

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-_____

DANNY HAROLD ROLLING,

Petitioner,

v.

JAMES R. MCDONOUGH,

Secretary, Florida Department of Corrections, and CHARLES J. CRIST, Attorney
General of Florida,

Respondents.

**PETITION SEEKING TO INVOKE THE COURT'S ALL WRITS
JURISDICTION, WITH APPENDIX**

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INTRODUCTION AND SUMMARY OF ARGUMENT

This court has just (on October 18, 2006) affirmed, in Case No. SC 06-1966, the October 9, 2006 final order rendered by the Circuit Court for the Eighth Judicial Circuit, Hon. Stan R. Morris, presiding, that denied Rolling's Florida Rule of Criminal Procedure Rule 3.851 successor motion to vacate his death sentences. One of the key claims raised in the appeal was that Florida's procedure for effecting lethal injection as the means of causing Rolling's death constitutes cruel and unusual punishment as prohibited by the Eighth and Fourteenth Amendments to the United States Constitution -- because the procedure will subject Rolling to intense pain and suffering. The Florida Department of Corrections ("the DOC") responded in part by claiming that Rolling's lethal injection claim was moot because the procedure was approved by this court in *Sims v. State*, 754 So. 2d 657 (Fla. 2000), *Hill v. State*, 921 So. 2d 579 (Fla. 2006), *Rutherford v. State*, 926 So. 2d 1100 (Fla. 2006), among others. The DOC's lethal injection procedure under judicial scrutiny in *Sims* and its progeny was set forth in a January 28, 2000 DOC protocol, a copy of which is attached hereto as Ex. A.

However, it has recently come to light that the DOC markedly and secretly changed its lethal injection protocol after *Sims* was decided. In this regard, see Ex. B, which is the protocol adopted by the DOC on or about August 16, 2006.

The revisions to the DOC's lethal injection protocols should have been made known to Rolling, his counsel, Judge Morris and this court. There is a distinct likelihood that the new protocol (Ex. B) is markedly different from the one in place when *Sims* was decided (Ex. A). There is also a distinct likelihood that the new protocol will result in Rolling suffering extreme pain and suffering when it is imposed upon him. But it is certain that the new protocol has not been subjected to careful judicial review at the trial court level.

Under the circumstances, a stay of Rolling's execution must be entered if due process of law is to have any real meaning.

STATEMENT OF THE CASE AND OF THE FACTS

On November 15, 1991, Rolling was indicted by an Alachua County, Florida grand jury on five counts of first-degree murder, three counts of sexual battery, and three counts of armed burglary of a dwelling with a battery. On February 15, 1994, he changed his previously entered not guilty pleas to guilty pleas as charged on all counts. The penalty phase of the trial commenced the next day per the provisions of Section 921.141, Florida Statutes. The jury returned advisory sentencing recommendations of death as to all five homicide counts by votes of 12-0. The trial court, Hon. Stan Morris, Circuit Judge, sentenced Rolling to death as to each of the five homicides. *Rolling v. State*, 695 So. 2d 278 (Fla. 1997).

Rolling appealed directly to this court. He raised six claims of error including the claim that the trial court abused its discretion in denying his motion for a change of venue and thereby violated his Sixth Amendment right to be fairly tried by an impartial jury due to the pervasive and prejudicial pretrial publicity. *Rolling v. State*, 695 So. 2d 278 (Fla. 1997). On March 20, 1997, his judgments and sentences were affirmed. *Id.* A petition for writ of certiorari was filed in the Supreme Court of the United States, but that petition was denied. *Rolling v. Florida*, 522 U.S. 984 (1997).

Rolling next timely filed a motion for post conviction relief in the state trial

(circuit) court per the provisions of Florida Rule of Criminal Procedure 3.850. The motion was later amended. Rolling proceeded on two claims: (1) That his state court trial counsel were constitutionally ineffective for failing to timely and properly seek and procure a change of venue, and (2) that trial counsel were ineffective for failing to challenge particular jurors during *voir dire*. After an evidentiary hearing, on March 5, 2001, the amended post conviction motion was denied. Rolling appealed but this court affirmed. *Rolling v. State*, 825 So. 2d 293 (Fla. 2002).

On August 26, 2002, Rolling filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Florida, Gainesville, Division, per the provisions of Title 28, United States Code, Section 2254. A response was filed by the state on December 2, 2002. On August 1, 2005, the district court denied the petition. On the same day, the clerk of the district court entered a clerk's judgment. After filing a timely application for certificate of appealability and notice of appeal, the district court issued the certificate. An appeal to the United States Court of Appeals, Eleventh Circuit, followed. On February 9, 2006, the Eleventh Circuit affirmed the order of the United States District Court that denied Rolling habeas corpus relief. *Rolling v. Crosby*, 438 F.3d 1296 (2006). On May 9, 2006, Rolling submitted a second petition for writ of

certiorari to the United States Supreme Court. On June 26, 2006, certiorari was denied. *Rolling v. McDonough*, ___ U.S. ___, 126 S.Ct. 2943; 2006 U.S. LEXIS 5052 (2006).

