

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-564

MARTIN GROSSMAN

Appellant,

v.

STATE OF FLORIDA

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,
STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

Mr. Grossman's appeal involves mixed issues of law and fact and are to be reviewed de novo by this Court. Stephens v. State, 748 So.2d 1028 (1999).

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Grossman lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Grossman accordingly requests that this Court permit oral argument.

I. PROCEDURAL HISTORY

Mr. Grossman was convicted of First Degree Murder as charged after a trial held October 22-31, 1985. Following the penalty phase, a jury recommended the death penalty. On March 19, 1986, the trial judge entered his written order in support of the death sentence. Mr. Grossman appealed his conviction to the Florida Supreme Court which affirmed his conviction and sentence in Grossman v. State, 525 So.2d 833 (Fla. 1988). Included in Mr. Grossman's direct appeal for review was the denial of the motion to sever. Mr. Grossman sought review in the United States Supreme Court which denied the petition for writ of certiorari. Grossman v. Florida,

489 U.S. 1071 (1989).

A death warrant was signed on March 8, 1990. The execution was stayed by the Florida Supreme Court on April 5, 1990. Mr. Grossman filed his Rule 3.850 Motion to Vacate Judgment of Conviction and Sentence in state court. Included in the motion were claims of ineffective assistance of counsel in penalty phase and the failure of the state to disclose exculpatory, material evidence. After an evidentiary hearing on May 31 - June 2, 1994, the state trial court denied the Rule 3.850 motion on October 2, 1995.

Mr. Grossman appealed the state court denial of the Rule 3.850 post-conviction relief motion to the Florida Supreme Court. The Florida Supreme Court affirmed the denial of Rule 3.850 relief. Grossman v. Dugger, 708 So.2d 249 (Fla. 1997).

Mr. Grossman then timely filed a federal Petition for Writ of Habeas Corpus on September 18, 1998. That petition was stricken and returned to Mr. Grossman. The order striking the petition was modified and Mr. Grossman filed a petition in response to that modified order. Respondent filed a response to that petition on February 25, 2002, and Mr. Grossman filed a reply on March 21, 2002.

On July 22, 2002, the case was administratively closed pending the outcome of two Florida cases that raised Ring v. Arizona, 536 U.S. 584 (2002) issues. On

August 14, 2003, Mr. Grossman filed a successive state habeas petition. The Florida Supreme Court rejected the petition in a one-sentence order issued May 7, 2004. Mr. Grossman filed a motion for rehearing on May 19, 2004. The motion was denied on July 15, 2004.

On July 26, 2004, Mr. Grossman's federal proceeding was reopened, and he filed his amended petition on August 25, 2004. The petition was denied by the Federal District Court on January 31, 2005. Mr. Grossman made application for a certificate of appealability which was denied by the Federal District Court on February 28, 2005. Mr. Grossman filed a renewed application for a certificate of appealability. The Eleventh Circuit Court of Appeals denied relief by affirming the district court's decision on October 16, 2006. Mr. Grossman made a petition for certiorari with the United States Supreme Court which was denied on May 21, 2007.

Pursuant to Florida Rules of Criminal Procedure 3.851, Mr. Grossman filed a Successive Motion to Vacate Judgements of Conviction and Sentences on September 12, 2007. The circuit court orally denied this motion on February 1, 2008 and the Honorable Judge Joseph A. Bulone signed his order of denial in writing on February 26, 2008. This timely appeal follows.

II. SUMMARY OF THE ARGUMENTS

A. NEWLY DISCOVERED EVIDENCE PROVES EXECUTION BY LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT

PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THEREFOR MR. GROSSMAN'S SENTENCE OF DEATH IS UNCONSTITUTIONAL.

- B. THE FLORIDA STATUTE WHICH PROHIBITS MR. GROSSMAN'S COUNSEL FROM FILING A SECTION 1983 CLAIM ON HIS BEHALF DEPRIVES MR. GROSSMAN OF DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FLORIDA AND FEDERAL CONSTITUTION.**
- C. THE NEW ABA REPORT DEMONSTRATES THAT THE FLORIDA DEATH PENALTY SYSTEM IS INTRINSICALLY FLAWED AND UNCONSTITUTIONAL IN ITS CURRENT STATE.**

ARGUMENT I

NEWLY DISCOVERED EVIDENCE PROVES EXECUTION BY LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THEREFORE MR. GROSSMAN'S SENTENCE OF DEATH IS UNCONSTITUTIONAL.

An evidentiary hearing on this claim should have been granted.

A. The Eighth Amendment to the United States Constitution prohibits the “unnecessary and wanton infliction of pain,” Gregg v. Georgia, 428 U.S. 153, 173 (1976)(plurality opinion), and procedures that create an “unnecessary risk” that such pain will be inflicted. Cooper v. Rimmer, 379 F.3d 1029, 1033 (9th Cir.2004). The Eighth Amendment has been construed by the Supreme Court of

the United States to require that punishment for crimes comport with “the evolving standards of decency that mark the progress of a maturing society.” Roper v. Simmons, 543 U.S. 551, 561 (2005)(quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion). Executions that “involve the unnecessary and wanton infliction of pain,” Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion), or that “involve torture or a lingering death,” In re Kemmler, 136 U.S. 436, 447 (1890), are not permitted.

B. Florida’s Lethal Injection Protocol creates an unnecessary risk of excessive pain and therefor violates the Eighth Amendment’s command that “cruel and unusual punishment [not be] inflicted.” U.S. Const. amend. VIII.

Florida’s lethal injection protocol (Hereinafter Protocol, Attached as Exhibit C) is defective for the following reasons:

(1) The Florida Department of Corrections (hereinafter FDOC) screening of members of the execution team is inconsistent and unreliable and thus has created an undue risk of unnecessary pain during the execution procedure.

(2) The FDOC has failed to ensure or implement meaningful training, supervision and oversight of the execution team which has created an undue risk of unnecessary pain during the execution procedure.

(3) The FDOC has failed to implement or ensure consistent and reliable

record keeping which has created an undue risk of unnecessary pain during the execution procedure and lack of meaningful oversight to ensure that executions are carried out in a lawful manner.

