**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC06-1946**

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**ARTHUR DENNIS RUTHERFORD,**

**Petitioner,**

**v.**

**JAMES McDONOUGH,**

**Secretary, Florida Department of Corrections,**

**Respondent.**

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# PETITION FOR WRIT OF HABEAS CORPUS AND PETITION SEEKING TO INVOKE THIS COURT'S ALL WRITS JURISDICTION

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## INTRODUCTION

On September 17, 2006, five (5) days before the Governor Bush re-scheduled Mr. Rutherford=s execution, the American Bar Association=s Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team published its comprehensive report of Florida=s death penalty system. See American Bar Association, **Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report**, September 17, 2006 (hereinafter ABA Report on Florida). In light of the content of the ABA Report, undersigned counsel has sought to present a claim on Mr. Rutherford=s behalf that the Florida capital sentencing scheme now stands in violation of the Eighth Amendment for the reasons set forth in Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam).

Given the Governor=s decision to ignore the ABA Report and reschedule Mr. Rutherford=s execution, counsel hurriedly put the claim together and filed it in a successive 3.850 motion. When the State responded that the ABA Report was not Aevidence@, but merely a compilation of known facts regarding Florida=s capital process, counsel filed a 3.800 motion relying upon this Court=s language in Anderson v. State, 267 So. 2d 8 (Fla. 1972). The State then moved to strike the 3.800 motion arguing that the capital defendants were precluded from filing 3.800 motions. The circuit court granted the motion to strike indicating that since the ABA Report was not in the court record, 3.800 relief was not available.[1] The circuit court then denied the claim in the 3.850 premised upon Furman,

[1]Of course when this Court relied upon 3.800 to grant relief in Anderson, the United States Supreme Court=s decision in Furman was not of record, but was jurisprudence regarding the identified problems with various death penalty statutes that lead this Court to conclude that Florida=s death penalty was unconstitutional. Similarly, when this Court granted relief in Hopping v. State, 708 So. 2d 263 (Fla. 1998), it said Awhere it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause, the sentence is illegal and can be reached at any time under rule 3.800.@ In finding a constitutional violation, this Court of necessity concerned itself with the law regarding what constituted a double jeopardy

indicating that the ABA Report did not constitute evidence that could be considered in a 3.850 proceeding.[2]

These circuit court rulings in this regard seems inherently inconsistent: 1) the information contained in the ABA Report is not in the record, so a 3.800 motion is inappropriate, and 2) the ABA Report is not evidence, but merely a compilation of identified problems with the death penalty procedure, and thus cannot be considered in

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violation. Thus, the more appropriate dichotomy would seem the usual one concerning matters that are questions of fact versus ones that are questions of law. Thus, the issue should be, does the ABA Report present questions of fact or questions of law. When thought of in those terms, it is clear that the circuit court=s ruling was in essence that the question posed was neither, and that seemingly is a *non sequitur*. It simply must be one or the other.

[2]Of course, the circuit court=s ruling specifically relied upon a finding deemed decisive, *i.e.* that the ABA Report would not be admissible at a retrial or resentencing. Certainly, this was contrary to this Court=s jurisprudence that new evidence of valid constitutional or statutory claim, need merely establish the error. Roberts v. State, 840 So. 2d 962 (Fla. 2002)(relief granted in a third successive 3.850 motion because of new evidence that the judge through *ex parte* communication had the prosecutor drafting findings in support of death sentence); Porter v. State, 723 So. 2d 191, 196-7 (Fla. 1998)(granting sentencing relief to defendant who proved judicial bias through newly discovered evidence in a successive collateral proceeding).

3.850 proceedings on the issue of the constitutionality of the capital sentencing statute. Without waiving his argument that one these procedural vehicles permits Mr. Rutherford to present the merits of his Furman, he files this Petition as a third alternative vehicle for having his claim heard. Following Furman, this Court did on one occasion consider the matter in a petitioner=s original writ requesting that his death sentence be voided. In re Baker, 267 So. 2d 331 (Fla. 1972). Given that jurisprudence, Mr. Rutherford alternatively presents his claim in this petition, which is being filed in order to address Florida=s current death penalty scheme and its failure to comply with Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam).

Neither Mr. Rutherford, nor his counsel, mean any disrespect to this Court. It is just that given the arguments advanced by the State below, given the circuit court=s decisions, and given this Court rulings in Anderson and in Baker, there are three potential procedural vehicles for presenting Mr. Rutherford=s Furman challenge. Neither Mr. Rutherford, nor his counsel, wish to fail to invoke the proper procedure. From Mr. Rutherford=s perspective, he has no interest in picking one procedure and advocating that it is proper to the exclusion of the others. He merely wishes to have this Court consider his claim and rule on the merits, as it did in Anderson and Baker. Accordingly, he presents his claim in the three different procedural methods merely as alternatives.

## JURISDICTION

Mr. Rutherford invokes the jurisdiction of this Court pursuant to Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, ' 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, ' 13, Fla. Const.

Additionally, Mr. Rutherford also invokes the jurisdiction of this Court pursuant to Article V, Section 3(b)(1) and (7) of the Florida Constitution which gives this Court exclusive appellate jurisdiction over all capital cases and the ability to issue "all writs

necessary to the complete exercise of its jurisdiction." This Court's "all writs" jurisdiction may be invoked in capital cases when warranted by circumstances. Johnston v. Singletary, 640 So. 2d 1102 (Fla. 1994). The circumstances presented herein warrant invocation of the "all writs" jurisdiction. In re Baker, 267 So. 2d 331 (Fla. 1972).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to review issues arising in the course of capital postconviction proceedings. State v. Lewis, 656 So. 2d 1248 (Fla. 1995). The reasons set forth herein demonstrate that the Court's exercise of its "all writs" jurisdiction, and of its authority to correct errors such as those herein pled, is warranted in this action.

Mr. Rutherford urges this Court to invoke its inherent jurisdiction to do justice. See State v. Burton, 314 So. 2d 136, 138 (Fla. 1975)(AUnder the common law, any court of record had absolute control over its orders, decrees, etc., and could amend, vacate, modify or change them at any time *during the term at which rendered*. Control now is in the courts during the period allowed by the rules of court, terms (as used in common law) having been abandoned. But this restriction does not apply to such orders, judgments or decrees which are the product of fraud, collusion, deceit, mistake, etc. Such may be vacated, modified, opened or otherwise acted upon *at any time*. This is an inherent power of courts of record, and one essential to insure the true administration of justice and the orderly function of the judicial process.@).

## REQUEST FOR ORAL ARGUMENT

Mr. Rutherford requests oral argument on this petition/writ.

## STATEMENT OF THE CASE AND FACTS

Mr. Rutherford was indicted in Santa Rosa County, Florida, for first-degree murder and robbery (R. 1). A jury found Mr. Rutherford guilty (R. 74) and recommended death by a

vote of 8 to 4 (R. 75). The court found the State had knowingly committed a discovery violation and ordered a retrial (R. 106-11).

At a retrial, the jury found Mr. Rutherford guilty (R. 150). The jury recommended death by a 7 to 5 vote (R. 156). The judge sentenced Mr. Rutherford to death (2nd Supp. R. 3). This Court affirmed Mr. Rutherford=s conviction and sentence on appeal. Rutherford v. State, 545 So. 2d 853 (Fla. 1989), cert. denied, 110 S. Ct. 353 (1989).

Mr. Rutherford filed a postconviction motion under Fla. R. Crim. P. 3.850 (PC-R. 2). The circuit court held an evidentiary hearing on the penalty phase ineffective assistance of counsel claims (PCR1. 386-94), and later denied relief (PCR1. 675-834). This Court affirmed, Rutherford v. State, 727 So. 2d 216 (Fla. 1999), and denied relief on a petition for a writ of habeas corpus. Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000).

Mr. Rutherford filed a petition in federal district court. The district court denied the petition, and the Eleventh Circuit affirmed. Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2004), cert. denied 125 S.Ct. 1847 (2005).

