**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. _____**

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**TERRY MELVIN SIMS,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA**

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# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

References to the trial and post-conviction records are as follows:

| | |
|---|---|
| Trial: | (Tr.R. ___) |
| Post-conviction: | (1st PCR. ___) |
| October, 1999: | (2nd PCR ___) |
| February, 2000 | |
| *Huff* Hearing: | (*Huff* ___) |
| Evidentiary Hearing: | (T___) |

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## INTRODUCTION

*Argument I:* The truth was not told at Mr. Sims' trial and sentencing, and he was wrongfully convicted and sentenced to death. If the truth is told at a re-trial, Mr. Sims would be acquitted. The cost of a re-trial is insignificant when compared with the alternative – government execution of an innocent person.[1]

Mr. Sims was wrongly convicted in the same way that *most* innocent capital

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[1] The death penalty machinery in this country is not infallible–innocent persons by the scores end up on death row. The now irrefutable evidence of this horror:

(a.) led the Republican Governor of the State of Illinois (a strong proponent of capital punishment) to place a moratorium on executions until a panel can determine whether the risk of executing innocent persons can be eliminated. N.Y. Times, February 6, 2000; Tallahassee Democrat, February 13, 2000 (Appendix A);

(b.) led to the February 11, 2000, introduction of the Federal "Innocence Protection Act," which "offers a range of solutions to rectify wrongful convictions and prevent further injustices from occurring." (Appendix B); and

(c.) led the "certainly concerned" president of the United States seriously to consider Senator Russ Feingold's request that the federal government not execute any federally death-sentenced persons. AP, February 4, 2000 (Appendix A).

This is not the atmosphere in the executive and legislative offices in Tallahassee. "In Florida ... 20 wrongful convictions resulted in inmates being sent to death row – the most in the nation. [Yet l]awmakers in Florida recently enacted a so-called fast-track system that shortens times for appeals for inmates sentenced to death." (Appendix A).

defendants are: the perjured testimony of co-defendants.[2] The lower court found that Petitioner had satisfied the standard in this State for consideration of "newly discovered evidence" of innocence with respect to a perjurious co-defendant, but denied relief by holding that this newly discovered evidence would not be admissible

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[2] During the evidentiary hearing held below, Professor Michael Radelet testified about problems which have arisen with executions by lethal injection, and his study of such "botched" executions was introduced. *See* Defendant's Exhibit 2. The State cross-examined Professor Radelet regarding another of his scholarly works, his study of innocent persons who had been sentenced to death, *see* Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan L. Rev. 21 (1987)(hereinafter "Miscarriages of Justice"), which was then introduced into evidence. *See* Appendix C, hereto; *see, also*, *Herrera v. Collins*, 113 S.Ct. 853, n. 15 (1992)(citing "Miscarriages of Justice," and citing Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988) [also introduced below]); *Callins v. Collins*, 114 S.Ct. 1127, 1138, n. 8 (1994)(Blackmun, J., dissenting from the denial of certiorari)(citing "Miscarriages of Justice" in support of finding that "innocent persons have been executed").

In "Miscarriages of Justice," the authors determined that *the most frequent* reason for the conviction of an innocent person is perjury: "*perjury by prosecution witnesses* (117 cases) is twice as frequent a cause of error as the next most important factors (eyewitness testimony, in 56 cases, and false or coerced confessions, in 49 cases)." App. C, note 184 (emphasis added). And,

> "[p]otentially capital cases tend, more than other felony cases, to lack eyewitnesses except for those who are or might be considered as accomplices. **The arrest of accomplices creates a greater incentive for perjury in this type of crime**" because of the risk of a death sentence.

*Id.* (emphasis added). This phenomenon readily explains the testimony of the chief witnesses against Mr. Sims, the co-defendants, Halsell and Baldree.

on re-trial. This was error, the evidence *would* be admitted on re-trial, and the record as a whole provides no confidence that the Petitioner is guilty. *State v. Gunsby*, 670 So.2d 920 (Fla. 1996).

*Argument II*: Mr. Sims was sentenced to death by judicial electrocution. Tr.R. 1089. That is the only lawful sentence that can be applied to him. The clearly established *substantive* law of the State of Florida at the time of the crime for which Mr. Sims was wrongly convicted, and at the time of his conviction and sentencing, required that Mr. Sims be executed by judicial electrocution, if at all. *See* Art. X, § 9, Fla. Const.; *Washington v. Dowling*, 92 Fla. 601,109 So. 588 (Fla. 1926); *Ex parte Browne*, 93 Fla. 332, 111 So. 518 (Fla. 1927). Florida law also provided that if the death penalty in a case is declared unconstitutional, as Mr. Sims's death sentence would be were a challenge to judicial electrocution finally considered, the sentence must be reduced to life. § 775.082, Fla. Stat. (1981).

Throughout the entire history of this case, Florida substantive law provided that a statutory change in a method execution could not be applied retroactively as punishment for a crime committed before the change in law. *Washington*; *Browne, supra*. The State and lower court argue that a recent amendment to Article I, section 17 of the Florida Constitution (hereinafter "revised section 17") changed that aspect of Florida law. The validity of revised section 17 is a matter currently pending before

this Court, and until that issue is decided, the amendment cannot be applied to Mr. Sims. In fact, the application of revised section 17 to this case, raises serious questions about the amendment's validity. If the amendment to section 17 is upheld, or if this Court overrules *Washington* and *Browne*, *supra*, that change would unconstitutionally alter Mr. Sims's rights in violation of the Due Process Clause of the Fourteenth Amendment, and the Ex Post Facto Clause of Article I, section 10, United States Constitution.

*Argument III*: Appellant had to prepare this lethal injection challenge in the dark, and conduct the hearing without preparation. DOC concealed the specifics of critical matters about its proposed lethal injection methods prior to filing of this postconviction motion, and what specifics were learned had to be drawn out of DOC-supplied witnesses during the hearing itself. Such slipshod review of an issue of such fundamental importance as the method by which the state intends to take a life cannot be considered sufficient.

During the hearing appellant sought to introduce testimony that physician and physician assistant participation in a lethal injection was contrary to their respective codes of ethics, but the trial court sustained the state's objection, and refused to permit its introduction. The proffered testimony showed these professionals are in fact precluded from such participation. This evidence is quite relevant to the issues

before the court, since the evidence shows DOC intends to rely on physicians and physician's assistants to assist when a problem arises, when in fact, they cannot.

*Argument IV:* DOC seeks to avoid judicial review of its lethal injection procedures by writing nothing down. But by writing nothing down, it has deprived the participants of any guidance in how a lethal injection is to be conducted, and sewn confusion into the process. Though the only medically-trained person from DOC to testify stated he would not participate in the execution, the equally sure testimony from DOC officials was that he was being relied upon to assist in case of trouble. Though the people at FSP believe the non-medical executioner is in charge once the flow of chemicals begins, the Secretary of DOC believes "medically-trained" people will take over if there is a problem. These and other conflicts in the understanding of the participants show no one is in charge, and that DOC is not prepared to carry out a lethal injection that does not carry a substantial risk of unnecessary pain and a lingering death. The plans DOC does have nearly ensure the actual method of execution will be by asphyxiation, as an inmate is likely to aspirate vomit as the anesthetic is introduced within an hour of the last meal. Other parts of the protocol conflict with state law and the constitutions: there is no provision for the inmate's counsel and spiritual adviser to be present, and part of the execution will be conducted out of sight of the statutorily-required witnesses.

## STATEMENT OF THE FACTS RELEVANT TO LETHAL INJECTION

Dr. Radelet is a Professor of Sociology and chair of that department at the University of Florida. T11. He taught medical ethics at the medical school for ten years, and continues to teach that course. T12. He has an extensive educational background, and has given testimony before various legislative bodies and the courts on issues involving the death penalty. T13-14. He has conducted numerous studies and has authored numerous articles on the death penalty. T14; Ex. 1.

Professor Radelet coauthored a paper about to be published in an attempt to establish a prevalence measure of how often executions go wrong in the United States. T23. "It turns out that lethal injection is the most commonly botched means of execution in the United States today." T24.[3] Two states, Virginia and Texas, stand out for the high number of botched lethal injection executions. Approximately five percent of all executions are botched, and that rate is 5.2% for lethal injections. T25. This rate appears to stay steady over time. T24.

An "array" of problems have arisen during lethal injections: a breakdown in the drug sequence leading to gasping for breath or audible distress, violent, prolonged

[3] By "botched," the witness means "those in which there were unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner, or that reflect gross incompetence of the executioner." T26-27.

movements indicating some agony. "Probably the most common problem with lethal injection is the difficulty of finding a good vein." T28. [4] In one case the straps were too tight and the drugs could not flow. T55. Five of the sixteen cases involved problems that occurred requiring the process to be interrupted after the first dose of anesthetic was administered. "So, thereby it caused a gradual rather than an instantaneous death." T30. In one case there was a kink in the plastic tubing, another a chemical reaction between the drugs that clogged the IV tube. T30-31.[5] In two cases, the syringe came out of the inmates' arm after the chemicals began to flow, one in which a vein collapsed. T31-32.[6] There were four cases in which the witnesses observed violent movements or spasms or hearing heaving sounds during the execution attributed by prison officials to unusual violent reactions to the drugs used in the lethal injection. T33. All of the lethal injection executions in which problems took place lasted longer than 45 minutes.

The court sustained the state's objection to testimony concerning the medical

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[4] Short vignettes of botched executions are contained in the study, which was admitted as Exhibit 2. T29.

[5] In that case the anesthesiologist blamed the inexperience of the prison officials in administering drugs. T54.

[6] The study is based on newspaper reports, which were proffered, sometimes spokespersons for the department of corrections, and some interviews with people involved. T32, 54.

ethics of physicians and physician assistants participating in executions, T16-20, so appellant proffered the testimony. On this issue, Dr. Radelet testified, with supporting documentation (Comp. Exh. C), that "the American Medical Association guidelines make it very clear that physicians should not be involved in executions at all except to certify death and even that exception is subject to some controversy within the profession." T35. Most interpretations forbid a physician from being present because "it puts the physician in to a position where she or he would tell the executioner that the inmate is not yet dead and, therefore, in fact, order a second jolt of electricity or be there to assist with the lethal injection apparatus." T36. Physician's Assistants are governed by similar rules. The American Academy of Physicians' Assistants has had a rule in place since 1983 stating that "physician's assistants should not participate in executions." T36. It is consistent with and similar to the American Medical Association policy prohibiting physician involvement in executions. T38.

The state crossed Professor Radelet at length on his article coauthored with Professor Bedau, cataloguing the execution of innocent people. T60; Appendix C, hereto. While then-Attorney General Edwin Meese criticized the article, "the vast majority of the evaluations of that paper and subsequent research has been quite positive. Former Chief Justice Gerald Kogan, has personally as well as publicly

commended us for that work as have several members of the U.S. Supreme Court." T61.

On questioning from the court about comparing mistakes in lethal injections to normal medical procedures, Professor Radelet testified the two could not really be compared because normal medical procedures are performed by highly trained people, while those participating in lethal injections, these more experienced people are not involved because of ethical bans. T66-67.

There was a renewed request for a subpoena duces tecum. T69.

James Crosby, warden of Florida State Prison, testified he is the person designated by statute with the responsibility for carrying out executions. T70. The warden has no medical training or certification. T71. The department set up the lethal injection procedures, and he has been a part of that. In developing the lethal injection procedures, his role has been to insure he has the right people with the right background to handle the scientific part. T72. The warden did not participate in any way in selecting the equipment or chemicals to be used in the lethal injection. T72. He designated people to handle that. T72. He has "more or less" directed people in their positions and "coordinated their efforts" in getting ready, "but I did not make the selection of the persons that would be used in the process." T73. He did not make selections of the chemicals or hardware or anything like that. T73. He has not

observed any lethal injection execution in any other state. T100.

The only written protocols for carrying out lethal injection executions are those contained in Exhibit 4. There are no other written documents he was "aware of" setting out the procedures for conducting the lethal injection execution. T74. Warden Crosby is "not aware of" any documents setting forth the amount of medical training of people who are to mix the compounds, the drugs or chemicals which are to be used, the sequence in which the drugs are to be administered, for variations in administration depending on the inmate's body weight, medical history, last time they ate a meal, or what meal they ate. T75-76; 77. Neither has he seen audio or videotapes describing the procedure, and does not know who would have any written documents or written procedures. T96. The warden could "probably pass that test" on which chemicals are to be used, but does not have the dosages memorized. T77. He could not describe the volume of the syringe or IV tubing or length, or the mixtures or concentration levels. T97. There are two IV tubes. T97.