(4) The FDOC has allowed improper mixing, preparation and administration of the lethal chemicals which has created an undue risk of unnecessary pain during the execution procedure.

(5) The FDOC execution chamber is an inadequate and poorly designed facility which has created an undue risk of unnecessary pain during the execution procedure.

(6) The FDOC has failed to ensure that properly trained, certified and licensed medical professionals oversee the lethal injection procedure and this failure has created an undue risk of unnecessary pain during the execution procedure.

(7) The FDOC has failed to ensure a sufficient protocol to reasonably manage complications inherent in the lethal injection process.

Angel Diaz

C. Newly discovered evidence of the lethal injection Protocol adopted secretly in August of 2006 and not made public until October 2006, the December 13, 2006 execution of Angel Diaz and the March 1, 2007 report by the Commission establishes that Florida's use of lethal injection as a means of execution violates the

Eighth Amendment's prohibition on the unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

On December 13, 2006, Angel Diaz was executed by the State of Florida. Attorney Neal Dupree, witnessed the execution and described the failures in an affidavit. The execution was carried out under a lethal injection protocol adopted in secret on August 16, 2006. Public knowledge of the Protocol did not occur until counsel for a condemned inmate learned of the Protocol on October 17, 2006, on the eve of the inmate's execution. Mr. Diaz's was the third execution since the public was made aware of the Protocol.

Newspaper accounts of Mr. Diaz's execution describe the execution 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.

Immediately following the execution, a representative of the Department of Corrections (DOC hereinafter) stated:

He had liver disease, which required them to give him a second dose of the lethal chemicals. **It was not unanticipated.** The metabolism of the drugs to the liver is slowed.

The Associated Press, December 13, 2006 (emphasis added).

Shortly thereafter, Governor Bush affirmed the representations of the Department of Corrections:

As announced earlier this evening by the Department, a preexisting medical condition of the inmate was the reason tonight's procedure took longer than recent procedures carried out this year.

Ron Word, "Execution of Fla. inmate takes 34 min.," *The Times-Picayune*, December 13, 2006.

On December 15, 2006, the medical examiner who performed an autopsy of Mr. Diaz's body publicly reported his preliminary findings:

"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.**

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

The Governor ordered the creation of a commission to examine the state's lethal injection process, with a final report due by March 1, 2007. After numerous hearings in which it heard sworn testimony, the Commission reviewed documents, heard testimony and issued its Report. (Attached as exhibit A).

The Commission determined:

(A) The execution team failed to properly obtain venous access, failed to administer the chemicals properly, and failed to follow FDOC guidelines, which were also inadequate;

(B) FDOC's Protocol was insufficient to deal with complications during an

execution;

(C) FDOC's training and guidelines were inadequate;

(D) FDOC leadership failed to ensure adequate communication or guidance during the actual execution.

(E) The execution chamber is poorly designed. Id. at 9-13

Physician members of the Commission also found that because “authoritative bodies in this country are tending to require more sophisticated medical techniques and personnel to administer . . . lethal injection,” they “conclu[de] that . . . the potential unreliability of lethal injection cannot be fully mitigated.” Id. at 15.

The Report created by the Governor's Commission on Administration of Lethal Injection provides substantial evidence of how flawed and inept Florida's capital execution protocols have been. The Commission's detailed Report shows the physical and mental peril Mr. Grossman would face if he were executed in violation of his Eighth Amendment rights.

Ian Deco Lightbourne

D. Based on the botched execution of Angel Diaz, a death row inmate named Ian Deco Lightbourne filed an “All Writs Petition” in the Florida Supreme Court which remanded the case to the Fifth Circuit Honorable Judge Carven Angel. Judge

Angel held hearings and issued an order based on the Angel Diaz execution, and the Florida Department of Correction's response to such. (See Ian Deco Lightbourne Order, Attachment as exhibit B). Judge Angel held hearings throughout the early part of the summer of 2007 on May 18, May 21, June 18, and July 17-22. Id. at 1. Judge Angel issued a temporary stay of Mr. Lightbourne's capital proceeding and ruled:

Florida's lethal injection procedures must be compatible with evolving standard of decency and compatible with standards that mark the progress of a maturing society. The process must be consistent with notions of dignity of men and, to that end, the State must establish a procedure that is not likely to result in the unnecessary or wanton infliction of pain. Counsel for the Department of Corrections identified modifications to be made to the May 9 procedures. The Court finds that those identified modifications will be beneficial to the process, and further directs the Department of Corrections modify the procedures to comport with the Court's oral statements, including stating with particularity the qualifications, training, licensure, and credentials for each member of the execution team that is necessary to perform the various technical functions, such as starting intravenous lines, that are part of the lethal injection procedure; setting out the training that shall be required for each of the designated executioners, and specifically training for contingencies that might arise; creating checklists for each function performed by execution and technical team members, correcting scrivener's errors; setting time frames and providing for periodic review of the procedures by the Department; providing for certification of the readiness of the Department to carry out an execution; and clearly setting forth in plain

language that any observed problems or deviations from the procedures should be brought immediately to the attention of the warden in charge of the team. Id. at 2-3.

This Stay Order was signed by the Honorable Judge Carven Angel on July 31, 2007, and provides further new evidence of Florida's flawed lethal injunction procedures.

New Lethal Injection Procedures

E. Subsequent to the Stay issued in State v. Lightbourne, the Florida Department of Corrections issued a new set of lethal injection protocols titled Execution By Lethal Injection Procedures, Effective for executions after August 1, 2007. (Attached as exhibit C). Despite the recommendations of the Commission to evaluate the cocktail used during the procedure, (Report at pg. 13) the same three solution cocktail used to torture and kill Angel Diaz, is still being approved for use in future executions in this state. (Protocols at pgs. 6-7). Also, although the Commission recommended that an FDLE agent be placed in the Chemical Room and the Witness Room to document and log the execution in 30 second intervals (Report at pg. 10), the new procedures only require the log to be documented every two minutes and fails to place an FDLE agent in the Witness Room. (Protocols at pg. 5).