In September of 2002, Mr. Rutherford filed a successive postconviction motion in the circuit court based on Ring v. Arizona, 122 S.Ct. 2428 (2002). Following the denial of relief by the circuit court, this Court affirmed on May 25, 2004. Rutherford v. State, Case No. SC03-243 (Fla. 2004), rehearing denied July 23, 2004.

On March 4, 2005, Mr. Rutherford filed a petition for a writ of state habeas corpus based on Crawford v. Washington, 124 S.Ct. 1354 (2004). This Court denied Mr. Rutherford=s petition on July 8, 2005. Rutherford v. State, Case No. SC05-376 (Fla. 2005).

On November 28, 2005, Mr. Rutherford filed a petition for a writ of state habeas corpus based on the decision in Deck v. Missouri, 125 S. Ct. 2007 (2005). This Court denied Mr. Rutherford=s petition on January 5, 2006. Rutherford v. Crosby, Case No. 05-2139 (Fla. 2006).

On November 29, 2005, Governor Jeb Bush signed a death warrant setting an

execution date of January 31, 2006 at 6:00 p.m. Mr. Rutherford filed a successive 3.850 motion on December 21, 2005, which was summarily denied. This Court affirmed. Rutherford v. State, 926 So. 2d 1100 (Fla. 2006).

On January 31, 2006, the United States Supreme Court granted a stay of execution to Mr. Rutherford based on a petition for writ of certiorari concerning his federal court proceedings. On June 19, 2006, the Supreme Court granted the petition for writ of certiorari and remanded his case to the circuit court of appeals.

On September 22, 2006, Governor Bush re-scheduled Mr. Rutherford=s execution for October 18, 2006, at 6:00 p.m. On September 27, 2006 Mr. Rutherford filed a successive 3.850 motion. On October 2, 2006, Mr. Rutherford also filed a Motion to Correct an Illegal Sentence pursuant to Florida Rule of Criminal Procedure 3.800(a).

On October 4, 2006, by written order, the lower court dismissed Mr. Rutherford=s 3.800(a) motion. On October 6, 2006, the lower court summarily denied Mr. Rutherford=s successive Rule 3.850 motion and the amendment thereto. Simultaneously with this petition/writ, Mr. Rutherford files his appeal from the lower court=s orders.

## GROUNDS FOR RELIEF AND ARGUMENT

## MR. RUTHERFORD=S SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

### A. Introduction

Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam).[3]

[3]The previous year, the United States Supreme Court in McGautha v. California, 402 U.S. 183 (1971), had considered whether:

> the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of

> reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.

McGautha, 402 U.S. at 196. In the majority opinion written by Justice Harlan, the Court found no due process violation. In reaching this conclusion, the majority noted the impossibility of cataloging the appropriate factors to be considered:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability . . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

Id. at 204, 208. When Furman reached the Court the next year and the Petitioners presented an argument that the statutory schemes for imposing a sentence of death violated the Eighth Amendment, Justice Stewart and Justice White joined the dissenters from McGautha and found that the death penalty statutes were indeed unconstitutional.

At issue in Furman were three death sentences: two from Georgia and one from Texas. The Petitioners relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death schemes were then operating to be arbitrary and capricious. Furman, 408 U.S. at 253 (Douglas, J., concurring) (AWe cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.@); Id. at 293 (Brennan, J., concurring) (Ait smacks of little more than a lottery system@); Id. at 309 (Stewart, J., concurring) (A[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual@); Id. at 313 (White, J., concurring) (Athere is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not@); Id. at 365-66 (Marshall, J., concurring)(AIt also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.@)(footnote omitted). As a result, Furman stands

for the proposition most succinctly explained by Justice Stewart in his concurring opinion: AThe Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed@ on a Acapriciously selected random handful" of individuals. Id. at 310.[4]

In the wake of Furman, all death sentences were vacated. Proof of individual harm or the lack of such proof was irrelevant. Thereafter, the State of Florida (as well as others states) sought to adopt a death penalty scheme that would pass scrutiny under Furman. Florida=s newly adopted scheme was reviewed by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976). In Gregg v. Georgia, 428 U.S. 153 (1976), a companion case to Proffitt, the United States Supreme Court explained: Athe concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.@ Gregg v. Georgia, 428 U.S. at 195 (plurality opinion). Applying this principle to Florida=s newly-adopted capital sentencing scheme, the Supreme Court concluded:

> Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the

[4]It is important to recognize that the decision in Furman did not turn upon proof of arbitrariness as to one individual claimant. Instead, the Court looked at the systemic arbitrariness. Furman involved a macro analysis of a death penalty scheme and a determination as to whether the scheme permitted the death penalty to be imposed in an arbitrary and/or capricious manner.

> state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed.

Proffitt, 428 U.S. at 259-60. Subsequent Supreme Court decisions have explained that Furman required that a capital sentencing scheme produce constitutional reliability and Aa reasoned moral response to the defendant's background, character, and crime.@ Penry v. Lynaugh, 492 U.S. 302, 319, (quoting California v. Brown, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring) (emphasis deleted). See Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(plurality opinion); Jurek v. Texas, 428 U.S. 262, 276 (1976)(plurality opinion). As a result, a capital sentencing scheme must: 1)Anarrow@ the capital sentencer=s discretion, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988); and 2) permit the sentencer to consider A*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.@ Lockett v. Ohio, 438 U.S. 586, 604 (emphasis in original). See also Penry v. Lynaugh, 492 U.S. 302, 324 (1989).

However over time, various Justices of the United States Supreme Court have expressed concern whether the capital sentencing schemes approved in Gregg and Proffitt actually delivered the promised and requisite reliability. Justice Scalia observed an inherent inconsistency between the narrowing requirement and the broad discretion to consider mitigation requirement:

> My initial and my fundamental problem, as I have described it in detail above, is not that *Woodson* and *Lockett* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*. It is that which led me into the inquiry whether either they or *Furman* was wrong. I would not know how to apply them -- or, more precisely, how to apply both them and *Furman* -- if I wanted to. I cannot continue to say, in case after case, what degree of "narrowing" is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett*. And I cannot continue to say, in case after case, what sort of restraints upon sentencer discretion are unconstitutional under *Woodson-Lockett* when I know that the Constitution positively *favors* constraints under *Furman. Stare decisis* cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.

Walton v. Arizona, 497 U.S. 639, 672-73 (1990).

Thereafter, Justice Blackmun soon concluded that the Furman promise could not be delivered, and accordingly the death penalty should be declared unconstitutional:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia, 408 U.S. 238 (1972),* and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman v. Georgia, supra,* can never be achieved without compromising an equally essential component of fundamental fairness -- individualized sentencing. See *Lockett v. Ohio, 438 U.S. 586 (1978).*

Callins v. Collins, 510 U.S. 1141, 1143-44 (1994)(Blackmun, J., dissenting from the denial of cert.).

Most recently, Justice Souter wrote in an opinion joined by Justices Stevens, Ginsburg, and Breyer:

> Decades of back-and-forth between legislative experiment and judicial review have made it plain that the constitutional demand for rationality goes beyond the minimal requirement to replace unbounded discretion with a sentencing structure; a State has much leeway in devising such a structure and in selecting the terms for measuring relative culpability, but a system must meet an ultimate test of constitutional reliability in producing "'a reasoned moral response to the defendant's background, character, and crime,"' *Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)* (quoting *California v. Brown, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987)* (O'Connor, J., concurring); emphasis deleted); cf. *Gregg v. Georgia, 428 U.S. 153, 206, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)* (joint opinion of Stewart, Powell, and STEVENS, JJ.) (sanctioning sentencing procedures that "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant"). The *Eighth Amendment*, that is, demands both form and substance, both a system for decision and one geared to produce morally justifiable results.
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> That precedent, demanding reasoned moral judgment, developed in response to facts that could not be ignored, the kaleidoscope of life and death verdicts that made no sense in fact or morality in the random sentencing before *Furman* was decided in 1972. See *408 U.S., at 309-310, 92 S. Ct. 2726, 33 L. Ed. 2d 346* (Stewart, J., concurring). Today, a new body of fact must be accounted for in deciding what, in practical terms, the *Eighth Amendment* guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by

> requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."
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> We are thus in a period of new empirical argument about how "death is different," *Gregg, 428 U.S., at 188, 96 S. Ct. 2909, 49 L. Ed. 2d 859* (joint opinion of Stewart, Powell, and STEVENS, JJ.): not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases. While it is far too soon for any generalization about the soundness of capital sentencing across the country, the cautionary lesson of recent experience addresses the tie-breaking potential of the Kansas statute: the same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.

