IN THE SUPREME COURT OF FLORIDA

NO. SC06-2305

ANGEL NIEVES DIAZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

DEATH WARRANT SIGNED, EXECUTION SET FOR December 13, 2006 AT 6:00 P.M.

INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of an order summarily denying Mr. Diaz's successive Rule 3.850 motion. The following symbols will be used to designate references to the record in this appeal:

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

"PC-R." – record on appeal from the denial of postconviction relief after a limited evidentiary hearing;

"PC-R2." – current record on appeal after summary denial

"App." -appendix to Mr. Diaz's 3.851 motion in the present proceedings.

All other references are self-explanatory or otherwise explained herewith.

REQUEST FOR ORAL ARGUMENT

Mr. Diaz is presently under a death warrant with an execution scheduled for December 13, 2006, at 6:00 p.m. This Court has not hesitated to allow oral argument in other warrant 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, as well as Mr. Diaz's pending execution date. Mr. Diaz, through counsel, urges that the Court permit oral argument.

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PROCEDURAL HISTORY

On December 21 1985, Mr. Diaz was convicted of first-degree murder and related offenses in the Circuit Court of the Eleventh Judicial Circuit, Dade County (R. 252-261) and on January 24, 1986, he was sentenced to death (R. 300-309). The judge's sentencing order, drafted by the state prosecutor, was entered on February 14, 1986 (R. 319-330).

On October 8, 1987 Mr. Diaz's convictions and sentence of death were affirmed on direct appeal. Diaz v. State, 513 So. 2d 1045 (Fla. 1987), *cert. denied*, 484 U.S. 1079 (1988).

Mr. Diaz applied for executive clemency on June 23, 1988. On August 28, 1989, clemency was denied by the signing of a death warrant and Mr. Diaz's execution was scheduled for October 27, 1989.

Mr. Diaz thereafter simultaneously filed an emergency motion for post conviction relief and an application for stay of execution on October 24, 1989. On October 25, 1989, the circuit court temporarily stayed Mr. Diaz's execution and the Florida Supreme Court subsequently granted an indefinite stay of execution on October 26, 1989.

An evidentiary hearing was held in circuit court on December 4, 5 and 6, 1991, on Mr. Diaz's claim relating to ineffective assistance of counsel at penalty phase. However, the circuit court summarily denied the remainder of Mr. Diaz's

claims without attaching any files or records demonstrating that the claims were conclusively refuted by the record, and denied all relief (Supp. R. 1) in an order written by the State after ex parte contact between the court and State (PC-R. 301-20). Mr. Diaz timely filed a notice of appeal to the Florida Supreme Court (PC-R. 347).

On July 3, 1996, Mr. Diaz filed a petition for state habeas corpus and appealed the circuit court's denial of post conviction relief. On June 11, 1998, the Florida Supreme Court affirmed the circuit court's denial of post conviction relief and denied Mr. Diaz's petition for a writ of state habeas corpus. Diaz v. Dugger, 719 So. 2d 865 (Fla. 1998), *cert. denied*, 526 U.S. 1100 (1999). Rehearing was denied, over a dissenting vote, on November 30, 1998.

Mr. Diaz timely filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida on November 24, 1999. The federal proceedings were thereafter held in abeyance while Mr. Diaz sought state habeas corpus relief when the Florida Supreme Court acknowledged applying incorrect legal standards in reviewing Mr. Diaz's post conviction appeal. Mr. Diaz filed the petition to reopen state habeas corpus proceedings on June 20, 2000. On July 5, 2001, the Florida Supreme Court denied relief in an unpublished order. Diaz v. Moore, 797 So. 2d. 588 (Fla. 2001).

Mr. Diaz moved to reopen his federal habeas proceedings, and thereafter

filed an amended federal petition for habeas corpus on February 19, 2002.

On February 11, 2003, Mr. Diaz filed another petition for state habeas corpus relief in the Florida Supreme Court based on the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). The Florida Supreme Court denied the petition on October 20. 2003. Diaz v. State, 869 So. 2d 538 (Fla. 2003), *cert. denied* Diaz v. Crosby, 543 U.S. 854 (U.S., Oct. 4, 2004).

The federal habeas petition was denied on January 23, 2004 by the United States District Court. A timely notice of appeal was entered and a Certificate of Appealability was granted. On August 11, 2004, Mr. Diaz filed an initial brief in the United States Court of Appeals for the Eleventh Circuit. On March 15, 2005, the Eleventh Circuit Court of Appeals affirmed the United States District Court's denial. Diaz v. Secretary of Department of Corrections, 402 F.3d 1136 (11th Cir. 2005) *cert. denied* Diaz v. Crosby, 126 S. Ct. 803 (U.S., Dec. 5, 2005).

Mr. Diaz filed a 3.851 motion in the circuit court on September 25, 2006 challenging the constitutionality of Florida's lethal injection statute and procedure. At a November 1, 2006 case management conference/Huff hearing, Mr. Diaz, through counsel, requested leave to orally amend the 3.851 motion to address a new lethal injection protocol that was promulgated by the Florida Department of Corrections on August 16, 2006 but not revealed to the public and CCRC attorneys until October 17, 2006. The circuit court denied the request to orally amend but

granted leave to file a written amended 3.851 motion.

On November 1, 2006, Mr. Diaz also filed Demands for Additional Public Records pursuant to Rule 3.852(i).

On November 9, 2006, Mr. Diaz filed an amended Rule 3.851 motion.

On November 14, 2006, the Governor's Office signed a death warrant for Mr. Diaz setting the execution for December 13, 2006.

On November 15, 2006, this Court issued an Order directing that "Matters pending in the trial court shall be acted on and orders disposing of those matters entered on November 22, 2006. A Notice of Appeal, if any, shall be filed by November 27, 2006."

On November 16, 2006 the circuit court issued an order setting Mr. Diaz's case for a hearing on November 17, 2006 and directing that all emergency motions be filed with the circuit court by 4:00 pm on November 16th, that same day. That afternoon, Mr. Diaz filed a Motion for Leave to File Amendment to Amended Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851 with the attached Amendment to Amended Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851.

The Court held a hearing on November 17, 2006 and addressed Mr. Diaz's amended motion, 3.852(i) public records demands filed on November 1, 2006, motion for leave to amend, and amendments to amended motion. Prior to the

beginning of this hearing Mr. Diaz filed in open court additional Demands for Additional Public Records pursuant to Rule 3.852(h)(3) and 3.852(i). Based on Rule 3.852(h)(3), Mr. Diaz has 10 days in which to file public records demands from a person or agency from which records were previously requested. The State objected to the "late" filing of the public records demands because they were not filed within the time constraints ordered by the circuit court.

On November 20, 2006, Mr. Diaz filed a Motion to Compel Production of Co-Defendant's Motion to Vacate. The State filed a response to Mr. Diaz's Motion to Compel Production of Co-Defendant's Motion to Vacate and a "global" objection to Mr. Diaz's Demands for Additional Public Records. The Attorney General asserted that it represented all the agencies for which Mr. Diaz served with a Demand for Addition Public Records on November 17, 2006.

On November 21, 2006, the circuit court held a hearing on all outstanding motions and issued its ruling as to each one. As to the matters pending before the circuit court at the time the warrant was signed, the circuit court denied Mr. Diaz's Amended Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851 filed on November 9, 2006 as well as the Demands for Additional Public Records pursuant to Rule 3.852(i) filed on November 1, 2006. In addition, the circuit court denied Mr. Diaz's Motion to Compel Production of Co-defendant's Motion to Vacate Judgment and Sentence, Application for Stay of Execution, and the Second

Amended Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851 filed on November 16, 2006. Mr. Diaz's Rule 3.851 motion, and the amendments thereto, were summarily denied without attaching any files or records demonstrating that the claims were conclusively refuted by the record.

On November 21, 2006, the circuit court also heard very limited argument on Mr. Diaz's Demands for Additional Public Records pursuant to Rule 3.852(h)(3) and 3.852(i) filed on November 17, 2006. The circuit court denied all of Mr. Diaz's Demands for Additional Public Records.

On November 22, 2006, Mr. Diaz timely filed his appeal.

On November 27, 2006, Mr. Diaz filed a successive Motion to Vacate Judgments of Conviction and Sentence Pursuant to 3.851 together with a Motion to Relinquish Jurisdiction to this Court.

On November 29, 2006, this Court granted the Motion to Relinquish Jurisdiction for the Circuit Court to consider the 3.851 motion, indicating that the circuit court must rule on the motion by December 3, 2006 at 5:00 p.m.; a notice of appeal was to be filed by December 4, 2006 by 9:00 a.m. and the briefs were due by 3:00 p.m. on the same date. On the same date, Mr. Diaz filed two Demands for Additional Public Records and a Renewed Application for Stay. The circuit conducted a hearing on November 30, 2006.

On December 1, 2006, the circuit court summarily denied Mr. Diaz's Motion to Vacate Judgments of Conviction and Sentence, denied his Demands for Additional Public Records and his Renewed Application for Stay.

Mr. Diaz timely filed his notice of appeal.

STATEMENT OF THE CASE

Mr. Diaz and codefendant, Angel Toro, were originally indicted on January 25, 1984 for first-degree murder of the bar manager, armed robbery of the bar and customers, and kidnapping of the persons confined in the bathrooms, as well as the use of firearms in committing those felonies. The case suffered numerous delays, some due to the absence of the judge regularly assigned to that division. A new trial judge took over and assigned a trial date of February 1986. She then reset the case earlier (January 6th, 1986) and finally pushed the date up to December 17, 1985 (R. 438), over defendant's objections. Mr. Diaz's attorney protested that he was prejudiced by having inadequate time to prepare for a late-produced state witness, Ralph Gajus (R. 440).[1] By this time, the codefendant, Angel Toro, had accepted a plea offer for a life sentence and was no longer in the case. The state nolle prossed several counts, leaving one count of first-degree murder, four of

[1] It is important to note that Gajus, a jailhouse snitch, was the only witness to testify that Mr. Diaz was the shooter, although he admitted he had merely *inferred* this conclusion from his conversations with Mr. Diaz (R. 1123-1124).

kidnapping, three of armed robbery, one of attempted armed robbery, and one of use of firearm (R. 692-693).

Throughout the pretrial proceedings and jury selection, the defense repeatedly objected to unusual and very obvious security measures in the courtroom: Mr. Diaz wore shackles for the entirety of the trial and, at first, even handcuffs (R. 435, R. 453, R.684-685); everyone who entered the courtroom, including the jurors, was searched upon entry (R. 449, R. 751); large numbers of security personnel were conspicuously present in the courtroom (R. 444). The trial judge made findings of fact that, in the opinion of court security personnel, all these measures were necessary (R.451-454, R. 701). She suggested, more than once, that Mr. Diaz hide his leg shackles behind a briefcase (R. 700-701). Mr. Diaz was not permitted to be alone with his attorney (R. 435), to visit the cells of fellow prisoners who might become witnesses (R. 1213), or to use a telephone (R. 1348) during the entire trial.

After the jury had been sworn (R. 762), but before the opening statements, defense counsel announced that Mr. Diaz desired to assume his own defense (R. 767). Rather than delay the trial, the judge allowed the state to open, then heard the newly-raised motion to act *pro se* while the jury was at lunch. Counsel for Mr. Diaz informed the court that Mr. Diaz had "exhibited rather bizarre tendencies" (R. 797). Counsel observed that Mr. Diaz was being irrational and unresponsive; Mr.

Diaz's eyes were not focusing properly; and when questions were posed to Mr. Diaz he did not respond or gave answers with no relevance to the question (R. 797). Upon defense motion for a psychological examination and a mistrial (R. 797), the court granted an examination to determine Mr. Diaz's competence to stand trial, but ordered it to take place in the evening, after court was recessed for the night (R. 808). In the meantime, the judge proceeded to question Mr. Diaz about his request to represent himself. During this colloquy, it appeared that Mr. Diaz (a) was unable to speak and understand English very well (R. 802) and would have to rely on an interpreter as he had from the outset of the trial (R. 436); (b) had "no idea" how a trial was conducted and had never read a law book (he could not read English well) (R. 803); (c) had never finished high school but had obtained an equivalency degree (R. 803); (d) had read only "part" of the U.S. Constitution (he is a Puerto Rican citizen) (R. 802); and (e) felt that his appointed counsel, though not incompetent, was unfamiliar with his case (R. 806). The court pointed out to Mr. Diaz:

> Since you have no ability to speak the English language in this court, you have no knowledge of the law, you did not attend after high school, it would appear to this Court that it would be impossible for you to act as an attorney in your own defense.

(R. 805). However, even after concluding this, the court entered a finding that defendant had made a free, voluntary and intelligent choice to represent himself (R. 814). The Court placed his counsel, with his consent, as standby. The court

noted that any objections standby counsel might suggest to witness' testimony would generally come too late (counsel did not speak Spanish either, and the testimony and objection would both have to be translated) (R. 812).

Mr. Diaz gave an opening statement, and the prosecution commenced its case. State witness Candice Braun testified that she was the former girlfriend of Mr. Diaz and had lived with him during the time of the alleged incident (R. 878). Braun recalled that on the evening in question, Mr. Diaz had returned to the apartment with three other men, Willie, Luisito, and Angel Toro (who was also known as Sammy) (R. 880). Upon their return, the three men were arguing (Id.). Braun stated that everybody was yelling at Toro and he was responding so that the others would not be mad at him (R. 913). She specifically remembered that she didn't hear Toro's voice as loud as everybody else and, for this reason, she thought Toro was defending himself (R. 918). When she Asked Mr. Diaz later about the argument, he told her that Toro had "shot a guy during the robbery" (R. 881).