On August 16, 2006, the Florida Department of Corrections secretly promulgated the new lethal injection protocol for all subsequent executions. *See* Ex. B. On August 17, 2006, Hon. Jeb Bush, the Governor of Florida, reinstated the death warrant against Clarence Hill.¹ At no time prior to Hill's September 20, 2006 execution did the DOC disclose to Hill or his counsel that the lethal injection procedures adopted by that agency on January 28, 2000 (Ex. A), and approved in *Sims v. State*, 754 So. 2d 657, 666-68 (Fla. 2000), had been superseded and replaced by the new protocol (Appendix B). This is so even though the state relied upon its claim that the procedures approved in *Sims* had not been changed in seeking the dismissal of Hill's federal lawsuit.²

¹ The timing of the reinstatement of Hill's death warrant -- one day after the new lethal injection procedure was adopted, is troubling.

² Apparently, there was also a decision made by the DOC not to disclose the fact that a new lethal injection procedure had been adopted even though litigation was occurring in federal court regarding the Florida lethal injection protocol that had been approved in *Sims*. *Hill v. McDonough*, ___ F.3d ___, No. 06-14927, 2006 WL 2641659 at f. 2 (11th Cir. September 15, 2006). Certainly, one would have expected the DOC to disclose to the federal courts the fact that the procedure at issue in *Sims* had been superseded.

On September 22, 2006, Governor Bush reinstated the death warrant against Arthur Rutherford. On that same date, the governor signed Rolling's death warrant. (Vol. I, R. 2A-2B) The governor did not reveal any changes in the lethal injection process.

On September 28, 2006, Rolling sent public records requests to the Medical Examiner for the Eighth Judicial Circuit of Florida and to the Florida Department of Corrections. The records requests related, in part, to the autopsy and toxicology reports of those persons put to death in Florida by lethal injection and the protocols used in the lethal injection process. These records were requested pursuant to Florida Rule of Criminal Procedure 3.852(h)(3). On or about September 29, 2006, written objections were filed by the DOC and by the Medical Examiner's Office, and the documents have not been provided. The attorney general argued in this regard that the public records request was overbroad, of questionable relevance, and unlikely to lead to discoverable evidence. The attorney general added that the request was not reasonably calculated to lead to the discovery of admissible evidence. The attorney general continued that the issue of whether execution by lethal injection is constitutional had already been fully litigated in post conviction proceedings in Florida and determined to be constitutional, citing *Sims v. State*, 754 So. 2d 657 (Fla. 2000), *Hill v. State*, 921 So. 2d 579 (Fla. 2006), and *Rutherford v.*

State, 926 So. 2d 1100 (Fla. 2006), among others. At no time did the DOC disclose to Judge Morris, Rolling or his counsel that the lethal injection procedure adopted on January 28, 2000 as set forth in Ex. A and approved in *Sims* had been superseded and changed by the procedure set forth in Ex. B.

On October 5, 2006, Rolling filed a successor motion for post conviction relief seeking to vacate his death sentences per the provisions of Florida Rule of Criminal Procedure 3.851 with three exhibits. In so doing, he challenged the DOC's lethal injection procedure as approved in *Sims*. On October 6, 2006, the state filed a detailed response. Again, the state made no mention that the procedures for lethal injection had been modified.

On October 4, 2006, the trial court denied Rolling's public records requests except for his personal medical records. On October 9, 2006, the trial court rendered a final order denying the successor Rule 3.851 motion. On October 9, 2006, Rolling filed a notice of appeal to this court. On October 10, 2006, he filed an amended notice of appeal. The appeal, as noted above, was just denied by this court. Rolling had assigned the trial court's refusal to grant Rolling's counsel access to the aforementioned records as error on appeal.

An earlier all writs petition based upon the same grounds as Rolling has raised here was filed by Arthur Rutherford in SC06-2023. On October 17, 2006,

this court denied that petition.

JURISDICTION

This court's all writs jurisdiction has been previously recognized as a proper means of raising a challenge to a method of execution. *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997). A petition to invoke this court's all writs jurisdiction is an original proceeding in this court governed by Florida Rule of Appellate Procedure 9.100. This court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9), Florida Constitution.

BASIS OF CLAIM FOR RELIEF

Rolling has been deprived of his right to due process of law as protected by Amendment XIV, United States Constitution, and an opportunity to be heard, and to the disclosure of critical information germane to the lethal injection process critical to the development and prosecution of an Eighth Amendment claim of cruel and unusual punishment.

In *Sims v. State*, 754 So. 2d at 668, this court said: “From our review of the record, we find that the DOC has established procedures to be followed in administering the lethal injection and we rely on the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection as attested do not violate the Eighth Amendment’s prohibition against cruel and unusual punishment.”

The procedures at issue in *Sims* have now been superseded. During the recent oral argument in the United States Supreme Court in *Hill v. McDonough* certain representations were made by counsel for the Florida Department of Corrections regarding Florida’s lethal injection procedure:

Florida Attorney General:

But to -- address some of the issues that were currently brought before the Court today with regard to the ability of the defendant to come forward and discern what exactly was the method by which Florida was intending to execute him, the record bears out that, in fact, the *Sims* case was in the public domain and, in fact, is the method by which Florida does execute individuals. There was - -

Justice Ginsburg:

But there's no statute and there's no regulation that requires Florida to do that.