Kansas v. Marsh, 126 S.Ct. 2516, 2542, 2544, 2545-46 (2006) (Souter, J., dissenting).

The flaws and defects identified by the ABA Report issued on September 17, 2006, demonstrate that Florida=s capital sentencing scheme does not deliver on the Furman promise.[5] The identified flaws and defects inject arbitrariness into the capital sentencing process. Who in fact gets executed in Florida does not depend upon the facts of the crime or the character of the defendant, but upon the flaws and defects of the capital sentencing process. Thus, Athe imposition and carrying out of the death penalty in [Mr. Rutherford=s] case[] constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.@ Furman, 408 U.S. at 239-40.

The report indicates that there are a number of the areas Ain which Florida=s death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures@. ABA Report on Florida at iii. In the report, recommendations were made to assist Florida in fixing a broken system. But, the report cautions that the apparent harms in

[5]The ABA Report centers on thirteen distinct areas of the death penalty system: 1) death row demographics, 2) DNA testing and testing and preservation of biological evidence; 3) law enforcement tools and techniques; 4) crime laboratories and medical examiners; 5) prosecutorial professionalism; 6) defense services; 7) direct appeal process; 8) state postconviction proceedings; 9) clemency; 10) jury instructions; 11) judicial independence, 12) racial and ethnic minorities; and 13) mental retardation and mental illness.

the system Aare cumulative@ and must be considered in such a way; Aproblems in one area can undermine sound procedures in others.@ Id. at iii-iv. A review of the areas identified in the report as falling short makes apparent that in Florida=s death penalty scheme is deficient for the many of the same reasons the schemes at issue in Furman were found to be unconstitutional.[6]

Based on the information contained in the report, it is clear that death sentences, like Mr. Rutherford=s, are a product of an arbitrary and capricious system. Who is executed in Florida is determined by a myriad of factors unrelated to the facts of the crime or the character of the defendant.

**B. Florida Death Penalty System**

**1. The Number of Executions**

The information and conclusions contained in the ABA Report make clear that

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[6]For example, the various opinions written in Furman noted the same evidence of arbitrary factors unrelated to the crime or the defendant=s character that were at work in the sentencing process that is set forth in the ABA Report on Florida. Furman, 408 U.S. at 256 n. 21 (whether counsel timely objected to error was on occasion a decisive, albeit arbitrary factor in whether a death sentence was imposed); Id. at 290 (the manner in which retroactivity rules operate injected arbitrariness); Id. at 293, 309-10, 313 (the number of executions in comparison to the number of murders suggested a lottery); Id. at 364-66 (evidence that racial prejudices and/or classism and/or sexism infected sentencing decisions); Id. at 366-67 (likelihood that an innocent may be executed suggested arbitrariness); Id. at 368 n. 158 (the failure to apply scientific developments in criminal cases fast enough to enhance reliability of outcome of process created arbitrary results).

Florida=s death penalty scheme has failed to satisfy the Furman mandate. Florida=s capital sentencing is still arbitrary and capricious. Since 1972, Florida has carried out a total of 61 executions; while between 1972 and 1999, there were 857 defendants sentenced to death (obviously since 1999, there have been more death sentences imposed). ABA Report on Florida at 7. Statistics of the number of individuals who committed murder during that time has not been recorded. Nevertheless, it is clear that few death sentences that are imposed are actually carried out. Undoubtedly, the percentage of murderers in Florida actually executed since 1972 is minuscule. Furman, 408 U.S. at 293 (Brennan, J., concurring) (Ait smacks of little more than a lottery system@); Id. at 309 (Stewart, J., concurring) (A[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual@); Id. at 313 (White, J., concurring) (Athere is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not@). The ABA Report on Florida demonstrates the same flaws and defects condemned in the Furman once again infect Florida=s capital sentencing scheme.

**2. The Exonerated**

In Florida, since 1972, twenty-two (22) people have been exonerated and another individual has been exonerated posthumously, while sixty-one (61) people have been executed. ABA Report on Florida at iv, 8 (A[T]he proportion exonerated exceeds thirty percent of the number executed.@). ASince the reinstatement of the death penalty in 1972, Florida has led the nation in death row exonerations.@ Id. at 45.[7] Yet in Florida, there has been no investigation to determine why. There has been no effort to learn what defects and flaws have allowed innocent men to not just get convicted, not just have the convictions and sentences affirmed on direct appeal, but to have those convictions on at least one occasion (Juan Melendez) be all the way through a first round and second round of state postconviction proceedings before prevailing in a his third motion for postconviction relief and being released from death row after 17 years. Surely what happened to Mr. Melendez was Acruel and unusual in the same way that being struck by lightning is cruel and unusual@ Furman 408 U.S. at 309 (Stewart, J., concurring). The number of Florida exonerations demonstrates a broken system that violates the Furman promise. But equally symptomatic

[7]As noted by Justice Souter in his dissenting opinion in Kansas v. Marsh, 126 S.Ct. at 2544-45, when Illinois had 13 exonerations between 1977 and 2000, a moratorium was imposed and investigation launched. During the investigation, 4 more individuals were determined to be innocent. As a result, the Illinois capital sentencing scheme was reformed and all death sentences imposed under the old scheme were vacated. Yet, as the ABA Report on Florida notes, Florida has had more capital exonerations than Illinois. The staggering rate of exonerations certainly suggest that Florida=s death penalty system is just as broken as Illinois= was B that politics, race, prosecutorial misconduct and deficient lawyering afflict the system.

of a broken system is the lack of curiosity or concern that innocent men have been sent to death row.

**a. The arbitrariness in the treatment of evidence of actual innocence.**

While the State of Florida has recently passed legislation to allow capital defendants the opportunity to seek DNA testing,[8] most of the exonerated defendants= cases, had no connection to favorable post-verdict DNA results. Yet, the State of Florida has not made any substantive or procedural improvements for those who have no DNA evidence in their case, but could show innocence through the use of other evidence.[9] Indeed, while the State of Florida has now removed the time limitation for bringing a motion seeking DNA testing, see Fla. Stat. ' 925.11 (1)(b) (2006); Fla. R. Crim. P. 3.853, capital postconviction defendants, like Mr. Rutherford, must prove diligence in bringing claims of innocence. Indeed, this Court has held that it would not consider evidence of innocence presented in a successive collateral motion where the circuit court had found that the capital defendant=s attorney had not been diligent in uncovering and presenting that evidence. Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002).[10] In yet another case,

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

[9]In Mr. Rutherford=s case, the forensic evidence collected at the time of the crime which could certainly prove useful to him today was destroyed shortly after his conviction, without notice to Mr. Rutherford or his counsel. In collateral proceedings, Mr. Rutherford has presented evidence in effort to establish his innocence. The evidence, in the form of a confession by another individual to a third person has not been considered in any meaningful way, but simply disregarded because of this Court=s determination that there was other evidence of guilt. Rutherford v. State, 926 So. 2d 1100, 1109-10 (Fla. 2006).