During Mr. Diaz's cross examination of his former girlfriend, he became agitated and the judge suggested that he was perhaps unable to handle his defense; he agreed (R. 899). Motion for mistrial was made by standby counsel, and denied (R. 901-902). After a brief recess, the case continued with Mr. Diaz acting *pro se*.

Two additional state witnesses, Vincent Pardinas and Norman Bulenda, confirmed that Mr. Diaz was not, and could not have been, the shooter. Pardinas

testified that he was a patron of the bar on the evening that it was robbed and was sitting at the bar next to Carroll Robbins (R. 947-948). Pardinas noticed something was happening when a man "came behind Mr. Robbins and myself, in between us...He said, 'Hello.' Pulled out a gun" (R. 950-951). Pardinas further testified that two other persons were involved, one man was on the stage, and the third man had "his arm around the young lady with a gun to her head and was leading her in toward the office" (R. 953-954). When shown a photographic line-up, Pardinas was able to choose three men that most likely fit the description of the man who came up behind himself and Mr. Robbins (R. 964). From those three individuals, he was able to narrow it down to one: Mr. Diaz (R. 964-967). The wallet that Pardinas described as being stolen from him (R. 956) matches the description of a wallet which Candice Braun testified was given to her by Mr. Diaz when he returned that evening (R. 881-882).

Throughout the presentation of the state's case, the prosecutor continually referred to the man who initiated the robbery at the bar as robber one (the same man identified by Mr. Pardinas as Mr. Diaz); the man on the stage as robber two; and the man in the back, by the office entrance, as robber three. Mr. Bulenda, when asked by the prosecutor the location of robber three, responded:

> Yes, sir. He was at the back near the -- between the bathrooms and the office entrance with a gun in his hand, and when the door to the office opened, he fired into it.

(R. 998). Based on the testimony of Ms. Braun, Mr. Pardinas and Mr. Bulenda, Mr. Diaz was not the man positioned near the office entrance and thus was not the shooter.

The only witness who claimed Mr. Diaz was the shooter was a jailhouse snitch named Ralph Gajus. Gajus testified that Diaz said he shot the man, but that he only inferred that the victim was shot in the chest based on Mr. Diaz acting out what took place (R. 1123-1124). However, Gajus described his cell and Mr. Diaz's cell as being approximately 15 feet apart (R. 682). Also, each confinement cell has two cell doors, so that a person must enter two doors from the main hallway before actually being inside the prisoner's cell (R. 679). To add to the physical obstructions, the court found that Mr. Diaz does not speak English very well, and in fact needed an interpreter in court. Mr. Gajus did not speak Spanish.

During the evening recess, two court-appointed psychiatrists examined Mr. Diaz. Based on their reports, the judge entered a finding that Mr. Diaz was competent to stand trial (R. 984). The record reflects that only one doctor, Dr. Haber, was present in court (R. 981). Dr. Haber informed the court, in a very conclusory manner, that Mr. Diaz was competent (Id.). Dr. Haber's conclusory presentation was also done outside the presence of the attorneys for either side and outside the presence of Mr. Diaz (Id.).

During cross examination of the lead detective, Mr. Diaz was reprimanded

for arguing with the witness (R. 1089) and became so agitated that the trial was again recessed (R. 1094). Upon conclusion of the state's evidence, Mr. Diaz moved for judgment of acquittal (R. 1159). That denied, he indicated his desire to call a number of witnesses whom his counsel had not subpoenaed. He did not seem to understand how to procure witnesses (R. 1160-1161). The court stated that no continuances would be given for obtaining witnesses (R. 1162-1163). Mr. Diaz attempted to explain what witnesses he needed and what testimony he hoped to elicit from them (R. 1188-1208). The court ruled that no effort would be made to locate witnesses (R. 1208-1210) but Mr. Diaz's standby counsel could interview two potential witnesses who were in jail near Mr. Diaz. That offer was refused by Mr. Diaz, who insisted on seeing the potential witnesses himself (R. 1213-1214). He insisted that the court had never warned him he would be unable even to speak to his witnesses (R. 1214). Finally, he was allowed to speak to them from an adjoining secure cell but not to view them, because security personnel feared having Mr. Diaz together with any of his witnesses (R. 1216-1217). After the inmate witnesses had been interviewed, the court informed Mr. Diaz that most of what they should testify about was inadmissible. He again asked the court for help in obtaining the other seven people he needed, and was again refused (R. 1224-1225). Eventually, the defense rested without presenting any evidence (R. 1240).

Mr. Diaz then moved unsuccessfully for mistrial, partly on the grounds that

it was error to permit him to defend himself "without the necessary intellect to do so" (R. 1242). The jury was instructed on first-degree murder and felony murder, and was specifically told that felony murder did not require "a premeditated design or intent to kill" (R. 1291-1292). During deliberations, the jury requested a copy of the instructions, which the court furnished (R. 1328); it also requested the "entire testimony" of witnesses Candy Braun and Ralph Gajus, which the court refused to furnish. The court replied that the jury must rely on its recollection (R. 1329). The jury found Mr. Diaz guilty of first-degree murder, four counts of kidnapping, two counts of armed robbery, one count of attempted robbery, and one of possessing a firearm during the commission of a felony (R. 1332-1334).

A recess of two weeks intervened before the penalty phase of the trial. Before the recess, the court again offered counsel to Mr. Diaz. He stated that he would accept his standby counsel as his attorney for the sentencing proceeding (R. 1341). To help his preparations, Mr. Diaz was to be allowed the use of a telephone but only if his conversations were monitored by court personnel (R. 1348-1349).

At the commencement of the sentencing proceeding, Mr. Diaz demanded the right to again represent himself, although under repeated questioning from the court he maintained that he was not capable of representing himself adequately (R. 1356-1361). Finally, the court appointed his standby counsel to represent him in the sentencing. At Mr. Diaz's insistence, defense counsel refrained from cross

examining the first few prosecution witnesses; finally, the court commented, in front of the jury, that although he had been appointed over Mr. Diaz's objection, counsel must nevertheless act as he thought best (R. 1394). Counsel's motion for Mistrial, based on this remark, was denied (R. 1402-1403).

The state argued the statutory aggravating factors of prior violent felony, being under prior sentence of imprisonment, causing great risk to many persons, committing the capital felony to aid another crime, and acting for pecuniary gain; the defense argued the mitigating factor of being a mere accomplice to the crime of another, but presented no new evidence of this, or of any nonstatutory mitigating factors. The jury recommended a death sentence. At sentencing, the court merely stated that the jury had considered the aggravating and mitigating factors (R. 1467-1468). The court proceeded to list the aggravating factors and no discussion was had regarding the mitigators (R. 1468). After this vague pronouncement, the court sentenced Mr. Diaz to death (R. 1468-1469). The State informed the court that it would submit an appropriate order based on this pronouncement (R. 1470), and did submit a detailed order weighing the aggravators and mitigators, a task taken on independently of the court (R. 319-330).

SUMMARY OF THE ARGUMENTS

1. The lower court's denial of public records prevented Mr. Diaz from receiving a full and fair postconviction proceeding.

2. The lower court erred in denying an evidentiary hearing on Mr. Lightbourne's claim that Florida's lethal injection statute and the existing procedure by which Florida carries out executions by lethal injection are unconstitutional under the Florida and United States Constitutions as it constitutes cruel and unusual punishment. New scientific research not presented to and/or not considered by this Court in previous cases necessitates an evidentiary hearing on this claim.

3. Newly discovered empirical data and the conclusions drawn from that data, make clear that Florida's death penalty system is so seriously flawed and broken that it does not meet the constitutional requisite of being fair, reliable or accurate. Florida's death penalty scheme stands in violation of the Eighth Amendment. Mr. Diaz's case encapsulates all that is wrong with Florida's death penalty scheme.

4. Mr. Diaz's severe mental illness renders him ineligible for the death penalty under the Eighth Amendment and the U.S. Supreme Court's reasoning in Atkins v. Virginia, 536 U.S. 304 (2002) and Roper v. Simmons, 543 U.S. 551 (2005).

5. Newly discovered evidence demonstrates that the only witness indicating Mr. Diaz was the shooter now states that Mr. Diaz never told him he was the shooter and Mr. Diaz's actions describing the shooting were unclear.

Alone and cumulatively, Mr. Gajus' admission that he was untruthful when he testified establishes a reasonable probability of an acquittal and/or a life sentence. Jones v. State, 591 So. 2d 911 (Fla. 1992).

STANDARD OF REVIEW

The Constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court to the extent they are supported by supported by competent and substantial evidence. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690 (1996); Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

The lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true, even in a successor Rule 3.850 proceeding being considered during the pendency of a death warrant. Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996).

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. DIAZ'S DEMANDS FOR ADDITIONAL PUBLIC RECORDS PURSUANT TO FLA. R. CRIM. P. 3.852(I) AND (H)(3), IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9 AND 17 OF THE FLORIDA CONSTITUTION.

On November 1, 2006, collateral counsel filed Demands for Additional

Public Records pursuant to Fla. R. Crim. P. 3.852(i)(hereinafter "lethal injection demands) from the Medical Examiner - 8th District, the Office of the Attorney General, Florida Department of Corrections and the Warden of Florida State Prison (PC-R2. 787-792). These "i" demands related to Mr. Diaz's pending Rule 3.851 Motion challenging the constitutionality of Florida's use of lethal injection. Subsequently, on November 15, 2006, written objections were filed by the Department of Corrections and by the Attorney General's Office, who filed its own objection, as well as objections on behalf of the medical examiner and the Governor's Office (PC-R.2 814-826).

Governor Bush signed Mr. Diaz's death warrant on November 14, 2006. On November 15, 2006, this Court ordered that all matters pending in the trial court be acted on and orders disposing of those matters be entered by November 22, 2006. On November 16, 2006, the circuit court ordered an emergency hearing for November 17, 2006, "to argue all pending motions, including the Amended Motion for Postconviction Relief and the Public Records Requests." The court further ordered that "any emergency motions shall be filed and faxed to the court by 4:00 p.m. on November 16, 2006." (Order Setting Emergency Hearing, November 16, 2006).

A. 3.852(i) Demands Filed November 1, 2006 (Lethal injection demands)

The lower court's November 21, 2006 Order Denying Request for

Additional Public Records addresses only the demands for public records filed before Mr. Diaz's death warrant was signed (PC-R. 1528-1529). These demands involved records regarding Florida's use of lethal injection. The lower court found that all of Mr. Diaz's demands in this regard "are overbroad and are not designed to lead to relevant and discoverable evidence." (PC-R2. 1529).

The State argued that the 3.852(i) demands were untimely and overbroad and unduly burdensome (PC-R2. 1146). Collateral Counsel objected to the Assistant Attorney General speaking on behalf of the agencies, who had counsel and were not present at the hearing. (Id.) The assistant attorney general represented to the court that she had been requested by the agencies to represent them (PC-R2. 1447).

At the outset, it is important to note that this Court's opinions in Hill v. State, 921 So. 2d 579 (Fla. 2006), and Rutherford v. State, 926 So. 2d 1100 (Fla. 2006), regarding public records requests do not control this case. Both Mr. Hill and Mr. Rutherford were under warrant at the time they made their public records requests relating to lethal injection, so their requests were governed by Fla. R. Crim. P. 3.852(h)(3), which does not allow requests to agencies from which the inmate has not previously requested records. Mr. Diaz was not under warrant at the time of making the requests, and therefore his records requests fall under Fla. R. Crim. P. 3.852(i).

At the hearing, collateral counsel argued that the 3.852(i) demands stated specifically what counsel was seeking and were not unduly burdensome (PC-R2. 1461-1462, 1448-1452). The records requested, including the types and doses of drugs used, the order in which they are injected, and the method used to inject the drugs, would either be admissible evidence or were reasonably calculated to lead to admissible evidence in the form of expert opinions as to whether lethal injection, as conducted under Florida's protocol, causes unnecessary pain. (Id.)

As argued supra, new evidence suggests that lethal injection may cause extremely painful and torturous death such as would violate the Eighth Amendment. Since this research was developed in other jurisdictions, Mr. Diaz's expert witnesses would need to review records related to Florida's lethal injection protocol in order to apply the new research to Florida's procedures. The requested records are necessary for Mr. Diaz's experts to determine whether Florida's lethal injection procedures pose a risk of causing an unnecessarily painful and torturous death.

In order to fairly form an opinion on the lethal injection protocol, the experts would have to know the qualifications of the personnel involved in the execution. Lethal injection requires the mixing of drugs, insertion of IV catheters, administration of drugs, and other tasks requiring medical training and skills. The use of unqualified and untrained personnel would make it more likely that errors

will occur and that the designated drugs will not function as intended under the protocol, causing unnecessary suffering.

The experts would also need to review reports of observations of previous executions by lethal injection, including autopsies and toxicology reports and reports of complications, in order to form an opinion on the likelihood that condemned inmates in Florida have suffered painful and torturous deaths by lethal injection. It would also be necessary for the experts to review the documents related to the adoption of lethal injection as a means of execution in Florida in order to assess, among other issues, the criteria used for choosing the lethal injection protocols, whether the protocols were evaluated scientifically before being adopted, whether alternative protocols were considered, and whether there was an awareness of the risk of inflicting pain. Only after reviewing these records would Mr. Diaz's expert witnesses be able to testify fully and fairly.