Florida Attorney General:

The statute itself merely says that lethal injection is the method by which Florida is to execute individuals.

The Department of Corrections, through rule making process internally, provides protocols for the execution day and other protocols with regard to the execution team performing its function on that given day and - - *and hours leading up to that. And that has not been changed not modified*, nor has it been challenged --

Justice Ginsburg:

But there is no statute, no regulation. That means the executive can do what it will. *There's nothing that binds them to the way it was done in the Sims' case.*

Florida Attorney General:

That is correct, to the extent that there's no statutory provision or regulatory rule because, in fact, under Florida - - the Florida legislature has exempted rulemaking of the Department of Corrections with regard to executions.

Justice Ginsburg:

And I suppose that's -- that's the complaint. If there were a procedure in place, we could address it. If Florida reserves to itself the ability to change at any time, well, that's -- we want to be told what it will be in our particular case so we have a target that we can aim at.

Florida Attorney General:

And I understand that, but the state would contend that *there have been 16*

executions since the time that Sims has occurred and all those executions have been performed exactly as the manner in which Sims has occurred, and that there has not been any challenge to a deviance from that, and in fact, the Florida Supreme Court has ratified again in this case, when Mr. Hill brought his Eighth Amendment claim, that Sims was the method of execution in Florida, I think we have a very reasoned determination that, in fact, the method of execution, as it has been proposed in Sims, is currently the method of execution that we utilize.

Hill v. McDonough, 126 S.Ct. 2096 (2006), Oral Argument transcript at pp. 26-28, emphasis added.

It is now clear that the protocol at issue in *Sims* has been superseded for reasons that are not clear. Rolling's understanding in this regard is that the new lethal injection procedure is substantially different from that set forth in the protocol approved in *Sims*. The new procedure includes a requirement that the execution team receive training, that execution simulations be conducted on a regular basis, that a lethal injection checklist be completed after each execution documenting what occurred (or did not occur), and, most importantly, that the amount of the drugs being used is no longer the amount this court discussed most recently in *Hill v. State*, 921 So. 2d 579, 583 n. 3 (Fla. 2006). As a result, the representations made by the DOC during the *Hill* oral argument are not correct now. The DOC withheld that fact from Hill prior to his execution, and has refused to provide Rolling with the new lethal injection procedure, let alone any of public records regarding when, how, or why the *Sims* protocol was superseded or what the process was in

promulgating the new procedure.

This court has held that the state is under a continuing obligation during post conviction proceedings to disclose favorable evidence to the defendant. *Johnson v. Butterworth*, 713 So. 2d 985, 987 (Fla. 1998). Here, the DOC has repeatedly argued that no change had been made to the protocol at issue in *Sims*. This assertion was the lynchpin of the department's argument that any challenge to the protocol was foreclosed by *Sims*. However, the assertion that there has been no change in the protocol is incorrect. Because the DOC concealed the lethal injection procedure adopted on August 16th, Rolling has been denied the opportunity to present this new procedure to experts in order to investigate, prepare and present Rolling's Eighth Amendment challenge to the new procedure. *Roberts v. State*, 840 So. 2d 962, 971 (Fla. 2002) (due process violated where post conviction defendant denied the opportunity to present relevant evidence); *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995) (reversing conviction because defendant's due process rights were violated when he was deprived of the opportunity to rebut the state's scientific evidence).

At a minimum, Rolling is entitled to have the DOC provide him with the details of the August 16th changes in the lethal injection procedure. He is entitled to a copy of the checklist from the Hill execution. He is entitled to all public records

regarding the process through which the new lethal procedure was adopted. This would include the records showing how and why the decision was made to establish the new lethal injection procedure. This would also include (a) the records showing who developed the new procedure and what information was considered, (b) the records regarding decisions and/or debates about what to include or not to include in the new lethal injection procedures and (c) the records regarding who received copies of the proposed lethal injection procedure and why it was determined that the new lethal injection procedure would not be disclosed to the condemned or to the courts. Given the circumstances created by the withholding of the new lethal injection procedure, discovery depositions should be permitted.

CONCLUSION

For the reasons set forth above, this court is requested to grant a stay of execution in order to provide Rolling that which he was denied by the DOC: notice of the new lethal injection procedure and a reasonable opportunity to investigate, prepare and present any Eighth Amendment challenge he may have to the procedure.

The last minute nature of the request is due to the actions of the State of Florida in not revealing the pertinent information.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been provided counsel for the respondents, Hon. Carolyn Snurkowski, Deputy Attorney General of Florida, the Florida Capitol, Plaza Level One, Tallahassee, FL 32399-2300, and to the Office of General Counsel, Florida Department of Corrections, 2601 Blairstone Rd., Tallahassee, FL 32399-2500, this 20th day of October 2006.

CERTIFICATE OF COMPLIANCE

I also certify that this pleading was prepared using a Times New Roman font, not proportionally spaced, 14 point font, in conformity with the rules of this court.

Baya Harrison