[10]In fact, in Swafford, three justices dissented on the grounds that the new evidence would have probably produced an acquittal had it been presented to the jury. Id. at 978-79.

this Court, while considering some of the newly discovered evidence presented in a successive collateral motion, excluded from its consideration certain other pieces of the newly discovered evidence. This Court deferred to the circuit court=s conclusion that Leo Jones had failed to prove his diligence in uncovering certain pieces of newly discovered evidence, and excluded evidence of another man=s confession as inadmissible hearsay. Jones v. State, 709 so. 2d 512, 519-20, 525 (Fla. 1998). In Jones, two justices vigorously dissented. See Id. at 527.[11] A system that precludes the presentation of evidence of innocence in a form other than the results of DNA testing injects arbitrariness and randomness into the process in violation of Furman.[12] It simply defies logic to require an innocence man to be executed because his attorney failed to prove diligence in discovering the evidence that proves his innocence.[13]

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[11]The ABA Report also notes that the Death Penalty Information Center lists the case of Leo Jones as one that may have resulted in the execution of an innocent man. ABA Report on Florida at 8.

[12]Indeed, the reasons for removing the time limit for bringing a motion for new trial on the basis of the results of DNA testing apply with equal force to any evidence in whatever form that demonstrates that an innocence man is under sentence of death. The distinction that has been drawn is likely to result in the execution of innocents.

[13]Several states have now created systems of review in cases where claims of factual innocence are made. ABA Report on Florida at x. This type of system is necessary

because of the Aperception that procedural defaults and inadequate lawyering sometimes prevent claims of factual innocence from receiving full consideration.@ Id. The state assessment team recommends that such a system be created in Florida.

As was noted in Furman, any judicial system with procedural and substantive protections for an accused will result in errors; innocent individuals will be convicted. Furman, 408 U.S. at 366 (AOur >beyond a reasonable doubt= burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.@). Yet, not only does empirical evidence now demonstrate that Florida has the highest exoneration in capital cases of any state, nothing has been done to investigate, find out why, and attempt to remedy the matter. Having such knowledge and experiencing such a situation first-hand in Florida, the courts and government have ignored the arbitrariness that accompanies the determinations that one type of proof of innocence is less valuable than another; one type qualifies for less procedural restrictions than another; and one type imposes less hurdles to be cleared before consideration of the evidence on the merits.

While DNA is a powerful tool in proving innocence, the recantation of witness testimony, confession by another individual to a third-party and other scientific improvement may be equally revealing. See House v. Bell, 126 S.Ct. 2064 (2006). And, while there may be a more obvious issue of credibility attached to evidence of recantations, confessions and other scientific advances than may not be present with DNA, that does not mean that there will not be credibility issues raised as to the accuracy of DNA results. It is simply arbitrary to place a diligence requirement when dealing with a particular type of evidence of diligence, but not another. See Jones; Swafford.

Florida=s decision to ignore the need for an actual innocence exception which allows an individual to defeat procedural bars and to demonstrate innocence has created a system that tolerates and accepts the risk of executing an innocent individual. As a result, Florida=s capital sentencing scheme violates the principles enunciated in Furman.

**b. DNA.**

The State of Florida has now decided that DNA evidence will not be subjected to the procedural bars that apply to other evidence of innocence. However, those ignored by the State are those who cannot prove their innocence through DNA testing because the State destroyed the evidence before the testing could be conducted. In fact, these are the circumstances in Mr. Rutherford=s case.

As the ABA Report on Florida makes clear: AMany who have been wrongfully convicted cannot prove their innocence because states often fail to adequately preserve material evidence.@ ABA Report at 43. Indeed, Athe State of Florida did not require the preservation of physical evidence in death penalty cases until October 1, 2001.@ Id. at 56. There is no protection for defendants who fall into this category. Thus, depending on whether an agency of the State of Florida had the space to store evidence, the weather[14], and other extraneous factors, evidence of innocence will be available to some, but not others. There are no ramifications for the State or protections for defendants who encounter such a situation. The distinction between the case where the evidence was retained and the testing demonstrates innocence and the case where the evidence would have established innocence, but was destroyed, can only be described as Awanton@ or Afreakish@. Furman, 408 U.S. at 310.

**2. Representation**

The ABA Report identified several problems concerning the representation of indigent capital defendants that leads to the arbitrary imposition of the death penalty and the problems effect all levels of representation. Indeed, the Report noted that defense counsel=s competence to be perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty. ABA Report on Florida at 135. See

[14]In December, Mr. Rutherford learned that evidence in his case had been destroyed due to storage issues and that weather problems.

Furman, 408 U.S. at 256 n. 21 (whether counsel timely objected to error was on occasion a decisive arbitrary factor in whether a death sentence was imposed).

**a. Trial level representation**.

The team found that there was inadequate compensation for trial counsel in death penalty proceedings. ABA Report on Florida at iv. In addition, the administration of the funding and timing of counsel=s ability to seek payment severely hamper obtaining qualified counsel who has adequate funding for a death penalty case. Of course, Florida is obligated to provide effective representation at the trial under the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984). As explained in Strickland, the purpose of this constitutional obligation is insure that the trial is an adequate adversarial testing that produces a reliable result. Recently, the United States Supreme Court not only recognized that the ABA had promulgated a set of guidelines devoted to setting forth the obligations of defense counsel in capital cases, but found that those guidelines served as a benchmark in further the goal of obtaining a constitutionally adequate adversarial testing. Rompilla v. Beard, 545 U.S. 374 (2005).[15] With those guidelines in mind, the team recommended that steps be taken to insure the appointment of Aqualified and properly compensated counsel.@ Id. at 174. The team also recommended that this guarantee include A[a]t least two attorneys@ with access to investigators and mitigation specialists. One member of the

[15]Even though the United States Supreme Court has explained that its decisions finding ineffective assistance in Rompilla v. Beard, Wiggins v.Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), were all dictated by its decision in Strickland and therefore each of those decisions date back to Strickland, this Court has refused to re-examine its decisions predicated on its understanding of Strickland which are at least arguably in error under Rompilla, Wiggins, or Williams. Thus, individuals on Florida=s death row who have meritorious claims under any one of these three decisions do not get the benefit of those three decisions if this Court had denied a Strickland claim before the United States Supreme Court issued these decisions. As explained *infra*, this is the injection of an arbitrary factor into who gets executed and who does not that violates the principle of Furman.

defense team should be trained in mental health screening. Id. at 175-76. These and the other recommendations made in the ABA Report reflect that Florida has not lived up to its obligation to minimize, if not remove, arbitrary factors from the capital sentencing process.

**b. Postconviction representation**

An even more substantive failure to deliver on the Furman promise arises in the context of Florida=s capital postconviction representation. The quality of Florida=s capital postconviction representation system has steadily declined over the past ten years when the federal funding for resource centers was eliminated. The past ten years have demonstrated a consistent pattern of turmoil and chaos in the representation of capital postconviction defendants. The state-funded agency responsible for representing postconviction defendants was overwhelmed with cases, absorbing those cases that the federally funded organization had represented, and a large number of cases in the mid-90s when death sentences spiked and rule changes caused initial motions to be filed much quicker than in previous years.[16] That the location of the agency was split into three regional offices but still managed under the auspices of a single agency. The agency was then officially separated into three regional offices with the creation of the Registry system to handle conflict and overflow cases. A few years later, the Florida Legislature eliminated one of the regional offices and sent Registry sixty-plus cases. Under the current system, at that part of the capital process at which errors are sought to be caught and corrected,[17] qualifications to be appointed to a capital postconviction case are minimal, oversight is

[16]For a more complete history of the state funded capital collateral system see ABA Report on Florida p. 195-6.