The Commission also made a recommendation that the Florida Department of

Corrections “develop and implement procedures to insure that a closed circuit monitoring of the inmate in the Death Chamber by the execution team members in the Chemical Room. This should include at a minimum the condemned inmates face and IV access points. No recordings of the closed circuit monitoring should be made.” (Report at pg. 11). Of course, this recommendation is in response to the anguish displayed on Angel Diaz’s face during his execution, and the disputed testimony to the meaning of his grimacing and agonizing. The new protocols do not mandate or recommend the use of a closed circuit monitoring system despite the Commission’s recommendations.

Judge Carven D. Angel’s Order in State v. Ian Deco Lightbourne (Attached as exhibit B) made a number of recommendations to modify the procedures used in the lethal injection process. However, the new protocols which went into effect one day after the Lightbourne Order was signed, failed to incorporate recommendations from the Order such as “stating with particularity the qualifications, training, licensure, and credentials for each member of the execution team that is necessary to perform the various technical functions, such as starting intravenous lines, that are part of the lethal injection procedure, and setting out the training that shall be required for each of the designated executioners.” (Order at pg 3). The new protocols currently in place will certainly violate Mr. Grossman’s Eighth

Amendment rights and are not “compatible with evolving standards of decency and compatible with standards that mark the progress of a maturing society.” Trop at 100-101. Therefore, Mr. Grossman’s sentence of death is unconstitutional and he respectfully requests an evidentiary hearing on this claim.

Obesity

F. Martin Grossman’s obesity will put him at risk having a difficult, painful and botched execution. On May 24, 2007, Ohio death row inmate Christopher Newton was put to death, and the circumstances surrounding his death were described as follows:

The 16 minutes it took for Christopher Newton to die once lethal chemicals began flowing into his veins was the longest stretch of any executed inmate for whom records have been kept since 1999, an Associated Press review of state prison records shows.

Lindsay McCoy, “Botched Execution in Ohio Raises Concerns”, *Akron News Now*, May 26, 2007.

Ohio State University surgeon Jonathan Groner, a death penalty opponent, said the second of three drugs contained in the cocktail should have paralyzed Newton, rather than allowing the five minutes of movement witnessed in the execution could observe. “That would suggest that the second drug of the 3-drug protocol was not being effective,” he said. “It’s rapidly effective within 90 seconds. It paralyzes the muscles and stops the lungs.”
Id.

Groner said multiple needle insertions into Newton's veins - which began in the crook of his elbow but migrated up and down both his arms as efforts intensified to insert the shunts - are likely to have made them porous and unable to efficiently deliver the deadly chemicals. "It seems too long," he said. "The whole thing seems agonizing." Id.

Mr. Newton's obesity was a crucial factor contributing to why his execution was botched causing him to possibly suffer.

The execution team stuck Christopher Newton at least 10 times with needles to get in place the shunts used to administer the lethal chemicals.

The Associated Press, "Obesity delays execution of Ohio inmate", USA

Today, May 24, 2007. The report continued to mention Mr. Newton's weight.

He weighed 265 at his physical on Wednesday. The head of the Public Defender's death penalty division, Joe Wilhelm, said Newton told him it was hard for blood to be taken from his veins because of his weight. Id.

Among Martin Grossman's numerous health problems is the fact that he is obese, and weighs 265 pounds. Mr. Grossman's obesity would cause any execution of him to be tantamount to torture in violation of his Eighth Amendment rights under the United States Constitution.

G. The current lethal injection process is wholly flawed and unconstitutional.

New

evidence such as the death of Angel Diaz, the ensuing Lightbourne Order, the

Commission's Report, the insufficiency of the new Florida Department of Correction Procedures, and the botched execution of obese, death row inmate Christopher Newton demonstrate that Mr. Grossman is entitled to a hearing on his claims. "Concerns for finality to a state's judgements do not outweigh the absolute need to protect against the deprivation of an individual's constitutional rights which might invalidate his capital sentence." State v. Carey, 273 Neb. 495, 730 N.W. 2d 563, (2007).

Florida's Death Penalty Today

H. The decision in Baze v. Rees, 128 S. Ct. 1520 (2008), does not mean that Florida's capital punishment system is constitutional. For the reasons mentioned below, Florida's lethal injection system is still unconstitutional despite the Baze decision. Moreover, the Appellant recognizes the precedents set by Lightbourne v. McCollom, SC06-2391, 2007 WL 3196533 (Fla. Nov. 1, 2007) and Schawb v. State, 969 So.2d 318,(Fla. 2007), cert. denied, 2008 LEXIS 4273 (U.S. May 19, 2008). The Appellant urges this honorable Court to revisit this issue, particularly in light of the recent decision out of Ohio in State v. Rivera, No. 04CR065940 (Ohio St., Lorain Co. June 10, 2008).(attached as exhibit D). Florida's lethal injection system remains flawed and unconstitutional.

A challenge to Florida's lethal injection method of execution is properly made

by way of a motion for postconviction relief under Rule 3.851. Diaz v. State, 945 So.2d 1136 (2006) (“[E]xecution procedures . . . can and have been challenged through postconviction proceedings under rule 3.851 . . . In light of the exigencies inherent in the execution process, judicial review and oversight of the DOC procedures is preferable to chapter 120 administrative proceedings.”).

This claim is predicated on newly discovered evidence and recent changes in the law. It is therefore timely. The newly discovered evidence includes all that was revealed by the Diaz execution, the Commission proceedings and the Lightbourne hearings, all of which have occurred within the past year. F.S. 922.105 providing for execution by lethal injection is not self implementing, it must be implemented in accordance with the protocols written by the Florida Department of Corrections. Those protocols have been revised twice since the Diaz execution in December, 2006.

In Sims v. State, 754 So.2d 657 (Fla.2000) the Florida Supreme Court held that Florida’s lethal injection procedure did not violate the Eighth Amendment. The court has reaffirmed that holding in a number of cases, including Diaz v. State, 945 So.2d 1136 (Fla.2006). A few days after that opinion was released, Diaz was the subject of a botched execution. That event led to the Governor’s Commission, the Lightbourne hearings, and two revisions of the protocols. Sims and progeny

were predicated on protocols that have been superseded. The expectation that lethal injection would be raised and considered in this case is clear.