The procedures were developed by attorneys and others in central office staff, some of whom were trained in "those sciences." T78. The warden does not know who was at those meetings. The warden knows who the executioners are. T78. One person actually administers the drugs. T80. The qualifications of that person, the executioner, are they be over 21, citizens of the state, and have ability to perform the

function. T81. This is in "the statutes." T81. He was not just telling the court what the statute says,

> I am telling you what you have to do to do it. That's all you have to do to do it. The function itself is something anyone with reasonable intelligence can do and functioning skills. I mean, there is nothing to it except for administering the syringe, pushing the syringe. That's their only function.

T81; 102.

Warden Crosby described his understanding of how the lethal injection procedure is to be carried out:

> There will be a sequence of syringes that have the premixed drugs in each syringe. You will take one and you will put it into the tubing. You will push the syringe. You put it down and pick up Number 2 and go through, I think, it's eight syringes. It may be six or eight syringes. It's preset as that's what's needed by those persons who have the scientific knowledge and expertise to put that part of it together. Their role is just the pushing of the drug itself into the tubing.

T81-82. Two IV lines with saline solutions are hanging on hooks, and the syringe interrupts the flow and pushes through the actual chemicals. T103. Before bringing the inmate into the execution chamber, he will be strapped into a gurney. T83.

As for the person who actually inserts the needle or catheter, "One initially is involved in that process. We also have a person on standby if the process becomes

more complicated." T83. Specific people are designated for this duty, with a "considerable amount of experience in that field." T84. The backup has even more extensive training. The warden has not actually read the certification of either person, but knows basically what their backgrounds are. T84. Neither person is required to be a physician's assistant, "but we have a physician's assistant there watching and monitoring the process. . . They could assist if necessary, but it's not a part of the way it would normally operate." T84. It is not planned that the person who inserts the needle be a physician's assistant, though it could be. T84. It would be someone they consider capable. T85. The physician's assistant is "somebody that if we need could be used. That would be available to use." T85. The physician's assistant is present as a backup and a non physicians assistant actually inserts the needle. T85. The person who is to insert the needle has never participated in a lethal injection to the warden's knowledge. T85. He or she went to Virginia, however, to watch two lethal injections. T85. The physician's assistant has been to Texas to watch executions. T86.

He has not had a psychological evaluation conducted on the person who is to insert the needle, or on the physician's assistant, or the executioner. T86. No background check of any of these individuals has been conducted other than a criminal background check. T86. "We have done no special background checks on

any of these persons on this process and procedure." T86.

A medical doctor is supposed to be present during the procedure, and that person's name is blacked out on the protocol. T87. The physician's duty it "[t]o pronounce the offender dead." T87. Also, "If there is a problem, yes, the physician would be available to assist if we had a problem." T87.

The warden knows no more about the specifics of the administration of the chemicals. T87.

When asked how the people participating in the lethal injection know what they are all supposed to do since there are written guidelines, the warden testified:

> Well, the people that are carrying out the various aspects of the procedures have been trained in their fields which directly transfers over to the actions they are taking. The person that is inserting the IV doesn't need a procedure on how to insert the IV. He knows how to insert the IV. He's done it. The person is trained in that.
>
> The person – in any procedure that is required, the people knowhow to perform those functions. In other words, an officer doesn't need a written procedure on how to escort an inmate. The officers are trained in strapping down the inmate. They don't need written guidelines on how to do that. They do that by practice.
>
> So, yes, I guess to answer your question it is their own self-knowledge in each of these stages according to what role they are playing.

T88. As for the people who insert the needle, he knows of their qualifications

because someone "from the medical standpoint" told him who they were and what they did. He hasn't read their credentials himself. T89. He did not select the person who inserts the needle. He knows the persons who are preparing the chemicals are qualified because of their present job function; one is a pharmacist. T90-91.

He did not have the Virginia Department of Corrections Execution Manual with him, but did not remember what it said, but that it was similar to theirs. T90.

As for who will prepare and label the syringes, the warden testified:

> There will be two of them. One of them is a physician's assistant and one of them is a pharmacist and they will mix the drugs or the chemicals. They will put them in the syringes. They place them one, two, three, four, five, six, seven, eight.
>
> They will take them to the area where the executioner will later stand. They will lock them and secure them there. No one will have access to them. We will then get the executioner and bring him in. The executioner stands there with them. They prepare them. They lay them out one through eight and set them ready.

T92. The chemicals are mixed and prepared elsewhere. T93. The executioner is brought into the chamber about 30 minutes before they take the person into the chamber, about the same time they are beginning to insert the IV into the inmate, which goes on in another area. T93. At 6 a.m., the drugs are "happening", and "about 6:30, you're starting with the offender," inserting the IV, "and 7:00 you have

the execution. T93. The whole process should take between ten and fifteen minutes, from what the warden has been told. T94. The physician who speaks with the inmate prior to the execution will offer him an anti-anxiety medication, which the warden "believes" is going to be Valium." T94-95. There will be two EKG devices attached to the inmate's chest. T98.

The warden has observed a walk-through of a lethal injection in Virginia, where he was for five or six hours, and brought back what he learned in Virginia "in my mind." T101. They have had six to eight walk-throughs at the prison. T105. The executioners have not participated yet. They "fake" the mixing of the drugs. T106. A person plays the role of the offender, is strapped in and a catheter taped on, as they "do not actually stick them." T106.

The warden does not have the technical experience to talk about the pharmacology of the drugs, "[n]ot more than I could talk about the electrical part of the electric chair." T107. He is ultimately responsible, and is like "a traffic cop at a busy intersection. I've got to keep it all going, make sure the people are doing the right things at the right places, the right time. Walkers aren't walking when they not supposed to be, and cars aren't coming when they're not suppose to come. Doesn't mean I know how a combustible engine runs." T108.

No one actually inserts the catheter in the walk through. As for why the

procedures are not in writing, "I don't have any idea. I didn't write the protocols." T108.

William Matthews, a Physician's Assistant at Florida State Prison, testified. T111. He practices medicine at the prison under the direction of a physician. T113. He speaks with the inmates about their medical problems. T113. His role in the lethal injection procedure is to be an observer. T113. He was not involved in the selection of chemicals or establishing the procedure. T113. He "basically" knows how DOC intends to administer the lethal injection. T113. He has not ever participated in a lethal injection. T114. He has witnessed lethal injections in the past in Virginia and Texas. T114. He had no role in developing the lethal injection procedure. The physician's assistant was clear about his role in the lethal injection procedure:

> Q. Could you tell what your role is going to be in that proposed lethal injection procedure?
>
> A. To be an observer.
>
> Q. And that's all?
>
> A. Yes.

T114. He has not participated in training anyone to conduct a lethal injection. T114. He "basically" knows how the procedure is going to work. He has not seen an written

materials that set out the lethal injection procedures. T115. The reason why there is nothing in writing is not a concern of his, he has never worried about it, and it has never been a problem. T115. He has seen portions of the Virginia Department of Corrections execution manual, but is not aware if it is going to be used for lethal injections in Florida. T115. He does not know how people who are participants in the lethal injection have been trained. T116. He feels the warden and an assistant warden will be there, probably and executioner, and probably a physician. T116. He described what he knew of the medical portion of the lethal injection:

> After the inmate is secured on a gurney, a medically trained person will hook the inmate up to an EKG machine, a heart monitor. A medically trained person will start two IV's, using the standard IV bags, IV tubing and IV needles.
>
> At some time the inmate will be carried into the execution chamber. After he's been given a chance to have his last words, and I'm sure the Warden will be speaking with the governor at the appropriate time, a signal will be given. There will be a row of syringes, they are labeled like one, two, three, in sequence, and on the IV tubing there is a port, this is an opening, a standard universal IV port. On the end of each syringe is a blunt needle, it is not sharp. And at the appropriate time the executioner will start with syringe number one, he will insert the blunt needle into the port and he'll commence to push the contents of the first syringe in the IV tubing. The blunt needle is kind of small, it's safe, and it kind of restricts the flow or the amount of agent being pushed in at the time. After he finishes with the first syringe, he will at that point go to the second syringe, until all the syringes are emptied

in sequence.

> A physician will be monitoring the heart monitor. And when the physician has deemed that the inmate has expired, at that point two witnesses, more than likely I'll be probably the first one, will examine the inmate for any signs of life, anything that might suggest life at all. In turn, a physician will examine the inmate. If, indeed, he is dead, at that point he will notify the Warden of such.

T117-18. If the inmate is not dead after all eight syringes are used, a second set has been prepared and will be used in the same sequence. T118.

As far as he knows, a medically trained person will stick the needle or catheter in the vein. T118. He does not know who it is. T118. The Physician's Assistant repeated that his role is just an observer. T119. Even if a problem occurs, he will not participate:

> Q. If there is a problem with the execution, is your role to participate in ensuring that it continue?
>
> A. I'm sorry, I don't see how I could possibly do that.
>
> Q. Why would that be?
>
> A. That would go against everything I'm trained to do.
>
> Q. So you then would not be able, under your, I guess it's the code of ethics of the American Academy of Physician Assistants, – Would that be right or not?
>
> A. My job is to be an observer.

Q. All right. So I guess the question is just to make sure that you observe, you do not actually step in, even if there is some problem arises, the needle slips out, they can't find a vein, the vein collapses, there is some unusual reaction to the chemicals, the person's fighting, any of those contingencies while it's happening, you, even though you're an observer, as a physician's assistant, you cannot participate in assisting the execution to go forward.

A. I would assume, and that's assumption, that the State of Florida would have a medically trained person to meet those needs at that time.

Q. Okay. But – But the answer was then you would not assist in having the execution move forward?

A. I have no plans or desires to be an executioner.

Q. I understand. You're not going to do it, right? You're not going to do it.

A. To do what?

Q. To assist if there's a problem with the execution and ensuring that it moves forward.

A. My job at this point is to observe. That's what I'm planning on doing.

Q. And that's all.

A. Yes.

T119-120. As to whether the physician who was to be present would be under those same constraints, the Physician's Assistant said "I – you really probably would have

to ask that person to get an honest answer." T121. His understanding is that there will be medically trained personnel on hand to "meet the needs so it's done appropriately." T121.

The physician's assistant testified he knew the chemicals that would be used, and the first agent is thiopental sodium, or sodium thiopental, The second "agent" is pancuronium bromide, also called Pavulon, and the third agent is potassium chloride. T122. He could "probably give you a range" of the dosages, based on his "best knowledge." T122. He had never witnessed a lethal injection in Florida, "and this is a proposed event." He had no input into the dosages, but could give a "guesstimate range." T123. He referred to other states using lethal injection, and said he would be saying what is used elsewhere. However, he did not know the actual dosage to be used in Florida. T123. He is sure someone within the department is in charge and knows what the dosages will be, "[p]robably someone in Central Office." T123. He can only speak for himself, and has been given some ranges. He knows approximately what the range is that will be used here: "The thiopental, probably somewhere between two and ten grams. Pavulon, probably between fifty and a hundred fifty milligrams. And potassium chloride will probably be several hundred milliequivalents." Several meaning "[p]robably two to three hundred." T124-25; 146. These are consistent with dosages in other states. T146.

The chemicals go into the tube with the IV bag attached, and the tubing has a one-way valve. T126. The chemicals can be administered in either of the two tubes attached to the inmate. T126. He did not know the concentration levels, but the thought the syringes were 60 cc's, with a blunt needle. As for the contents planned sequence of the syringes : Syringe one and two are thiopental (sodium thiopental), syringe three contains normal saline, numbers four and five are pancuronium bromide (pavulon), six is normal saline, and seven and eight are potassium chloride. T128; 144. He "would assume" each of the syringes containing the lethal chemicals contain half the dosage he previously described. T128. He does not know where the chemicals are stored or their shelf life, T128, and is not involved in procuring them. T129. His understanding is that a standard IV catheter would be used, not a triple lumen catheter. T129. A perfusion pump will not be used. T129. Monitoring of the dosage is just from what is in the syringe. T130. He is not aware whether any of the participants in the lethal injection have been trained in determining whether someone is anesthetized. T130.

If there is a problem with extravasation, where the chemicals go into the muscle instead of the vein, he is sure if the "site was to become compromised" "some action will be taken." He knows what it looks like when there is such a problem. T131. If something like that happens, he was asked whether he would step in and he said the

executioner was responsible:

> Q. You know what that looks like.
>
> Now, when you're observing, are you actually . . . if something like that happens, are you gonna say a word? Are you gonna participate or tell the folks that are conducting the execution there's a problem?
>
> A. Haven't thought about that. I'm, at this point, as I understand it, the executioner will be monitoring that, and if that point should the IV be compromised at that site, he'll take the appropriate action.
>
> Q. You said you were just an observer. Are you going to say a word?
>
> A. I haven't really thought about that.
>
> Q. So you don't know whether you are or not if something like that happened?
>
> A. Correct.

T132.

He did not know if there was a plan to determine the medical history or background of the person to be injected to see if there is any problem, and he's "not aware" of any written procedures on this. He does not know if there is any plan to calculate different dosages according to weight, or make adjustments depending on whether a person has used drugs, intravenously or not. T133.