[17]AVery significant percentages of capital convictions and death sentences have been set aside in such proceedings . . . @ ABA Report on Florida at 214.

non-existent, and funding is inadequate.[18] Id. at v. Compensation is capped. Though this Court has recognized that the cap may be breached in extraordinary circumstances, the fact that the determination of whether the cap was properly breached is made after the fact. Fla. Dept.of Financial Services v. Freeman, 921 So. 2d 598 (Fla. 2006). Certainly, requiring attorneys who find that the requisite work exceeds the statutory cap to litigate their compensation after the fact has a chilling effect. Within the Registry system, statutorily funding is only available for 840 attorney hours for attorneys representing capital postconviction defendants on the registry when research suggests that 3,300 attorney hours are required to represent a capital postconviction defendant. ABA Report on Florida at v. This is not the only monetary limitation, funds for investigative, expert, travel and other costs is limited. Moreover, there is no provision for compensation for successor proceedings.[19]

While Registry counsel are restricted in funding, the Capital Collateral Counsel (CCC) offices are not. Thus, CCC attorneys can exceed the 840 hours without the consequence of non-payment. CCC attorneys can hire experts, pay investigators and incur other costs associated with litigating a capital postconviction case without consequence of non-payment. There is no valid basis for distinction between death row defendants represented by Registry counsel and death row defendants represented by CCC attorneys.[20] Undoubtedly, this disparity in funding will impact the representation and

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[18]In 2003, upon the elimination of the Capital Collateral Counsel for the Northern Region, Mr. Rutherford=s case was sent to the Registry system and is governed under Florida Statutes '' 27.710 and 27.711 (2005).

[19]Juan Melendez was exonerated in the course of his third motion for post-conviction relief. Yet, the funding of the registry makes no provision for even a second motion, let alone a third.

[20]Many capital defendants went from having representation by the CCC office in Tallahassee to having representation by Registry. These capital defendants were arbitrarily stripped of their right to have counsel working on their behalf outside the stricture

arbitrarily effect the ultimate success of capital postconviction defendants in challenging their convictions and death sentences.

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of a cap. See *e.g.* Florida Dept. Of Financial Services v. Freeman.

In 1988, this Court recognized that the creation of CCR extend to all Florida capital defendants the right to have effective representation in all collateral proceedings in both state and federal court. Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988)(Aeach defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings.@). Having recognized the statutorily created right, this Court has generally found that no remedy exists for a breach of the statutorily created right to effective collateral counsel. Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996)(Aclaims of ineffective assistance of postconviction counsel do not present a valid basis for relief@).[21] This Court did recognize an exception to the Lambrix rule where state-provided collateral counsel due to neglect failed to file a timely notice of appeal. Porter v. State, 788 So. 2d 917 (Fla. 2001). Otherwise, state-provided collateral counsel=s failure to exercise diligence in investigating and timely presenting evidence of innocence or of a constitutional deprivation operates as a bar to a court=s consideration of the resulting claims for relief. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002).

Because, beyond the narrow circumstance identified in Porter v. State, a capital defendant has no remedy when state-provided counsel either through negligence or a lack of diligence fails to provide effective representation, Florida=s capital sentencing process

[21]However, in the non-capital context not involving the statutory right to effective collateral counsel, this Court held that when a convicted defendant establishes that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner, due process requires that the convicted defendant be authorized to file a belated motion to vacate. Steele v. Kehoe, 747 So. 2d 931, 934 (Fla. 1999)(Awe [have] made clear that >postconviction remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States.=@). Accordingly, this Court ordered that Fla. R. Crim. Pro. 3.850 that addresses post conviction motions filed by non-capital defendants be amended to provide that an untimely motion could be filed if Athe defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion.@ Fla. R. Crim. Pro. 3.851 was not amended in a corresponding fashion.

fails to live up to the Furman promise. As noted in the ABA Report, the performance of Registry counsel has been openly criticized, even by members of this Court:

> This lack of appellate experience may account for the questionable performance of some registry attorneys. For example, a number of registry attorneys have missed state post-conviction and federal habeas corpus filing deadlines possibly precluding their clients from having their claims heard. Specifically, registry attorneys in at least twelve separate cases filed their clients= state post-conviction motions or federal habeas corpus petitions between two months to three years after the applicable filing deadline.
>
> Performance like this has led two Florida Supreme Court Justices to publicly comment on the quality, or lack thereof, of registry attorneys. Justice Cantero stated that the representation provided by some registry attorneys is A[s]ome of the worst lawyering@ he has ever seen. Specifically, Asome of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven=t raised the right ones.@ Chief Justice Barbara Pariente reiterated the concerns of Justice Cantero by stating that A[a]s for registry counsel, we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimal levels of competence.@ The questionable performance of these attorneys, as well as the lack of requisite qualifications, is particularly troublesome in light of the fact that death-sentenced inmates do not have a state of federal constitutional right to assert a claim of ineffective assistance of post-conviction counsel.
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> The performance of these attorneys has also led many legal experts as well as some Democratic and Republican Legislators to criticize the closure of CCRC-North Office in 2003. In fact, many legal experts, including Justice Cantero and the Executive Director of the Commission on Capital Cases, have cautioned against proposals to eliminate the two other CCRC Offices.

ABA Report on Florida at 183-84. Thus, it is well recognized by state officials in the legislative and judicial branches of government that a number of the post-conviction attorneys provided by the State are incompetent, *i.e.* some of the worst lawyering ever seen. Yet, the capital defendants provided some of the worst lawyering ever seen must accept the incompetent representation without recourse.[22]

[22] An amicus brief filed in the United States Supreme Court that is noted and relied upon in the ABA Report, catalogues instances where Registry counsel simply do not know

or understand capital postconviction law, and thereby waive the capital defendants= rights and avenues to obtain relief without their consent or knowledge. See ACLU=s Amicus Brief in Lawrence v. Florida.

A system that knowingly provides capital defendants with Asome of the worst lawyers@ that a Justice of this Court has ever seen, and strips the capital defendant of the right to complain and seek redress, simply does not comport with the Furman promise that states with capital sentencing schemes must affirmatively take steps to eliminate the risk that an execution will be as random as a bolt of lightning. It is well-recognized within the State of Florida, as the ABA Report documents, that the Asafety net@ of postconviction has been stripped away.[23] Those capital postconviction defendants who receive Asome of the worst lawyering@ that a Florida Supreme Court justice has ever seen and who may have meritorious claims for relief and who in fact may be innocence, have been arbitrarily denied any real chance of obtaining relief by Florida=s knowing willingness to provide incompetent counsel. The situation Asmacks of little more than a lottery system.@ Furman, 408 U.S. at 293 (Brennan, J., concurring). The outcome of the post conviction process, directly linked to whether state-appointed counsel is incompetent, is a purely arbitrary.

**3. Issues Related to the Jury=s Role in Sentencing**

**a. Jury Instructions.**

The ABA Report makes clear that capital jurors, i.e., those individuals largely involved in the decision of whether a defendant receives the death penalty, do not understand Atheir role or responsibilities when deciding whether to impose a death sentence.@ ABA Report on Florida at vi. Indeed, A[i]n one study, over 35 percent of

[23] As Justice Marshall explained in Furman, Athe measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours.@ 408 U.S. at 371. Yet here, Florida seems bereft of concern for those condemned to receive Asome of the worst lawyering.@

interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt.@ Id. The same study found that over thirty-six percent (36%) Abelieved that they were *required* to sentence the defendant to death if they found the defendant=s conduct to be >heinous, vile or depraved=@ beyond a reasonable doubt. Id. (emphasis in original). Over twenty-five percent (25%) considered future dangerousness, even though such a factor is not a legitimate sentencing factor under Florida law. Id. Based on these disturbing results, the state assessment team recommended that the State of Florida redraft its capital jury instructions in order to prevent common juror misconceptions, misconceptions that can only inject arbitrariness to the process. Id. at x. The presence of an identified arbitrary factor, *i.e.* juror confusion, warrants action. Had Florida launched an investigation into why there have been some many exonerations from death row, it may have learned that one factor contributing to the problem was juror confusing. But instead, as red flags are waved, as alarm bells go off, as identified arbitrary factors are identified, nothing is done. The system tolerates it. This violates the promise of Furman.

**b. Unanimity.**

AFlorida is now the only state in the country that allows a jury to find that aggravators exist *and* to recommend a sentence of death by a mere majority vote.@ State v. Steele, 921 So. 2d 538, 548-49 (Fla. 2005)(emphasis in original). The ABA Report on Florida cites a study which finds that permitting capital sentencing recommendations by a majority vote reduces the jury=s deliberation time and may diminish the thoroughness of the deliberation. ABA Report on Florida at vi-vii. In the ABA Report on Florida, the state assessment team recommended that the State of Florida require a unanimous jury verdict.[24] Id. at x.

