IN THE SUPREME COURT OF FLORIDA

CASE NO. SCOO-2483

THOMAS JAMES MOORE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References in this brief will be consistent with those made in Appellant's Initial Brief, with the following additions:

"IB at _____." Appellant's Initial Brief

"AB at _____." Appellee's Answer Brief.

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SUMMARY OF ARGUMENTS IN REPLY

Mr. Moore address four (4) issues in his reply brief: the lower court's refusal to order agencies to comply with public records requests, and refusal to grant hearings to establish lack of compliance by said agencies (Argument I); the lower court's erroneous summary denial of Mr. Moore's 2nd Amended Motion for Postconviction Relief (Argument II); the lower court's striking of Mr. Moore's 3rd Amended Motion for Postconviction Relief (Argument III), and, the lower court's denial of Mr. Moore's Motion to Disqualify Judge (Argument IV).

Argument I: The lower court erred by refusing to order state agencies to comply with Mr. Moore's public records requests, and the lower court erred by refusing to grant Mr. Moore hearings to establish the lack of compliance by the agencies. The actions of the lower court prevented Mr. Moore from fully investigating and establishing his right to postconviction relief. The lower court's actions were unreasonable in that defendants similarly situated to Mr. Moore have benefitted from the right to obtain and use public records in their postconviction appeals.

Argument II: The lower court erred by summarily denying all of the claims plead in Mr. Moore's 2nd Amended Motion for Postconviction Relief. The deficiencies in the 2nd Amended Motion were due mainly to the lack of compliance by state agencies with Mr. Moore's public records requests, as well as the actions of the lower court which prevented Mr. Moore from

investigating and establishing his right to postconviction relief. In summarily denying Mr. Moore's 2nd Amended Motion, the lower court erroneously made findings without the benefit of testimony or evidence.

Argument III: The lower court erroneously ruled that Mr. Moore's 3rd Amended Motion for Postconviction Relief was untimely and unauthorized. The lower court's actions leading up to the filing of Mr. Moore's 3rd Amended Motion (waiting several months to rule on public records requests and objections; ignoring Mr. Moore's numerous requests for assistance in obtaining pubic records; ordering Mr. Moore to amend his postconviction motion with public records but refusing to order agencies to turn over said records; denying Mr. Moore sufficient time to investigate the contents of public records) did not comport with due process and cannot be deemed reasonable.

Argument IV: The lower court erred in denying Mr. Moore's Motion to Disqualify Judge. The actions of the lower court leading up to the filing of the Motion to Disqualify, combined with the statements in the August 19th order telling Mr. Moore he would be denied relief "no matter how entitled", caused Mr. Moore to reasonably question the lower court's impartiality and created a well grounded fear in Mr. Moore that he was not being afforded fair and unbiased proceedings in postconviction.

ARGUMENT I: THE PUBLIC RECORDS CLAIM

The lower court erred by refusing to order state agencies to comply with Mr. Moore's public records requests, and the lower

court erred by refusing to grant Mr. Moore hearings to establish the lack of compliance by the agencies. The actions of the lower court prevented Mr. Moore from fully investigating and establishing his right to relief in postconviction, denying Mr. Moore the due process he is entitled to.

In their answer brief, the State submits that the lower court's rulings were reasonable and not an abuse of discretion (AB. at 8), but the lower court's actions were anything but reasonable. The State relies on Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), in arguing that the lower court's rulings are reasonable and should not be overturned unless "no reasonable [person] would take the view adopted by the trial court" (AB. at 8). This Court, however, goes on to explain in Canakaris that discretionary power exercised by trial courts is not unlimited:

> The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic or reasonableness.

Id. Following this logic, inconsistently applying rules and law to different defendants would be a clear abuse of a court's discretionary powers, as well as a clear denial of a defendant's due process rights. This is what occurred in Mr. Moore's case. The lower court ignored rules and law in dealing with Mr. Moore's public records requests.