Additionally, the lower court made factual findings which are unsupported by the record. For example, the court found that Mr. Diaz should have requested records from the Medical Examiner's Office "prior to filing the 2006 motion and not at the Huff hearing" (PC-R2. 1528). The records sought pertained only to the post-mortem examinations of Hill, Rutherford and Rolling. With the exception of Hill, these records would not have existed prior to the filing of Mr. Diaz's motion to vacate on September 25, 2006. The court made additional bizarre findings that

have no basis in the record, but appear to be based on the Court's personal opinion.

Since the lethal injection protocol itself would be admissible evidence,[2] and since expert testimony on the issue of whether lethal injection is constitutional would be admissible, all of the records sought were reasonably calculated to lead to admissible evidence, and the lower court abused its discretion in finding that this requirement of Fla. R. Crim. P. 3.852(i) was not met.

B. 3.852(h)(3) and (i) Demands filed November 17

Pursuant to Rule 3.852(h)(3), Mr. Diaz had until November 24, 2006, to file Demands for Additional Public Records. On November 16, 2006, two days after the death warrant was signed, collateral counsel sent Demands for Additional Public Records by Federal Express to Miami-Dade Department of Corrections, Office of the Medical Examiner, Department of Health, Office of Executive Clemency, Florida Department of Law Enforcement and Office of the State Attorney, 11th Circuit (PC-R2. 1386-1425). Collateral counsel also sent demands pursuant to Fla. R. Crim. P. 3.852(i) to Division of Elections, Judicial Qualifications Commission, and the Office of the Attorney General, with affidavits as required under that rule (Id.). The demands were filed in open court on

[2] While Mr. Diaz has received a copy of DOC's new protocol, the new protocol generates many additional questions and concerns. It further indicates that additional documentation is being kept pertaining to executions. Specifically, DOC indicates that it creates and maintains checklists after each execution. Counsel is entitled to copies of the checklists for the three most recent executions.

November 17, 2006 (PC-R2. 1443). Pursuant to Mr. Diaz's successive Rule 3.851 motion filed on November 27, 2006, Mr. Diaz filed two additional public records demands pursuant to Rule 3.852(i) on November 29, 2006. The trial court likewise denied these demands.

The State argued at the November 17 emergency hearing that Mr. Diaz's 3.852(h)(3) demands were untimely because the court had set a deadline of 4:00 p.m. on November 16. The court heard argument on the merits of Mr. Diaz's pending Rule 3.851 Motion but did not immediately rule on the substance of the motion, the lethal injection demands, or the 3.852(h)(3) demands. The court set a subsequent hearing for November 21, 2006. Collateral counsel sought to clarify whether the court would consider the merits of the 3.852(h)(3) demands:

> MS. KEFFER: If I could clarify, I know the State's argument was that I should not be allowed to file the public records demands or they should not be addressed, you should deny them outright, and I did not file them in the time frame. If that is what you are going to address, we should wait to see what your ruling is as to whether I can even file them or whether--
>
> THE COURT: Yes.
>
> ***
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> MS. KEFFER: I wanted to clarify how you are treating those demands.
>
> MS. JAGGARD: And the State's position is not only that they should not be considered, they were not timely and improper. They are a last minute fishing expedition requesting any and all records.

> MS. KEFFER: But if we are going to get into those kinds of arguments, that is a public records hearing. And whether or not your Honor is going to deny them outright – I understand the State's argument that you should deny them outright because they are not timely. I have to address why they are timely, if [the State] wants to get into specifics about fishing expeditions and everything else. . .that's putting the cart before the horse.
>
> THE COURT: I think so.
>
> MS. KEFFER: As to whether you are going to consider them --
>
> MS. JAGGARD: You sent out an order you were considering every and all evidence in this case today...
>
> THE COURT: Well, I want you to know so everything could be done before the very last minute. If necessary, I would have to see you on Monday [November 20].

(PC-R2. 1484-1485).

Subsequently, on November 20, 2006, the Attorney General's Office filed a written "Global Objection" on behalf of all agencies (PC-R2 1541-1547). The court did not conduct a hearing on Monday, November 20, nor did counsel receive any indication that the court would conduct a public records hearing. At the scheduled November 21st hearing, the State argued "on behalf of all the agencies served" that "in addition to it being filed after the pleading deadline these [3.852(h)(3)] requests are remarkably similar to the requests made in Mills v. State, 786 So. 2d 547 (Fla. 2001)" and "were nothing more than a last minute fishing expedition." (PC-R2. 1503). Collateral counsel again objected to the State representing all agencies served with a demand (PC-R2. 1506). The assistant

attorney general represented to the court that she had been requested by the agencies to represent them, however collateral counsel was not notified of this.[3] Collateral counsel attempted to make argument on the demands and to the sweeping objection made by the State, however, the court indicated that the demands for additional public records were being denied (PC-R2. 1510). Again, when counsel requested to make argument for purposes of appeal, the court questioned counsel as to the timing of filing the demands and stated that she made her ruling (PC-R2. 1510-1512).

In its November 21, 2006 Order Denying Demand for Additional Public Records Filed November 17, 2006 the lower court denied all of Mr. Diaz's public records pursuant to 3.852(h)(3) (PC-R2. 1532-1535). The court's order does not address the issue of timeliness, which was the basis for the court's refusal to hear further argument on the demands. Rather, the court made findings regarding each agency that are not supported by any facts elicited at the November 17 or 21 hearings, and are unsupported by the record. For example, the court found that the demand for the Medical Examiner's file was "unlikely to lead to discoverable evidence" and denied the request, in part, because Mr. Diaz had not previously requested records as required under Rule 3.852(h)(3) (PC-R2. 1532). In fact, had

[3] Contrary to the State's representation, counsel for one of the agencies, Department of State Division of Elections, informed collateral counsel that she specifically did not request that the Attorney General represent her agency in this matter.

he been given the opportunity, Mr. Diaz would have shown at a proper public records hearing that he had requested records from the Medical Examiner on September 18, 1989. Similarly, the lower court denied Mr. Diaz's request for information from the Department of Health, Judicial Qualifications Commission and Division of Elections, without hearing argument, by simply stating that the requests are "unlikely to lead to discoverable evidence." (PC-R2. 1532-1533).

The court denied Mr. Diaz's demands from several law enforcement agencies and the State Attorney's Office for records related to himself and his co-defendants (PC-R2. 1532-1535). The 3.852(h)(3) demands sent to the Florida Department of Law Enforcement and the Office of the State Attorney requested, inter alia, criminal records related to the jurors in Mr. Diaz's case. Whether or not any of the jurors had any criminal history and/or involvement with the criminal justice system, law enforcement or the state is relevant because it gives rise to a claim for relief if a juror failed to disclose this information to the court at the time of trial. In Buenoano v. State, 708 So. 2d 941 (Fla. 1998), this Court made it clear that any such claim will be procedurally barred if counsel fails to exercise due diligence.

Likewise, the records requested pursuant to 3.852(i) from the Division of Elections and the Judicial Qualifications Commission were not extensive. The only request made was for records regarding Judge Amy Steele Donner. These

records are necessary to investigate a claim whether the trial judge received contributions from any persons having an interest in Mr. Diaz's case. See Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995). Mr. Diaz is prohibited from questioning a judge directly without first showing good cause. State v. Lewis, 656 So. 2d 1248 (Fla. 1994); Porter v. Singletary. As a result, Mr. Diaz has no other means of establishing good cause.

In denying Mr. Diaz's demands, the court relied, in part, on this Court's emphasis in Glock v. Moore, 776 So. 2d 243 (Fla. 2001), that

> The language of section 119.19 and of rule 3.852 clearly provides for the production of public records after the governor has signed a death warrant.
>
> ***
>
> *This language was intended to and does convey to the reader the fact that a public records request under this rule is intended as an update of the information previously received or requested*.

(PC-R2. 1534, citing Glock v. Moore, 776 So. 2d at 253, citing Sims v. State, 753 So. 2d 66, 70, (emphasis in original)). To the extent that the court found Mr. Diaz's 3.852(h)(3) demands were not an "update" of previously received records, this finding is demonstrably false. Had he been given the opportunity[4], Mr. Diaz would have shown that he requested records from Florida State Prison on August

[4] At the hearing counsel explained that she had copies of previous records requests to each agency that the 3.852(h)(3) demands were sent (PC-R2. 1510-1511).

30, 1989, May 27, 1990 and February 8, 1991; Metro-Date Police Department and Florida Department of Law Enforcement on September 6, 1989; Department of Business and Professional Regulation[5] on February 13, 1991; Dade County Medical Examiner on September 18, 1989; and Dade County jail on September 20, 1989. Each of Mr. Diaz's 3.852(h)(3) demands were for updated information consistent with the intent of the rule.

Similarly, the court's reliance on Sims and Glock for the finding that "all of the additional demands were either overbroad, do not seek relevant information or likely to result in admissible evidence [sic]" (PC-R2. 1534) is misplaced here. Mr. Diaz was never afforded an opportunity to be heard on his public records demands or to adequately address the State's global objection on behalf of the agencies, despite having requested that the court conduct a proper public records hearing with the agencies present.

At the November 21st hearing, the State argued that this Court's holding in Mills v. State, which relied on Glock and Sims, prevented Mr. Diaz from obtaining additional records (PC-R2. 1503). In Mills, collateral counsel under warrant filed 3.852(h)(3) demands for records from several agencies. Rather than voicing a

[5] At the time of Mr. Diaz's original requests, Department of Business and Professional Regulation was the appropriate agency for requesting records regarding medical professionals. The Department of Health has since assumed the responsibility of maintaining such records, and the recent 3.852(h)(3) demand was properly directed to them.

"global" objection, the agencies complied, at least in part, with the demands. The circuit court conducted public records hearings at which each agency, represented by counsel, argued their objections. The court carefully considered the substance of each demand and ordered that several agencies produce records over objection. Furthermore, many of the agencies produced some records, while objecting to producing everything contained in the demands. While the court denied production of many of the requested records, Mr. Mills did obtain records.

Such is not the case here. Mr. Diaz filed his demands pursuant to 3.852(h)(3) within the time required by this Court. The circuit court failed to conduct a proper public records hearing to address the demands, in part because the demands were made after the trial court's imposed deadline. The lower court did not set a public records hearing, but heard argument without the agencies being noticed or present. Collateral counsel objected to the Attorney General representing every agency and noted that, as was the case in Mills, prior to the Attorney General's self-appointment as counsel, many of the agencies would comply in part with the demands even if they objected to them in part (PC-R2. 1507-1511). Counsel pointed out that she has never had an objection to updated Department of Corrections records on her own client (PC-R2. 1507).[6]

[6] Mr. Diaz's medical records are of particular importance to the instant proceedings where he is alleging that errors will occur during the execution and

Mr. Diaz sought public records pursuant to Fla. Stat. Ch. 119 and Fla. R. Crim. P. 3.852(h)(3) and (i). See Ventura v. State, 673 So. 2d 479 (Fla. 1996); Muehleman v. Dugger, 634 So. 2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Counsel for Mr. Diaz has the duty to seek and obtain every public record in existence in this case. Porter v. State, 653 So. 2d 375 (Fla. 1995), cert. denied 115 S. Ct. 1816 (1995). This Court has ruled that collateral counsel must obtain every public record in existence regarding a capital case or else a procedural default will be assessed against the defendant. Porter v. State, 653 So. 2d 375 (Fla. 1995). However, a concomitant obligation under relevant case law as well as Chapter 119 rests with the State to furnish the requested materials. Ventura v. State, 673 So. 2d 479 (Fla. 1996). When the State's inaction in failing to disclose public records results in a capital post conviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the post conviction motion should be denied or dismissed. Id. ("The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act").

This Court applies the “abuse of discretion” standard when reviewing

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that the designated drugs for carrying out lethal injection will not function as intended under the protocol, causing unnecessary suffering.

appeals from denials of requests for public records. Hill v. State, 921 So. 2d 579 (Fla. 2006). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." Parker v. State, 904 So. 2d 370, 379 (Fla. 2005).

The lower court here abused its discretion in several respects. First, the court ignored Fla. R. Crim. P. 3.852(h)(3) which provides ten days from the signing of a death warrant for collateral counsel to file demands for additional public records. Rather, the court imposed its own arbitrary and unreasonable rule, allowing Mr. Diaz only two days to request records. Second, the court sustained the State's "global" objection on behalf of every served agency to Mr. Diaz's demands without the opportunity to respond specifically to each agency's objections, relying on factual findings that are demonstrably false. No reasonable person would take the view adopted by the lower court. Mr. Diaz's rights to access to the courts, equal protection and effective legal representation are being denied because the circuit court has denied access to public records to which he is entitled. This Court should remand this case to the circuit court for full public records disclosure.

ARGUMENT II

THE STATE OF FLORIDA'S LETHAL INJECTION STATUTE, FLA. STAT. § 922.105, AND THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATE ARTICLE II, SECTION 3 AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.