[24]The current Attorney General Charles Crist, and candidate for Governor of the State of Florida has opposed changing Florida=s statute regarding unanimity in

recommending the death penalty, claiming that such a change would Aweaken@ Florida=s death penalty system. Interestingly, Attorney General Crist did not comment on the how the change in statute may effect the fairness and reliability of the death penalty system or make the system less arbitrary.

Of course, the question of the constitutionality of permitting a jury to recommend a death sentence on the basis of a majority vote has been upheld. Spaziano v. Florida, 468 U.S. 447 (1984). But here in Florida where death recommendations have been permitted on less than a unanimous vote, 22 exonerations of death sentenced individuals has occurred since 1972. Of course, the cause for the highest rate of capital exonerations in the nation has not been investigated. However, it is recognized that Florida has held that a sentencing jury is precluded from consideration of residual or lingering doubt as to guilt as a mitigating factor that may warrant a life sentence. ABA Report on Florida at 311 (Athe Florida Supreme Court has consistently rejected >residual= or >lingering doubt= as a non-statutory mitigating circumstance@). It is certainly logical that an innocent man or woman may have less to argue in the way of mitigation than a guilty one. See Cheshire v. State, 568 So. 2d 908, 912 (1990)(AEvents that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court.@). Where the defendant is innocent, the reality is that there were no Aevents@ that led to a murder that he did not commit. There is only the mitigation inherent in any individual=s life story. Thus, the exclusion of lingering doubt as a basis for a sentence of less than death clearly increases the odds that an innocent defendant will receive a sentence of death.

The coupling of a simple majority verdict with the preclusion of consideration of lingering doubt as a basis for a sentence of less than death certainly add to the risk that an innocent will be sentence to death. Given that Florida is the only state to have coupled these things together and given that Florida leads the nation in capital exoneration, certainly provides a basis for arguing the synergistic effect of the choices made in structuring Florida=s capital scheme has produced a system that Asmacks of little more than a lottery system.@ Furman, 408 U.S. at 293 (Brennan, J., concurring).

**c. Judicial Overrides.**

In Florida, the judge who presides over a capital sentencing proceedings has the ability to override a jury=s sentencing recommendation. ABA Report on Florida at 31. This Court adopted the standard to be employed when reviewing a judicial override in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). However, the Tedder standard has been the source of great debate over the years. Justice Shaw opined in 1988 that the Tedder standard had created Furman error:

> This presents a serious *Furman* problem because, if *Tedder* deference is paid, both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation and, thus, cannot rationally distinguish between those cases where death is imposed and those where it is not.

Combs v. State, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring) (footnote omitted). In 1989, a majority of this Court held that the vigorousness of the Tedder standard had waxed and waned over the years:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that *Tedder* has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to *Grossman v. State*, 525 So.2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring):
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> > During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation. . . .
> >
> > Clearly, since 1985 the Court has determined that *Tedder* means precisely what it says,that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So.2d at 910.

Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). Thus, this Court confessed that standard used to review overrides on appeal had varied over time. A clearer confession that arbitrariness had infected the decision making process is hard to imagine.

More recently, three dissenters argued that a majority of the Court once again failing to give meaning to the Tedder standard:

> In the final analysis, the majority's tenuous reliance on Garcia simply underscores its abandonment, with no compelling rationale, of our principled and well-reasoned caselaw in Tedder and its progeny.

Zakrzewski v. State, 717 So. 2d 488, 498 n. 6 (Fla. 1998) (Anstead, J., dissenting).

But not just members of this Court have been trouble by the jury override and this Court=s erratic treatment of the Tedder standard. In Parker v. Dugger, 498 U.S. 308 (1991), the United States Supreme Court reviewed this Court=s application of the Tedder standard and its resulting affirmance of a judicial override of a life recommendation. The United States Supreme Court found:

> What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge=s findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge=s findings.

Parker, 498 U.S. at 320. In reversing, the United States Supreme Court explained:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. * * * The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker=s sentence at all.

Parker, 498 U.S. at 321.

The sporadic use of the judicial override and the erratic application of the Tedder standard has again injected arbitrariness into Florida=s capital sentencing scheme. As noted by Justice Shaw, the use of the override and the use of the Tedder Apresent[ed] a serious Furman problem@ B this has simply been ignored. Combs v. State, 525 So. 2d at 859 (Shaw, J., specially concurring). The failure to address this problem reflects an abandonment of the Furman promise. Layer upon layer of arbitrary sentencing factors entirely divorced from the facts of the crime or the character of the defendant have accumulated and rendered the Florida sentencing scheme in violation of Furman.

### 4. Racial and Geographic Disparities

Racial and geographic disparities still plague Florida=s death penalty scheme as noted in the ABA Report.

#### a. Racial Disparities.

The ABA Report relied on three previous studies concerning race and the death penalty as well as an analysis of current statistical discrepancies concerning race and the death penalty. In 1991, a criminal defendant in a capital case was 3.4 times more likely to receive the death penalty if the victim is white that if the victim is African American.[25] Id. 7-8. This statistic has not changed. A[A]s of December 10, 1999, of the 386 inmates on Florida=s death row, >only five were whites condemned for killing blacks. Six were condemned for the serial killings of whites and blacks. And three other whites were sentenced to death for killing Hispanics.= Additionally, since Florida reinstated the death penalty there have been no executions of white defendants for

[25]The victim in Mr. Rutherford=s case is a white female.

killing African American victims.@ Id. at viii.[26]

The State of Florida=s knowledge of the disparities of race on its death penalty scheme and disregard of the impacts of such a factor demonstrates an impermissible acceptance of a system that permits the death penalty Ato be . . . wantonly and . . . freakishly imposed@ on a Acapriciously selected random handful" of individuals. Furman, 408 U.S. at 310.

**b. Geographic Disparities.**

[26]The statistics relied on in the ABA Report on Florida make clear that race is a factor in Florida=s death penalty scheme. Such a factor causes the death penalty to be arbitrary and capricious. Furman, 408 U.S. at 364-66 (Eighth Amendment violated where racial prejudices and/or classism and/or sexism infected sentencing decisions). Even after Governor Bush commissioned a study of race and its impact on the justice system in 2000, and those involved recommended an additional study, no steps have been taken find a remedy for the injection of a improper factor into the sentencing process. ABA Report on Florida at xi.

Likewise, geographic disparities contribute to the arbitrariness of Florida=s death penalty scheme. In 2000, 20 percent of the death sentences imposed that year came from the panhandle, while in 2001, 30 percent of the death sentences imposed that year came from the panhandle. ABA Report on Florida at 9.[27] Thus, death sentences are significantly influenced by the county where a crime occurred. Geographic disparities clearly show that a factor unrelated to the circumstances of the crime or the character of the defendant are at work in the decision to seek and impose a death sentence. In a state such as Florida, where race, ethnicity, religious affiliation, cultural background, age and political philosophies differ so drastically from county to county, the geographic disparity breaches the Furman promise that death sentences not be premised upon arbitrary factors.

**5. Prosecutorial Misconduct**

[27]Mr. Rutherford=s sentence of death was imposed in the First Judicial Circuit which is in the panhandle.