The law is clear that capital postconviction defendants have a right to obtain public records for purposes of discovering grounds for postconviction relief. See Florida Rule of Criminal Procedure 3.852 (1996)[1]; Florida Rule of Criminal Procedure 3.852 (1998); Ventura v. State, 673 So.2d 479, 481 (Fla. 1996); Muehleman v. Dugger, 623 So.2d 480, 481 (Fla. 1993). In fact, certain sections of Rule 3.852 (1998) require agencies to automatically provide records without requiring postconviction defendants to make specific requests for said records. See Fla.R.Crim.P. 3.852 (d) and (e). Furthermore, many sections require hearings by the trial court to resolve public records disputes. See Fla.R.Crim.P. 3.852 (g)(3), (i)(2), (l)(2).

Capital postconviction litigants similarly situated to Mr. Moore have benefitted from the right to obtain and use public records as Mr. Moore attempted to do in the court below. The actions of the lower court denied Mr. Moore the benefits conferred on other similarly situated capital collateral litigants. See generally Reed v. State, 640 So. 2d 1094 (Fla. 1994); Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993); Anderson v. Sate, 627 So. 2d 1170, 1172 (Fla. 1993); Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1994); Provenzano v. Dugger, 561 So. 2d 541, 547 (Fla. 1990); Mendyk v. State, 592 So. 2d 1076, 1082 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla.

[1] When Mr. Moore was assigned postconviction counsel, Florida Rule of Criminal Procedure 3.852 (1996) had not been replaced by Florida Rule of Criminal Procedure 3.852 (1998). The 1998 version of Rule 3.852 took effect on October 1, 1998.

1991). Furthermore, along with Mr. Moore's constitutional right to public records exists a right to challenge a state agency's assertion that is has fully complied with a public records request, as well as a right to a hearing to resolve the challenge. See Florida Rule of Criminal Procedure 3.852 (l)(2).

Clearly, public records disclosure is a necessary (and contemplated) part of the process for capital postconviction defendants who seek to have their convictions or sentences overturned, and not a privilege to be handed out by trial courts, at their discretion, in an inconsistent manner. In Mr. Moore's case, the lower court ignored the law and rules applicable to Mr. Moore's case, and unreasonably failed to ensure compliance by various agencies. This was a clear abuse of discretion.

The state also contends that Mr. Moore sat on his public records requests "for months", and that any access to public records afforded to Mr. Moore by the lower court after this time "was a gratuity." (AB. at 10). Regarding Mr. Moore sitting on his requests for months, the record clearly indicates that any delay in achieving public records compliance was not the fault of Mr. Moore. Once postconviction counsel had been afforded to Mr. Moore, he timely initiated his public records requests in accordance with Fla.R.Crim.P. 3.852 (1996). (Supp. 1-20). When Fla.R.Crim.P. 3.852 was amended in 1998, Mr. Moore timely requested records under this rule. (Supp. 87-163). Most agencies objected to the requests, and most refused to provide records to Mr. Moore in accordance with 3.852 (1996) and 3.852 (1998). The

lower court chose to wait more than eight (8) months to hear and rule on pending objections. After the lower court ruled, certain agencies[2] still delayed records compliance, requiring Mr. Moore to file an incomplete amendment to his 3.850 motion (Supp. 300). Fault for this delay cannot be placed at Mr. Moore's feet.

The state also asserts that Mr. Moore has failed to show good cause for why certain records requests were not made until after Mr. Moore's 1-year deadline for filing his 3.850 motion. (AB. at 11) This argument, however, ignores the obvious. Many of Mr. Moore's subsequent records requests were based on the few (and incomplete) records provided by various agencies. Thus, the timeliness of these subsequent requests, including those filed after the expiration of Mr. Moore's 1-year deadline, are also the result of the same inaction by the lower court and various agencies.