The physician's assistant was again asked who was in charge if problems arose:

> Q. The executioner then, the person who's actually using the syringes is the person who's responsible for dealing with problems if they arise? Is that your testimony or not?
>
> A. I'll repeat it again.
>
> As far as I understand, should there be a problem with the IV site, then the executioner will take appropriate action at that time.

T133.

He did not know if there was a plan to time the execution depending on when the person ate their last meal or what they had eaten. He had seen no procedures. T133. When asked about another potential problem, he testified, "If the line is compromised, at that point the executioner will take different action." T134. If there is an unusual reaction to the drugs, since the sodium pentothal in his opinion is probably a lethal dose, "it really doesn't matter." As far as who is in charge, "As I understand it, when the nod is given from the warden, the execution will proceed." T135.

The assistant also testified a cut down to find a vein is normally a surgical procedure which he was sure the department would have a medically trained person handle. T136, 137. "As far as I know, there's very little plans on doing a cut down." T136. He thinks they would just try to find another vein. T137.

The executioner is not a medically trained person. T138. Extravasation is

when the catheter gets out of the vein, and the fluid gets into the tissue rather than the vein, and causes swelling "immediately." T138. This is the same order of administration in "all those I've witnessed." T140. He believes loss of consciousness is rapid, about ten seconds, with pentothal. T140. He is familiar with his role, but not necessarily with the role of other people involved. T141. The protocol is that a doctor visits with the inmate prior to the execution to provide medical assistance and explain the procedure. T141-42. He hasn't seen the time of the inmate's last meal on the protocol. T142. If the line becomes compromised, they simply switch to the other line. T142. He described a cut down. T143.

The P.A. testified that in surgery, the dosage of sodium pentathol is based on body weight, size, "incoordinate conditions." "It's based on the individual" and he couldn't give a specific dosage. Some states don't split the chemicals into different syringes. T146. There is no technical reason for doing this. T148. He does not know who the person who puts the needle in the vein is going to be. T148.

Appellant presented the testimony of a neuropharmocologist, Dr. Jonathan Lipman. Dr. Lipman is board certified in pain management, forensic medicine, and in psychopharmacology. T165. He holds a doctorate in neuropharmacology, has done post-doctorate work in the field, and has had faculty appointments in departments of anesthesiology, medicine, surgery, and psychology. T166, 167. He

has written numerous articles, most related to pain management and relief. T167.

Dr. Lipman had reviewed the "execution day procedure" of January 28th, and had familiarized himself with lethal injection procedures in various states, and listened to the testimony of the DOC employees Warden Crosby and Physician Assistant Matthews. T168-69. His opinion is that "The protocol itself . . . has room for error in it, and if error occurs, then the consequences will be very painful and will certainly involve suffering." T171. He believed that if the drugs DOC identified were administered by the routes, dosages and sequence identified, "and at the appropriate time, which I do not yet know," they would "bring about the desired effect." T172.

He testified sodium pentothal is an anesthetic drug, which renders a person unconscious if taken in a large enough dose. When used medically, it is used to "induce a state of insensibility prior to surgery." T171. "It has a very brief action" because it is quickly deposited into the fatty tissues. It is called a "briefly acting or even an ultra-short acting barbiturate. That of course, is only true during the beginning of the injection." T173. It both acts and dissipates quickly. T173. There is an "enormous difference" between sodium pentathol and a pain blocker. Analgesic drugs like opiates elevate tolerance to pain while thiopental has no such effect "and low doses can make pain, the sensation of pain worse." T173. The anesthetic

"amplifies" pain both in low doses and when it wears off. T174. The anesthetic can only be administered by an anesthesiologist or certified registered nurse anesthetist under the direct supervision of one, in the medical setting. T175.

The second drug, pancuronium bromide, is one of a number of agents used by anesthesiologists to paralyze the respiratory and other muscles so the anesthesiologist can take over the patient's breathing during surgery. T175. "The drug produces a state of complete immobility." T175. It does not cause anesthesia on its own, and there have been "patients whose anesthetic wore off and nobody realized that they were actually quite awake but paralyzed as they were being operated on." T175. It is a "disaster" if a patient has been given pancuronium bromide without anesthetic, or it has worn off. T176. "The drug essentially [produces] suffocation if respiration isn't supported and it has been described as the feeling as if you have a horse sitting on your chest. You cannot breathe, you cannot move." T177.

The third drug, potassium chloride is only used medically in sparing solutions to treat hypokalemia or restore low potassium levels. "In high doses it sends, it paralyzes the rhythmical contracture of the heart and causes it to arrest in a state of asystole so that it no longer pumps blood." T177. Without an anesthetic, "[i]t would feel like a hot poker going up your arm. This wave of muscular paralysis and contracture would then spread to the lungs and heart." T178. It would probably feel

like a heart attack. T178.

An anesthesiologist determines whether the anesthetic has rendered the person unconscious by asking them to count, a testing of responses by a sternal rub, which is a sharp force on the sternum, which is painful, and other tests. T178-79. At the beginning the anesthesiologist injects a test dose to see the reaction it produces. T178. It is "absolutely" necessary for the anesthesiologist to know the medical background of the person because prior drug history and use of barbiturates may make a person more tolerant, and they will require larger doses. T179. The fat per muscle ratio is also important because it affects the amount of drug necessary to anesthetize a person. T179. The background and medical history is also important to determine whether the patient has "blown all their blood vessels" through intravenous injection, making it very difficult to find a functioning vein. T180. The same is true with people who have periphery diseases such as diabetes or a number of conditions which produce vasoconstriction, making it extremely difficult to reach a vein. T181.

On some people, particularly obese people, a cut-down procedure is necessary, which requires the cutting away of the tissue over the vein to expose and cannulate it with or without ligature or ties to hold the needle or cannular in place. T182. "It's very simple to do but the consequences of a mistake are awful so it's invariably done

as a last resort." T183. It is a surgical procedure.

It is important to know when the subject who is to be given sodium pentothal has been given their last meal, as that drug can cause vomiting. T183. "[I]t ultimately wouldn't make a lot of difference whether it was just fluid or solids, you would drown." T184.

Some people have an unusual reaction to sodium pentothal, such as cough and something similar to an allergic reaction. T184. The rate of the onset of paralysis can occur unevenly with pancuronium bromide. T185. While the pharmacologist had not known anyone in a hospital to be injected with potassium chloride, "[t]he pain would be awful." T185.

Mistakes in the administration of sodium pentathol are made in the medical setting. T185. "One problem that arises is that the needle does not deliver the drug directly in the lumen of the vein, but passes right through the vein and the drug then is delivered into tissue around the vein so called extravasation." T186. This is "extremely painful," and would balloon up. The time it takes to balloon out depends on the volume. T186. Other problems that can occur is when the drug is being injected through tubing which contains an acidic drug from a previous injection. Since sodium pentathol is alkaline, if it comes into contact with an acidic drug, it will precipitate, and the solution will suddenly become "an insoluble precipitative drug,

a yellow powder." T187. It can clog the needle and the anesthetic will not get into the vein, and will likely cause thrombosis. T187. Pancuronium bromide is acidic. T187. This chemical reaction would occur if the order of the syringes was mixed up, as the saline solution proposed to be injected between the two drugs should flush out the tube. T188.

The pharmacologist had not been advised of the "dead space" or volume of the tubing. However, if the first injection is 60 cc's of saline solution, and the first injection of sodium thiopental is the same, after the first injection, the drug is not in the patient, it is in the tubing. The thiopental will push the first 60 cc's of saline down the tube, and remains there. The next injection should be saline, but if it turned out to be pancuronium bromide the precipitate chemical reaction would develop. T189. So long as the saline is injected properly, the chemical reaction is not supposed to occur. T189.

In the example of the chemical not going into the vein, after one or two syringes of chemicals there would be a visible balloon and of course the person would be complaining. T190. However, a situation could, and has, occurred in which a blood vessel has been tied off surgically and the drug did not go back to the heart. T190. If the thiopental does not flow correctly, it would not "knock you down" quickly." T191. Also, if the anesthetic goes into a muscle instead of a vein, the

uptake is "very, very slow," and it would take longer to be anesthetized. T191-92. The injection of the second chemical before the first took effect "would render you paralyzed before you were anesthetized." T192.

Written procedures for sodium pentothal are used in medical settings. T198. Such written procedures are necessary to establish whether there have been variations from a recognized standard of care. T198. It is a standard scientific and medical practice to have a written procedure, or protocol describing the sequence of events and allows for contingencies to be instituted if a step fails or is circumvented. T199. Such procedures are usually developed by peer review. T200. After meeting together, a protocol is sent to someone outside the group to concur or find flaws. T200. "It matters most when something goes wrong." T237. The procedure is simple so long as nothing goes wrong. If an untoward event occurs, it is best to have a written contingency plan.

As an example of the problem with a lack of specific written procedures, the doctor pointed to the difference between the procedure to follow in the "execution day procedures" document, and the testimony at the hearing. T201. It needs to be clear that if a line becomes clogged, the syringes will be injected into the second injection line beginning with the first again, and not just continue. The difference is that if the tube began clogged at and the sodium pentathol did not get to the subject,

continuing with syringes three and four on the other arm would result in the pancuronium bromide being given to the inmate without anesthetic. T202. While the protocol was not clear, the testimony of the DOC person was that if there was a problem, there is a second set of syringes which would be started one through eight on the other IV line. T203.

The pharmacologist had no information whether a disposable or glass syringe was being used, but disposable syringes tend "to jam or the rubber septum will become distorted" and are "more prone to plunger problems." T205. This is particularly a problem if the disposable syringe is reused. T205.

The testimony the pharmacologist heard indicated the executioner was in charge once the lethal injection started. T207. The lack of medical problems of this person would take away that person's ability to deal with any problems that might arise. T208.

On cross the doctor agreed that even five kilograms per kilogram of body weight of sodium pentathol would induce a barbiturate coma. T212-13. A person could not breathe on his own in such a coma. T213. Two grams of thiopental is way over the therapeutic threshold. T214. Depending on circulation, a rapid loss of consciousness would result within thirty seconds. T214. It is a lethal dose. T214. The person would have no further sensation with that dose. T215.

For pavulon, or pancuronium bromide, the surgical dose is .1 mg per kg. on a 154 pound man, it would be a .7 mg. dose. T216. 100 mg is far and away sufficient to induce total muscle paralysis. T216. This is at least seven times the therapeutic dose. 150 mg of potassium chloride would stop the heart if given quickly. T217. With an IV push, cardiac standstill would be the result. T217, 150 to 200 or 250 milliequivalents would cause asystolic without a doubt if given quickly. T218. The IV push syringe qualifies as quickly.

If someone is properly trained in starting an IV line, they would know how to spot extravasation. T221. He could spot it if there has been an IV line with a saline drip running for awhile. T222. Mistakes with IV's happen in the medical setting. T222. The error rate is surprisingly high, even among RN's and phlebotomists. 222.

There is a risk of vomiting if the sodium pentathol is given within 12 hours of food or drink, and if the person is lying on his back, he will aspirate it. T223. If the person is given 5 grams of pentathol and vomits, he will not feel it, and that dosage is lethal in and of itself. T224.

A medically trained person can properly start and monitor an IV, and he would hope spot problems. T230. Injecting drugs into a properly installed IV line can be done easily. T230. He would hope the numbering of syringes with large numbers would ensure they be given in the correct and proper sequence. T231. The flush

syringe between chemicals would eliminate any problems with drug interaction. T231.

Michael Moore, Secretary of the Department of Corrections, testified. He was employed as a director in the South Carolina Department of Corrections, and has no medical training. T243. Planning for the lethal injection process began in January. T244. Nothing in writing was produced from the meetings, he testified. T245. While DOC physicians were involved, no outside people were consulted. T248. After the first warrant, he instructed general counsel to draft the protocols. T247. The Secretary had experience with fourteen lethal injections in South Carolina. T245. The only written procedures for lethal injection he knew of were the January 28th lethal injection procedures document. There are no other written guidelines. T247. The January 28th document was signed on the afternoon of that day. T248-49.

Secretary Moore described the procedure which will be followed. Early in the morning, the inmate is given his final meal. He will be visited by a medical practitioner to check him. Later that morning he will be led from the cell, placed on a gurney, strapped down, and the medical personnel will begin the IV's. T250. The heart monitor will be placed on the offender and he will be escorted into the death chamber, last words are said, and the warden then signals the process to begin. T251.

The chemicals to be used are the same used in South Carolina. T251. "We will

use no less than two grams of sodium pentothal, fifty milligrams of pavulon . . . and fifty milliequivalents of potassium chloride." T251. All he would say was the minimum, and does not know the maximum. T252. They would not use less than those amounts. These are the minimums in South Carolina. T252. He could not say what the specifics were, such as concentration and the size of the tubing. T253, 259. He knew the order of the drugs. T253.