AThe prosecutor plays a critical role in the criminal justice system.@ ABA Report on Florida at 107. And, even more so in a capital case, where the prosecutor had Aenormous discretion@ in determining whether to seek the death penalty. Id. Yet, this Court regularly orders new trials in capital cases because of prosecutorial misconduct.[28] On occasion, this Court has found the prosecutorial misconduct was only sufficiently prejudicial at the penalty phase to warrant the grant of penalty phase relief.[29] And on a number of occasions, this Court has determined that the prosecutor acted improperly, but prejudice was insufficiently established to warrant relief from either the conviction or the death sentence.[30]

Despite the numerous instances of prosecutorial misconduct in Florida capital cases, no investigation has been launched nor program instituted to stamp out such misconduct.[31] However, the ABA=s assessment team stated that to stop prosecutorial

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

New trials on the basis of prosecutorial error have also been ordered by the federal courts in course of federal habeas proceedings. Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1993); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). New trials have also been ordered on prosecutorial misconduct for which there is no reported decision. Ernest Miller and William Jent both received new trials from the federal district court in light evidence that the State withheld exculpatory information from the defense. Similarly, Juan Melendez received a new trial from the state circuit court on the basis of his claim that the State improperly withheld exculpatory information..

[29]See Young v. State, 739 So. 2d 553 (Fla. 1999); Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

[30]See Guzman v. State, 2006 Fla. LEXIS 1398 (Fla. June 29, 2006); Smith v. State, 931 So. 2d 790 (Fla. 2006); Ventura v. State, 794 So. 2d 553 (Fla. 2001); Duest v. Dugger, 555 So. 2d 849 (Fla. 1990).

[31]The trial prosecutor in Mordenti v. State was sanctioned, not for her misconduct in

abuses, Athere must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct.@ ABA Report on Florida at 108. The United States Supreme Court has recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

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Mordenti by for her actions as federal prosecutor during a non-capital proceeding. Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001).

Berger v. United States, 295 U.S. 78, 88 (1935). Thus, there should be a higher ethical obligation because the prosecutor carries with him power derived from his position which must be held in check, just as each branch of government is subject to checks and balances. Florida=s willingness to tolerate prosecutorial misconduct violates the promise of Furman.[32]

The ABA Report further recommends that each prosecutor=s office have written polices governing the exercise of prosecutorial discretion. Id at 125. This is necessary given Florida=s history to try to eradicate arbitrary factors from not just the trial, but in the exercise of prosecutorial discretion to seek death in the first instances. Without such policies or guidelines, Florida=s death penalty scheme Asmacks of little more than a lottery system.@ Furman, 408 U.S. at 293 (Brennan, J., concurring).[33]

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[32]Despite the frequency of prosecutorial misconduct, whether warranting or new trial, coupled with the fact that Florida leads the nation in the number death row exonerations, nothing has been done to investigate the causes for the pattern of prosecutorial misconduct and frequency of exonerations. The State of Florida by its conduct has demonstrated that the situation is acceptable, and that the risks that an innocence man or woman will be convicted, or that guilty man or woman will receive an undeserved death sentence are okay.

[33]The state assessment team noted that the arbitrariness of the death penalty scheme begins with the charging process, noting that A[i]n spousal killings, [prosecutors sought the death penalty 3 1/2 times more often in cases with white victims than those

involving black or Hispanic victims.@ ABA Report at 124. Also, A[i]n cases in which the victims and accused killers were friends or relatives, prosecutors in Orange and Seminole Counties asked for the death penalty four times more often when the victim was white.@ Id.

Time and time again, prosecutors violate the rules B the rules of discovery, the rules of evidence, the rules of due process. This Court often identifies capital cases where the prosecutor went to far, or was guilty of a discovery violation, yet, the Court refuses to grant relief because the defense failed to object and/or the error was Aharmless@ or insufficiently prejudicial.[34] The acceptance of prosecutorial misconduct as merely a kind of error, like a deficient jury instruction, certainly offers a ready explanation for Florida=s leadership of death row exonerations. It also constitutes a violation of Furman that turns the capital process, not into a search for truth or for justice or for the objectively right result, but into a game of relativity, where all that matters is winning.

**6. The Direct Appeal Process**

This Court reviews all of the cases where the death sentence is imposed in order to determine whether death is a proportionate penalty. Yet, because this Court only reviews cases Awhere the death penalty was not imposed in cases involving multiple co-defendants@, the proportionality review is skewed. ABA Report on Florida at xxii. ABecause of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment system will function in an arbitrary and discriminatory manner.@ Id. at

[34]The failure to do anything about the numerous instances of prosecutors not following the rules, or in essence excusing the misconduct because of an apparent Ano harm no foul@ rule, actually encourages prosecutors to convert the Berger limiting principle into a perversion of itself, to make it into a self-righteous justification that because winning is justice, winning is everything, and therefore, the ends justify the means.

xxii, 208. The limited scope of the proportionality review, only looking at other cases in which death has been imposed, skews the review in favor of death and undercuts its Ameaningfulness@.

In addition to this, the ABA Report noted a disturbing trend in this Court=s proportionality review: ASpecifically, the study found that the Florida Supreme Court=s average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period.@ ABA Report on Florida at 212. The ABA Report noted Athat this drop-off resulted from the Florida Supreme Court=s failure to undertake comparative proportionality review in the >meaningful and vigorous manner= it did between 1989 and 1999.@ ABA Report at 213. The ABA Report also noted Athat, since 1999, the Florida Supreme Court is no longer holding true to its own rule that proportionality review should be a >qualitative review . . . of the underlying basis for each aggravator and mitigator= and not simply a comparison between the number of aggravating and mitigating circumstances.@ ABA Report on Florida at 213.[35]

[35]The ABA Report noted that its Astudy attributed this drop-off in vacations of death sentences on proportionality grounds to the political pressure from the executive and legislative branches regarding the disposition of death penalty appeals and the changing composition of the Court.@ Id. at fn.53, 213.

The shift in the affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends upon what year the appellate review was or is conducted.[36] This variable has nothing to do with the facts of the crime or the character of the defendant. Accordingly, it could only be describe as arbitrary.[37]

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[36]Even the United States Supreme Court has noted deficiencies in this Court=s appellate review. See Parker v. Dugger, 498 U.S. 308, 320 (1991)(AWhat the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge=s findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge=s findings.@). In Parker, this Court=s failure to accurately read the record was itself a violation of the Eighth Amendment.

[37]As noted previously, the shift in this Court=s proportionality review commencing since the year 2000, reflects a reoccurring pattern in the appellate process. This Court=s review of judicial overrides of life recommendations has shifted repeatedly. Even though the majority of the Court always cites Tedder v. State as establishing the standard, dissenting justices who were previously in other cases in the majority repeatedly assert that the manner in which the Tedder is applied has shifted. See Combs v. State; Cochran v. State; Zakrzewski v. State. Moreover, the affirmance rate of judicial overrides also waxes and wanes in a fashion supporting dissenting justices claim that the manner in which the standard was applied has altered.

### 7. Retroactivity

Problems with the appellate review process show in other ways. For example, the United States Supreme Court has explained that its decisions finding ineffective assistance in Rompilla v. Beard, Wiggins v.Smith, and Williams v. Taylor, were all dictated by its decision in Strickland and therefore each of those decisions, while issuing between 2000 and 2005, actually date back to Strickland, and reflect what the decision in Strickland the very day it was issued in 1984. Between 1984 and 2000, this Court addressed ineffective assistance of counsel claims under Strickland in virtually every capital post conviction case that it heard. It is clear from analyzing those opinions that this Court did not read Strickland the way it was read and applied in Rompilla, Wiggins, and Taylor. Yet, this Court has refused to re-examine its decisions predicated upon its understanding of the meaning of Strickland which was at least arguably in error under Rompilla, Wiggins, or Williams. Thus, individuals on Florida=s death row who have meritorious claims under any one of these three decisions and who presented those claims to this Court before the issuance of these three opinions since the year 2000, will not get the benefit of those three decisions. In essence, this Court has stripped those death row inmates of their Sixth Amendment rights as defined by the United States Supreme Court.[38]

[38]Of course, many of the individuals who submitted the ineffectiveness claim to this Court prior to 2000 have also submitted the ineffective assistance claim to the federal

courts in a federal habeas petition. Just as the federal courts in Rompilla, Wiggins, and Williams, had failed to properly to read Strickland or failed to recognize that the state court reading was in fact contrary to Strickland, the Eleventh Circuit denied many ineffective assistance of counsel arguable meritorious under Rompilla, Wiggins, and Williams. But by virtue, the Anti-Terrorism and Effective Death Penalty Act of 1996, the ability to file a second habeas and obtain review of the previously, albeit wrongly, denied ineffective assistance claim. Thus, numerous individuals are now stuck with a meritorious claim in light of Rompilla, Wiggins, or Williams, but with no court in which to have the claim properly evaluated.