A. Cruel and Unusual Punishment

In his successive 3.851 motion, Mr. Diaz argued that new scientific evidence, not previously available to this Court when it decided Sims v. State, 754 So. 2d 657 (Fla. 2000), and not considered by this Court in the cases, Hill v. State, 921 So. 2d 579 (Fla. 2006), Rutherford v. State, 926 So. 2d 1100 (Fla. 2006) and Rolling v. State, demonstrates that the existing procedure that the State of Florida uses in executions violates the Eighth Amendment to the U.S. Constitution and the corresponding provision of the Florida Constitution, as it will inflict upon Mr. Diaz cruel and unusual punishment. The lower court denied an evidentiary hearing on this claim, stating that:

> At the Huff Hearing/Case Management Conference, Diaz argued that an evidentiary hearing was not granted in the *Rolling* or *Rutherford* cases because of the time constraints due to the issuance of a death warrant. This court rejects that argument. If a court had even the slightest doubt that a defendant's constitutional rights were being violated, it would issue a stay and hold an evidentiary hearing on the issue.

(PC-R2. 1521). Mr. Diaz never made an argument that an evidentiary hearing was not granted in Rutherford and Rolling due to the "time constraints" of the warrant.

Mr. Diaz argued that in Hill and Rutherford, federal courts characterized the lethal injection claim as eleventh-hour attempts to delay execution, and therefore denied the federal claims as barred. Hill v. McDonough, 464 F.3d 1256 (11th Cir. 2006). See also, Rutherford v. McDonough, 466 F.3d 970 (11th Cir. 2006). Mr. Diaz pointed out to the court that his challenge to lethal injection was being filed prior to the signing of a death warrant and thus, was in a different posture than the previous cases.

The lower court further denied relief relying primarily on Sims v. State (PC-R2 1521-1523). The lower court's reliance on Sims is misplaced as this is no longer applicable in light of new scientific evidence discussed infra. In Sims v. State, 754 So. 2d 657 (Fla. 2000), Terry Sims, who was to be the first death-sentenced inmate to be executed by lethal injection in Florida, challenged Florida's lethal injection procedure as a violation of the Eighth Amendment. This Court denied relief, finding the possibility of mishaps during the lethal injection process insufficient to support a finding of cruel and unusual punishment.

This Court decided Sims more than six years ago. As Mr. Diaz argued in his 3.851 motion, a large amount of new scientific research has been published since 2000. This research, explained below, makes clear that the possibility of lethal injection mishaps that this Court considered in Sims is no longer speculative. Rather, it is the stark and certain reality of executions by lethal injection as carried

out under Florida's protocol. The lower court failed to consider much of the new research and thus, erred in denying Mr. Diaz an evidentiary hearing on this issue. Since the recent scientific research has been conducted in other states, an evidentiary hearing is necessary in order for Mr. Diaz to prove that the problems that occur under lethal injection procedures in other states also occur in Florida, and will occur when the State uses the same protocol to execute Mr. Diaz. Several recent developments since this Court's previous decision in Sims, compel this Court to address this claim. First, the Florida Department of Corrections revised its lethal injection protocols, promulgating "Execution by Lethal Injection Procedures", signed by DOC Secretary James R. McDonough on August 16, 2006 ("2006 Procedures", Attachment A); second, an April 16, 2005 article published in the medical journal THE LANCET;[7] and third, a number of U.S. District Court orders granting relief in lethal injection challenges.

On August 16, 2006, the Florida Department of Corrections revised its lethal injection protocols. The revised lethal injection protocol calls for three drugs to be administered in succession through an IV tube attached to the inmate: 5 grams of sodium pentothal, an ultra-short acting barbituate which is used to render the inmate unconscious; 100 mg of pancuronium bromide, a paralyzing agent; and

[7] Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 THE LANCET 1412 (2005) (Attachment B).

finally 240 mg of potassium chloride, which stops the heart.[8] As a backup, a second set of syringes containing the same doses of drugs is prepared in the event that "If after the complete administration of the lethal chemicals, the heart monitors do not reflect a flat line reading and/or the physician cannot pronounce the inmate dead, the executioner will begin a second flow of lethal chemicals….". (2006 Procedures, p. 8.) The use of this combination of drugs creates a risk that Mr. Diaz will experience excruciating pain if the dose of sodium pentothal is not sufficient to produce anesthesia or is not properly administered before the injection of the pancuronium bromide and the potassium chloride. Because the protocol provides for no means of monitoring the inmate's consciousness after administration of the sodium pentothal, there is no means of determining if Mr. Diaz is in fact awake and feeling the effects of the lethal drugs.

While the lower court held that the new protocol contains nothing that conflicts with the procedure outlined in Sims, a thorough review of the new protocol reveals it is in stark contrast to the protocol asserted in Sims.[9] The new

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[8] Florida's previous written lethal injection protocol, effective January 28, 2000, did not specify the types of drugs or dosages used. ("2000 Procedures", Attachment C). They are described in the Florida Supreme Court opinion in Sims v. State, 754 So. 2d 657 (Fla. 2000).

[9] The new protocol provides the warden with unfettered discretion to "select two (2) executioners who are fully capable of performing the designated functions to carry out the execution." This change causes many questions and concerns: What capabilities need an executioner possess? Does a "capable" individual possess any medical training?

protocol does not remedy any concerns that Mr. Diaz will suffer undue pain and in fact, generates numerous additional questions as to the constitutionality of the protocol.

A 2005 study published in the prestigious medical journal THE LANCET detailed the results of research on the effects of chemicals in lethal injection. See Leonidas G. Koniaris et. al., Inadequate Anaesthesia in Lethal Injection for

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The old protocol did not provide for maintenance or storage of the chemicals, while the new protocol does. This change causes many questions and concerns: How will the chemicals be stored so that they are secure? What qualifications does the execution member have to determine whether the chemicals have surpassed their expiration dates?

The new protocol calls for the use of a checklist. The old protocol did not provide for the use of checklist. Where is the checklist from the executions of Clarence Hill, Arthur Rutherford and Danny Rolling?

The old protocol did not provide for a determination of issues that could interfere with the lethal injection procedure and for a process to resolve those issues. This change causes many questions and concerns: What type of issues could interfere with the proper administration of the lethal injection process? Will the condemned and/or his attorney be notified? What resolutions will be considered in regard to the problems?

The new protocol calls for two hours prior to the execution to "prepare the lethal injection chemicals. The old protocol did not provide for preparation of the chemicals. This change causes many questions and concerns: Does it matter that the chemicals are prepared two hours prior to the execution? Who mixes the chemicals? What is his/her training?

The new protocol calls for "A designated member of the execution team" to "explain the lethal injection procedure to the inmate and offer any medical assistance or care deemed appropriate. This change causes many questions and concerns: What type of medical assistance is contemplated? Does this individual have the required medical training and ability to administer the medical care?

The new protocol calls for a central venous line to be placed with or without a venous cut-down if peropheral venous access cannot be achieved. The old protocol did not provide for a cut-down. This change causes many questions and concerns: Who will do the cut-down? How will it be done? When will it be done?

Execution, 365 THE LANCET 1412 (2005). The study analyzed lethal injection protocols and autopsy and toxicology reports from a number of states that made such data available. This study confirmed, through the analysis of empirical after-the-fact data, that the use of sodium thiopental, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.

While this Court has previously considered THE LANCET article and rejected it as requiring an evidentiary hearing, the Court must consider the article in conjunction with Dr. Richard Weissman's letter to THE LANCET dated September 24, 2005, Dr. Richard Weisman explained that the actions of sodium thiopental in a dying individual undergoing lethal injection are not comparable to its actions in a ventilated surgical patient. See *Correspondence*, Robyn S. Weisman et al., 366 THE LANCET 1074 (2005) (Attachment D).[10] According to Dr. Richard Weisman, a pharmacist and director of the Florida Poison Information Center, studies on living dogs showed that after a dog is injected with sodium thiopental, breathing slows and carbon dioxide builds up in the blood, leading to acidosis. See id. Acidosis causes the sodium thiopental to leave the blood and enter the fatty tissues. This suggests that the same dose of sodium thiopental may wear off more rapidly in an

[10] The lower court rejected the Weisman letter as newly discovered because it is "based on data from a 1950 study." (PC-R2. 1524). The court's reasoning ignores the fact that the newly discovered evidence is the conclusions drawn by Dr. Weissman and his conclusions support of THE LANCET article.

inmate undergoing lethal injection than in a surgical patient who is ventilated and not experiencing hypoxia and acidosis, risking that the inmate will be conscious and in pain from the effects of the pancuronium bromide and potassium chloride, but unable to communicate because he is paralyzed by the pancuronium (see discussion *infra*). This also indicates that the effects of doses used in clinical practice cannot be extrapolated to determine their effects on inmates during execution.

As stated above, Pancuronium bromide, sometimes referred to simply as pancuronium, is a paralytic agent that stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech.[11] Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. Its only function is cosmetic -- to prevent spasms that would be disturbing to witnesses. See Denise Grady, *Doctors See Way to Cut Suffering in Executions,* N.Y. Times, June 23, 2006, at A1

[11] The third chemical used is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart and causes massive muscle cramping before inducing cardiac arrest. Without adequate anesthesia, the condemned would feel the pain of a heart attack, but is unable to communicate his pain because the pancuronium bromide has paralyzed his entire body so that he cannot express himself either verbally or otherwise.

(Attachment E); see also Human Rights Watch report, *So Long as They Die: Lethal Injections in the United States* (April 2006) at 26-27 (Attachment F).

Significant is the fact that the American Veterinary Medical Association (AVMA) panel on euthanasia specifically prohibits the use of pentobarbital[12] with a neuromuscular blocking agent to kill animals. (Attachment G). Additionally, 19 states have expressly or implicitly prohibited the use of neuromuscular blocking agents in animal euthanasia because of the risk of unrecognized consciousness.

Additional recent articles emphasize the necessity for review of Florida's lethal injection protocol. The American Society of Anesthesiologists has issued a practice advisory. See 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 (Attachment H) The report advises that "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." Id. at 854. On April 24, 2006, Human Rights Watch released a report, So Long as They Die: Lethal Injections in the United States, recommending that states suspend lethal injections until each state convenes a

[12] Pentobarbitol is an intermediate-acting anesthetic with a half-life of many hours, which means that its effects last much longer than the ultra-short acting sodium thiopental.

panel of experts authorized to review and recommend changes to lethal injection execution protocols to ensure the least possible pain and suffering for the inmate.

Furthermore, Florida's procedure is similar to procedures in California, North Carolina, Missouri, Arkansas, and Ohio, where federal district courts have issued orders addressing serious Eighth Amendment questions raised by lethal injection.[13] Most significantly, a federal district court judge found that a California

[13] In North Carolina, a federal district court conditionally denied an inmates motion for a preliminary injunction on the condition that there are present and accessible throughout the execution, personnel with sufficient medical training to ensure that Plaintiff is unconscious throughout the administration of the three drug protocol. Order, Brown v. Beck, No. 5:06-CT-03018-H (E.D. N.C., Western Division, April 7, 2006) (Attachment N). In response, the North Carolina Department of Corrections changed its lethal injection procedure. The Defendants purchased a bispectral index monitor ("BIS monitor"), a diagnostic device approved by the Food and Drug Administration ("FDA") that is used extensively in clinical settings to insure the unconsciousness of surgical patients; revised the execution protocol to utilize the BIS monitor to measure the Plaintiff's level of consciousness throughout the execution procedure; revised the execution protocol to provide for the administration of additional quantities of sodium pentothal beyond the initial dose of not less than 3000 mg, if the Plaintiff, based on the readings of the BIS monitor, has not been rendered unconscious; and revised the execution protocol to insure that Plaintiff is in fact unconscious, as measured by the BIS monitor, prior to the administration of any pancuronium bromide. See Defendant's Notice and Response to 7 April 2006 Order, Brown v. Beck, (April 12, 2006) (Attachment O).

A number of federal district courts have granted stays of execution in response to lethal injection challenges. See, e.g., Order, Jackson v. Taylor, Civ. No. 06-300-SLR. (D. Del. May 9, 2006) (Attachment P); Order Granting Preliminary Injunction, Hill v. Taft, No. 2:04-cv-1156 (S.D. Ohio, Eastern Division, April 28, 2006) (Attachment Q). See also Order, Anderson v. Evans, No. Civ-05-0825-F, (W.D. Okla. Jan. 11, 2006) *and* Report and Recommendation, Anderson v. Evans, (Dec. 20, 2005), (district court accepted in its entirety a Magistrate Judge's report finding that death-sentenced inmates stated a valid claim

death row inmate had raised substantial questions regarding whether administration of California's lethal injection protocol would create an undue risk that Morales would suffer excessive pain when he is executed. See Order Denying Conditionally Plaintiff's Motion for Preliminary Injunction, Morales v. Hickman, No. C 06 926 JF RS (N. D. Cal. Feb. 14, 2006) (Attachment I). Florida's lethal injection protocol uses the same combination of three drugs as California.

The district court ordered that the State could proceed with the execution provided that it met certain conditions outlined by the court. See id.[14] Morales'

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that Oklahoma's administration of the same three-chemical sequence for lethal injection "creates an excessive risk of substantial injury" and pain under the Eighth Amendment) (Attachment R).

Two courts have granted relief in response to lethal injection challenges brought pursuant to §1983. See, e.g., Order, Nooner v. Norris, No. 5:06CV0011OSWW (E.D. AK, June 26, 2006) (Attachment S); Order, Taylor v. Crawford, No. 05-4173-CV-C-FJG (W.D. MS, June 26, 2006) (Attachment T).