There are no written rules or guidelines to assist those involved in the lethal injection process if problems arise. They have medically trained people to cover the scenarios. They have double backups, two of everything, and made sure they have the medically trained people in there in case a situation comes up. They have thought of everything by looking at other states' problems. T254. He knows some states have had problems with veins, the tubing kinking, or the IV slipped out. T255. Both a physician and physician's assistant will be there. T255. Medically trained people will take care of "certain functions." These functions are administering the IV, and if there is a vein problem, and medical procedure to clear up the process. There are medical personnel in case of the need for a cut down. DOC will have a board certified medical surgeon "if we need that" to be there. T256. They would do any medical procedure needed. He is relying on the doctor if there is a problem, and the physician's assistant to also step in if there is a problem. T257.

While people have told him of the medical people, he does not personally know their qualifications. T257. The offender is given a complete physical when he arrives at the capital punishment facility at FSP. T258. There is also a medical background to make sure veins are available. T258. The DOC employees know to do this because they know it is part of the process. T258. If trouble arises, "We have medically trained personnel that if there's any trouble, they are there to make those decision, to make sure things are taken care of immediately." T259.

The hardware and equipment is similar to that used in South Carolina. T260. On cross by the state, the secretary corrected himself to say the minimum will be 150 milliequivalents of potassium chloride. T260. He is familiar with qualifications of people. T262. The level of medical training is appropriate to carry this out. T262. He drew heavily on his experience in South Carolina. There is a training program on this at Florida State Prison to make people "well aware of what their role is to the fullest." T263. Each participant knows a little about everyone else's role, but not the specifics. T263. Each person on the team has a specific task. There is no intention to reuse the syringes. T264. There was a difficulty in finding a vein of an inmate to be executed in South Carolina, and it took 45 minutes. T265.

When the inmate is brought to the facility, DOC outlines the details of the execution, and will be told they will have a medical visit the morning of the

execution, and will be available if they wish to take a relaxant at that time. T266-67. The purpose of the visit is to check their state of anxiety. T267.

The executioner is not required to be a medically trained person. T267. A medically trained person will be standing right behind him. T267. This is "[i]n case there's any problem with the application of the dosage or any other problems that could come up during that process, to give directions to the executioners as to their next step." T267.

Preparation of the drugs will be done by medical personnel under the direct supervision of a licensed pharmacist. T268. It is the responsibility of those people to make sure the correct dosage of the drugs are in the syringes and that they are properly labeled. T268.

The Secretary relies on the warden to know what everyone's role is. T270. There is no procedure for calling off or delaying an execution if there is a problem, there are other procedures to enable DOC to continue with the execution. T270.

The secretary got the information on the drugs and dosage by calling someone from South Carolina and asking them to read it to him. T270-71. South Carolina has written procedures, but he does not have them and they are protected. T271.

The court advised Secretary Moore that P.A. Matthews had testified candidly his role was just as an observer. The secretary said there is a medically trained

backup, not Mr. Mathews. The secretary said he just observes, and "He is there to advise the executioners if there is a problem with dosage, as I understand it." T273. This was the role the Secretary saw during a walk-through. He also examines the inmate at the conclusion. T274. Each person does not know exactly what the other one does.

## STATEMENT OF THE CASE

The challenged judgments of conviction and sentence were entered by the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida. Mr. Sims was tried before a jury on a five count indictment. Count I alleged, in the alternative, that Mr. Sims killed George Pfeil by premeditated design or in the course of robbing Robert Duncan. Count II alleged, in the alternative, that Mr. Sims killed George Pfeil by premeditated design or in the course of robbing William Guggenheim. Count III charged Mr. Sims with robbing Mr. Guggenheim; Counts IV and V charged him with robbing Mr. Duncan. Mr. Sims pled not guilty and has consistently maintained his innocence to this day.

Trial began on January 30, 1979. The court granted a judgment of acquittal on Count V; the jury convicted Mr. Sims as charged on Counts I - IV. The date of the judgment of conviction is February 1, 1979.

After a brief penalty phase hearing, the jury, on February 8, 1979,

recommended a death sentence. The trial court sentenced Mr. Sims to death on July 24, 1979. Mr. Sims was sentenced to death by electrocution. Tr.R. 1089.

This Court affirmed the conviction and sentence. *Sims v. State*, 444 So.2d 922 (Fla. 1984).

In March, 1986, Mr. Sims filed in this Court a "Petition for Writ of Habeas Corpus" (case number 68,422). On the basis of Mr. Sims's voluntary notice of dismissal, his *pro se* petition was dismissed on September 2, 1986. *Sims v. Wainwright*, 494 So.2d 1153 (Fla. 1986) (memorandum opinion).

On July 24, 1986, Mr. Sims, through counsel, filed in the Eighteenth Judicial Circuit, in and for Seminole County, Florida, a Motion to Vacate Judgments and Sentence pursuant to Florida Rules of Criminal Procedure Rule 3.850. On October 19, 1987, Mr. Sims, though counsel, separately filed in this Court an *Application for Relief Pursuant to Hitchcock v. Dugger* in the Supreme Court of Florida (case number 71,313). By order of this Court the latter claim was transferred to the trial on July 12, 1989.

On September 21, 1989, petitioner filed a *Supplement and Amendment* to his previously filed Rule 3.850 motion. Thereafter, on March 23, 1990, pursuant to court order, Mr. Sims filed an *Amended and Supplemented Motion to Vacate Judgments and Sentence*.

On May 29 and June 1, 1990, an evidentiary hearing was held on Mr. Sims's amended and supplemented Rule 3.850 motion. On February 18, 1991, the Seminole County Circuit Court denied the Rule 3.850 motion.[7] This Court affirmed. *Sims v. State*, 602 So.2d 1253 (1992), *cert. denied*, *Sims v. Florida*, 506 U.S. 1065 (1993). Two Members of this Court dissented, and would have granted Mr. Sims relief. *Id*., 602 So.2d at 1258 (Kogan, J. and Barkett, C.J., dissenting).

On February 25, 1993, Sims filed in this Court a *Petition for a Writ of Habeas Corpus*. The petition was denied on June 24, 1993. *Sims v. Singletary*, 622 So. 2d 980 (Fla. 1993).

On December 1, 1993, Mr. Sims filed a *Petition for a Writ of Habeas Corpus* pursuant to 28 U.S.C. Section 2254 (1993) in the United States District Court for the Middle District of Florida. He filed an Amended Petition on June 27, 1994. On August 22, 1997, the District Court entered an order denying relief as to the convictions and granting relief in part and vacating Mr. Sims's death sentence.

The respondent appealed and Mr. Sims cross appealed, and on September 22, 1998, the United States Court of Appeals for the Eleventh Circuit entered an order affirming the denial of relief as to the judgments of convictions and reversing the

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[7] References to the record of Mr. Sims's initial post-conviction action are as follows: 1st PCR at ___.

District Court's grant of relief as to the sentence of death. *Sims v. Singletary*, 155 F.3d 1297 (11th Cir. 1998). Timely petition for rehearing was denied November 18, 1998. *Sims v. Singletary*, 163 F.3d 1362 (11th Cir. 1998). A Petition for a Writ of Certiorari was denied on June 21, 1999. *Sims v. Moore*, ___ U.S. ___, 119 S.Ct. 2373 (1999).

On October 21, 1999, Mr. Sims filed in the Circuit Court for the Eighteenth Judicial Circuit a *Motion to Vacate Judgments of Conviction and Sentence*. An evidentiary hearing was conducted on October 24, 1999. Relief was denied the same day. By order of this Court, briefs were filed the following day, before Mr. Sims had obtained the record of the hearings. Mr. Sims brief was incomplete. Oral argument was held the following day, and the trial court was affirmed the day after that. *Sims v. State*, Case No. 96,818, 1999 WL 989282 (Fla. Oct. 27, 1999). No rehearing was allowed.

After a stay was entered by the United States Supreme Court in *Bryan v. Moore*, No. 99-6723 (Oct. 26, 1999), Mr. Sims filed a motion in this Court for full briefing and argument. That request was denied.

On January 25, 2000, Mr. Sims filed in the United States Supreme Court a *Petition for Writ of Certiorari* which is currently pending. On January 26, 2000, the Governor and the Warden rescheduled Petitioner's execution for February 23, 2000.

On February 9, 2000, Mr. Sims filed in this Court an Application for Stay of Execution pending review of Mr. Sims's petition for writ of certiorari.

On February 7, 2000, Mr. Sims filed a Rule 3.950 motion in the trial court. An evidentiary hearing was conducted February 9-10, 2000. An Order denying relief was entered February 12, 2000. This appeal followed.

## ARGUMENT I

### NEWLY DISCOVERED EVIDENCE THAT MR. SIMS IS INNOCENT PROHIBITS HIS EXECUTION

Terry Melvin Sims is innocent of the murder of George Pfeil. He was convicted via the bargained-for testimony of co-defendants Curtis Baldree and James B.B. Halsell,[8] and the tainted identification testimony of hypnotized witnesses.[9] Throughout trial, appellate, and postconviction proceedings, Mr. Sims and his counsel have presented ever-increasing evidence showing that Terry Gayle (not Terry

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[8]As shown in footnote 2, *supra*, the most common cause of error in the conviction of the innocent is the perjured testimony of co-defendants. "In one-third of the [innocence] cases (117), the erroneous witness testimony was in fact perjured. This type of corruption spans the years and the jurisdictions; it is too frequent and to familiar to need detailed illustration here." *See* "Miscarriages of Justice," *supra*, n. 184. (Appendix C).

[9]The unreliable testimony of "eyewitnesses" is the *second* most common reason for the conviction of the innocent, even when the eyewitnesses are not hypnotized, as they were in this case. *See* footnote 2, *supra*, "Miscarriages of Justice," at n. 184. (Appendix C).

Sims) was Baldree's, Halsell's, and Robinson's[10] fellow robber in this case.

The newly discovered evidence presented here is the testimony of Joyce Gray. This new evidence, in combination with all of the evidence of innocence now available, requires a new trial for Mr. Sims. At a minimum he cannot be executed. *Herrera v. Collins*, 113 S.Ct. 853 (1992).

*A. Joyce Gray's Newly Discovered evidence is admissible*

1. The evidence is newly discovered

In late 1999, defense counsel discovered a police report generated by a Detective McGilvray which listed Terry Gayle as a partner in crime with Baldree, Halsell, and others. Appendix D. Their crimes together were identified in the report as being similar to, and committed around the same time as, the crime for which petitioner was convicted.[11]

Counsel for Petitioner immediately set about locating and interviewing persons whose names appeared in this newly discovered McGIvray report. One of the persons interviewed was Jerry Lawrence, who swore that both Baldree and Halsell

[10]Robinson was an un-arrested co-defendant.

[11]Trial counsel testified in 1999 that this was precisely the type of evidence they were trying to uncover before trial to support their theory before the jury that it was Terry Gayle, not Terry Sims, who was with Halsell and Baldree and who committed the murder here. According to trial counsel, this police report contained "our defense." (2nd PCR Hrg. at 13-14).

told him after the trial that Terry Sims was not involved in the crime. App. E. Lawrence stated that "Joyce" had been present when Curtis Baldree made such statements at the Famous Amos restaurant in Jacksonville. *Id*.

In the 1999 proceedings, counsel for petitioner presented Lawrence's evidence, and the lower court found it to be "newly discovered." Counsel looked for and found "Joyce (Joyce Gray)" but *not* in time to present her evidence to the lower court.

In his most recent Rule 3.850 motion and hearing, Sims presented Joyce Gray's affidavit and explained why it could not have been presented in the exercise of due diligence before the close of evidence during the 1999 post-conviction proceedings.[12] Judge Eaton then held that the Joyce Gray affidavit was newly discovered evidence, and that conclusion is correct under *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991).

2. The evidence is admissible

Joyce Gray, the "Joyce" referred to in Lawrence's evidence, swears to the following:

- in 1981, Curtis Baldree told her that at trial "he had no choice, but to lie – that Sims had nothing to do with it;" and
- Baldree "said he had to lie to protect himself and the others that were

[12]Counsel showed below that after they spoke with Lawrence they immediately (that very day) attempted to find and interview "Joyce." However, it was not until the next day that she was located and signed an affidavit, after the close of evidence in the Rule 3.850 proceeding. *See* Appendix F and G.

> actually involved;"

Joyce Gray corroborates Jerry Lawrence's evidence about the statements made by Baldree at the Famous Amos restaurant:

> "Jerry [Lawrence] confronted Curtis about snitching on someone who was not even involved. All Curtis could say to Jerry was that he did what he had to do."

