IN THE SUPREME COURT OF FLORIDA

GREGORY MILLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

DEATH WARRANT SIGNED: EXECUTION SCHEDULED FOR MAY 2, 2001, AT 6:00 P.M.

CASE NO. SC01-775

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0998818

JUDY TAYLOR RUSH
Fla. Bar #438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
FAX (904) 226-0457

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS[1]

In its opinion affirming the denial of habeas corpus relief, the Eleventh Circuit Court of Appeals summarized the history of Mills' case in the following way:

> The State of Florida charged Mills through an indictment dated June 29, 1979, with four counts relating to the May 25, 1979 shooting of Wright: (1) first degree felony murder (Count I); (2) burglary (Count II); (3) aggravated battery (Count III); and (4) possessing a firearm despite a prior felony conviction (Count IV). On August 16, 1979, a jury trial commenced. After the trial judge denied Mills's motion for judgment of acquittal, the jury returned verdicts of guilty on the charges of first degree felony murder, burglary and aggravated battery. At the penalty phase of the proceedings on the first degree murder conviction, the jury recommended that Mills receive a life sentence. On April 18, 1980, the trial judge overrode the jury's recommendation after finding that the aggravating factors surrounding Mills's crime outweighed the absence of statutory mitigating factors pursuant to Florida Statute § 921.141, and sentenced Mills to death.
>
> On direct appeal to the Florida Supreme Court, Mills raised the following issues: (1) whether sufficient evidence supported his felony murder conviction; (2) whether he received ineffective assistance of counsel because of a conflict of interest in the public defender's office; (3) whether the trial court violated his confrontation rights in abridging cross-examination of Ashley; (4) whether the trial court erred in admitting gunshot residue tests; (5) whether his conviction for aggravated battery was improper; (6) whether his convictions for both felony murder and burglary were improper; and (7) whether the trial judge's override of the jury's recommendation was improper. *See Mills,* 476 So.2d at 175, 179.
>
> The Florida Supreme Court affirmed Mills's convictions and sentences for felony murder and burglary, but vacated

---

[1]The Briefs are filed simultaneously. It is axiomatic that issues cannot be raised for the first time on appeal.

the sentence and conviction for aggravated battery. See *Mills*, 476 So.2d at 175, 177. The Florida Supreme Court held that Mills's contentions concerning ineffective assistance and gunshot residue tests were meritless, and that the trial court did not abridge Mills's right to confront the witnesses against him. *See Mills*, 476 So.2d at 175-77.

The Florida Supreme Court then analyzed the trial judge's override of the jury's recommendation at Mills's sentencing. It found that the trial judge had found the existence of no mitigating factors and the following six aggravating factors pursuant to Florida Statute §921.141: (1) under sentence of imprisonment; (2) previous conviction of violent felony; (3) great risk of death to many persons; (4) felony murder; (5) pecuniary gain; and (6) heinous, atrocious or cruel. The Florida Supreme Court held that the following aggravating factors were improper: (1) great risk of death to many persons; (2) pecuniary gain; and (3) heinous, atrocious or cruel. It affirmed the remainder of the aggravating factors, as well as the trial court's finding that no mitigating factors existed. *See Mills*, 476 So.2d at 177-79. The Florida Supreme Court affirmed the trial judge's imposition of the death sentence, holding that the override complied with *Tedder v. State*, 322 So.2d 908 (Fla. 1975). The United States Supreme Court denied Mills's petition for writ of certiorari. *Mills v. Florida*, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986).

The Governor of Florida signed Mills's death warrant, and Mills thereafter moved for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied all requested relief. Mills appealed the trial court's denial to the Florida Supreme Court, petitioned for a writ of habeas corpus and requested a stay of execution. The Florida Supreme Court denied Mills's petition for habeas corpus, but reversed the trial court's summary denial of his 3.850 motion and directed the trial court to hold an evidentiary hearing on Mills's 3.850 claim of ineffective assistance relating to his lawyer's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances. *See Mills v. Dugger*, 559 So.2d 578, 579 (Fla. 1990).

The trial court held an evidentiary hearing pursuant to

> the Florida Supreme Court's remand. Mills called numerous witnesses at the evidentiary hearing, including: his trial attorneys, one of whom testified that "with the benefit of hindsight" she would have looked at mental health evidence; two psychologists who testified that Mills had some brain damage and satisfied the criteria for two statutory mental mitigators; and his sister and one of his brothers, who recounted Mills's difficult upbringing. The trial court held that Mills failed to show that his lawyer's performance was deficient under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
>
> The Florida Supreme Court affirmed, holding that Mills's lawyer's admission that "with the benefit of hindsight" he would have investigated mental health evidence "illustrates the Supreme Court's concern [in ineffective assistance claims] 'that every effort be made to eliminate the distorting effects of hindsight.'" *Mills v. State,* 603 So.2d 482, 485 (Fla. 1992) (*quoting Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). The Florida Supreme Court found that Mills also failed to satisfy the prejudice prong of *Strickland,* holding that "Mills has not demonstrated a reasonable probability that the currently tendered evidence would have produced a reversal of the judge's override of the jury's recommendation." *Mills,* 603 So.2d at 486.
>
> Mills then filed a petition for extraordinary relief and for writ of habeas corpus with the Florida Supreme Court. He raised two issues in the petition: (1) the Florida Supreme Court performed an inadequate harmless error analysis in affirming the death sentence; and (2) the felony-murder aggravator is an unconstitutional automatic aggravating circumstance in felony murders. The Florida Supreme Court found both issues to be procedurally barred. *Mills v. Singletary,* 606 So.2d 622, 623 (Fla. 1992).
>
> After exhausting state remedies, Mills filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida.