The state also asserts that Mr. Moore has failed to specify what harm he has suffered from the various agencies lack of compliance. (AB. at 11). Mr. Moore's Initial Brief, however, clearly addresses the harm. (IB. at 24-25) Mr. Moore's case was investigated by the Duval County Sheriff's Office, and Mr. Moore was prosecuted by the Duval State Attorney. These agencies failed to turn over, among other things, the following:

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[2] For example, the Duval Sheriff waited nearly **another** year to get Mr. Moore the public records documenting their actual investigation of Mr. Moore's case, and the lower court did nothing to assist despite Mr. Moore requesting assistance to obtain said records several times. (Supp. 300, 456, 468, 516; PCR. 1, 229).

investigator notes; all statements made by the two co-defendants; documentation regarding plea bargains for the co-defendants; a complete set of investigative and homicide reports; crime lab reports; and, all witness statements taken during the investigation of this case. Due to this lack of public records compliance (from these and other agencies), it was impossible for Mr. Moore to investigate possible violations of Brady v. Maryland[3], fully investigate possible ineffectiveness on the part of trial counsel[4], to determine if additional records are needed from these agencies for use in postconviction (as envisioned by Fla.R.Crim.P. 3.852, sections g, h, and i), and/or investigate other possible sources of postconviction relief.

Mr. Moore also addressed the harm he suffered by the lower court's actions (or inaction). Mr. Moore filed motions to compel public records compliance based on the lack of compliance by the

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[3] Any investigation into violations of Brady v. Maryland requires a defendant to determine what information the state had in their possession at the time of trial. Even if a defendant receives information from an outside source regarding a possible Brady violation by the state, that defendant must still investigate and determine what information the state possessed in order to establish the violation.

[4] In Mr. Moore's Third Amended Motion to Vacate (PCR. 308-452), which the lower court struck, Mr. Moore plead in Claim V that his trial counsel failed to obtain the assistance of experts necessary to ensure a reliable fact-finding process. As one example, trial counsel failed to retain a fire expert to review inconsistencies in the findings and testimony of the state's fire expert. (PCR. 47-50) In footnote #6, Mr. Moore explained that recently received records provided the origin for this subclaim (as well as others). Mr. Moore went on to explain that postconviction counsel had determined that records still being withheld by state agencies were relevant to this claim and that he needed the records to fully plead the claim.

Duval State Attorney and the Duval Sheriff. (PCR. 267, 271). The lower court refused Mr. Moore a hearing on the Duval State Attorney motion (PCR. 829), and failed to fully address (and issue an order on) the Duval Sheriff motion. The lower court also refused to hear argument on several pending public records requests. The lower court's refusal to do so violated provisions of Fla.R.Crim.P. 3.852, violated Mr. Moore's due process rights, and rendered Mr. Moore's postconviction counsel ineffective by preventing counsel from fully investigating Mr. Moore's case.

The lower court's actions in this case were unreasonable. Mr. Moore was denied the same ability to explore possible avenues of relief afforded to other postconviction defendants. Mr. Moore asserts that no reasonable person could find it acceptable to deny a capital defendant access to the records, statements and evidence used to put that defendant on death row, especially when the defendant (like Mr. Moore) followed the rules promulgated by this Court to obtain said materials. The lower court clearly abused its discretion.

ARGUMENT II: SUMMARY DENIAL OF THE 2ND AMENDED MOTION

The lower court erred by summarily denying all of the claims plead in Mr. Moore's 2nd Amended Motion for Postconviction Relief. In its Answer Brief, the State submits that the lower court correctly denied hearings on several of Mr. Moore's claims because they were insufficiently plead. (AB. at 13). At the outset, Mr. Moore submits that the deficiencies in the 2nd

Amended Motion were due mainly[5] to the lack of compliance by state agencies with Mr. Moore's public records requests, as well as the actions of the lower court, which prevented a complete investigation into possible sources of postconviction relief. (See, IB. at 14-25; reply to Argument I, supra). Furthermore, the same lack of compliance had the same effect on Mr. Moore's ability to plead his 3rd Amended Postconviction Motion, which the lower court erroneously struck. (See, IB. at 36-46).