App. H.[13]

This newly discovered evidence would be admissible on re-trial. First, Baldree was a co-defendant and thus a party, an adverse party, to Mr. Sims. As such, Baldree's statements constitute admissions of a party and are not hearsay. Ehrhardt, *Florida Evidence*, at 682-690 (1997 Ed.) Second, these statements would impeach Baldree's testimony that Sims was present at and committed the crime. *Id*., pp. 484 - 488. Third, these statements constitute declarations against interest – no sentient person in Baldree's crowd would admit to others in the group that he had framed someone if it was not true. "'[I]f a reasonable man would believe that the declaration is against interest, a finding that the declarant believed the declaration to be against interest is justified.'" *Id.*, p 748, no. 8 (citation omitted). Fourth, the right to present defense evidence is necessary to "protect the integrity of the adversary process . . .."

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[13] This "did what he had to do" scenario is how co-defendant testimony in capital cases frequently sends innocent people to death row. *See* Miscarriages of Justice, footnote 2, *supra*.

*Taylor v. Illinois*, 484 U.S. 400, 409 (1988). It is essential to due process and cannot be unduly restricted by state hearsay rules. *Chambers v. Mississippi*, 410 U.S. 284, (1973). Thus, even if hearsay, this evidence is otherwise reliable and corroboratedc and ought to be admitted.

### *B. The Record as a Whole (Including the Newly Discovered Evidence) Requires a New Trial–There is Now No Credible or Reliable Evidence of Mr. Sims' Guilt, and All Evidence Points to Another Person as the Culprit*

Mr. Sims is entitled to relief if the newly discovered evidence in conjunction with the record as a whole "would *probably* produce an acquittal on retrial" or a sentence less than death. *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991). The question is whether the evidence Mr. Sims would present in a new trial would probably produce reasonable doubt in the minds of the jury. In making that forward-looking determination, the Court must consider all the evidence Mr. Sims has developed in post-conviction proceedings. *Lightbourne v. State*, 742 So.2d 238 (Fla. 1999)(reversing denial of successive post-conviction motion and remanding "for the trial court to consider, when evaluating Lightbourne's claims, the *cumulative effect* of the evidence that has been presented in this *and prior postconviction proceedings*")(emphasis added); *see also Kyles v. Whitley*, 514 U.S. 419 (1995). The cumulative effect of the evidence of Mr. Sims' innocence requires that Mr. Sims

receive a new trial.

1. The evidence that Terry Gayle, not Terry Sims, is guilty

Halsell and Baldree testified at trial that Sims participated in the robbery-murder. Sims's defense was that he was not present, he did not commit the crime, and he was framed--it was Terry Gayle who participated with Halsell and Baldree, and they both perjured themselves when they testified otherwise. **"Curtis Baldree and B.B. Halsell, were the state's *chief* witnesses."** *Sims*, 444 So.2d at 923.[14] The evidence now available shows that these chief witnesses were lying under oath:

- Baldree has admitted that Sims had nothing to do with the crime and that he, Baldree, lied at trial[15]

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[14]Because the State doubted the reliability of the supposed "eyewitnesses," the prosecutor told the jury in closing argument: "*All we had* was Curtis Baldree and B.B. Halsell." Tr.R. 738 (emphasis added).

[15]*See* Joyce Gray evidence (App. H) and Jerry Laurence evidence (App. E). Jerry Laurence's name was in the newly discovered McGilvray report (App. D), which is why he was interviewed. He mentioned Joyce Gray, which was why she was interviewed. Thus, Joyce Gray "derives" from the 1999 newly discovered evidence.

Respondent's argument -- that Joyce Gray could not provide newly discovered evidence because she was a witness at trial and thus her existence was known all along to post-conviction counsel -- was rightly rejected by the lower court. Counsel are not required to re-interview trial witnesses every six months, or 12 months, or two years, just to determine whether the witnesses have learned something new (i.e., that a co-defendant has recanted, as here), and the failure to so perform is not evidence of a lack of due diligence.

- When Halsell was asked if Terry Gayle did the Longwood job he got nervous; when asked if it was Terry Sims, he said "no, it wasn't Terry Sims" (2nd PCR Hrg. at 113); (Appendix J, the Harold Bryan Affidavit)[16]

- In early 1981, Halsell was asked to explain how he could put Terry Sims in a position where he would get into a shootout, and Halsell said "it wasn't Terry Sims . . . ." (2nd PCR Hrg. at 94)(Appendix J, the Harold Bryan Affidavit)[17]

- Terry Gayle acted in an incriminating manner and made incriminating statements shortly after the crime, and after the trial (Appendix H, the Joyce Gray Affidavit)[18]

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[16] Bryan's name was contained in the newly discovered McGilvray report, which led to his being interviewed.

[17] This evidence would be admissible on re-trial for the same reason that Baldree's statements would be admissible. *See* section A(2), *supra*.

[18] When Halsell and Baldree were first detained by the police, Terry Gayle hovered around the arrest scene and observed the arrest in a clandestine manner. When told the next day that the police had told Halsell he was wanted for murder and robbery, Terry Gayle exclaimed: "it must be the Longwood job." Appendix H. "The Longwood job" is the crime for which Petitioner was convicted.

Gayle's presence at and actions around the scene of the arrest would be admissible on re-trial because it confirms the defense theory that he was hanging around Halsell and Baldree at the pertinent time. His statement "it must be the Longwood job" would be admissible as a statement against interest, *see* Ehrhardt, *supra*, pp. 747 - 753, as an excited utterance, as a spontaneous statement, as a statement of then existing state of mind, *id.*, at 621 - 635, and as impeachment by prior inconsistent statement, if Gayle denied saying it at re-trial. *See* section A (2), *supra*.

- Gayle and Sims are look-a-likes, Tr. 49-50 (testimony of Ann Robinson), 589-90 (testimony of Gail Milliken)

- Gayle was a known criminal associate of Baldree, Robinson, and Halsell (Appendix D, the McGilvray report), (Tr.R. 349 (Halsell cross), 549-550 (Ann Robinson), (cross of Officer Schumaker)

- Gayle was committing drug store robberies with Halsell up to six weeks before the Longwood robbery (the McGilvray Report, App. D)

- Gayle, not Sims, was known for doing robberies at which he preferred to guard the door so he could count the drugs right away (2nd PCR Hrg. 78, 86); (Appendix J, the Harold Bryan affidavit)

- Gayle and Halsell were "as brothers" and often did robberies and burglaries together (2nd PCR Hrg. at 80); (Appendix J, the Harold Bryan Affidavit)[19]

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Also, Terry Gayle admitted to Gail Milliken that he, not Terry Sims, killed the victim in this case. Gail Milliken is deceased. However, this admission by Terry Gayle would still be admitted on re-trial. First, Gail Milliken's son would testify that his mother Gail Milliken said that Terry Gayle confessed to her. This testimony would not be offered for the truth of the matter asserted, but only as proof that the statement was made by Terry Gayle. If the statement was made by Terry Gayle, Terry Gayle's statement would be admissible for the truth of the matter because it is a statement against interest. *Id.*

[19] "Reverse-*Williams* Rule" evidence, *see Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied* 361 U.S. 847 (1959), which shows like crimes committed by a third party, is admissible to show that the third party committed the offense charged. *See* §90.404(2)(a), Fla.Stat. (1989); *see also Rivera v. State*, 561 So.2d 536, 540 (Fla. 1990); *Pahl v. State*, 415 So.2d 42 (Fla. 2d DCA 1982). This Court held in *State v. Savino*, 567 So.2d 892 (Fla. 1990), that the admissibility of reverse

- Halsell was often dependent on Gayle for drugs and repaid Gayle by doing more robberies with him (2nd PCR Hrg. at 111-12); (Appendix K, the Danny Morrison Affidavit)[20]

- Gayle purchased lock pullers near the time of the crime and it was undisputed that a lock-puller was used to steal the getaway car used in the crime (1st PCR 22-3, 1210; *see generally* 1st PCR 179-85, 336-37)

- In December 1977, Gayle, Halsell, and Baldree were planning a drugstore robbery in the Orlando area and looking for a fourth participant (2nd PCR Hrg. at 81-82); (Appendix L, the Clyde Oglesby Affidavit);[21] (Appendix J, the Harold Bryan Affidavit)

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*Williams* Rule evidence is governed by the same standards as *Williams* Rule evidence propounded by the state.

If Terry Gayle were on trial, the evidence outlined here would be admissible against him to show plan, *modus operandi*, and identity. *See Davis v. State*, 87 So.2d 416 (Fla. 1956); *Moore v. State*, 324 So.2d 690, 691 (Fla. 1st DCA 1976), *aff'd*., 343 So.2d 601 (Fla. 1977). Thus, Mr. Sims could introduce this evidence at re-trial as reverse *Williams*-rule evidence to show Gayle was the actual culprit. "[W]here evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990). A wide range of evidence can point to the guilt of another, and "[o]ne accused of a crime may show his innocence by proof of the guilt of another." *Pahl v. State*, 415 So. 2d 42 (Fla. 2d DCA 1982)(*citing Lindsay v. State*, 69 Fla. 641, 68 So. 932 (1915)).

[20]Danny Morrison's name was in the newly discovered McGilvray report, which led to him being interviewed.

[21]Clyde Oglesby's name was in the newly discovered McGilvray report, which led to him being interviewed.

Under these circumstances this Court can have no confidence in the outcome of the previous trial in this case.

2. The Corroborating Eyewitnesses are Incredible

Descending from the State's "chief witnesses," the second tier of evidence against Mr. Sims is made up of the hypnotically created testimony of the robbery victims. There were three victim witnesses who testified they recognized Terry Sims as the fourth participant in the robbery: Sue Kovec, William Guggenheim, and Colleen Duncan. Tr.R 405, 487, 505. This testimony came after the witnesses were (a) exposed to an overly suggestive photographic line-up, (b) hypnotized to "enhance" their "memories," and (c) exposed to extensive media footage of Sims. Despite all this, as the prosecutor argued to the jury in closing, prior to their actual testimony the State doubted whether these witnesses could identify Mr. Sims at all. Tr.R. 738. Thus, they were presented as corroboration for Baldree and Halsell given the co-defendants' obvious credibility problems.

Based on evidence adduced and credited in Mr. Sims's initial post-conviction proceeding, we now know that this post-hypnotic testimony was unreliable. This Court acknowledged that the procedure employed in this case "was subsequently discredited and hypnotically refreshed testimony is no longer admissible. *Bundy v. State*, 471 So.2d 9 (Fla. 1985)." *Sims*, 602 So.2d at 1255 (quoting trial court); *id.*, at

1256 ("we believe there was sufficient evidence in the record to support the trial judge's ruling . . . .").

Even the law enforcement officer whose hypnosis produced the victims' identification testimony would have told the jury that

> in employing [his] technique there was a possibility of confabulation, which he identified as a mixture of fact and fantasy. **Because of this, [Office Bruce Drazen] said that *any information obtained by hypnosis should be corroborated***.

*Sims*, 602 So.2d at 1255 (emphasis added).[22]

Mr. Sims presented evidence at trial and in post-conviction that another man "looks like" Terry Sims: Terry Gayle. *See* Tr.R. 549-50 (testimony of Ann Robinson), 589-90 (testimony of Gail Milliken).

> The main theory of the defense was mistaken identity. * * * The defense attacked the identification testimony of one of the customers as the product of a suggestive photographic line-up and questioned the testimony of [William] Guggenheim on the basis of his earlier failure to choose [Mr. Sims] from a photographic line-up. The defense presented evidence of [Mr. Sims's] resemblance to

[22]Whom did the State and the Florida courts rely upon to corroborate these unreliable hypnotized witnesses? B.B. Halsell and Curtis Baldree. *Sims*, 602 So.2d at 1256 ("assuming that none of the hypnotized witnesses had testified, the record still would contain the testimony of two of Sims' accomplices, who had turned state's evidence. Their testimony included the *strongest identifications in the record*") (emphasis added); *ibid.* (testimony deemed admissible under *Bundy* was "corroborated [by] the statements of the two codefendants").

> another individual [Terry Wayne Gayle] said to be a frequent criminal associate of Baldree and Halsell.

*Sims*, 444 So.2d at 924. Certainly these hypnotized witnesses could have been mistaken.

In this Court's 1991 opinion, the dissenting Justices called Drazen's hypnosis technique a "highly unorthodox, quirky, and suggestive form of hypnosis [which was used] to 'enhance' the testimony of several key witnesses." *Sims*, 602 So. 2d at 1258. Reviewing the record after the initial post-conviction hearing, Justices Kogan and Barkett concluded relief should be granted:

> Contrary to the majority's suggestions, the State's case against Sims was far from rock-solid. It was little more than a rickety conglomeration of two things: unbelievable 'memories' retrieved through the superhuman 'zoom' vision of mesmerized witnesses, and unreliable statements of drug-abusing codefendant-felons who faced near certain death if they did not please the prosecutor.

*Sims*, 602 So. 2d at 1259.

