Baze requires a defendant to show that a particular method of execution presents a “substantial risk of serious harm,” or an “objectively intolerable risk of harm.” Baze, 128 S. Ct. at 1531.

The “substantial risk of serious harm” was one of several standards discussed and applied in Lightbourne. That case, of course, considered the constitutionality of Florida’s current lethal injection procedures following an extensive evidentiary hearing in the circuit court. This Court concluded that, under the protocols adopted by the Department of Corrections in August, 2007, Florida’s procedures do not present a substantial risk of harm and do not violate the Eighth Amendment. Lightbourne, 969 So. 2d at 353. In fact, this Court expressly considered and rejected the argument that the adoption of a different standard in Baze would affect this Court’s ruling to uphold the constitutionality of Florida’s execution procedures. Lightbourne, 969 So. 2d at 352 (“Alternatively, even if the Court did review this claim under a ‘foreseeable risk’ standard as Lightbourne proposes or ‘an unnecessary’ risk as the Baze petitioners propose, we likewise would find that Lightbourne has

failed to carry his burden of showing an Eighth Amendment violation”).

In addition, the Baze decision itself affirms that Florida’s procedures comply with the Eighth Amendment. In Baze, the Court specifically held that protocols similar to those used in Kentucky “would not create a risk that meets this standard,” and Florida’s protocols provide greater protection than Kentucky’s, reducing the risk of unnecessary harm. See Baze, 128 S. Ct. at 1537 (discussing standard); Baze, 128 S. Ct. at 1570 (Ginsburg, J., dissenting, noting Florida has adopted safeguards for protection not found in Kentucky’s protocols); Schwab, 33 Fla. L. Weekly at S433 (comparing procedures in Florida and Kentucky). Clearly, Baze offers no support for the claim that Florida’s procedures are constitutionally flawed, or that this Court misapplied the Eighth Amendment in Lightbourne.

As Lightbourne explains, the current protocols, adopted in August 2007, represent a concerted effort to improve the administration of the death penalty following identification of weaknesses identified both by the Governor’s Commission and the Department of Corrections following the Diaz execution. Lightbourne affirms the presumption of deference to the executive branch in administering lethal injection. Lightbourne, 969 So. 2d at 352; Provenzano v. State, 739 So. 2d

1150, 1153 (Fla. 1999); Buenoano v. State, 565 So. 2d 309, 311 (Fla. 1990).

Grossman also asserts that his obesity puts him at risk, noting that the execution of Ohio inmate Christopher Newton in May, 2007, presented complications due to Newton's weight. However, as the court below noted, the current protocols take into consideration the individual physical attributes of each inmate and provide for a physical examination to identify and resolve any particular health concerns, such as obesity (V2/193). There has been no suggestion that the Ohio procedures in place for the Newton execution provided any similar safeguard.

Grossman offers no further claim beyond the allegations already considered by this Court and rejected in Lightbourne. His challenges to the current protocols as well as the chemicals used for judicial execution in Florida have been repeatedly rejected. See Schwab 33 Fla. L. Weekly at S433; Lightbourne; Sims v. State, 754 So. 2d 657, 668 (Fla. 2000).

The court below properly denied relief, applying binding precedent from Lightbourne and Schwab. Baze has now confirmed that Florida's procedures are constitutionally valid. This Court must affirm the denial of relief on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING GROSSMAN'S CLAIM THAT SECTION 27.702, FLORIDA STATUTES, IS UNCONSTITUTIONAL.

Grossman also challenges the denial of his claim that Section 27.702, Florida. Statutes, is facially unconstitutional. The court below denied this claim as procedurally barred and without merit (V2/193). The constitutionality of a statute and the propriety of finding a procedural bar are legal questions, subject to *de novo* review. Rubio v. State, 967 So. 2d 768 at 771 (Fla. 2007); Coney, 845 So. 2d at 137 (Fla. 2003).

Grossman does not acknowledge or address the trial court's finding of a procedural bar on this issue. A challenge to the facial validity of this statute could have been brought previously; this statute has existed for over a decade and was specifically upheld against a similar challenge in 1998. Grossman offers no explanation for his failure to raise this issue in prior proceedings.