Claim III of Mr. Moore's 2nd Amended 3.850 motion alleged newly discovered evidence that Mr. Moore was unknowingly exposed to harmful and potentially deadly hazardous waste during his childhood which adversely affected his learning ability, nervous system and metabolic functioning. Mr. Moore also alleged that, should the lower court find that this evidence does not constitute newly discovered evidence, then trial counsel was ineffective for not investigating and presenting this information to the jury. The lower court denied this claim without a hearing.

The State argues that the lower court's finding, that this information was discoverable during trial using due diligence, should be upheld. The State, however, ignores the fact that the lower court made this finding without hearing any testimony whatsoever. It was error for the lower court to come to this

[5] Mr. Moore had also informed the lower court that the Office of the Capital Collateral Counsel had run out of funds in January of 1999, preventing Mr. Moore's counsel from investigating his case for several months.

conclusion without considering testimony and/or evidence regarding whether trial counsel, or Mr. Moore himself, could have been aware of the presence of hazardous waste near where Mr. Moore grew up. Nothing in the record supports this finding by the lower court.

Regarding Claims VII, VIII and IX of Mr. Moore's 2nd Amended 3.850 motion, the lack of testimony below resulted in errors in the lower court's rulings on these claims as well. The lower court rejected these claims, in part, based upon **its** assumption of what trial counsel's strategy was without hearing testimony on this point from trial counsel, without knowing what information trial counsel had to use in formulating a trial strategy, and without considering whether trial counsel's strategy was an informed strategy or was reasonable given all of the circumstances. Without hearing what testimony Mr. Moore had to offer, it is impossible to see how the lower court could have made the findings it did.

ARGUMENT III: THE LOWER COURT'S REFUSAL TO CONSIDER MR. MOORE'S 3rd AMENDED MOTION TO VACATE

The lower court refused to consider Mr. Moore's 3rd Amended 3.850 motion, ruling that it was untimely and unauthorized. The State asks this Court to uphold this ruling, arguing that the lower court "expressly invited Moore to tender any claims arising from the recently provided public records information", and that

Mr. Moore "could not show the trial court[6] any substantive post-conviction allegation" arising from the newly provided records. (AB. at 35)

At the hearing held on March 8, 2000 (PCR. 739-806), the lower court gave Mr. Moore an opportunity to file proposed amendments based on the contents of public records Mr. Moore had not yet received. The lower court gave the Duval Sheriff and the Duval State Attorney nine (9) days to turn over the records, and gave Mr. Moore twenty (20) days after that to file said amendments. However, Mr. Moore did not get the benefit of the twenty (20) days because one agency, the Duval Sheriff, was a week late turning said records over to Mr. Moore[7]. More importantly, the records turned over were incomplete and, despite requesting assistance from the lower court in obtaining said records (PCR. 267, 271), Mr. Moore never received them and never had a real opportunity to present the lower court with amendments based on their contents. The State should not benefit from their lack of compliance. Ventura v. State, 673 So.2d 480 (Fla. 1996). Thus, if the claims in Mr. Moore's 3rd Amended motion are lacking, the lower court and the State deserve a substantial amount of the blame.

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[6] As he did in his initial brief (IB. at 45), Mr. Moore again asserts that the lower court never provided him an opportunity to point out where in the 3rd Amended 3.850 motion the new information was located. (PCR. 910-912)

[7] Said records were the same records Mr. Moore had been requesting from the Duval Sheriff for well over a year.

The State also argues that the lower court's decision not to consider Mr. Moore's 3rd Amended motion was reasonable "in light of the totality of facts in this case". (Ab. at 37) The totality of the facts contained in the record on appeal, however, suggest otherwise. As discussed in Reply Argument I, supra, the lower court's actions have been anything but reasonable. The lower court waited approximately eight (8) months to rule on various agencies' public records objections[8]. The lower court ignored countless requests by Mr. Moore for assistance in obtaining public records. The lower court ordered Mr. Moore to amend based on public records but refused to assist Mr. Moore in obtaining said records when agencies failed to completely (and timely) provide them. Lastly, the lower court struck the 3rd amended motion without allowing Mr. Moore's counsel the opportunity to identify what he was able to amend. In this case, the actions of the lower court did not comport with due process, and cannot be deemed reasonable.