3. The non-existent gunshot wound

What this Court recently identified as the third pillar supporting Mr. Sims's conviction–the testimony of convicted drug dealer and former surgeon William Dunbar–was not even part of the State's case in chief at trial. *Sims*, Case No. 96,818, slip op. at 6. Dunbar's rebuttal evidence was so weak and insignificant that it is not

even mentioned in the Florida Supreme Court opinions on direct appeal or in the first post-conviction proceeding, or in the lower Court's order denying the initial post-conviction motion.

Suddenly, in 1999 the lower court and this Court found that Mr. Sims must have been the killer of George Pfeil because the killer "was wounded . . . by a gunshot to the hip" and the doctor who supposedly treated Sims testified that Sims "had such a wound." *Ibid*. Nothing in the record supports this finding.

The record establishes that Dunbar *never testified that the man brought to him was Sims or that the man had a gunshot wound*:

> [Prosecutor] What was the nature of the injury?
>
> [Dunbar] Actually I don't know the exact nature of the injury.
>
> * * *
>
> [Prosecutor] Tell us what the injury looked like, doctor?
>
> [Dunbar] Well, I can't get a clear picture. The injury was sort of an elongation on the left hip. * * * It seemed like it was of variable size. It looked *more like a tear of some kind or a cut*, to me.
>
> * * *
>
> [Prosecutor] This man right here [indicating Mr. Sims] was brought to you on the morning of January 3rd?

> [Dunbar] That *looks like* the man. I have only seen him one time, but that *looks like* him.
>
> * * *
>
> [Rabinowitz] Okay. Do you have, do you have any knowledge of whether or not the man who came to your office on that day, when you first looked at him, of whether or not the wound that you were looking at was a gunshot wound, when you first saw it? *Did it look like a gunshot wound?*
>
> [Dunbar] *No, I don't think it looked like a gunshot wound at that time.* I don't recall it that way. * * * I couldn't tell what the wound came from when I first looked at it, sir.

Tr.R. 66-74.

*C. Re-trial is Required*

"[T]he cumulative effect of the evidence that has been presented in this and prior postconviction proceedings," *Lightbourne v. State*, 742 So.2d 238 (Fla. 1999), is that Mr. Sims probably would not be convicted if re-tried. Petitioner requests that this Court reverse the lower court's judgment and order that Mr. Sims be re-tried or released.

## ARGUMENT II

UNDER ARTICLE X, SECTION 9, FLORIDA CONSTITUTION, THE EX POST FACT CLAUSE AND EIGHTH AMENDMENT OF UNITED STATES CONSTITUTION, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE

FLORIDA CONSTITUTION, MR. SIMS'S SENTENCE IS AND MUST REMAIN DEATH BY ELECTROCUTION UNLESS AND UNTIL JUDICIAL ELECTROCUTION IS DECLARED UNCONSTITUTIONAL WHEN HIS SENTENCE MUST BE REDUCED TO IMPRISONMENT FOR A MINIMUM OF 25 YEARS

Mr. Sims was sentenced to be "electrocuted till [sic] dead." Tr.R. 1089. Under Florida law electrocution was and is the only legal punishment that may be inflicted on someone sentenced to death for a crime committed in 1977, the year of the crime for which Mr. Sims was sentenced to death. § 922.10, Fla. Stat. (1985); Art. X, § 9, Fla. Const. There is only one other option under Florida law for a person convicted of a capital felony. § 775.082, Fla. Stat. (1981). If the death sentence imposed in this case is unconstitutional because Florida has persisted in using judicial electrocution in an unconstitutional manner–and that is precisely the situation here–clearly established Florida substantive law provides that his sentence must be reduced to a minimum of 25 years' imprisonment. §§ 775.082(1) & (2), Fla. Stat. (1981).

*A. No Choice*

The State contends that the recent legislation changed Mr. Sims's sentence to a choice: he may "elect" either a potentially lethal injection administered by an untrained, unskilled, unknown, unsupervised, and unreliable prison guard, or face a

practice of judicial electrocution known for setting people on fire[23] and being so "plagu[ed]" by "human error," *Provenzano v. Moore*, 744 So.2d 413, 422 (Fla. 1999)(Quince, J., concurring), that "each time an execution is carried out, *the courts* wait in dread anticipation of some 'unforeseeable accident' . . . ." *Id.*, 744 So. 2d at 417 (Harding, C.J., concurring specially). "The Greeks, after all, were more humane with their hemlock." A. Camus, *Reflections on the Guillotine*. "Superadd[ing]" to Mr. Sims' original sentence the terror this "choice" engenders–as it necessitates Mr. Sims contemplating pain, disfigurement, public dehumanization, and uncertainty–violates the Eighth Amendment and the Ex Post Facto Clause. *In re Medley*, 134 U.S. 160, 171, 172 (1890).

Even assuming *arguendo*, that such an "election" could be imposed on Mr. Sims, he has not made one, either purposefully, or be default, or by operation of the statute. Mr. Sims was sentenced to death by electrocution. That is cruel and unusual as carried out in Florida, so Mr. Sims may not be executed. Mr. Sims has not elected to be executed in any other way–he did not elect the punishment he was to receive when he was sentenced, and he has not elected the punishment he will receive if he is in fact executed. It is the State's (not the condemned's) duty to determine how to

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[23] *See Jones v. State*, 701 So.2d 76 (Fla. 1997), and *Buenoano v. State*, 565 So.2d 309 (Fla. 1990).

punish, and making the condemned select the state's way of executing is macabre, gratuitously torturous, and mocking. It shocks the conscience, and violates the evolving standard of decency in a free society. Mr. Sims was not sentenced to choose which poison he preferred; he was sentenced to death by electrocution.

As Justice Wells recently noted, "A change to lethal injection for inmates *may be* legally attainable based upon an *express waiver* by the prisoner of *any contest* as to the method of execution." *Provenzano*, *supra*, 744 So.2d at 419 (Wells, J., concurring). Mr. Sims has made no such waiver; quite the contrary, he is challenging in this action lethal injection, Florida's practice of judicial electrocution, and the imposition of an "election" between them as part of his sentence.

*B. No waiver*

To presume that a person has waived one thing and elected another by being silent is the height of fiction. Mr. Sims has not elected anything. He did not (and does not) know his options, and he has not acted in a way that would allow a valid choice to be found. If the new lethal legislation applies to Mr. Sims, he was given only 48 hours from some time on January 26th to "choose his poison." Yet DOC had no lethal injection procedures in effect until the afternoon of January 28th, after his time for such an election had expired under the statute. T248-49 (Moore). The State cannot meet its burden of establishing a valid waiver because none of the procedural

requirements for waiving fundamental rights is present in Florida's choice-of-execution procedures. A waiver of a fundamental constitutional right must comport with stringent procedural requirements. Such rights may be deemed waived only after a court has determined the decision to waive the constitutional right is knowing and voluntary. *See, e.g., Godinez v. Moran*, 509 U.S. 389, 400 (1993). Courts are obligated to undertake this "serious and weighty responsibility" precisely because of the importance of the constitutional rights involved. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938); *see also Schneckloth v. Bustamente*, 412 U.S. 218, 237-38 (1973)(fundamental rights include right to counsel, both at trial and upon a guilty plea; right to confrontation; right to a jury trial; right to a speedy trial; and right to be free from double jeopardy). The waiver must appear on the record. *Johnson v. Zerbst*, 304 U.S. at 465; *see also United States v. Christensen*, 18 F.3d 822, 824 (9th Cir. 1994). Any waiver can be accepted only after the person has had the opportunity to consult with counsel. *See, e.g., Brady v. United States*, 397 U.S. 742, 748 n.6 (1970).

"The purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez*, 509 U.S. at 401 n.12; *see also Boykin v. Alabama*, 395 U.S. 238, 243 (1969) ("Ignorance,

incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."). Thus, before a waiver can be found to be "knowing" and "intelligent," a court must apprise the person "of the dangers and disadvantages" of waiver and ensure "that the record . . . establish[es] that 'he knows what he is doing and his choice is made with eyes open'." *Faretta v. California*, 422 U.S. 806, 835(1975) (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942); *Boykin*, 395 U.S. at 244. To verify that the waiver is "voluntary," the court must consider whether, in the totality of the circumstances, it was obtained "by physical or psychological coercion or by improper inducement so that the [individual's] will was overborne." *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir.1988).

*C. No Retroactivity*

The substance of the Florida Constitution's prohibition on retroactive application of criminal statutes was clearly established at the time of the crime for which Mr. Sims was wrongly convicted, and at the time of his conviction and sentence. The law was, and as far as Mr. Sims is concerned still is, that (1) amendment or repeal of a criminal statute could not be applied to a crime committed before the change in law, Article X, section 9, Florida Constitution, and (2) a change in a method of execution falls within this *constitutional* rule of non-retroactivity.

*Washington v. Dowling*, 92 Fla. 601, 610-11, 109 So. 588, 589 (Fla. 1926); *Ex parte Browne*, 93 Fla. 332, 111 So. 518 (Fla. 1927). Under these rules of Florida law, the recent adoption of lethal injection as a method of execution cannot be applied to Mr. Sims. These rules have not changed. If this Court were to hold, as the trial court did, that Article X, section 9 of the Florida Constitution no longer means what it meant for the entire Twentieth Century[24] and that this change in Florida constitutional law applies to Mr. Sims's case, such a change would violate due process and the prohibition on ex post facto laws.

Mr. Sims's sentence calls for death by electrocution. Tr.R. 1089. That sentence remains in effect and was not altered by the trial court in this action. The recently passed lethal injection law purports to impose a different sentence on Mr. Sims. This Court has held that under the savings clause of the Florida Constitution, currently codified at Article X, section 9, such a change in a criminal statute cannot be applied to provide the *method* for punishing a crime committed before enactment. *Washington* and *Browne*, *supra*.

Mr. Sims stands in exactly the same position as the petitioner in *Washington*. Mr. Sims was sentenced to death under the law providing for one method of

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[24] Until the 1968 revision of the Florida constitution the text of Article X, section 9, Florida Constitution, was codified at Article III, section 32, Florida Constitution.

execution, and the executive branch of government wants to carry that sentence out under a much later-enacted law providing for a different method of execution. *See Washington*, 109 So. at 603. When Washington raised the same constitutional claim that Mr. Sims raises here and raised in the court below, this Court held that the savings clause of the Florida Constitution prohibited application of judicial electrocution to a case where the only lawful method of execution at the time of the crime was hanging. *Id.*, 109 So. 610-11.

One year later, in *Ex parte Browne*, 93 Fla. 332, 111 So. 518 (Fla. 1927), this Court decided a case in which the positions of the judicial and executive branches were the reverse of what they were in *Washington*. The trial court in *Browne* sentenced the defendant to death by judicial electrocution in accordance with the recently passed statute making that the State's method of execution. This Court held that as a matter of substantive Florida constitutional law, the savings clause of the Florida Constitution prohibited application of the electrocution statute to Browne:

> The effect of this constitutional provision is to give to *all criminal legislation*[25] a prospective effectiveness, that is to say, the repeal or amendment by subsequent legislation

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[25] In the lower court, the State argued that the present circumstances should be distinguished from *Browne* because Florida has not completely abandoned judicial electrocution as a method of execution as hanging had been rejected in 1923. The reasoning of *Washington*, *Browne* and this Court's other cases admit of no such casuistry.

> of a pre-existing criminal statute does not become effective either as a repeal or as an amendment of such pre-existing statute in so far as offenses are concerned that have been already committed prior to the taking effect of such repealing or amending law.

*Browne*, 111 So. at 519.

In *Washington*, this Court clearly stated that what it was deciding was the substantive scope of the Florida Constitution's savings clause. The question was

> whether or not section 32, art. 3, of the Constitution of this state, includes in its scope and effect a statute providing for the means to be followed in inflicting the penalty of death when imposed for the commission of a capital offense.

*Washington*, 109 So. at 607. Having determined the substantive scope of the savings clause in *Washington* and applied it accordingly there, all there was left to do in *Browne* was apply the clause to that case. *Browne*, 111 So. at 519, *citing Washington*. *Washington* and *Browne* remain the law of this State, and changing the rules they announce would adversely alter Mr. Sims's substantive rights under Florida law. *See Provenzano v. Moore*, 744 So.2d 413, 440 n. 53 (Fla. 1999) (Shaw, J., dissenting) (noting that Justice Shaw would recede from *Washington* so that the "Savings Clause would thus be inapplicable" to a person sentenced to death by electrocution).

This case is controlled by *Washington* and *Browne*.

> The doctrine of precedent is basic to our system of justice. In simple terms, it ensures that similarly situated individuals are treated alike rather than in accordance with the personal view of any particular judge. In other words, precedent requires that, when the facts are the same, the law should be applied the same.