On August 21, 2006, Oklahoma altered the way it administers the lethal injection drugs so that now inmates receive larger doses of the anesthetic, sodium thiopental, before the potassium chloride is administered. Associated Press, *Oklahoma Alters Lethal Injection Procedure*, available at http://www.chickashanews.com/malicoat/local_story_233142149.html (August 21, 2006). Additionally, on August 29, 2006, South Dakota Governor Mike Rounds delayed the state's first execution in 59 years, citing concerns that the state's plan to use a three-drug protocol did not comply with a state statute specifying a two-drug combination. Reuters, *South Dakota: Execution Postponed*, available at http://www.nytimes.com/2006/08/30/us/30brfs-003.html (August 30, 2006).

[14] The State of California opted to have two anesthesiologists present for the execution. See Defendants' Response to Court's Conditional Denial of Preliminary Injunction, in Morales v. Hickman, No. C 06 219-JF (N.D. Cal. Feb. 15, 2006) (Attachment J). The anesthesiologists scheduled to monitor the execution, however, backed out at the last minute, citing ethical concerns. See John M. Broder, *Questions Over Method Lead to Delay of Execution*, N.Y. TIMES, Feb.

execution was postponed indefinitely when the State could not comply with these conditions. As a result, an evidentiary hearing on whether California's lethal injection protocol constitutes cruel and unusual punishment was held September 26 – 29, 2006. (Transcripts attached as Attachment M). Contrary to the State's response and the circuit court's order, the trial testimony in Morales v. Hickman, No. C 06 219-JF (N.D. Cal., 2006), contains an abundance of evidence not presented at the Sims hearing. The most striking difference is that no executions by lethal injection had yet been conducted in Florida at the time of the Sims hearing. Therefore, no eyewitness testimony to a lethal injection could have been presented. Additionally, no testimony on veterinary euthanasia was presented in Sims. In Morales, the testimony regarding the special properties of sodium thiopental that make it likely that an inmate will be conscious during an execution, is at a level of detail far beyond anything presented in Sims. Finally, no testimony regarding the requirements for monitoring anesthetic depth was considered in

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21, 2006 (Attachment K). The American Medical Association, the American Society of Anesthesiologists and the California Medical Association all opposed the anesthesiologists' participation as unethical and unprofessional. See id.

The State of California opted to go ahead with the execution using a higher dosage of one drug, sodium thiopental, but had to postpone the execution indefinitely when it could not comply with the further conditions imposed by the court to prevent a botched and painful execution. The court ordered that the drug be administered by a licensed professional and injected directly into the prisoner's vein, rather than flowing through an intravenous tube from outside the death chamber. See Order on Defendant's Motion to Proceed with Execution Under Alternative Condition to Order Denying Preliminary Injunction, in Morales v. Hickman, No. C 06 219-JF (N.D. Cal. Feb. 21, 2006) (Attachment L).

Sims.

This Court's decisions in Hill v. State, 921 So. 2d 579 (Fla. 2006) and Rutherford v. State, 926 So. 2d. 1100 (Fla. 2006) (affirming the circuit courts' denial of an evidentiary hearing on lethal injection under the 2000 lethal injection protocol), and Rutherford v. State, No. SC06-2023 (Fla. October 17, 2006) (denying a petition for all writs jurisdiction to consider the revised lethal injection protocols), do not preclude this Court from addressing Mr. Diaz's claim. Hill and Rutherford, 926 So. 2d 1100 affirmed the circuit court's denial of an evidentiary hearing, and Rutherford, No. SC06-2023 denied all writs jurisdiction to review the new lethal injection protocol. Mr. Diaz's claim is based on the current lethal injection procedure, as well as evidence not previously considered.

Further, the Hill opinion, relying on Sims, addressed only the constitutionality of sodium thiopental as a lethal injection agent. The Court failed to address the use of pancuronium bromide and potassium chloride, the second and third drugs used in Florida's lethal injection protocol.[15] The Court also failed to address Dr. Weisman's September 24, 2005 letter to THE LANCET (discussed supra). An evidentiary hearing is required upon this claim.

[15] The new protocol calls for the administration of 100 mg of pancuronium bromide. The old protocol did not provide for this amount of pancuronium bromide. Nor did the testimony elicited in the Sims hearing. The new protocol calls for the administration of 2 syringes of potassium chloride, each of 120mEq. The old protocol did not provide for this amount of potassium chloride. Nor did the testimony elicited in the Sims hearing.

B. Separation of Powers

Florida's lethal injection statute is an unconstitutional delegation of legislative authority under the separation of powers doctrine and violates the Fourteenth Amendment due process clause because the legislature gave the Department of Corrections no intelligible principle by which to create a rule of lethal injection protocol, and/ or because its exemption of policies and procedures relating to the lethal injection method from the constraints and procedures of Florida's Administrative Procedure Act, without offering alternative procedures, gives the Department of Corrections unfettered discretion to create a lethal injection protocol.[16] Fla. Stat. § 922.105 (2005). The checks and balances of the Administrative Procedure Act serve to ensure that agencies make rules in an informed, public manner. Section 922.105's delegation of legislative power to the Department of Corrections to fashion a lethal injection protocol behind closed doors and by any method of its choosing cannot pass constitutional muster. See Lewis v. Bank of Pasco County, 346 So. 2d 53, 55-56 (Fla. 1976) ("The statute must so clearly define the power delegated that the administrative agency is

[16] In Sims v. State, 754 So. 2d 657, 670 (Fla. 2000), the Florida Supreme Court found that the Legislature's failure to define the chemicals to be administered in the lethal injection did not necessarily render the statute unconstitutional, but the Court did not consider the argument that the legislature's exemption of the policies and protocols from the procedural safeguards of the Administrative Procedure Act gave the Department of Corrections unfettered discretion to legislate, in violation of Article I, Section 17 of the Florida Constitution.

precluded from acting through whim, showing favoritism, or exercising unbridled discretion.").

C. CONCLUSION

The lower court erred in denying Mr. Diaz's claim. Mr. Diaz asks this Court to reverse the lower court's order and remand this case for an evidentiary hearing on the claim so that Mr. Diaz will not be executed using a procedure that was created behind closed doors by an agency making policy outside the scope of its usual business, that will likely involve the unnecessary and wanton infliction of pain contrary to contemporary standards of decency (see Argument IIA, supra), and that Mr. Diaz has been prevented from challenging effectively because the lethal injection policies and procedures that were created in secret still remain in the dark (see Argument I, supra).

ARGUMENT III

NEWLY DISCOVERED EMPIRICAL EVIDENCE DEMONSTRATES THAT MR. DIAZ'S CONVICTION AND SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Mr. Diaz acknowledges that this Court has recently addressed similar claims in Rutherford v. State, 2006 Fla. LEXIS S2370 (Fla. 2006), and Rolling v. State, 2006 Fla. LEXIS S2376 (Fla. 2006). In both these cases, the Court determined (1) that the ABA Report was not "newly discovered evidence" and (2) that no relief

was warranted in either case because neither defendant alleged how any conclusion from the ABA Report would render the death sentences imposed in those cases unconstitutional. Rutherford, 2006 Fla. LEXIS S2370 at *15-*16; Rolling, 2006 Fla. LEXIS S2376 at *12.

As for the conclusion that the ABA Report does not constitute "new evidence," Mr. Diaz submits that this Court has, in the past, recognized that "reports" issued by governmental or other bodies that affect the integrity of a defendant's trial or penalty phase can constitute newly discovered evidence. See Trepal v. State, 846 So. 2d 405 (Fla. 2003) (relinquishing jurisdiction in Mr. Trepal's pending appeal in order to permit Mr. Trepal to file an amended Rule 3.850 based on the newly discovered information contained in the Department of Justice's Inspector General's Report). Trepal, 846 So. 2d at 409-10. Indeed, Mr. Mr. Diaz's case is no different from the situation in Trepal. Mr. Diaz made additional argument with regard to his claim that the A.B.A report is newly discovered evidence in pointing out to the court that the newly discovered evidence is not the individual instances of error, but the totality of the empirical data and the conclusions drawn by the committee (PC-R2. 1472, 1474, 1481-1483). At a minimum, the ABA Report should be considered newly discovered evidence.

Moreover, as noted above, the Florida Supreme Court rejected relief in both Rutherford and Rolling because in neither case did the defendant make any attempt

to tie in the ABA Report's conclusions to the particular defendant's case. In contrast, as explained in the subsequent sections of this argument, Mr. Diaz's case contains many of the same errors that were strongly criticized by the ABA Report. Thus, unlike the defendants at issue in Rutherford and Rolling, Mr. Diaz **does** make a connection between the ABA Report and his case, thus providing the critical distinction between his case and Rutherford and Rolling.

The lower court misunderstood this claim. Despite, the lower court's belief that Mr. Diaz was arguing disproportionality, Mr. Diaz was not attempting to relitigate claims which were previously disposed of during postconviction, rather, counsel was pointing out that Mr. Diaz's case exemplifies exactly what was found by the ABA study: that meritorious claims are often not considered or are rejected for arbitrary reasons such as effectiveness of counsel, timing of the claim, procedural bars, etc. In fact, in Mr. Diaz's case many claims have been procedurally barred or rejected on the merits without any discussion of the claim whatsoever. Mr. Diaz has shown how the system's flaws are demonstrated within his case.

A. INTRODUCTION

Over 30 years ago, the U.S. Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Furman v. Georgia, 408 U.S. 238, 310 (1972)(per

curiam). In Furman, the Petitioners, relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. As a result, Furman stands for the proposition most succinctly explained by Justice Stewart in his concurring opinion: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. Id. at 310.[17]

On September 17, 2006, the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team published its comprehensive report of Florida's death penalty system. See American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006 (hereinafter Report) (Attachment U). The information, analysis and ultimate conclusions contained in the ABA Report make clear that Florida's death penalty system is so seriously flawed and broken that it does not meet the constitutional requisite of being fair, reliable or accurate. Id. at iii. Who in fact gets executed in

[17] It is important to recognize that the decision in Furman did not turn upon proof of arbitrariness as to one individual claimant. Instead, the court looked at the **systemic arbitrariness**.

Florida does not depend upon the facts of the crime or the character of the defendant, but upon the flaws and defects of the capital sentencing process. Thus, "the imposition and carrying out of the death penalty in [Mr. Diaz's] case[] constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Furman, 408 U.S. at 239-40. A review of the areas identified in the report as falling short makes apparent that Florida's death penalty scheme is deficient for many of the same reasons the schemes at issue in Furman were found to be unconstitutional.

B. Florida – An Arbitrary and Capricious Death Penalty System

1. The Number of Executions

Since 1972, Florida has carried out a total of 61 executions. Between 1972 and 1999, there were 857 defendants sentenced to death. Report at 7. Statistics of the number of individuals who committed murder during that time have not been recorded. Nevertheless, it is clear that of the death sentences imposed, few are actually carried out. The percentage of murderers in Florida actually executed since 1972 is minuscule.

2. The Exonerated

In Florida, since 1972, 22 people have been exonerated and another individual has been exonerated posthumously, while 61 people have been executed. Report at iv. "Since the reinstatement of the death penalty in 1972,

Florida has led the nation in death row exonerations." Id. at 45. The staggering rate of exonerations certainly suggest that Florida's death penalty system is broken and violates the Furman promise.

While the State of Florida has recently passed legislation to allow capital defendants the opportunity to seek DNA testing,[18] most of the exonerated defendants' cases had no connection to favorable post-verdict DNA results. Yet, the State of Florida has not made any substantive or procedural improvements for those who have no DNA evidence in their case, but could show innocence through the use of other evidence. Indeed, while the State of Florida has now removed the time limitation for bringing a motion seeking DNA testing, see Fla. Stat. §925.11(1)(b)(2006); Fla. R. Crim. P. 3.853, capital postconviction defendants, must prove due diligence in bringing their claims of innocence. A system that precludes the presentation of evidence of innocence in a form other than the results of DNA testing injects arbitrariness and randomness into the process in violation of Furman.

3. Representation

a. Trial level representation.

The ABA assessment team found that there was inadequate compensation

[18] While the ABA Report on Florida notes the progress in DNA testing, it is equally clear that the other burdens and requirements will certainly cause arbitrariness in determining who is granted the opportunity to test evidence and show proof of innocence. See Report at 51-3.

for trial counsel in death penalty proceedings and that the administration of the funding and timing of counsel's ability to seek payment severely hamper obtaining qualified counsel who has adequate funding for a death penalty case. Report at iv. With the ABA Guidelines in mind, the team recommended that steps be taken to ensure the appointment of "qualified and properly compensated counsel." Id. at 174. This and the other recommendations made in the ABA Report reflect that Florida has not lived up to its obligation to minimize, if not remove, arbitrary factors from the capital sentencing process.

In Mr. Diaz's case, his right to effective representation was violated by the trial court allowing Mr. Diaz to waive his right to counsel while at the same time ordering his competency to be evaluated; moreover, the competency evaluation that was conducted failed to address the key issue of whether Mr. Diaz was competent to waive counsel. The trial transcript is replete with proof that Mr. Diaz was not competent to waive his right to an attorney (See R. 829; 841; 857; 885; 899; 900; 903-04; 916; 921; 1081-2; 1089; 1091; 1157; 1212-1214; 1224; 1241-2). Further, Mr. Diaz's counsel was ineffective at the penalty phase for failing to investigate and present substantial statutory and non-statutory mitigation (PC-R. 76-117; 172). This is not the effective representation contemplated by the Sixth Amendment.

b. Postconviction representation

The quality of Florida's capital postconviction representation system has steadily declined over the past ten years when the federal funding for resource centers was eliminated.[19] The state-funded agency responsible for representing postconviction defendants was overwhelmed with cases and was eventually separated into three regional offices with the creation of the Registry system to handle conflict and overflow cases. The Florida Legislature then eliminated one of the regional offices and sent the Registry more than 60 cases. Under the current system, at the part of the capital process at which errors are sought to be caught and corrected, qualifications to be appointed as Registry counsel are minimal, oversight is non-existent, and funding is inadequate. Id. at v. While Registry counsel are restricted in funding, the Capital Collateral Counsel (CCC) offices are not. Undoubtedly, this disparity in funding will impact the representation and arbitrarily effect the ultimate success of capital postconviction defendants in challenging their convictions and death sentences.