ARGUMENT IV: DENIAL OF THE MOTION TO DISQUALIFY

The lower court erred in denying Mr. Moore's Motion to Disqualify Judge. (Supp. 479-496) In their brief (AB. at 38), the State asserts that Mr. Moore's motion to disqualify the lower

[8] During that time (the first 8 months of Mr. Moore's 1-year time limit for filing his motion), Mr. Moore was without public records to assist in his postconviction investigation. Contrary to the State's assertion that the lower court attempted to move this case along consistent with Fla.R.Crim.P. 3.851 and this Court's concerns over delays in the postconviction process (AB. at 37), Mr. Moore asserts that, if there has been delay, the lower court is responsible for much of it.

court was predicated upon "a statement" made by the trial court in its August 19, 1999, Order on Defendant's Motion for Reconsideration and Request for Hearing, and the Defendant's Supplement to that Motion. (Supp. 475) This "statement", however, actually occurs twice in the Order:

> This Court will not entertain any further motions for extension of time, nor will this Court entertain any further motions for rehearing as to this deadline, **no matter how entitled**.

(emphasis added). The Court repeated this statement a second time in the same Order:

> No further extensions of time will be entertained, nor will any motions for rehearing as to this order (**no matter how entitled**) be entertained.

(emphasis added).

The State suggests that the lower court's statements are not grounds for disqualification in that they are no more than an adverse ruling on Mr. Moore's July 19, 1999, Motion for Reconsideration and Request for Hearing, and the August 9, 1999, Supplement to that motion. (AB. at 39) Mr. Moore asserts that the particular words at issue are more than adverse rulings. Instead, they are a clear indication of the unacceptable level of due process the lower court was willing to afford Mr. Moore in postconviction.

Mr. Moore's July 19th motion, and the August 9th supplement to that motion, asked for more than an extension of time for filing Mr. Moore's amended 3.850 motion. The motion and

supplement requested assistance from the lower court in acquiring public records from various state agencies, and explained to the lower court that the missing records were preventing Mr. Moore from amending his 3.850 motion. Mr. Moore was entitled to these public records to assist in his postconviction investigation. In fact, the lower court had previously ordered state agencies to provide some of the requested records but, as of the date of the July 19th motion and August 9th supplement, the agencies had failed to comply. When Mr. Moore received the lower court's August 19th order denying his motion and read the statements telling him that he would not receive any relief "no matter how entitled", Mr. Moore then had a "well grounded fear that he will not receive [fair postconviction proceedings] at the hands of the judge." Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983).

Mr. Moore's Motion to Disqualify Judge, however, was predicated on more than these two statements. The motion was also predicated on the actions of the lower court leading up to the Court's August 19th order: the lower court waited over eight (8) months to rule on Mr. Moore's initial public records requests (and corresponding objections); the lower court failed to assist Mr. Moore in obtaining public records, including records the court had previously ordered turned over to Mr. Moore; the lower court failed to issue written orders to agencies to turn over records, further delaying Mr. Moore's access to said records; and, the lower court refused to hold hearings on these matters. Not surprisingly, the same actions (or inaction) continued after

the lower court denied Mr. Moore's Motion to Disqualify. (Argument I, supra) Thus, the actions (or inaction) of the lower court detailed above, combined with the statements in the August 19th order, caused Mr. Moore to reasonably question the lower court's impartiality and created a well grounded fear in Mr. Moore that he was not being afforded fair and unbiased proceedings in postconviction. The lower court erred by not disqualifying itself.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 2, 2001.

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CERTIFICATE OF FONT SIZE

I hereby certify that the foregoing document is in compliance with the Florida Rules of Appellate Procedure 9.210.

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JOHN M. JACKSON