*Perez v. State*, 620 So.2d 1256, 1259-61 (Fla. 1993) (Overton, J., concurring). "Unsettling legal principles is extremely disruptive in the criminal justice system . . . ." *Delgado v. State*, No. SC88638, 2000 WL 124382 (Fla. Feb. 3, 2000)(Wells, J., concurring in part and dissenting in part). "If the doctrine of stare decisis has any efficacy under our case law, death penalty jurisprudence cries out for its application." *Blanco v. State*, 706 So.2d 7, 12 (Fla. 1997) (Wells, J., concurring).

This would violate due process by expanding the application of Florida's death penalty law beyond its scope at the time of the crime for which Mr. Sims was wrongly convicted. *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964); *State v. Snyder*, 673 So. 2d 9 (Fla. 1996).

*D. No "Amendment Two;" the Pendency of* <u>*Armstrong v. Harris*</u>

In order for the trial court to be affirmed, the State must establish that the trial court summarily–and sub silencio–properly concluded that the recent amendments to Article I, section 17, Florida Constitution (hereinafter "revised section 17"), (1) are valid, (2) apply to Mr. Sims, (3) are dispositive of the question whether the lethal

injection statute applies to Mr. Sims, and (4) do not pose any (5) due process or (6) ex post facto problems. Not surprisingly, given the lack of analysis involved, the court was wrong on all counts. Justice Wells had earlier noted that *if* a legislative change to lethal injection were possible. "such a change requires full study and awareness by the legislature of the legal issues." *Provenzano*, 744 So.2d at 419 (Wells & Quince, JJ., concurring). No one could credibly maintain that the impromptu special session conducted by the legislature in January included "full study and awareness" of anything.[26]

The lower court held that revised section 17 of the Florida Declaration of Rights disposes of Mr. Sims claim that the Savings Clause of the Florida Constitution prohibits application of the lethal injection legislation in this case. If the lower court is correct, the amendment to section 17 would adversely alter Mr. Sims's substantive rights in violation of the Ex Post Facto Clause. Ironically, such an application of revised section 17 would also establish the invalidity of the constitutional amendment under Article XI, section 15 of the Florida Constitution. For nothing in the title, summary, or text of Amendment Two--the Legislature's ballot initiative--informed

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[26] Governor Bush's lead policy advisor on the death penalty spoke to the purpose of the proposed legislation: "What I hope is that we will become like Texas . . . . Bring in the witnesses, put them on the gurney, and let's rock and roll." Jo Becker and William Yardley, *Bush Backs Off Firm Limit to Death Row Appeals*, St. Petersburg Times, January 5, 2000, at 1A.

the electorate that the revised section 17 would change the meaning and scope of Article X, section 9 of the Florida Constitution. The "omission of such material information is misleading and precludes voters from being able to cast their ballots intelligently."[27] *Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994).

Mr. Sims argued in his Motion to Vacate, and at the *Huff* hearing, that the amendments made to Article I, section 17, Florida Constitution, are under review in this Court, and therefore should not be applied in this case. *See Armstrong v. Harris*, 732 So.2d 325, No. 95,223 (Fla. Certificate filed March 31, 1999). Mr. Sims argued, *inter alia*, that this Court had previously declined give retroactive effect to revised Article I, section 17, in part because *Armstrong* was still pending. In *Brennan v. State*, 24 Fla. L. Weekly S365 at n. 4 (Fla. 1999), this Court rejected the State's request that revised Article I, section 17 be applied retroactively in part because "this Court is presently considering the validity of this amendment in *Armstrong*."

It would be arbitrary for this Court to apply the revised provision in this case while its validity is still being decided. Particularly because revised Article I, section

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[27] By separate motion filed contemporaneously with this Brief, Mr. Sims seeks a stay of execution pending disposition of *Armstrong*, and also moves to have revised Article I, section 17, Florida Constitution, declared invalid. Mr. Sims incorporates the arguments raised there into this Brief by specific reference.

17, is even more likely to be declared invalid in light of the emphasis placed on it in this case.

*E. No Change in the Rules*

In *Brennan*, *supra*, this Court also noted another problem with applying revised section 17 to a case in which the crime occurred prior to the passage of Amendment Two. This Court declined to apply revised section 17 retroactively in part because there were

> serious questions [about] whether an amendment, which would adversely affect the substantive law in effect at the time of the original crime, could be applied retroactively without violating the United States Constitution's prohibition against ex post facto laws.

*Brennan*, *supra* at n. 4. There is no question that revised section 17 would adversely effect the substantive law that applies to Mr. Sims. Indeed, as explained *supra*, *the State is counting on it*.

As applied by the trial court, revised section 17 would have the effect of (1) allowing Mr. Sims to be executed in a manner which the substantive law of Article X, section 9, Florida Constitution, prohibits, and (2) preventing Mr. Sims from challenging judicial electrocution and, if successful, receiving the life sentence which section 775.082(2), Florida Statutes (1981), would require. Removing such a defense against the infliction of capital punishment in this case would violate the Ex Post

Facto Clause. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990), *citing Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925).

The State of Florida has sentenced Mr. Sims to death in a manner which the State, because of its own action, cannot carry out consistent with the Eighth Amendment. Nevertheless, clearly established Florida substantive law in effect from long before the crime for which Mr. Sims was wrongly convicted to the present day, prohibits the State from statutorily changing the method of execution in this case. Mr. Sims challenges the State's constitutional authority to inflict judicial electrocution on him. If Mr. Sims is successful in that challenge, and "the death penalty in [this] capital felony is held to be unconstitutional . . . the [trial] court . . . *shall sentence*" Mr. Sims to imprisonment for a minimum of 25 years. § 775.082, Fla. Stat. (1981). This unmistakably clear legislative directive establishes that Mr. Sims has a due process right either a constitutional death by electrocution, or, if the State cannot accomplish that, a sentence of imprisonment. *See Ford v. Wainwright*, 477 U.S. 399, 428 (1986)(O'Connor, J., concurring)("Our cases leave no doubt that where a statute indicates with 'language of an unmistakeable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause."). The State cannot withdraw or remove that right without violating the Ex Post Facto

Clause. *Youngblood, supra*.

## ARGUMENT III

### THE TRIAL COURT FAILED TO CONDUCT A FULL AND FAIR HEARING ON THE CONSTITUTIONALITY OF LETHAL INJECTION IN VIOLATION OF EIGHTH AMENDMENT AND DUE PROCESS STANDARDS

*A. The Hurried Hearing*

The lethal injection legislation took effect January 14, 2000, upon the signature of the governor. On January 26, 2000, the governor reset Mr. Sims's execution date for February 23, 2000. Shortly after this Court set a filing and deadline schedule of February 11, 2000, in this court, the trial court set a filing date of February 7, 2000, for any motions, setting any required hearing for February 9, 2000. Appellant complied with this schedule, and a *Huff* hearing was held on February 7, 2000. The court ordered an evidentiary hearing on the newly discovered evidence and lethal injection claims, over Mr. Sims's objection that he had no information about the proposed lethal injection procedures from DOC other than its document of January 28, 2000, "Execution Day Procedures." *Huff* T48-60; 61-63. DOC had refused to supply any information pursuant to a Chapter 119 request with the exception of invoices for purchase of hardware for the refurbishing of the death chamber, and related materials. *See* Maher letter, 3.850 appendix.

Appellant also filed a motion for subpoena duces tecum setting forth specific written documents sought, together with the testimony of any person designated by DOC who was familiar with the proposed lethal injection procedures. As of February 7th, appellant still did not know what chemicals were to be used, the dosages, sequence, timing, rate, intervals, or any other information relevant to the plans for the lethal injection, with the exception of the bare outline of the "Execution Day Procedures" published January 28th. Appellant sought to compel the information at the *Huff* hearing. T48-63. The DOC counsel refused to provide even the names of the chemicals to be used, citing vague safety concerns. When the trial court expressed concern over DOC's refusal to provide any information and the need for judicial review, T60-63, DOC counsel and the attorney general conferred. At the end of that conference, the attorney general admitted the real reason for the concealment was that DOC was concerned if it gave doses "that we're gonna be fighting about that from now on." *Huff* T65. He said the concern was they not get into "the same thing we got into with the electric chair as to when we got to talking about volts and amperage . . . ." *Huff* T65. It then agreed to make the drugs known. T67. However, it continued to fight having to advise counsel and the court what the dosage was, and of any protocols, saying they were confidential. T66. Only the chemicals to be used were given to counsel that day at the close of the February 7th hearing.

Appellant objected to having an evidentiary hearing and requested discovery, a continuance and a stay at the close of the *Huff* hearing, due to the lack of knowledge of any of the specifics of the proposal, inability to properly prepare, or to consult with and retain experts. *Huff* T67-71. The court referred to the filing deadlines this Court set in denying a continuance: "There are lots of other things happening. Supreme Court set time limits, they've set time for oral arguments in this case, they expect me to do my job. . . . And I'm gonna try to do it. If I can't do my job, then I'll do something else, but I'm gonna try to do my job." *Huff* T71. The evidentiary hearing remained set for February 9th. The state and DOC agreed to produce people from the Florida State Prison who could testify about the plans for the lethal injection execution.

The morning of the evidentiary hearing, appellant again objected to the lack of discovery or other information from DOC. T4-6. The judge denied the request for a stay and continuance, and the hearing proceeded. At the hearing, appellant had to put the DOC witnesses on the stand without knowing what they would say. As it turned out, they did not know much. The chemicals and dosages given were only ranges based on a "guesstimate range." T123. The witnesses could not provide details about concentration level, IV tubing sizes, and other specifics. T97. The defense pharmacologist had to listen to the testimony and the next day testify about

the proposed procedure. However, he had to testify before knowing many of the specific details, and before hearing additional information from Secretary Moore, who testified that afternoon. T162-231; 243-274. The dosages related by Secretary Moore were obtained by him by calling someone in South Carolina, and he had them hand written on a piece of paper as he testified. T270-71. Even he could not provide any other specifics about the chemicals and equipment. T253, 259. Appellant was not provided sufficient time to prepare, to question appropriate DOC employees who are actually knowledgeable of the each participant's training and role in the process, or the physician who is supposedly going to assist.

The trial court's commencement of the hearing based on trying to meet this court's deadlines is precisely the basis for this court's reversal in *Provenzano v. State*, 744 So. 2d 413 (Fla. 1999), and this Court should reverse this case as well, and remand for a full and fair hearing that complies with due process.

*B. The Evidence Exclusion*

The trial court refused to consider evidence that physicians and physician's assistants cannot participate in a lethal injection execution. Appellant tried to present evidence that physicians and physician's assistants cannot perform the functions assigned by DOC under their respective codes of ethics. The trial court sustained the state's objection to such evidence as irrelevant, T16-20, and a proffer was made

through Professor Radelet, who has taught medical ethics for over ten years, that their codes do prohibit such conduct. T35-38; Dse Comp. Exh. C. That they will not perform the medical functions expected by DOC was borne out by the testimony of Physician's Assistant Matthews, who could not have been clearer that he would be an observer only, and would not assist. The physician would be similarly bound. Denial of the proffer also deprived appellant of a full and fair hearing and the ability to present this case.

## ARGUMENT IV

### LETHAL INJECTION AS PROPOSED IN FLORIDA IS CRUEL AND/OR UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION ARTICLE I, SECTION 17, FLORIDA CONSTITUTION

Without citation to authority, the trial court held DOC was prepared to carry out lethal injection constitutionally. However, the testimony at the hurried evidentiary hearing shows there is a substantial risk of unnecessary pain, and of a lingering, unseemly and undignified death, built right into DOC's lethal injection plans. DOC has no written procedures to guide the participants in any of the specifics of the lethal injection process, from the dosage to be administered to the steps to take if there is a mishap. As a result, there is much confusion on the critical issue of the role of "medically-trained" participants in the execution upon whom

DOC relies and yet are forbidden from assisting if a problem arises. The "Execution Day Procedures" DOC has published reveal a real risk that the death by the proposed lethal injection will instead result in death by suffocation on vomit, which the state argued below is a constitutionally acceptable method of execution. DOC has scurried to get ready for its first lethal injection, but it is not.

*A. Lethal Injection Can Be Cruel and Unusual Punishment*

"It turns out that lethal injection is the most commonly botched means of execution in the United States today." T24 (Radelet testimony). Problems have arisen in the breakdown of the drug sequence leading to gasping for breath and other indications of agony, prolonged difficulty in locating a vein, the straps so tight they impeded the flow of chemicals, prolonged interruption of the process, a kink in the tubing, the needle falling out or a vein collapsing during injection, an interaction of the drugs resulting in the chemicals clogging the IV tube, and unusual reaction to the drugs. T28-33. These even in states in which the participants are experienced.