Because a capital defendant has no remedy when state-provided counsel either through negligence or a lack of diligence fails to provide effective representation, see Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996), Florida's capital sentencing process fails to live up to the Furman promise. As noted in the ABA Report, the performance of Registry counsel has been openly criticized, even

[19] For a more complete history of Florida's capital collateral system see Report p. 195-6.

by members of this Court. Thus, while it is well recognized by state officials in the legislative and judicial branches of government that a number of the post-conviction attorneys provided by the State are incompetent, *i.e.* some of the worst lawyering ever seen, capital defendants must accept the incompetent representation without recourse. The outcome of the post conviction process, directly linked to whether state-appointed counsel is incompetent, is purely arbitrary.

4. Issues Related to the Jury's Role in Sentencing

a. Jury Instructions.

The ABA assessment team found that capital jurors do not understand "their role or responsibilities when deciding whether to impose a death sentence." Report at vi.[20] The team recommended that Florida redraft its capital jury instructions to prevent common misconceptions that inject arbitrariness to the process, in violation of Furman. Id. at x.

b. Unanimity.

[20] Indeed, in one study, over 25 percent of interviewed Florida capital jurors considered future dangerousness, even though such a factor is not a legitimate sentencing factor under Florida law. Id. The finding that many jurors consider future dangerousness is particularly relevant in Mr. Diaz's case where two of the aggravators were based on Mr. Diaz's sentence of imprisonment at the time of the crime and a prior violent felony. In fact, the prosecutor improperly argued to the jury at sentencing that Mr. Diaz should not be allowed to live because he was likely to again escape from prison and commit violent acts in the future. This argument of future dangerousness did not address a statutory aggravating factor and was based on speculation. This was mere prediction and was designed to inject fear of future acts into the jury's sentencing deliberation. Defense counsel strenuously objected (R. 1436-37, 1439).

"Florida is now the only state in the country that allows a jury to find that aggravators exist *and* to recommend a sentence of death by a mere majority vote." State v. Steele, 921 So. 2d 538, 548-49 (Fla. 2005)(emphasis in original). The ABA Report on Florida cites a study which concluded that permitting capital sentencing recommendations by a majority vote reduces the jury's deliberation time and may diminish the thoroughness of the deliberation. Report at vi-vii. Florida precludes sentencing juries from considering residual or lingering doubt as to guilt as a mitigating factor that may warrant a life sentence. Report at 311. The coupling of a simple majority verdict with the preclusion of consideration of lingering doubt certainly add to the risk that an innocent will be sentenced to death. This is particularly true in Mr. Diaz's case where there is substantial evidence that he is not the triggerman and the jury recommended death by a recommendation of 8 to 4. The fact that Florida is the only state to have coupled these things together and also leads the nation in capital exoneration certainly provides a basis for arguing the synergistic effect of the choices made in structuring Florida's capital scheme has produced a system that "smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring).

c. Judicial Overrides.

In Florida, the judge who presides over a capital sentencing proceedings has the ability to override a jury's sentencing recommendation. Report at 31. This

Court adopted the standard to be employed when reviewing a judicial override in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). However, the Tedder standard has been the source of great debate over the years. Justice Shaw opined in 1988 that the Tedder standard had created Furman error. Combs v. State, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring). In 1989, a majority of the FSC held that the vigorousness of the Tedder standard had waxed and waned over the years. Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). A clearer confession that arbitrariness had infected the decision making process is hard to imagine.[21] Layer upon layer of arbitrary sentencing factors entirely divorced from the facts of the crime or character of the defendant have accumulated and render Florida's sentencing scheme in violation of Furman.

5. Racial and Geographic Disparities

The ABA Report relied on 3 previous studies concerning race and the death penalty as well as an analysis of current statistical discrepancies concerning race and the death penalty. In 1991, a criminal defendant in a capital case was 3.4 times more likely to receive the death penalty if the victim is white than if the victim is African American. Id. 7-8.[22] This statistic has not changed. Id. at viii. The statistics relied on in the ABA Report on Florida make clear that race is a factor in

[21] Not only members of this Court have been troubled by the jury override and this Court's erratic treatment of the Tedder standard. See Parker v. Dugger, 498 U.S. 308, 321 (1991).

[22] The victim in Mr. Diaz's case is white.

Florida's death penalty scheme. Such a factor causes the death penalty to be arbitrary and capricious. Furman, 408 U.S. at 364-66.

Likewise, geographic disparities contribute to the arbitrariness of Florida's death penalty scheme. In 2000, 20 percent of the death sentences imposed that year came from the panhandle, while in 2001, 30 percent of the death sentences imposed that year came from the panhandle. Report at 9. Thus, death sentences are significantly influenced by the county where a crime occurred. Geographic disparities clearly show that a factor unrelated to the circumstances of the crime or the character of the defendant are at work in the decision to seek and impose a death sentence, in violation of Furman.

6. Prosecutorial Misconduct

"The prosecutor plays a critical role in the criminal justice system." Report at 107. This is especially true in capital cases, where the prosecutor had "enormous discretion" in determining whether to seek the death penalty. Id. This Court regularly orders new trials in capital cases because of prosecutorial misconduct.[23] On occasion, the Court has found the prosecutorial misconduct was only sufficiently prejudicial at the penalty phase to warrant the grant of penalty

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

phase relief. Young v. State, 739 So. 2d 553 (Fla. 1999); Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Additionally, on a number of occasions, the Court has determined that the prosecutor acted improperly, but prejudice was insufficiently established to warrant relief from either the conviction or the death sentence.[24]

During his postconviction proceedings Mr. Diaz presented evidence of prosecutorial misconduct. Specifically, the State failed to disclose a memorandum in its possession indicating that it was Angel Toro, not Angel Diaz, who was the triggerperson in the Velvet Swing Lounge incident. This memorandum was not disclosed to the defense, and its exculpatory nature is evident. The undisclosed memorandum indicating that Toro was the killer further demonstrates that the State knowingly presented false testimony from Ralph Gajus that Mr. Diaz had allegedly confessed to being the shooter (R. 1121). Additionally, documents disclosed during postconviction revealed that the State Attorney's Office had a practice of editing and "cutting and pasting" reports to be turned over in discovery.

The ABA Report recommends that each prosecutor's office have written polices governing the exercise of prosecutorial discretion. Report at 125. Florida's willingness to tolerate prosecutorial misconduct violates the promise of Furman.

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[24] Guzman v. State, 2006 Fla. LEXIS 1398 (Fla. June 29, 2006); Smith v. State, 931 So. 2d 790 (Fla. 2006); Ventura v. State, 794 So. 2d 553 (Fla. 2001); Duest v. Dugger, 555 So. 2d 849 (Fla. 1990). This is not an exhaustive listing, but demonstrates the prevalence of prosecutorial misconduct in capital cases in Florida.

7. The Direct Appeal Process

This Court reviews all cases in which a death sentence is imposed to determine whether death is a proportionate penalty. However, because this Court only reviews cases "where the death penalty was not imposed in cases involving multiple co-defendants," the proportionality is skewed. Report at xxii. But in addition to this, the ABA assessment team noted a disturbing trend in this Court's proportionality review: "Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." Report at 212. The ABA Report noted "that this drop-off resulted from the Florida Supreme Court's failure to undertake comparative proportionality review in the 'meaningful and vigorous manner' it did between 1989 and 1999." ABA Report at 213. The shift in the affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends in part upon what year the appellate review was or is conducted. It is not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" Furman, 408 U.S. at 313 (White, J., concurring).

Proportionality of a co-defendant was at issue in Mr. Diaz's case. On direct appeal this Court rejected Mr. Diaz's proportionality argument based on its

disagreement that there was insufficient evidence that Mr. Diaz was the shooter. Diaz v. State, 513 So. 2d 1045 (Fla. 1987). Substantial evidence exists that Mr. Diaz's co-defendant, Angel Toro is the actual triggerman. Newly discovered evidence and evidence the State failed to disclose impacts the Florida Supreme Court's proportionality discussion. (See Argument V); See Diaz v. State, 513 So. 2d at 1049 (Barkett, J., specially concurring) ("if one believed that this defendant was not the actual triggerman, the proportionality argument would have merit").

8. Retroactivity

The U.S. Supreme Court has explained that its decisions finding ineffective assistance in Rompilla v. Beard, Wiggins v. Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), were all dictated by its decision in Strickland v. Washington, 466 U.S. 668 (1984) and therefore each of those decisions, while issuing between 2000 and 2005, actually date back to Strickland. Between 1984 and 2000, this Court addressed ineffective assistance of counsel claims under Strickland in virtually every capital post conviction case that it heard. It is clear from analyzing those opinions that this Court did not read Strickland the way it was read and applied in Rompilla, Wiggins, and Williams v. Taylor. This is exactly what happened in Mr. Diaz's case. [25] Yet, this Court has refused to re-

[25] During Mr. Diaz's appeal to the Florida Supreme Court regarding the lower court's denial of postconviction relief following a limited evidentiary hearing and petition for state habeas corpus relief, this Court failed to provide meaningful

examine its decisions predicated upon its understanding of the meaning of Strickland.[26] In essence, this Court has stripped those death row inmates, including Mr. Diaz, of their Sixth Amendment rights as defined by the U.S. Supreme Court. Certainly, the manner in which the retroactivity rules currently operate has as at least as much to do with who gets executed and who does not as do the facts of the crime and the character of the defendant. This Court's application of its retroactivity rules is arbitrary and violates Furman.

9. Procedural Default

This Court frequently relies upon procedural defaults to create procedural bars that 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). Certainly, the refusal to consider issues that go towards the reliability of the conviction and/or the sentence of death increase the risk that the innocent or the legally undeserving will be executed. It decreases 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).

10. Clemency

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appellate review in light of its later acknowledgement that it failed to properly apply Strickland v. Washington, 466 U.S. 668 (1984), to Mr. Diaz's case. See Stephens v. State, 748 So. 2d 1028 (Fla. 1999) (citing Diaz v. Dugger as a case where "this Court has been inconsistent in its approach to the standard of review of ineffective assistance of counsel claims")

[26] Diaz v. Moore, 797 So. 2d. 588 (Fla. 2001).

Clemency is a critical stage of the death penalty scheme. It is the only stage at which factors like lingering doubt of innocence, remorse, rehabilitation, racial and geographic influences and factors that the legal system does not correct can be considered. See Herrera v. Collins, 506 U.S. 390, 412 (1993). However, the assessment team found Florida's clemency process to be severely lacking and entirely arbitrary because there are no rules or guidelines delineating factors for the Board to consider regarding clemency. Report at vii.

11. Politics

Undoubtedly politics is a factor that causes arbitrariness in Florida's death penalty scheme. In fact, the state assessment team 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 this 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.

12. Mental Disabilities

While Florida has recently excluded individuals suffering from mental retardation from the death penalty, it has not extended its logic to those suffering from severe mental disabilities. Id. at xi. The distinction between the mentally

retarded and the mentally ill and corresponding culpability of those inflicted with each condition is arbitrary.[27] Furthermore, the legislation and rule governing mental retardation procedures makes an arbitrary distinction between those individuals whose cases are final and those who are not. See Fla. Stat. §921.137; Fla. R. Crim. P. 3.203. The ABA assessment team also criticized the burden of proof imposed on capital defendants and recommended that the State be required to disprove a defendant's substantial showing that he is mentally retarded. Report at xxxviii. The imposition of the burden of proof on the defendant will undoubtedly cause the decision as to who gets executed to turn on arbitrary factors, such as whether records demonstrating onset before age 18 exist, etc.

13. Crime Laboratories and Medical Examiner's Offices

The ABA assessment team found that: "The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to the lack of proper training and supervision, the lack of testing procedures and the failures to follow such procedures, and inadequate funding." Id at 83. The result of these problems is errors that go unchallenged and uncorrected before the jury, yet another factor unrelated to the circumstances of the crime or character of the defendant that injects arbitrariness into Florida's death penalty

[27] During his postconviction proceedings, Mr. Diaz was found to be mentally ill by three mental health experts who also found that Mr. Diaz met the criteria for the statutory mental health mitigators at the time of the offense. See Argument IV.

scheme in violation of Furman.

C. Conclusion.

When all of the arbitrary factors identified herein and more fully in the ABA Report on Florida (incorporated herein by specific reference) that are present in the Florida death penalty scheme are considered together in analyzing the system's ability to deliver and/or produce a reliable result, the conclusion is inescapable: "it smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring). Florida's process cannot "assure consistency, fairness, and rationality" and it cannot "assure that sentences of death will not be "wantonly" or "freakishly" imposed." Proffitt v. Florida, 428 U.S. 242, 259-60 (1976). Accordingly, Florida's death penalty scheme stands in violation of the Eighth Amendment. Mr. Diaz's case encapsulates all that is wrong with Florida's death penalty scheme.