Because of this Court=s use of retroactivity rules to preclude consideration of meritorious claims,[39] the ABA Report recommended that the Florida state courts

[39]Another example of arbitrariness injected into the capital process by this Court=s erratic action in applying decisions retroactively can be seen in the manner in which it has handled the fallout from its decision in Delgado v. State, 776 So. 2d 233 (Fla. 2000). There, Mr. Delgado had been convicted of first degree murder on the basis that the homicide occurred in the course of a burglary in 1990. On appeal, the issue concerned whether Mr. Delgado, who had entered the victims= home with consent, committed a burglary by Aremaining in@ the residence. This Court concluded that the Aremaining in@ language only applied where the Aremaining in@ was done surreptitiously. In reaching this conclusion, this Court overturned a number of prior decisions, including Jimenez v. State, 703 So. 2d 437, 441 (Fla. 1997)(AJimenez argues that the burglary was not proven because there was no proof of forced entry, or that Minas refused entry, or that she demanded that he leave the apartment.@). The alleged burglary in Mr. Jimenez=s case happened in 1992 and involving the same criminal statute at issue in Delgado. Yet, this Court refused to apply its construction of legislative intent as to the meaning of a criminal statute that it applied to a 1990 crime, to a criminal case occurring in 1992 involving the same statute. Subsequently, this Court gave the benefit of the Delgado construction to a defendant who was charged with a 1980 burglary in which a homicide occurred. Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003), and give the benefit of the Delgado construction to a defendant who was charged with a 1994 burglary in which a homicide occurred. Raleigh v.

Ashould give full retroactive effect to United States Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.@ ABA Report on Florida at 241. The manner in which the retroactivity rules operate impacts who gets executed and who does not. The manner in which this Court applies its retroactivity rules injects unacceptable arbitrariness into the capital process.

**8. Procedural Default**

Further, this Court frequently relies upon procedural defaults to create procedural bars that preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002); Jones v. State, 709 so. 2d 512, 519-20, 525 (Fla. 1998). The refusal to consider issues that go towards the reliability of the conviction and/or the sentence of death increase the risk that the innocent or the legally undeserving will be executed. It decreases a Ameaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not@ Furman, at 313 (White, J., concurring). The ABA Report recommended that AState courts should permit second and successive post-conviction proceedings in capital cases where counsels= omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.@ ABA Report on Florida at 241. As it is, the Florida death penalty scheme violates Furman.

**9. Clemency**

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State, 932 So. 2d 1054 (Fla. 2006).

Clemency is a critical stage of the death penalty scheme. It is the only stage at which factors like lingering doubt of innocence, remorse, rehabilitation, racial and geographic influences and factors that the legal system does not correct can be considered. See Herrera v. Collins, 506 U.S. 390, 412 (1993). However, the ABA Report found Florida=s clemency process to be severely lacking: AGiven the ambiguities and confidentiality surrounding Florida=s clemency decision-making process and that fact that clemency has not been granted to a death-sentenced inmate since 1983, it is difficult to conclude that Florida=s clemency process is adequate.@ ABA Report on Florida at vii. See Furman, 408 U.S. at 253 (Douglas, J., concurring) (AUnder these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.@).[40]

For all practical purposes, the clemency process seems to be dead. It does not appear that any serious consideration is given. It certainly does not function in the manner that is suggested it should in Herrera. The clemency process is part and parcel of Florida=s death penalty scheme. All it provides is more arbitrariness.

**10. Politics**

[40]The clemency process is entirely arbitrary because there are no rules or guidelines Adelineating the factors that the Board should consider, but not to be limited to@ for consideration of clemency.

Undoubtedly politics is an arbitrary factor injected into Florida=s death penalty scheme. In fact, the ABA Report noted that judicial elections and appointments are influenced by consideration of judicial nominees= or candidates views on the death penalty. ABA Report at xxxi. The report also cited this Court=s recent quantitative approach to proportionality review, which has been caused by political pressures and the change of composition of the Court. Id at 213.[41] Florida=s death penalty scheme is

[41]Certainly, nothing could be clearer in Mr. Rutherford=s case, where the timing of his death warrant was controlled by a gubernatorial candidate, who is currently the Attorney General of Florida, Charles Crist. Under Florida law when a stay of execution is issued incident to an appeal, Aupon certification by the Attorney General that the stay has been lifted or dissolved, within 10 days after such certification, the Governor must set the new date for execution of the death sentence.@ Sec. 922.06, Fla. Stat (2005). In the recent case of Clarence Hill, Attorney General Charlie Crist waited until August 24, 2006, to notify the Governor that the United States Supreme Court=s stay of Mr. Hill=s execution had dissolved. This was a little less than two weeks before the contested primary election in which Mr. Crist was seeking the Republican nomination for governor however, and nearly two months after the stay had actually dissolved. Attorney General Crist and his representatives claimed that because Mr. Hill had nothing pending in court the statute was invoked; yet, his case was in fact pending in the Eleventh Circuit awaiting action by that court following the

infected by politics and decisions made for political gain rather than in fairness.

**11. Mental Disabilities**

The ABA Report concluded: AThe State of Florida has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence.@ ABA Report on Florida at ix. While Florida has recently excluded individuals suffering from mental retardation from the death penalty, it has not extended its logic to those suffering from severe mental disabilities. Id. at xi. The ABA Report recommended that the logic regarding those with mental retardation be extended to those with severe mental disabilities, noting that mental illness can effect every stage of a capital trial. Id at xxxviii. The distinction between the mental impairment of the mental retarded and the mental impairment of the mental ill and corresponding culpability of those inflicted with each condition appears to be arbitrary.

Even in the case of the mentally retarded, Florida has created a procedure that will produce arbitrary results, as ABA assessment team acknowledges. The legislation and rule governing mental retardation procedures makes a distinction between individuals whose cases are final and those who are not. See Fla. Stat. ' 921.137; Fla. R. Crim. P. 3.203. Those whose cases are final receive none of the protections received by those whose cases are not final. A distinction depending on where a defendant is in his criminal process are arbitrary.

**12. Crime Laboratories and Medical Examiner=s Offices**

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remand from the United States Supreme Court.

Now, only weeks away from the general election, Attorney General Crist has notified Governor Bush that Mr. Rutherford=s stay has likewise dissolved. And, Mr. Rutherford=s execution has been scheduled for just weeks before the election. Contrary to Attorney General Crist=s contention that Mr. Hill had nothing pending, thus, he invoked the statute, Mr. Rutherford had briefs pending before the Eleventh Circuit.

The ABA Report on Florida also describes many of the problems in the crime laboratories and medical examiner=s offices in the State of Florida. The team found that: AThe deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to the lack of proper training and supervision, the lack of testing procedures and the failures to follow such procedures, and inadequate funding.@ Id at 83. The result of these problems is errors B errors that go unchallenged and uncorrected before the jury. Thus, yet another factor, unrelated to the circumstances of the crime or the character of the defendant, that injects arbitrariness into Florida=s death penalty scheme in violation of Furman.

## CONCLUSION AND RELIEF REQUESTED

Mr. Rutherford, through counsel, respectfully urges that the Court issue its Writ of Habeas Corpus and vacate his unconstitutional sentence of death.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition/Writ has been furnished by electronic mail, to Charmaine Millsaps, Assistant Attorney General, Department of Legal Affairs, The Capitol PL01, Tallahassee, Florida 32399-1050 on October 9, 2006.


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## CERTIFICATE OF FONT

This petition is typed in Courier 12 point not proportionately spaced.

LINDA MCDERMOTT