In Darling v. State, --- So.2d ----, 2007 WL 2002499, 32 Fla. L. Weekly S486, (Fla. July 12, 2007) the Florida Supreme Court denied a lethal injection claim raised in an original 3.851 proceeding, citing Hill v. State, 921 So.2d 579 (Fla.2006), one of Sims' progeny, but added this footnote: "This habeas claim was presented to the Court in connection with facts existing prior to the execution of Angel Diaz on December 13, 2006. No events that may have occurred in connection with the Diaz execution have been considered as part of this proceeding." Id.n.5. The court thus left open the door to reconsideration of Sims.

Finally, the text of Sims supports this view. The Sims court quoted from a federal case which referred to eyewitness accounts of two executions where the prisoner lost consciousness within seconds and rejected the petitioner's argument as "speculation." The court also referred dismissively to Sims' expert testimony as a "parade of horrors." Since then, lethal injections have been botched around the country and if one theorizes that Diaz did not suffer pain despite all the evidence to the contrary, a careful examination of the record shows that it was only because the execution team managed to botch the second access site along with the first. Lethal injection is ripe for review.

Lethal injection is the method of execution used by 37 of the 38 capital punishment states. The basic procedure used by essentially all of these states, including Florida, is the three drug regimen first developed in Oklahoma in 1977. The procedure begins with securing venous access, followed by an injection of sodium thiopental, an ultra fast acting barbiturate, to render the prisoner unconscious.¹ The prisoner is then injected with a paralytic agent, pancuronium bromide, in sufficient quantities to stop respiration. Lastly, the prisoner receives an injection of potassium chloride, which induces cardiac arrest and permanently stops the prisoner's heartbeat. There is a general consensus that the administration of either of the second two drugs in a prisoner who is not adequately anesthetized will cause extreme and unnecessary pain and suffering. The procedure embodies goals and policies that are inherently in conflict. Lethal injection is a method of committing an inherently violent and deadly act – execution of a condemned prisoner – masquerading as a peaceful and painless medical procedure. In particular,

¹Florida uses a higher dose of sodium thiopental, 5 grams, which if fully injected into the prisoner's bloodstream will cause loss of consciousness within seconds and death due to respiratory failure within a few minutes. The fact that Diaz took over 30 minutes to die and that other Florida executions have taken a longer time than would be expected with an administration of that amount of thiopental indicates two possible alternative conclusions. First, an error occurred with the chemical delivery system and the inmate has not been adequately anesthetized. Second, the non-clinical dosage of sodium thiopental may suppress the cardiac function of the body to the extent where it delays the effect of subsequently administered drugs.

the use of a paralytic drug serves no legitimate clinical purpose during an execution. In the medical setting, pancuronium bromide (trade name “pavulon”) is used legitimately to relax respiratory function to facilitate intubation and to keep the patient still during surgery. In an execution, the drug simply serves to make the procedure look palatable to witnesses. Due to the effects of the paralytic drug, several members of the Commission questioned the wisdom of using pancuronium bromide during an execution. The most notable and forceful of the opponents was Eighth Circuit Court Judge Stan Morris, who recommended that the DOC revisit the use of this drug. It is used for merely cosmetic reasons but it significantly increases the risk that the prisoner will be subjected to agonizing pain and be unable to communicate the fact. The use of pancuronium bromide or a similar paralytic serves at best minimal state interests, but greatly increases the risk of unnecessary and extreme pain. As such, its use violates the Eighth Amendment.

Nationally based medical associations including the American Medical Association, American Society of Anesthesiologists, American Nurses’ Association, the National Association of Emergency Medical Technicians, and the National Commission on Correctional Health, all have ethics guidelines that oppose participation in lethal injections, as do numerous state level organizations.² Partly

Error! Main Document Only.²Code of Ethics E-2.06 (Am. Med. Ass'n. 2000),

as a result of this opposition the traditional anonymity of the actual executioner has been extended to all “medically qualified personnel” who actually participate in the execution. In fact, the medically qualified personnel are in reality executioners every bit as much as the designated “executioner” whose main role is simply to push the drugs.

While ethical violations in themselves may not implicate the Eighth Amendment, the effect of the ethical prohibition for medical participation in

available at [http:// www.ama-assn.org/ama/pub/category/8419.html](http://www.ama-assn.org/ama/pub/category/8419.html) ("A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."). Message from Orin F. Guidry, President, Am. Soc'y of Anesthesiologists, Observations Regarding Lethal Injection (June 30, 2006), available at <http://www.asahq.org/news/asanews063006.htm> (stating that the American Society of Anesthesiologists had adopted the American Medical Association's (AMA's) code of ethics regarding capital punishment in 2001). Am. Nurses Association, Ethics and Human Rights Position Statements: Nurses' Participation in Capital Punishment, [http:// nursingworld.org/readroom/position/ethics/prtetcptl.htm](http://nursingworld.org/readroom/position/ethics/prtetcptl.htm) (2007) ("The American Nurses Association (ANA) is strongly opposed to nurse participation in capital punishment. Participation in executions is viewed as contrary to the fundamental goals and ethical traditions of the profession."). The National Association of Emergency Medical Technicians takes the position that "assessment, supervision[,] or monitoring of the procedure or the prisoner; procuring, prescribing[,] or preparing medications or solutions; inserting the intravenous catheter; injecting the lethal solution; and/or attending or witnessing the execution as an EMT or Paramedic" are violations of the EMT Oath. NAEMT Position Statement on EMT and Paramedic Participation in Capital Punishment, [https:// www.naemt.org/aboutNAEMT/capitalpunishment.htm](https://www.naemt.org/aboutNAEMT/capitalpunishment.htm), (June 9, 2006). Standards for Health Services in Prisons P-I-08 (Nat'l Comm'n on Corr. Health Care 2003) (on file with the Fordham Law Review) ("The correctional health services staff do not participate in inmate executions.").

executions can lead to a violation in the context of proper training of the execution team. Since the three chemicals are given in a dosage that, individually, may be lethal in themselves, it would be impossible to clinically test their efficacy.

Every state authorizing the death penalty currently requires that official witnesses be present at each execution.³ Reasons include First Amendment concerns as well as the fact that an execution carried out in secret smacks of the worst kind of tyranny. Florida provides that twelve citizens “shall witness the execution.” F.S. 922.11(2). Counsel for the prisoner, clergy and members of the press are also permitted to view the execution under some limitations. Id.