ARGUMENT IV

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

Mr. Diaz has suffered continuously from severe mental illness since before the time of the crime for which he was convicted and sentenced to death. He has been diagnosed with suffering from borderline personality disorder and narcissistic personality disorder (Supp. RII. 89) as well as schizoid personality disorder. He

falls within the class of persons who are so much less morally culpable and deterrable than the "average murderer" as to be categorically excluded from being eligible for the death penalty, no matter how heinous the crime. Cf. Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty is unconstitutional for defendants under 18 at the time of the crime); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the death penalty is unconstitutional for mentally retarded defendants).

The American Bar Association ("ABA") recently issued Resolution 122A, which recommends that each jurisdiction that imposes capital punishment implement policies and procedures to prevent severely mentally ill defendants from being executed. Resolution 122A, approved August 8, 2006, available at http://www.abanet.org/leadership/2006/annual/DAILY_JOURNAL.pdf (Attachment V). Given his severe mental illness, which Mr. Diaz's counsel demonstrated at a 1991 evidentiary hearing through expert witnesses (PC-R. at), Mr. Diaz is constitutionally protected from execution because the death penalty is an unconstitutionally excessive punishment for Mr. Diaz for the reasons delineated in Atkins and Simmons.

In Gregg v. Georgia, 428 U.S. 152, 183 (1976), the U.S. Supreme Court identified retribution and deterrence of capital crimes by prospective offenders as the social purposes served by the death penalty. The Atkins Court ultimately

found that neither justification for the death penalty was served by its imposition on mentally retarded individuals. See also Simmons. The reasoning in Atkins and Simmons applies with equal force to severely mentally ill offenders such as Mr. Diaz, as some judges across the county have begun to recognize.[28] Mr. Diaz's severe mental illness causes him to suffer from the very same deficits in reasoning, judgment, and control of impulses that lessen his culpability and render the penological justification of retribution ineffective against him. Likewise, the justification of deterrence is not served by executing severely mentally ill individuals, as severe mental illness can impair an individual's ability to control impulses or understand long-term consequences.

At his 1991 evidentiary hearing, Mr. Diaz presented evidence of his severe mental illness through the testimony of several experts. Dr. Marina concluded that Mr. Diaz "is suffering from two major mental disorders; Borderline Personality Disorder and Narcissistic Personality Disorder" (Supp. RII. 89. Mr. Diaz's "psycho-social history, through previous psychological and psychiatric evaluations and through his need for medication and hospitalization and psychiatric placements in the past all indicate a pervasive pattern of instability of self image, interpersonal relationships, and mood" (Supp. RII. 89-90). Although Mr. Diaz has low average

[28] State v. Ketterer, 855 N.E.2d 48 (Ohio 2006)(Stratton, J., concurring.) See also Corcoran v. State, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting), State v. Scott, 748 N.E.2d 11 (Ohio 2001) (Pfeifer, J., dissenting).

intelligence, his significantly different scores on the subtests of the Wechsler Adult Intelligence Scale led Dr. Marina to conclude, "this protocol presents a prepsychotic personality disorder in which his temporary loss of reality does not allow him to use his full cognitive abilities" (Supp. RII. 88). Dr. Marina concluded that at the time of the offense, Mr. Diaz's capacity to conform his conduct to the requirements of law was substantially impaired and Mr. Diaz suffered from an extreme mental or emotional disturbance at the time of the offense (Id. at 977).

Additionally, Dr. Francis concluded that Mr. Diaz suffered from schizoid personality disorder and organic personality disorder (PC-R. 428). Dr. Francis' report details Mr. Diaz's mental illness and finds that "he had a disturbance that mentally and emotionally was extreme, had a capacity to conform conduct to requirements of law that was greatly diminished and substantially impaired …his functioning throughout his life, at the time of the offense, and at trial was effected and impaired by his mental illness. (Supp. RII. 113). Furthermore, Dr. Larson diagnosed Mr. Diaz as suffering from borderline personality disorder (Supp. RII. 640).

The lower court relies on Patton v. State 878 So. 2d 368 (Fla. 2004) in finding that "personality disorders are not mental illnesses." Both the court and the State improperly read Patton. The decisions cited in Patton, do not broadly cover "personality disorders," but specifically refer to antisocial personality disorder.

Mr. Diaz has been diagnosed with borderline, narcissistic and more importantly schizoid personality disorder, which is characterized by temporary breaks with reality. The doctors who testified during Mr. Diaz's postconviction evidentiary hearing, found that he was mentally ill.

Capital punishment's twin goals of retribution and deterrence would not be served by executing Mr. Diaz. The extensive and compelling evidence of Mr. Diaz's severe mental illness presented at his 2001 evidentiary hearing demonstrates that his significant impairments in reasoning, judgment, and understanding of consequences puts him in the same class as mentally retarded and juvenile offenders in terms of diminished culpability. Furthermore, because severely mentally ill defendants, mentally retarded defendants, and juvenile defendants are similarly situated with respect to the goals served by capital punishment, and because there is no rational basis for distinguishing severely mentally ill defendants from mentally retarded and juvenile defendants, executing Mr. Diaz would not comport with equal protection under the United States and Florida Constitutions. Mr. Diaz's severe mental illness renders him ineligible for the death penalty under the Eighth Amendment and the U.S. Supreme Court's reasoning in Atkins and Roper. Relief is proper.

ARGUMENT V

NEWLY-DISCOVERED EVIDENCE ESTABLISHES THAT MR. DIAZ'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A claim based on newly discovered evidence "if properly alleged...[is] not subject to the time limitations of Florida Rule of Criminal Procedure 3.850." Johnson v. State, 647 So.2d 106, 110 (Fla. 1994). In order to constitute "newly discovered evidence," Mr. Diaz bears the burden of proving the evidence was not discoverable through due diligence and that, if discovered and introduced at trial, would have "probably produced an acquittal." Swafford v. State, 679 So. 2d 736 (Fla. 1996). Contrary to the lower court's order, the evidence newly discovered by Mr. Diaz easily meets both threshold requirements.

Mr. Diaz and codefendant, Angel Toro, were originally indicted on January 25, 1984 for first-degree murder of the bar manager, armed robbery of the bar and customers, and kidnapping of the persons confined in the bathrooms, as well as the use of firearms in committing those felonies. By the time Mr. Diaz's case went to trial, the codefendant, Toro, had accepted a plea offer to second-degree murder and received a life sentence.

At Mr. Diaz's trial the only witness testifying for the state who claimed Mr. Diaz was the shooter was a jailhouse snitch named Ralph Gajus. Interestingly, Mr.

Gajus only surfaced as a witness a week before trial. Mr. Gajus testified that he was in the Dade County Jail at the same time as Mr. Diaz and their cells were located across from each other. During his testimony, Mr. Gajus indicated that Mr. Diaz was able to speak English very well (R. 1115). Gajus specifically testified:

> I don't recall the name of the bar, but [Mr. Diaz] was at a bar in the Southwest section, and I believe it was three of them, and he was sitting, he indicated, like in front of a stage at the bar, and they were committing a robbery, and that while committing the robbery, he, someone came from the back of the bar, and it was either he or him that would die so he went (indicating), and the guy - - he indicated that he shot the man.
>
> Q: Where did he indicate he shot the man?
>
> A: In the chest.
>
> Q. Did he ever come out and say to you in the words 'I shot the man in the chest'?
>
> A: No, he did not.
>
> Q: You were inferring that from his indications?
>
> A: Yes.

(R. 1123). Mr. Gajus further indicated what Mr. Diaz allegedly told him:

> He said there was a robbery going on before the man came out. They were robbing the people before he came out. He indicated moving by the cash register. Then a man came out from behind, and he had a firearm, and, then that's what -- he indicated that he had to shoot or the other guy would shoot.

(R. 1124).

Several witnesses testified that Mr. Diaz was not the triggerman, including the former girlfriend of Mr. Diaz, Candace Braun (R. 881). Two additional state witnesses, Vincent Pardinas and Norman Bulenda, confirmed that Mr. Diaz was not and could not have been the shooter. Based on the testimony of Mr. Pardinas and Mr. Bulenda, Mr. Diaz was not the man positioned near the office entrance and thus was not the shooter. (R. 947-948; 950-951; 953-954; 964-967)(R. 998).

Despite the conflicting testimony, Mr. Gajus' testimony left the jury to believe that Mr. Diaz had confessed to being the triggerman. However, Mr. Gajus' testimony was untruthful. On November 19, 2006, counsel's investigator interviewed Ralph Gajus, the jailhouse snitch that testified against Mr. Diaz, and Mr. Gajus has now provided the following sworn affidavit:

> I, Ralph Gajus, being first duly sworn, depose and say that:
>
> 1. In 1984 I was inmate in the Dade County Jail awaiting trial on a first degree murder charge. I was in the jail with Angel Diaz for 6 months. We were on the 6th floor on a wing with 6 cells. Angel Diaz was in the cell directly across from me and we would speak to each other across the hall from each other.
>
> 2. Angel Diaz spoke English with a very thick accent and used simple words. I sometimes had a hard time understanding Angel Diaz. I did not speak any Spanish. We would communicate by using our hands and with Angel Diaz's broken English. We also would write notes to each other.
>
> 3. We would always talk about each other cases. I told

him about mine and he always talked about his. Angel Diaz told me about a robbery at a bar with two other guys and amid the commotion a man was shot. Angel Diaz acted out the shooting using his hands. **I do not know what really happened or whether Angel Diaz did the shooting.** Angel Diaz never told me that he shot anyone.

4. During this time, Angel Diaz and I also talked about planning an escape. We passed notes among the inmates to plan the escape. Before the escape took place I read a note from Angel Diaz to another inmate and I believed I was going to be in danger during the escape. I asked the jail guards to move me and told the jail about the escape plan. I was angry with Angel Diaz because I found out they were not going to take me and I believed I was in danger.

5. After I was moved and told the jail about the escape Detective Smith and another officer came to talk to me about Angel Diaz. When the detective spoke to me about Angel Diaz's case I asked them to help me out with my case. They told me they would make a statement for me to the Judge.

6. I testified at Angel Diaz's trial that Angel Diaz acted out the
shooting and that he shot the man. I testified that Angel Diaz was the shooter. **At that time I testified I was unsure who really was the shooter because Angel Diaz never told me and when he acted out the shooting it was very unclear.** I testified that I believed that Angel Diaz was the shooter because I was angry about the escape plan and I believed that the police were going to help me with my case.

7. I plead guilty to second degree murder in August or September 1985 and was sentenced in 1986. I recall that Detective Smith testified at my sentencing that I helped with the escape and that I helped in their case against Angel Diaz. I was sentenced to 20 years with a three year

mandatory.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Ralph Gajus

(Attachment A to Motion to Vacate Judgment of Convict+and Sentence filed on November 27, 2006). Based on his affidavit, Mr. Gajus' now not only admits that Mr. Diaz never told him that he was the shooter, he further states that at the time he testified he was unsure who the shooter in fact was, but testified that it was Mr. Diaz because he was angry with Mr. Diaz and wanted to gain favor from the State in his own case. Mr. Gajus further testified at trial that he plead guilty to his own case in August 1985 and he was not promised anything by the State in exchange for his testimony (R. 1128-29). Mr. Gajus' sworn affidavit reveals that he was not sentenced until 1986 and Detective Gregory Smith testified at his sentencing to the assistance Gajus provided in Diaz's case and in other cases involving an escape attempt from the jail.[29]

The undersigned's investigator, nor the undersigned did not know about the

[29] The extent of the assistance received by Mr. Gajus is still unknown. A recent article published in the Miami Herald, reveals that judges and prosecutors in Miami-Dade County "have had official court records altered and kept secret dockets to disguise what was actually happening in some court cases." See Dan Christensen and Patrick Danner, *Dockets doctored to shield snitches*, Miami Herald, November 18, 2006. (PC-R2.). Mr. Diaz has been prevented from fully investigating what has been characterized as "established practice" due to the denial of access to public records.

substance of what Mr. Gajus would say until November 19, 2006, the day of the affidavit. Two investigators for the undersigned previously visited Mr. Gajus on March 27, 2006. At that time, Mr. Gajus did not provide any information that his account at trial was untrue. Nor did any of Mr. Diaz's previous counsel and/or investigators know that Mr. Gajus possessed information which contradicts his trial testimony.

The State claimed below that Mr. Gajus' admission was not newly discovered evidence because the same information was pled in Mr. Diaz's initial Rule 3.850 motion in 1989. Mr. Diaz initial motion includes the following conclusory sentence: "Mr. Gajus has informed current counsel that Mr. Diaz never admitted complicity to him and that Mr. Diaz's English was very, very poor." (PCR-118). This vague sentence was pled within a Brady claim, and the trial court determined that the claim was insufficient. Mr. Diaz argued to the lower court that the basis of this statement was essentially no different than what Gajus said at trial; Gajus testified that Mr. Diaz did not admit to being the shooter, but that Gajus inferred he was the shooter based on his actions. The distinction is that Mr. Gajus now says even that inference was a lie.

At the time of filing his initial motion to vacate in October 1989, Mr. Diaz was represented by the Capital Collateral Representative. His attorney at that time was Billy Nolas. Mr. Nolas confirmed that he did send someone to speak to Mr.