In addition, this claim has no merit. Grossman's specific challenge to Section 27.702 concerns the prohibition against Capital Collateral Regional Counsels from filing civil lawsuits in federal court. In 1998, this Court decided State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998), holding that section 27.702 prohibited the Capital Collateral Regional

Counsels from pursuing a civil rights action which had been filed to challenge the constitutionality of Florida's electric chair as a method of execution. In Diaz v. State, 945 So. 2d 1136, 1154-55 (Fla. 2006), this Court upheld section 27.702 against the same challenge Grossman now presents.

Grossman suggests, however, that Diaz is not applicable because Grossman may not be able to challenge lethal injection in a successive habeas petition due to the constraints of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In this regard, Grossman is in the same position as Diaz when this Court rejected Diaz's claim. Thus, there is no reason to treat Grossman's claim differently.

Moreover, Grossman cannot bring a federal civil rights action challenging lethal injection in Florida, as the statute of limitations has run on any such claim. Crowe v. Donald, 528 F.3d 1290, 1293 (11th Cir. 2008) ("Crowe's claim accrued no later than 2001, when, after direct review of his convictions had been completed, Crowe became subject to the method of lethal injection that he challenges. See id. at 1177. Crowe's complaint was filed several years beyond the applicable two-year statute of limitations.")<sup>1</sup>

---

<sup>1</sup> Crowe reaffirms that "a method of execution claim accrues on the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or

Section 27.702 does not facially deny Grossman any right to challenge lethal injection in a federal civil action, it only denies use of his taxpayer-supplied capital counsel for doing so. His attack on the statute is no more than a request for an unwarranted extension of his statutory right to counsel. As the court below properly found this challenge to be both procedurally barred and without merit, this Court must affirm the summary rejection of this claim.

---

substantially changed execution protocol," quoting McNair v. Allen, 515 F.3d 1168, 1174 (11th Cir. 2008). While Florida's protocols have become "more specific and more detailed as to the drugs administered and the procedures to be followed," see Lightbourne, 969 So. 2d at 344 they have not changed substantially as to create a new cause of action under 42 U.S.C. §1983.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING GROSSMAN'S CLAIM THAT THE 2006 ABA REPORT DEMONSTRATES THAT FLORIDA'S DEATH PENALTY SYSTEM IS UNCONSTITUTIONAL.

Grossman's last issue challenges the denial of his claim that the report issued by the American Bar Association on September 17, 2006, entitled "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report," demonstrates that Florida's capital sentencing process is unconstitutional. As the court below found, Grossman's claim is procedurally barred and without merit (V2/193). Review of this issue is *de novo*. Rubio, 967 So. 2d at 771; Coney, 845 So. 2d at 137.

This Court has expressly held that this article is not newly discovered evidence. Rutherford v. State, 940 So. 2d 1112 (Fla. 2006) (finding ABA Report is not newly discovered evidence because it "is a compilation of previously available information related to Florida's death penalty system and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches" and that nothing in the report would cause this Court to recede from its past decisions upholding the facial constitutionality of the death penalty); Rolling v. State, 944 So. 2d 176 (Fla. 2006)

(same). See also Diaz v. State, 945 So. 2d 1136 (Fla. 2006), wherein this Court explained:

Unlike Rutherford, Diaz did allege that many of the failures of the Florida death penalty system cited in the ABA Report were applicable in his case. However, this does not change the conclusion that the report is not newly discovered evidence. Furthermore, the "failures" that Diaz cites as applying to his case either have been or could have been litigated by him in his direct appeal and postconviction proceedings. Thus, we affirm the circuit court's summary denial of this claim.

Grossman claims that these cases do not preclude relief in his case, because those cases asserted a violation of the Eighth Amendment, while Grossman claims a violation of the due process clause of the Fourteenth Amendment. This is a distinction without a difference. The time limitations on motions for postconviction relief do not vary based on the nature of the claim presented. Since the ABA Report is not newly discovered evidence, it cannot provide a basis for the filing of an untimely postconviction claim.

Thus, this issue is not based on newly discovered evidence and, in any event, is without merit.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the Order filed below denying Grossman's successive motion for postconviction relief.

Respectfully submitted,

BILL MCCOLLUM  
ATTORNEY GENERAL

s/Carol M. Dittmar  
CAROL M. DITTMAR  
SENIOR ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 0503843  
Concourse Center 4  
3507 East Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
Telephone: (813) 287-7910  
Facsimile: (813) 281-5501  
carol.dittmar@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Ali A. Shakoor, Assistant Capital Collateral Counsel, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this 15th day of August, 2008.

s/Carol M. Dittmar  
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

s/Carol M. Dittmar  
COUNSEL FOR APPELLEE