Under these circumstances an execution by means of lethal injection can never meet medical standards. Ongoing monitoring of the prisoner’s state of consciousness cannot be performed adequately by someone medically qualified to do so without compromising the anonymity of that person or constitutional and policy requirement that the execution be viewed by certain members of the public.

The length of tubing used in an execution will always be substantially longer than that used in a clinical setting because the executioner and anonymous medical personnel must be in a separate room. That concern is heightened because the

³See John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 Fed. Comm. L.J. 355 (1993).

executioners who push the drugs are not required to have any medical expertise at all, and because resistance to the push was one of the major concerns in the Diaz case, and the State refuses to provide any information about the executioner other than that he or she is over the age of 18.

The underlying constitutional requirements and policies that apply to executions by lethal injection are fundamentally in conflict, and as a result Florida lacks a constitutionally sound method of execution.

Prior challenges to Florida's method of execution by lethal injection delved only into the adequacy of the protocols themselves without considering the inherent risks. In Sims v. State, 754 So.2d 657 (Fla. 2000), the Florida Supreme Court reviewed the Department of Correction's protocols for executions by lethal injection. Relying on the Arizona case of LaGrand v. Lewis, 883 F.Supp. 469 (D.Ariz.1995), aff'd, 133 F.3d 1253 (9th Cir.1998), and the lower court's order denying relief, the Florida Supreme Court concluded that the execution protocols were sufficient. In its opinion, the Court cited the lower court's order with approval which stated, in relevant part:

After considering the testimony presented by the witnesses from the DOC and the defense's experts on lethal injection, the trial court ruled that "the manner and method of execution to be carried out by lethal injection in Florida is neither cruel nor unusual and that the Department of Corrections is both capable and prepared to

carry out executions in a manner consistent with evolving standards of decency.

Sims at 667-68.

The Governor's Commission concluded otherwise. Its findings were that the Department of Corrections was neither "capable nor prepared to carry out" an execution in accordance within the dictates of the Eighth Amendment.⁴ In the six years between the Sims decision and the Diaz execution we have learned that the DOC never trained the primary or secondary executioners, that the execution team was never trained on the effects of the lethal chemicals, nor did it train (or tell) the execution team which chemicals they were injecting at any time during the execution process. The DOC was never trained as to the proper and necessary injection sequence, a sequence now known to be necessary under the Eighth Amendment. The DOC personnel were never properly trained to assess the patency of the IV lines, never trained to properly monitor the IV lines, let alone trained to insert them correctly. The DOC personnel were never properly trained to identify a problem with the IV lines when there was substantial resistance during the injection process. Furthermore, the execution team members testified that on at least seven prior occasions they felt similar resistance but were never trained to realize that this was due to an improper IV insertion.

⁴In short, Sims and progeny have been superseded by the Commission Report

Had the DOC been “capable and prepared” in establishing the second of the two IV lines, Diaz would have immediately felt the immense pain of the potassium chloride because the poorly trained DOC personnel ignored the protocols and skipped the injection of the sodium pentothal into the second line.

Recent litigation in other jurisdictions has raised concerns with the qualifications, training and proficiency of the individuals delegated the responsibility of carrying out executions by lethal injection. In Morales v. Tilton, 465 F.Supp.2d 972, 973 (N.D.Cal.2006), the federal court analyzed many of the issues shared by the thirty-six states that use lethal injection as a method of execution. In its Memorandum of Intended Decision, the Federal District Court summarized the issues and its findings:

In fact, this case presents a very narrow question: does California's lethal-injection protocol-as actually administered in practice-create an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment? Because this question has arisen in the context of previous executions, see Beardslee v. Woodford, 395 F.3d 1064 (9th Cir.2005); Cooper, 379 F.3d 1029, and is likely to recur with frequency in the future, the Court has undertaken a thorough review of every aspect of the protocol, including the composition and training of the execution team, the equipment and apparatus used in executions, the pharmacology and pharmacokinetics of the drugs involved, and the available documentary and anecdotal evidence concerning every execution in California since lethal injection was adopted as the State's preferred means

of execution in 1992[.]...The Court concludes that absent effective remedial action by Defendants-the nature of which is discussed in Part IV of this memorandum-this exhaustive review will compel it to answer the question presented in the affirmative. Defendants' implementation of lethal injection is broken, but it can be fixed.

Morales, 465 F.Supp.2d at 974.

The court reached several conclusions. First, there was “Inconsistent and unreliable screening of execution team members”. Id at 979. Second, there was a “lack of meaningful training, supervision, and oversight of the execution team”. Id. Third, there was “Inconsistent and unreliable record-keeping”. Id. Fourth, the court found “Improper mixing, preparation, and administration of sodium thiopental by the execution team”. Id. at 980. Finally, the court concluded that there was “Inadequate lighting, overcrowded conditions, and poorly designed facilities in which the execution team must work”. Id. These issues are the same concerns raised in this case.

In addition, the DOC has twice revised its execution protocols since the Diaz execution. The July 31st, 2007 protocols now call for specific medical qualifications of several execution team members. These qualifications, however, are no different than those held by the Diaz execution team members. Without more, Florida is in the same situation it was immediately after the Diaz execution.

Failure to anesthetize a prisoner before and throughout the lethal injection

procedure will result in a violation of the Eighth Amendment. Ensuring unconsciousness in a clinical setting is a complicated and demanding task. Yet even there, accidents happen.⁵ Clinical methods of determining depth of unconsciousness include all of the abilities and judgment of an anesthesiologist or a certified registered nurse anesthetist who is present and monitoring the patient at all times. He or she monitors the appearance of the patient, response to stimuli, EKG, temperature, blood pressure, heart rate, moisture content of the skin, size of the pupils, carbon dioxide respiration levels, and oxygenation of the blood if on a heart lung machine. Sophisticated medical equipment is used. Before beginning the procedure the surgeon administers a painful stimulus to test the patient's condition.