Gajus in 1989, but Mr. Gajus did not admit that he was untruthful at trial when he testified that he inferred that Mr. Diaz shot the man. (PC-R2. Attachment B to Motion to Vacate Judgment of Conviction and Sentence filed on November 27, 2006). Mr. Nolas reviewed the recently obtained affidavit from Mr. Gajus, and confirmed that Gajus' admission is substantially different than what he told CCR in 1989. Mr. Nolas further stated "it now appears that he admits he did not know who the triggerman was at the time he testified, despite testifying that Mr. Diaz was the shooter. I did not have this information." (Id.). Likewise, Todd Scher, who represented Mr. Diaz from 1992-2005, did not know of this new information, despite attempts made to interview Gajus during that time. (PC-R2. Attachment C to Motion to Vacate Judgment of Conviction and Sentence filed on November 27, 2006).

To the extent the State continues to argue that Gajus' admission is not newly discovered evidence, the lower court rejected the argument stating "nothing new is alleged **other than the recantation of Gajus' inference that Diaz was the shooter**." (Order at 4)(emphasis added). Thus, the court determined that Gajus' admission is new evidence. The court did not further address Mr. Diaz's diligence in discovering the new evidence. If the State contends that Mr. Diaz's diligence is in question, Mr. Diaz is entitled to an evidentiary hearing.

Alone and cumulatively, Mr. Gajus' admission that he was untruthful when

he testified clearly establishes a reasonable probability of an acquittal. Jones v. State, 591 So. 2d 911 (Fla. 1992). The newly discovered evidence standard is the same whether it pertains to guilt/innocence or penalty: would the new evidence probably result in a sentence of life rather than death? Id. Alone and cumulatively, it certainly establishes a reasonable basis for the jury to recommend life. This is particularly so given the jury's 8-4 recommendation.

The lower court concludes that the newly discovered evidence of Ralph Gajus' untruthfulness at trial would not have made a difference to the final result. The court incorrectly focuses on its own sentencing order[30] and further fails to cite

[30] To the extent the lower court relied on the sentencing order to support its conclusion that Gajus' admission would not have effected the final result, it is important to note that the sentencing order was written by the State. These were not the independent findings of the trial court. During her oral sentence, Judge Donner made no findings about aggravating and mitigating circumstances. Rather, Judge Donner stated that the jury had the opportunity to consider the aggravating and mitigating factors before making its recommendation, and that the jury and the Court considered the fact that Mr. Diaz was previously convicted of a prior crime of violence, and considered that the crimes were committed for pecuniary gain (R. 1467-69). Judge Donner did not find that these aggravating circumstances existed in this case, but only detailed the information that the jury had been given to consider. Judge Donner thereafter sentenced Mr. Diaz to death.

At no time during oral pronouncement did Judge Donner make actual findings regarding aggravating circumstances. At no time during oral pronouncement did Judge Donner mention, much less discuss, the mitigating evidence presented by Mr. Diaz. From Judge Donner's silence as to the mitigating evidence presented by Mr. Diaz, the sentencing order contains eight (8) legal-size pages of detailed discussion about mitigating factors. See R. 323-330. The discussion about mitigating factors contains lengthy legal discussion and factual determinations, none of which were mentioned during the oral pronouncement of sentence. Most incredibly, the State inserted a passage into the sentencing order

to the portion of its order that refers to Gajus' testimony. In it's sentencing order the trial court pointed out that the evidence was conflicting as to who was the actual triggerman, but confirmed that there was evidence from Ralph Gajus, "that the defendant was, in fact, the shooter" (R. 325). This Court also relied on the testimony of Ralph Gajus. See Diaz v. State, 513 So. 2d 1045, 1048 (Fla. 1987)(indicating that Gajus "provided evidence that Diaz shot the victim.")

The proper focus for determining whether Mr. Diaz has established a reasonable probability of an acquittal, based on Mr. Gajus' admission that his inference at trial was a lie, must concentrate on whether it would have made a difference to the jury. In reaching its conclusion that Mr. Gajus' admission would not effect the final result, the lower court only mentions the jury in what seems to be an afterthought. The court states in its order: "Given that three witnesses testified that Mr. Diaz was not the shooter, it cannot be said that Gajus' testimony that he inferred Diaz was the shooter was of any consequence." (Order at 7). If

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concerning the disparate treatment received by co-defendant Toro to the effect that "[t]he Court is satisfied that the disparate treatment of the co-defendant has been sufficiently explained by the written proffer submitted by [Assistant State Attorney] John M. Hogan" (R. 327). The order further included that the State's proffer "is specifically adopted by the Court and made a part of this Order" (R. 327). This was not mentioned by Judge Donner in her oral pronouncement of sentence. This is not a case where the trial court made the necessary findings, weighed the appropriate aggravators and mitigators, made such pronouncements orally, and then asked the State to memorialize those findings in writing. Here, the Court's oral pronouncement made no findings at all. That task was left to the State.

Mr. Gajus' testimony was of no consequence, why did the State present him as a witness? If his testimony was of no consequence, why did the jury request his testimony during deliberations? The jury requested the "entire testimony" of witnesses Candy Braun and Ralph Gajus, but the court refused to furnish it. The court replied that the jury must rely on its recollection (R. 1329). Depsite the lower court's opinion that the "jury was apt to believe the three witnesses who testified consistently rather than Gajus," obviously the jury was concerned by the testimony of Mr. Gajus.

Furthermore, the court failed to conduct a cumulative analysis. Instead the court stated: "All of the other allegations in Mr. Diaz's motion stem from information known at least since the first appeal of this case in 1986." However, Mr. Diaz specifically argued in determining whether there is a reasonable probability of an acquittal, either at the guilt or penalty phase, Mr. Diaz's claim must be evaluated cumulatively with his previously presented claims. See Strickler v. Green, 527 U.S. 263 (1999); Lightbourne v. State; Young v. State. Assuming, arguendo, that Gajus' admission that he was untruthful at trial does not rule out Mr. Diaz's conviction for First Degree Murder, he is still entitled to relief from the death sentence imposed.

The facts of this claim must be analyzed in light of information known but not disclosed by the State with respect to whether Mr. Diaz was the triggerman,

including information in its possession which supported the theory that it was Angel Toro, not Angel Diaz, who was the triggerman in the Velvet Swing Lounge incident. The undisclosed memorandum indicating that Toro was the killer further demonstrates that the State knowingly presented false testimony from Ralph Gajus that Mr. Diaz had allegedly confessed to being the shooter (R. 1121). The jury never heard the considerable and compelling evidence that was obviously exculpatory as to Mr. Diaz.

Evidence that Mr. Gajus could not testify that Mr. Diaz was the shooter must be considered with the other evidence of mitigation presented at trial and at Mr. Diaz's postconviction evidentiary hearing. The evidence presented in post-conviction from lay witnesses and mental health experts established numerous mitigating circumstances. The evidence established that at the time of the offense Mr. Diaz was suffering from an extreme emotional disturbance. See Fla. Stat. §921.141(6)(b). The evidence established that at the time of the offense, Mr. Diaz's capacity to conform his conduct to the requirements of law was impaired. See Fla. Stat. §921.141(6)(f). The evidence established that Mr. Diaz was abused as a child, a recognized nonstatutory mitigating factor, see Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990), and had a history of severe alcohol and drug abuse, another recognized nonstatutory mitigating factor, see Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990).

At his 1991 evidentiary hearing, Mr. Diaz presented testimony from family members and mental health experts. Mr. Diaz's two sisters and a cousin testified (Supp. RII. 702-730, 731-62, 763-768). These witnesses described Mr. Diaz's alcoholic abusive father who prayed to the devil (Id. at 742-43), and who beat the mother and children until they had to lock themselves in a room to wait for the father to calm down (Id. at 734-35). As a child, Mr. Diaz would lock himself in his room and cry because he could not protect the younger children (Id. at 706). The father sexually abused the female children (Id. at 708, 732-34). The father threatened the mother and children with a machete (Id. at 709-10). The children began receiving psychiatric treatment at young ages because of this abuse (Id. at 710-11, 7426). All of the children's adult lives have been damaged by the childhood abuse (Id. at 712-14, 742). Mr. Diaz was especially affected by the abuse because he was the oldest and felt he should protect the younger children and because he was very close to his mother and tried to protect her (Id. at 714-15, 740). The mitigating factors established by the testimony could not have been ignored by the jury and judge.

The lower court's order finds that the newly discovered evidence would not have effected the "final result" in large part because the court found 4 aggravating circumstances which were affirmed on direct appeal. This analysis does not take into consideration the totality of the case. Nor does it consider Mr. Diaz's previous

claims that counsel was ineffective for failing to challenge the aggravating circumstances at trial (R. 269-71).

Even without the evidence that Gajus was untruthful and not credible and absent the abundant mitigation now known, Mr. Diaz's penalty phase jury recommended death by a margin of only 8-4. There is no doubt that the new evidence of Mr. Gajus' untruthfulness, considered in conjunction with Mr. Diaz's claims in his initial Rule 3.850 motion and the evidence at trial, would have swayed two more jurors to vote for life.

This Court must also consider that on direct appeal, the Florida Supreme Court found that the aggravating factor that Mr. Diaz created a great risk of danger to many persons was not supported by the facts of this case, and thus struck it. Diaz v. State, 513 So. 2d 1045, 1048-49 (1987). Not only was the jury tainted by this improper aggravating circumstance, but they were also tainted by the untruthful testimony of Ralph Gajus. When the proper analysis is conducted, Mr. Diaz must be afforded a trial that is a true adversarial testing within the meaning of the constitutional guarantee.

In Mr. Diaz's case, not only he is not the shooter, but the person who actually pulled the trigger, co-defendant Angel Toro, received a plea to second-

degree murder and a life sentence.[31] The jury was never told about Toro's disparate treatment.[32] Based on the newly discovered evidence that the only witness indicating Mr. Diaz was the shooter now states that Mr. Diaz never told him he was the shooter and despite Mr. Diaz's actions describing the shooting, he did not know who the shooter was when he testified, this Court must collaterally review the lesser sentence of the co-defendant, the actual triggerman. See Scott v. Dugger, 604 So.2d 465, 469 (Fla. 1992). It cannot be said that Mr. Diaz was more culpable than his co-defendant. Even if it can be said that they are equally culpable, Mr. Diaz's is entitled to a life sentence.

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[31] Mr. Toro is currently challenging the validity of his plea. In November 2005, Mr. Toro filed a motion to vacate pursuant to Rule 3.850. (See Attachment D to Motion to Vacate Judgment of Conviction and Sentence filed on November 27, 2006). His claims are now on appeal to the Third District Court of Appeal. Based on this motion and pending appeal, the final disposition of Mr. Toro's case is yet uncertain.

[32] After the State rested during the penalty phase, trial counsel requested the Court take judicial notice of Toro's disparate sentence (R. 1408). The State responded, that it would present rebuttal evidence, through Assistant State Attorney Hogan, to show why the co-defendant was treated differently. After speaking to Hogan, trial counsel withdrew his request (R. 1409). However, at the close of judicial sentencing, the state still indicated that it needed to put reasons on the record for the disparate treatment between Mr. Diaz and his co-defendant. The Court suggested that this be done in a proffer. Trial counsel made no objection (R. 1470-1). Thereafter, a written stipulation was submitted by the State's attorney explaining in detail Assistant State Attorney Hogan's reasons why Angel Toro was offered a reduced charge and Angel Diaz was prosecuted to the ultimate punishment (R. 310-13). There was no cross-examination of Mr. Hogan. There was no adversarial testing of his proffer. There is no indication that he was even under oath. The proffer is full of hearsay, personal opinion and conjecture. The improper proffer did not address any of the circumstances of the crime, but only past violent acts and escapes and implied a risk of future violence.

Although noting that a co-defendant's life sentence is a relevant proportionality consideration if the co-defendant is the more culpable actor, this Court rejected Mr. Diaz's arguments. Diaz v. State, 513 So. 2d 1045, 1049 (Fla. 1989). In a special concurrence, Justice Barkett noted, however, "**if one believed that this defendant was not the actual triggerman, the proportionality argument would have merit**." Id. (emphasis added). Ralph Gajus was an important witness, as he provided the only evidence on behalf of the prosecution which arguably went to establishing that Mr. Diaz was the shooter. Based on the affidavit of Mr. Gajus, there is no longer any evidence indicating that Mr. Diaz was the shooter. In light of these new facts, this Court's proportionality analysis is clearly impacted.

Because the files and records do not conclusively refute this claim, Mr. Diaz is entitled to an evidentiary hearing and relief thereafter. In light of the totality of the record as it now stands, the inescapable conclusion is that Mr. Diaz is entitled to, at a minimum, a resentencing proceeding.

CONCLUSION

In light of the foregoing arguments, Mr. Diaz submits that he is entitled to have the lower court’s order reversed and his case remanded to the circuit court for full public records disclosure and an evidentiary hearing on his claims. Based on his claims for relief, Mr. Diaz is entitled to a new trial and/or sentencing

proceeding. Finally, Mr. Diaz submits that he should not be executed in a manner that constitutes cruel and unusual punishment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail and United States Mail to Sandra Jaggard, Assistant Attorney General, 444 Brickell Ave., Suite 650 Miami, Florida 33131 this ___ day of _____ 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition is typed in Times New Roman 14 point font, in compliance with Fla. R. App. P. 9.210(a)(2).

_____
SUZANNE MYERS KEFFER