Mills v. Singletary, 161 F.3d 1273, 1278-80 (11th Cir. 1998).

{footnote omitted]. Mills' application for rehearing *en banc* was

denied on April 8, 1999. *Mills v. Moore*, 178 F.3d 1305 (11th Cir. 1999). The United States Supreme Court denied Mills' petition for writ of certiorari on January 10, 2000. *Mills v. Moore,* 120 S.Ct. 804 (2000).

On or about February 12, 2001, Mills filed a third petition for writ of habeas corpus in the Florida Supreme Court. The State filed a response to that petition on March 14, 2001. Oral argument took place on April 2, 2001. On April 12, 2001, this Court issued an opinion denying all relief. *Mills v. Moore,* No. SC01-338 (Fla. April 12, 2001).

On March 23, 2001, a warrant was issued for the execution of Mills' sentence of death. The warrant period is April 30 through May 7, 2001. Execution is scheduled for May 2, 2001.

On April 3, 2001, this Court issued an order setting the schedule for filing any briefs in this Court. Seminole County Circuit Judge O.H. Eaton, Jr. issued a scheduling order directing that any motion for post-conviction relief be filed by 9:00 AM on April 16, 2001, setting a *Huff* hearing for that same day, and scheduling an evidentiary hearing, should one be held, for April 17, 2001. Mills filed a motion pursuant to *Florida Rule of Criminal Procedure* 3.850 on April 16, 2001 -- that motion raised three claims.[2] Following a *Huff* hearing (R1-36), the trial court

[2]The three claims were: 1. Newly discovered evidence that the co-defendant's testimony at trial was "false" and that his "utter lack of credibility establishes a reasonable basis for the jury's

determined that it would hold an evidentiary hearing on Claim I only. (R29).

On April 17, 2001, the Circuit Court issued an order disposing of the public records issue. The Circuit Court found that the demands were overly broad, and that this Court's decision in *Sims v. State*, 753 So. 2d 66 (Fla. 2000) was controlling. The Circuit Court found that the demands in this case were the same sort of "shot gun approach" as the demands in *Sims*, and denied Mills' request for further disclosure of public records based upon *Florida Rule of Criminal Procedure* 3.853(h)(3).

On April 17, 2001, the evidentiary hearing began on schedule. However, Mills' only witness, Vincent Ashley, refused to be sworn, and refused to testify about any matter.[3] Ashley was removed from the courtroom after he refused to testify despite the best efforts of Attorney Scher and Judge Eaton to change his mind. (R48). Subsequently, representatives of the State and counsel for Mills questioned Ashley privately in the presence of a court reporter in an effort to determine whether Ashley's refusal to testify was based upon confusion on his part about the proceedings.[4] (R55).

---

life recommendation;" 2. that the "during the course of an enumerated felony" is an "automatic aggravator;" and, 3. that "access to various public records has been denied. (R375-417).

[3]Ashley responded to the Clerk's attempt to administer the oath of veracity, stating that the only testimony he would give was "nothing." (R44).

[4]**Ashley was not under oath during this proceeding.**

Ashley continued to refuse to testify, threatening to give the State testimony it would not like if he were somehow forced to testify. (R55-58).

When court reconvened, the State offered to stipulate that Ashley had recently given the version of events set out in Claim I of Mills' motion.[5] (R58). Mills accepted that stipulation. Mills then had the court reporter read the events which transpired during the private meeting with Ashley to the Court. Thereafter, Judge Eaton, having read Ashley's trial testimony,[6] the allegations in the motion, and having heard what he said in the private meeting, commented that it appeared that Ashley is still a liar who "told the lawyers he might say anything." (R62, 541).

On April 18, 2001, the Circuit Court entered an denying all relief. This appeal follows.

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court properly denied all relief. That Court's disposition of the issues contained in the Rule 3.850 motion was correct, is supported by competent substantial evidence, and should not be disturbed.

---

[5]This stipulation was consistent with the State's argument at the *Huff* hearing that, even taking the allegations of Claim I as true, there was no basis for an evidentiary hearing, or for relief. (R21-23).

[6]Ashley admitted at trial that he had changed his version of the events of the murder. (RDA278).