By contrast, the consciousness assessment required by the protocols falls far short of medical standards. The warden, who is charged with making the

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"Intraoperative awareness occurs when a patient becomes conscious during a procedure performed under general anesthesia and subsequently has recall of these events . . . Intraoperative monitoring of depth of anesthesia, for the purpose of minimizing the occurrence of awareness, should rely on multiple modalities, including clinical techniques (e.g., checking for clinical signs such as purposeful or reflex movement) and conventional monitoring systems (e.g., electrocardiogram, blood pressure, HR, end-tidal anesthetic analyzer, capnography). The use of neuromuscular blocking drugs may mask purposeful or reflex movements and adds additional importance to the use of monitoring methods that assure the adequate delivery of anesthesia." American Society of Anesthesiologists, "Practice Advisory for Intraoperative Awareness and Brain Monitoring: A Report by the American Society of Anesthesiologists Task Force on Intraoperative Awareness" *Anesthesiology* 2006; 14:847-64:

consciousness assessment has no medical expertise beyond that required of a law enforcement officer.

The greater the painfulness of the stimulation the more the subject must be anesthetized. Administration of a high dose of potassium chloride is extremely painful and requires that the subject be in a surgical plane of anesthesia. Notably, the most painful stimulus in the lethal injection procedure occurs after the initial consciousness assessment is made and the execution is well underway.

Central venous access through the femoral vein is a sophisticated surgical procedure. Protocol (3)(b) addresses the minimum qualifications required to conduct the procedure. However, only a minority of doctors or at minimum a physician's assistant are qualified to perform the procedure. Mere licensure as a physician or physician's assistant is not in itself sufficient. Moreover, the procedure requires hospital room equipment or a surgical kit containing scalpels, catheters, suture equipment, wires, suturing needle, and so on. Protocol (12)(c)(5) does not reflect any of these requirements. The protocols are inadequate.

The protocols assign an important role to two FDLE monitors. One is stationed in the executioner's room and the other is in the execution chamber. (Protocol at 7). Both are to keep a detailed log of what they observe. Importantly, an independent observer from FDLE witnesses the mixing of the chemicals and

preparation of the syringes and all the other equipment that will be used during the execution. FDLE is an independent agency within the executive branch and as such performs an important oversight role. These functions can only be performed usefully by someone who knows what to look for.

Lethal injection is a complicated procedure which requires that the members of the execution team have considerable expertise. The protocols themselves, no matter how artfully drafted, cannot substitute for that expertise any more than a first year medical student reading from a textbook can substitute for a surgeon. An important finding reached by the Commission was that the execution team members in Diaz lacked training and proficiency. Moreover, vague assurances in the protocols to the effect that the Warden will select as executioner someone who is “fully capable of performing the designated functions” (Protocol at 2(a)) do not meet any objective standards of verifiability and accountability.

Baze v. Rees

I. On April 16, 2008, the United States Supreme Court issued its plurality opinion in Baze v. Rees, No. 07-5439, (April 16, 2008). The Supreme Court in Baze attempted to define the standard applicable to method of execution cases. Due to the nature of the Baze opinion, no clear standard was affirmatively adopted by a majority of the Court. In fact, four standards emerged from the various opinions with only two

having at least three justices joining. In an opinion by Chief Justice Roberts, joined by Justices Kennedy and Alito, the three members of the Court proposed that the proper standard should be a “substantial risk of serious harm”. Baze v. Rees, Slip Op. at 10-11 (Opinion of Roberts, C.J.)(hereinafter “Baze decision”). Further, this three-justice opinion requires an additional showing by a “condemned prisoner” for a stay of execution of a comparison between the challenged execution procedures and “known and available alternatives”. Id. at 22. Three other Justices, Breyer, Ginsburg and Souter, proposed a standard that requires a showing of an “untoward, readily avoidable risk of inflicting severe and unnecessary pain”. Baze at 11 (Ginsburg, J., dissenting); Id., at 1 (Breyer, J., concurring).

The Standards announced in Baze squarely conflict with the standard relied upon by the Florida Supreme Court in the January 24th, 2008, opinion in which it reviewed, condemned inmate’s, Mark Dean Schwab’s claim under an “inherent cruelty” standard. Schwab v. State, 2008 WL 190575, (Fla. Jan. 24, 2008). The Chief Justice Robert’s opinion is perhaps the one to be adopted by the lower courts. This opinion explains the standard which should be applied by the lower courts:

Our cases recognize that subjecting individuals to a risk of future harm-not simply actually inflicting pain-can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be “sure or very likely to cause serious illness and needless suffering,” and give

rise to “sufficiently imminent dangers.” ... We have explained that to prevail on such a claim there must be a “substantial risk of serious harm,” an “objectively intolerable risk of harm” that prevents prison officials from pleading that they were “subjectively blameless for purposes of the Eighth Amendment.

Baze v. Rees, Slip Op. at 10-11 (Opinion of Roberts, C.J.)

Based on Florida’s prior experience with lethal injection and documentary evidence concerning the Florida Department of Corrections’ current training program, as discussed above, Florida’s lethal injection execution procedures create a substantial risk of serious harm. The Appellant is entitled to relief.

ARGUMENT II

THE FLORIDA STATUTE WHICH PROHIBITS MR. GROSSMAN'S COUNSEL FROM FILING A SECTION 1983 CLAIM ON HIS BEHALF DEPRIVES MR. GROSSMAN OF DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FLORIDA AND FEDERAL CONSTITUTION

Section 27.702, Florida Statute (2006) prohibits CCRC counsel from filing any civil rights claims. In Hill v. McDonough, 126 S.Ct. 2096 (2006), the Supreme Court held that a section 1983 suit was an additional but not exclusive avenue to challenge lethal injection. In Diaz v. State, 945 So.2d 1136 (Fla. 2006), the Florida Supreme Court expressly held that the prohibition against CCRC from filing an action under 28 U.S.C. section 1983 to attack the constitutionality of lethal injection was not unconstitutional facially and as applied, because Diaz could have filed the claim in his federal habeas. However, Mr. Grossman has not filed a previous claim where he has raised this claim as it is not yet exhausted and he may be unable to challenge lethal injection in a successive habeas petition due to the constraints of AEDPA. Mr. Grossman and any other similarly situated death row inmate should not have their right to challenge the constitutionality of lethal injection in a federal proceeding impaired or extinguished because of the arbitrary constraints of section 27.702 and AEDPA. The statutory limitation on CCRC is arbitrary and capricious in its deprivation of a fundamental due process and equal

protection right entitled to Mr. Grossman.