The consequences of a botched lethal injection can be horrifying. The lethal chemicals are sodium pentathol (a fast-acting, and fast-dissipating, barbituate), pancuronium bromide or Pavulon (a muscle paralyzer), and potassium chloride (heart arrester). These are powerful drugs with equally powerful side effects. A mistake in the sequence of the introduction of the chemicals, through misnumbering of the

syringes or other error would produce catastrophic results. If pancuronium bromide is administered without anesthetic (or as the sodium pentathol wears off), even at low doses, the chest muscles would be paralyzed making it impossible to breathe and resulting in a conscious suffocation. T175-77 (pharmacologist). "The drug essentially [produces] suffocation if respiration isn't supported and it has been described as the feeling as if you have a horse sitting on your chest. You cannot breathe, you cannot move." T177. If potassium chloride is injected without anesthetic, "[i]t would feel like a hot poker going up your arm. This wave of muscular paralysis and contracture would then spread to the heart." T178. Similar horrifying results occur if there is a delivery of insufficient anesthetic either because of prior drug use, the needle missing the vein or vein collapse, or the anesthetic dissipates too rapidly. These are examples and not meant to catalogue all possible problems that can occur.

*B. Written Procedures are Essential*

In spite of the record of botched lethal injection executions in other jurisdictions, and the proven record of DOC in botching electrocution executions, that agency has refused to provide any specific written guidelines for the participants who

are to prepare and administer the lethal injection. [28] DOC has no written guidelines specifying the chemicals to be used, their dosages, timing, rate, concentration or sequence. T74. No written guidelines set forth the time or content of the last meal, the need for a medical and drug background of the inmate, or the qualifications and medical training of those who are to mix and administer the lethal chemicals. T75-76; 77; 115, 133. No documents specify who is in charge or what to do when a problem arises. T254 (Moore). Instead of written protocols, the participants "rely on their own self-knowledge." T88 (Crosby).

Specific written guidelines are standard protocol in the medical setting, particularly as a guide in how to deal with problems. T198. "It matters most when something goes wrong." T237. Testimony at the evidentiary hearing demonstrated the absence of such guidelines, T247, 254, has already resulted in dangerous confusion at DOC over the role of the physician and physician assistant in the execution.

### *C. The Persons Present at the Execution Do Not Know What they are Supposed to Do*

The DOC Secretary believes "medically trained" people present at the

[28] DOC has chosen to provide only general written guidelines to those carrying out the lethal injection, in an admitted effort to avoid judicial scrutiny of its methods. *See* Remarks of Nunnelley, *Huff* Hrg T65-66.

execution will take care of any problem that arises, T254-57, specifically mentioning a physician's assistant. When asked by the court, Secretary Moore testified his understanding of the Physician Assistant's role was: "He is there to advise the executioners if there is a problem with dosage, as I understand it." T273. Warden Crosby likewise intends to rely on the physician's assistant as "somebody that if we need could be used." T85. However, that physician's assistant could not have been clearer that he was there only as an observer, that assisting with a problem "would go against everything I was trained to do," and he would not assist in the execution if there was a problem. T114, 118-20, 132. He did not know if the physician who was there felt the same, T121, but the AMA code prohibits physician involvement in executions, the same as that for physician's assistants. (Proffered testimony of Radelet).

Likewise, the DOC secretary believes the "medically trained" participants will step in if there is a problem, T254-57, but the physician's assistant at the prison said the executioner (the person who pushes in the lethal mix from the numbered syringes) is in charge once the go-ahead is given by the warden. The executioner will determine whether there is a problem and provide the medical assistance necessary. T132 ("as I understand it, the executioner will be monitoring that, and if that point the IV should be compromised at that site, he'll take the appropriate

action");133(same);134,135. These are the sole qualifications of the executioner: that he be over 21, a state resident, and not a DOC employee. T81-82. No medical qualifications are required. T267.

*D. Drowning in Vomit*

What protocols DOC has established show at least one disaster waiting to happen. DOC intends to give the inmate his last meal an hour before the execution. T250 (Secretary Moore). Yet standard anesthesia protocol calls for no food or fluids twelve hours before a subject is given sodium pentathol, because people frequently vomit when given that anesthetic, and could aspirate the vomit and drown. T184. The state's response to this well-known medical issue is that *it does not care*. The attorney general argued below that it would be acceptable for an inmate to suffocate on his own vomit in the context of a lethal injection because he would be unconscious when he did so. T297. While no court would approve of this "vomit aspiration" method of execution, the state knows its method carries a high risk of such a horrifying and undignified death yet is "ready" to proceed in any event.

*E. The Written Protocol vs. Witness Testimony*

The pharmacologist also pointed out the execution day procedures adopted by DOC on January 28th conflict with that understood by the physician's assistant who testified at the hearing. In the "Execution Day Procedures" document at Page four,

paragraph D, the document says

> The designated member(s) of the Execution Team will observe the heart monitor. If the heart monitor does not indicate a flat line reading after the first administration of the lethal chemicals, then the Executioner(s) shall begin a second flow of lethal chemicals using the alternate IV line. This process will continue until a flat line reading is indicated and the Physician determines that death has occurred.

Ex. 7. Stopping the flow of the chemicals and picking up where they left off would result in conscious suffocation or sending the equivalent of a hot poker up the inmate's arm if the anesthetic had not been injected. However, Mathews said the protocol was to start over. T118. If, per the protocol, DOC just "begin[s] a second flow of lethal chemicals using the alternate IV line" that raises a substantial risk the anesthetic has not been fully injected, and of conscious suffocation, pain, or heart stoppage. T202-203.

*F. Contrary to State Law*

The protocols are also in conflict with Florida law. At page 4, "C," the protocol says "the only persons authorized in the witness room" are the listed persons, and that list excludes the inmate's counsel and spiritual representative. Yet section 922.11 (2), Fla. Stat. requires "Counsel for the convicted person and ministers

of religion requested by the convicted person may be present for the execution." This provision is unlawful.

Similarly, DOC lethal injection protocol shows it intends to begin the execution outside the presence of any witnesses, by hooking the inmate up to an IV in a separate preparation room, then wheeling him into the death chamber on the gurney. Ex. 7, Page 3 "A" - "F." This procedure is contrary to the statutory and constitutional requirement that the witnesses be permitted to view the execution. *See Oregon Newspaper Publishers Association v. Oregon Dept. of Corrections,* 988 P.2d 359 (Or. 1999).

*G. Contrary to the Eighth Amendment*

The Eighth Amendment "proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). It prohibits the *risk* of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Gregg*, 428 U.S. at 183; citing *Gamble*, 429 U.S. at 103). The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict[] bodily pain or mutilation." *Weems v.*

*United States*, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," *id*. at 366, or to "circumstances of *terror*, pain, *or disgrace*" "superadded" to a sentence of death. *Id*. at 370 (emphasis supplied). See *In re Medley*, 134 U.S. 160, 171, 172 (1890) (seclusion in solitary confinement and prohibition on telling condemned prisoner date and time of his execution are increased punishments, in violation of *ex post facto* clause, because solitary confinement induces "further terror," while "secrecy [about the time of execution] must be accompanied by an immense mental anxiety amounting to a great increase in punishment." *See also Trop v. Dulles*, 356 U.S. 86, 101 (1958).[29] A penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" *Gregg*, 428 U.S. at 173 (citing *Trop* , 356 U.S. at 100). The court must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid *undue risks* of inflicting inhumane punishments. *Compare Maynard v. Cartwright*, 486 U.S. 356 (1988), *with Lewis v.*

[29] *See Hudson v. McMillian*, 503 U.S. 1, 16-17 (1992) Blackmun, J., concurring) ("As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' not 'injury.' . . . 'Pain' in its ordinary meaning surely includes a notion of psychological harm. . . . I have no doubt that to read a 'physical pain' or 'physical injury' requirement into the Eighth Amendment would be no less pernicious and without foundation than the 'significant injury' requirement we reject today.").

*Jeffers*, 497 U.S. 764 (1990).[30]

This court cannot be so assured here. There are no specific protocols detailing the procedures to be followed. Appellant has shown there is in fact, confusion and miscommunication among the DOC staff and management as to each participant's role, level of participation, line of authority and other critical issues. *Compare, Jones v. State*, 701 So. 2d 76 (Fla. 1977)(adoption of specific protocols means execution will be constitutionally carried out). The state does not care that its procedure will probably produce death by vomit asphyxiation. This Court cannot let DOC proceed with lethal injection in its present state of unpreparedness and confusion.

*H. Separation of Powers*

The special session amendments to Sections 922.10 and 922.105, Florida Statutes, by House Bill 5A purports to change the method of execution to "lethal injection", and leave it to the Department of Corrections ("DOC") to divine what exactly the lethal mixture will be, and how it will be administered. DOC also decides whether the method of execution has been properly elected or "defaulted" by an inmate. This broad concession of agency discretion is an unlawful delegation of authority by the legislative to the executive branch of government. Article II,

[30] *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (the focus of the inquiry is whether there exists an "objectively intolerable risk of harm").

section 3 of the Florida Constitution provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

"The prohibition contained in the second sentence of Article II, section 3 of the Florida Constitution could not be plainer, as our cases clearly have held. This Court has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers." *B.H. v. State*, 645 So. 2d 987, 991 (Fla. 1994). This "strict separation" means "the legislature is not free to redelegate to an administrative agency so much of its lawmaking power as it may deem expedient." *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978). Here the legislature has charged DOC with the authority to put people to death by a lethal injection without further explanation, has exempted from the definition of the practice of medicine the person or persons who will administer the lethal injection, and has deprived the agency responsible for regulating the practice of medicine and all affected parties of any informational or adversarial process for developing and challenging the procedure pursuant to Chapter 120, Florida Statutes. (Subsection (7)). This standardless statute is an unlawful delegation of authority.

This Court has concluded that

> under the [nondelegation] doctrine fundamental and primary police decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.

*Cross Key Waterways*, 372 So. 2d at 925. While the standard has been variously articulated, "one clear principle emerges from the case law outlined above: The legislature may not delegate open-ended authority such that `no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law." *B.H.*, 645 So. 2d at 993 (quoting *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211 (Fla. 1968)). In *B.H.*, the Court found the legislature had unlawfully given standardless discretion to HRS to determine which commitment facilities were sufficiently restrictive that leaving the facility constituted the crime of escape. As in the case at bar, *B.H*. involved the intersection of the law of nondelegation with the criminal law. Where there is a challenge to agency delegation in the criminal context, both separation of powers and due process considerations apply:

> The nondelegation doctrine arising from article II, section 3 is directly at issue because `the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch.' *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla. 1991)(emphasis added). Likewise, due process is implicated because article I, section 9 requires that a criminal statute reasonably apprise persons of those acts

> that are prohibits; and the failure to do so constitutes a due process violation.

*B.H.*, 645 So. 2d at 992. The authorizing legislation in *B.H.* did not meet the constitutional command of "strict separation" because "while these [statutory] restrictions may create a minimum standard, they completely fail to create a maximum point beyond which HRS cannot go." The court continued:

> At the very least, all challenged delegations in the criminal context must expressly or tacitly rest on a legislatively determined fundamental policy; and the delegations also must expressly articulate reasonably definite standards of implementation that do not merely grant open-ended authority, but that impose an actual limit–both minimum and maximum–on what the agency may do. Art. II, Sec. 3, Fla. Const. The statute here fails because it made an open-ended delegation of the kind condemned in Conner.

*B.H.*, 645 So. 2d at 994.

The lethal injection bill sets no limits at all – it just informs DOC to carry out "lethal injection". HB5-A. While it requires a person authorized by state law to dispense and mix, the lethal "medication," it does not require the person who administers it to be authorized by state law to do so, or require any training whatsoever for that person.

One element courts consider in determining whether an attempted delegation is constitutional is whether the legislation involves fluid and complex issues: "As we

recognized in *Askew* and *Brown*, the sufficiency of adequate standards depends on the complexity of the subject matter and the `degree of difficulty involved in articulating finite standards.'" *Avatar Development Corp. v. State*, 723 So. 2d 199, 207 (Fla. 1998)(citations omitted). Execution by lethal injection is not a fluid and complex factual scenario like land use or environmental regulation. The legislature had the ability to determine the specifics itself. Had it taken the time, it could have held hearings and heard expert testimony on the lethal injection procedure, and set forth some kind of "maximum and minimum" standards for DOC to follow. It did not.

Furthermore, the legislature exempted the development of lethal injection procedures from Chapter 120, the Administrative Procedures Act. This exclusion deprives the parties of any voice in the development of the lethal injection procedure, which would have otherwise made such procedures "amenable to articulation and refinement by policy statements adopted as rules under the 1974 Administrative Procedures Act," *Cross Key Waterways*, 372 So. 2d at 919. The total lack of any process for input and challenge of the lethal injection procedures further exacerbates the already overbroad delegation of authority.

The statute is an unconstitutional delegation of authority.

## CONCLUSION

For the foregoing reasons the judgment of the trial court should be reversed and

this Court should enter a stay of execution.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief is being sent via facsimile transmission, copy to follow by United States mail, first class postage prepaid, Kenneth S. Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., Daytona Beach, Florida 32118-3958, this 14th day of February, 2000.


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