ARGUMENT III

THE NEW ABA REPORT DEMONSTRATES THAT THE FLORIDA DEATH PENALTY SYSTEM IS INTRINSICALLY FLAWED AND UNCONSTITUTIONAL IN ITS CURRENT STATE.

A. Background about the ABA Report

The ABA has always believed that “[f]airness and accuracy together form the foundation of the American criminal Justice system” and that “these goals are particularly important in cases in which the death penalty is sought.” (ABA Report on Florida at pg. 1) In 1997, the ABA responded to the growing concern that the capital jurisdictions did not provide fairness and accuracy in the administration of justice and called for a moratorium on executions until the states had an opportunity to study and implement changes to their systems.⁶ *Id.* Florida did not heed the ABA’s advice and no moratorium was imposed, nor any comprehensive study conducted. Instead, Florida continued to impose the death penalty and carry out

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In 2001, the ABA created the Death Penalty Moratorium Implementation Project to, among other things, collect and monitor data on death penalty developments, as well as analyzing responses from government and courts to death penalty issues. *Id.* And, “[t]o assist the majority of capital jurisdiction that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions’ death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process.” *Id.* Florida was one such jurisdiction.

executions.

The ABA's assessment team was charged with "collecting and analyzing various laws, rules, procedures, standards and guidelines relating to the administration of the death penalty." Id.⁷ The team identified a number of the areas in the report "in which Florida's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures" Id. at iii. Recommendations were made to assist Florida in fixing the system. But, the team cautioned that the apparent harms in the system "are cumulative" and must be considered so; "problems in one area can undermine sound procedures in others." Id. at iii-iv. 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.⁸ Death

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As set forth in the report's table of contents, the team concentrated on thirteen distinct areas: 1) death row demographics, 2) DNA testing and testing and preservation of biological evidence; 3) law enforcement tools and techniques; 4) crime laboratories and medical examiners; 5) prosecutorial professionalism; 6) defense services; 7) direct appeal process; 8) state postconviction proceedings; 9) clemency; 10) jury instructions; 11) judicial independence, 12) racial and ethnic minorities; and 13) mental retardation and mental illness.

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For example, the opinions written in Furman noted the same evidence of arbitrary factors unrelated to the crime or the defendant's character that were at work in the capital process that is set forth in the ABA Report. Furman, 408 U.S. at 256 n. 21

sentences, like Mr. Grossman's, are a product of an arbitrary and capricious system. Who is executed in Florida is determined by a myriad of factors unrelated to the facts of the crime or the character of the defendant.

Mr. Grossman's case is unlike prior cases where the Florida Supreme Court ruled that the Report from the American Bar Association to the effect that the death penalty was cruel and unusual punishment was not newly discovered evidence in violation of the Eighth Amendment of the United States Constitution warranting postconviction relief. See, Rutherford v. State, 940 So.2d 1112, (Fla. 2006), Rolling v. State, 944 So.2d 176, (Fla. 2006), and Diaz v. State, 945 So.2d 1136, (Fla. 2006). Rather than claiming an Eighth Amendment violation, Mr. Grossman is asserting that the new ABA Report is newly discovered evidence demonstrating that the current capital sentencing system in Florida has specifically abridged his Due Process rights in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Despite the rulings in Rutherford, Rolling, and Diaz, this has

(whether counsel timely objected to error was on occasion a decisive, though arbitrary factor in the imposition of a death sentence); Id. at 290 (the manner in which retroactivity rules operate injected arbitrariness); Id. at 293, 309-10, 313 (the number of executions in comparison to the number of murders suggested a lottery); Id. at 364-66 (evidence that racial prejudices and/or classism and/or sexism infected sentencing decisions); Id. at 366-67 (likelihood that an innocent may be executed suggested arbitrariness); Id. at 368 n. 158 (the failure to apply scientific developments in criminal cases fast enough to enhance reliability of outcome of process created arbitrary results).

been pled timely, and is preserved for federal review.

B. Florida – An Arbitrary and Capricious Death Penalty System

1. The Exonerated

In Florida, since 1972, twenty-two (22) people have been exonerated and another individual has been exonerated posthumously, while sixty-one (61) people have been executed. ABA Report at iv, 8 (“[T]he proportion exonerated exceeds thirty percent of the number executed.”). “Since the reinstatement of the death penalty in 1972, Florida has led the nation in death row exonerations.” *Id.* at 45. There has been no effort to learn what defects and flaws have led to this. The number of men released from Florida’s death row with their presumption of innocence restored shows a broken system that violates Furman.

2. Politics

Undoubtedly politics is a factor that causes arbitrariness in Florida’s death penalty scheme. Mr. Grossman’s case was, and continues to be at the center of politics in Florida. The fact that Mr. Grossman allegedly murdered a female police officer, has caused his case to be viewed with a heightened level of scrutiny and scorn. No elected judge could fail to be aware of the political fall out of granting relief in Mr. Grossman’s case. Further, the ABA noted that judicial elections and appointments are influenced by consideration of judicial nominees’ or candidates views on the death penalty. ABA Report at xxxi. The team also cited the Florida

Supreme Court's recent quantitative approach to proportionality review, which has been caused by political pressures and the change of composition of the Court. Id at 213. Florida's death penalty scheme is infected by politics and decisions made for political gain rather than in fairness and Mr. Grossman's case is an example of the arbitrary results of that system.

The intense political pressure in this case has and will continue to violate Mr. Grossman's Due Process rights. In this case, rulings have been made based on the heinousness of the crime itself, and the fear that a correct ruling regarding the issue of retroactivity would, god forbid, cause other similarly situated individuals to seek enforcement of their Due Process rights. Mr. Grossman believes that politics has unduly infringed on his right of Due Process.

3. Procedural Default

Some of Mr. Grossman's claims were never heard by a court, which violated his Due Process rights pursuant to the 14th Amendment of the United State Constitution due to the State's failure to adopt a "knowing, understanding, and voluntary" standard of evaluating waiver of claims because of procedural default.

The ABA Report on page 232 argues:

Florida post-conviction courts, including the circuit court hearing the 3.851 motion and the Florida Supreme Court hearing an appeal from the denial of the motion, do not use the "knowing, understanding, and voluntary" standard for overcoming procedural default of

constitutional errors not properly preserved at trial or raised on appeal.....the Florida Supreme Court hearing an appeal from the motion, does not use the “knowing, understanding and voluntary” standard for overcoming procedural default of state law errors not properly preserved at trial or raised on appeal. If the constitutional error claimed for the first time in a post-conviction could have been, but was not raised on appeal, the claim of error is procedurally barred during post conviction proceedings. In order to obtain post-conviction consideration of such claim, rule 3.851 requires the movant to give reasons why the claim was not raised on direct appeal. Other than ineffective assistance of counsel, it is unclear what other reasons for not raising the claim on direct appeal would justify consideration of a procedurally barred claim.

Mr. Grossman was denied a hearing on his claims resulting from an evaluation by Dr. Henry Dee, MD based on a prior successive 3.851 motion. Dr. Dee was able and willing to testify at a prior hearing, and is also available for any future evidentiary hearing if given proper notice. Dr. Dee would specifically give testimony in support of statutory mitigation. See Nelson v. State, 875 So.2d 579 (Fla. 2004) Moreover, in the trial court’s denial order of the defendant’s original 3.850 motion drafted by the Honorable Crockett Farnell on June 6, 1985 that court denied the defendant’s claim of ineffective assistance of counsel based on failure to provide for, or arrange an examination by a competent mental health professional. The court in relying on Medina v. State, 573 So.2d 293, 295 (Fla. 1990), ruled that Mr. Grossman’s claim was procedurally barred due to the claim allegedly being

“used as a second appeal, or to use a different argument to relitigate the same issue, or to circumvent the rule against second appeals”.

Mr. Grossman was also improperly denied a hearing at the Circuit Court level on Argument I of this very Brief. The Honorable Judge Bulone orally denied the Appellant’s claim at the February 1, 2008 hearing. (PCR Vol. II p. 230). Mr. Grossman made a viable and cognizable claim by focusing on how his obesity distinguishes his case from either Schwab or Lightbourne. Id. at 227-228.

The recently decided case of Mungin v. State, 932 So.2d 986 (Fla. 2006) has dicta that demonstrates when a Defendant is entitled to an evidentiary hearing on claims requiring a factual determination. Footnote 8 on page 996 clearly states:

For all death case post-conviction motions filed after October 1, 2001, Florida Rule of Criminal Procedure 3.851 requires an evidentiary hearing “on claims listed by the defendant as requiring a factual determination.” Fla. R. Crim. P. 3.851 (f) (5) (A) (I); see also Amendments to Fla. Rules of Criminal Procedure 3.851, 3.852, &3.993, 802 So.2d 298, 301 (Fla. 2001). However, prior to the 2001 amendments to rule 3.851, rule 3.850 (d) applied to the summary denials of post-conviction motions in both death and nondeath cases. See McLin v. State, 827 so.2d 948, 954 n.3 (Fla. 2002). Because Mungin’s motion for post-conviction relief was filed in 1998, the summary denial standard set forth in rule 3.850 (d) applies in this case.

The reasoning for granting an evidentiary hearing is further detailed in Allen

v Butterworth, 756 So.2d 52 (Fla. 2000):

In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of delay in post-conviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. This failure can result in years of delay. This Court has been compelled to reverse a significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal therefrom takes many additional months in order for the record on appeal to be prepared and the briefs to be filed in this Court. In order to alleviate this problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a substantial amount of the delay that is present in the current system Id. At 66,67.

The Florida Supreme Court frequently relies on procedural defaults to preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002); Jones v. State, 709 So. 2d 512, 519-20, 525 (Fla. 1998). The refusal to consider such issues increases the risk that the innocent or the legally undeserving will be executed. It diminishes a “meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not” Furman, at 313 (White, J., concurring). The ABA Report recommended that “State courts should

permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid." ABA Report at 241. As it is, the Florida death penalty scheme violates Furman.

The Florida Supreme Court dismissed numerous claims in Mr. Grossman's appeals because they were purportedly procedurally defaulted. Had the merits been reached, Mr. Grossman would have obtained relief.

In the last court opinion in this case, issued by the Supreme Court of Florida, the court denied five claims, including the conflict of interest claim, and in footnote 6 said that the claims were procedurally barred but without explanation. Grossman at 708 So.2d 250. The court did not explain how or why the procedural bar was applicable. A paltry declaration concerning an issue of constitutional importance should not deny Mr. Grossman federal habeas review.

Finally, after filing the successive state habeas petition based on the decisions in Wiggins v. Smith, 539 U.S. 510 (2003) and Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court of Florida denied the petition in a one sentence order. No reference was made to a procedural bar. Mr. Grossman should not be procedurally barred from raising his claims before this Court.

C. Conclusion

When all of the factors identified are fully explored, it is clear that the Florida capital process does not deliver and/or produce sufficiently reliable results under the Eighth Amendment. The conclusion is inescapable - "it smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring). "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" Furman, 408 U.S. at 313 (White, J., concurring).

The Florida capital process cannot "assure consistency, fairness, and rationality" and it cannot "assure that sentences of death will not be "wantonly" or "freakishly" imposed." Proffitt, 428 U.S. at 259-60. In light of the botched execution of Angel Diaz, and the failure of the state to bring its lethal injection procedure in line with constitutional requirements, Florida's death penalty statute violates the Eighth Amendment of the United States Constitution. Moreover, the denial of the ability to file a Section 1983 claim, and the failure of the System to comply with ABA standards calls for Mr. Grossman's sentence of death to be vacated.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Grossman contends the trial court erred. Mr. Grossman moves this Honorable Court to:

1. Grant Mr. Grossman an opportunity for oral argument.
2. Vacate the sentence of death, and sentence him to life imprisonment

RESPECTFULLY SUBMITTED,

Ali A. Shakoor
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant has been furnished to all counsel of record this ____ day of July, 2008.

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