ARGUMENT

I. THE "NEW EVIDENCE" CLAIM[7]

THE LEGAL STANDARD

In addressing claims of newly discovered evidence in the context of under-warrant litigation, the Florida Supreme Court held:

> In *Jones v. State*, 709 So.2d 512 (Fla. 1998), this Court reiterated the standard that must be met in order for a conviction to be set aside based upon newly discovered evidence:
>
> > First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by use of diligence." *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla. 1994).
> >
> > Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones*, 591 So.2d at 911, 915. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial."
>
> *Id*. at 521.

Glock v. Moore, 776 So. 2d 243 (Fla. 2001). *See also, Demps v. State,* 761 So. 2d 302, 305-6 (Fla. 2000). With respect to the timeliness of a claim of "newly discovered evidence," the *Glock*

---

[7]This claim, as pleaded by Mills, is directed solely toward his sentence of death. The conviction is not at issue.

Court expressly reiterated the one-year requirement:

> **As to the first prong of *Jones*, any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence**. *See Buenoano v. State,* 708 So.2d 941, 947-48 (Fla. 1998);*see also Fla. R.Crim. Pro*. 3 .851(b)(4) (providing for extension of time for filing of motion for postconviction relief where counsel makes a showing of good cause for the inability to file the postconviction pleadings within the one-year time period).

Glock v. Moore, *supra.* [emphasis added].

The standard applied to a claim of newly discovered evidence is the same regardless of whether the "evidence" is applicable at the guilt or penalty phase of Mills' capital trial:

> In order to provide relief, "newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. The same standard would be applicable if the issue were whether a life or a death sentence should have been imposed." *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991).

Kight v. State, 2001 WL 40377 (Fla. Jan. 18, 2001).

THE CIRCUIT COURT CORRECTLY DENIED RELIEF

Mills' "newly discovered evidence" claim is predicated upon an allegation that co-defendant Vincent Leroy Ashley testified differently at trial than his most recent recount of the events of the murder to CCRC staff. The Circuit Court denied relief on this claim, stating:

> The defendant called Ashley as a witness but he refused to testify. The court instructed Ashley as follows:
>
> > THE COURT: Mr. Ashley, you've been subpoenaed here for the purpose of testifying in this

> case, and I'm going to instruct you that it's your duty and responsibility to answer the questions that are put to you. If you fail to respond to the questions that are put to you you're subjecting yourself to a contempt charge and while that might not sound all that serious to you because of the fact you're serving a life sentence, it can have some affect on you because I don't have to impose that sentence until I feel like it. And you might be with us here for awhile.

After receiving that instruction, Ashley still refused to testify. The court removed Ashley from the court room and discussed possible alternatives with counsel. The State suggested that a conference with Mr. Ashley might be of benefit so counsel for the state and counsel for the defendant had a conference with Ashley in the jury room with the court reporter present. The conference was not productive. **In fact, Ashley told the lawyers he might say anything, including that he was the one that pulled the trigger. This statement was subsequently taken out of context by defense counsel but it was made for the purpose of dissuading the lawyers from calling him as a witness and not an announcement that his testimony had changed.**

After counsel reported back to the court room, the State offered to stipulate that if Ashley had testified he would have testified as alleged in Claim I. The defense accepted that stipulation and the matter proceeded to argument.

There really is nothing new here. The version of events contained in Claim I differs from Ashley's testimony at the trial in certain details. But, if the details matter, the version of events in Claim I establish that Ashley remained outside of the residence during the burglary while the defendant entered the residence alone. If this statement had been placed before the jury it would have simply been another inconsistent statement made by this witness. The jury already knew Ashley had lied about his involvement in the murder shortly after it happened and they knew he was an accomplice who had received absolute immunity from prosecution for his role in it. Thus, showing the jury that the witness had credibility problems through another inconsistent statement would not have mattered.

(R540-542). [emphasis added]. The Circuit Court denied relief, concluding that:

> The court is now being called upon to determine if the "newly discovered evidence" would have made a difference to the judge who imposed the sentence. The court concludes that it would not have made a difference. *See*, *Jones v. State*, 591 So.2d 911 (Fla. 1992).

(R542-543).

The Circuit Court applied the well-settled *Jones* standard, and, in doing so, found that there was no reasonable probability of a different result had the sentencing judge heard that Ashley remained outside the victim's residence and that Mills entered the residence alone. The Court explained: "If this statement had been placed before the jury it would have simply been another inconsistent statement made by this witness." (R542). Ashley's inconsistent statements merely reaffirmed what the sentencing judge well knew about Ashley's credibility when he sentenced Mills to death.

Moreover, given that the "new" version of Ashley's testimony makes Mills more, rather than less, culpable, there is no reasonable probability of a different result. *See, Sims v. State,* 754 So. 2d 657 (Fla. 2000); *Sims v. State,* 750 So. 2d 622 (Fla. 1999). The Circuit Court properly applied the law, and its findings are supported by competent substantial evidence. This Court should not substitute its judgment for that of the Circuit Court. *Melendez v. State,* 718 So. 2d 746, 748 (Fla. 1998); *Demps v. State*, 462 So.

2d 1074 (Fla. 1984).

The Circuit Court did not pass on the due diligence/timeliness component of *Jones* and its progeny. However, given that Ashley has been incarcerated in the Florida Department of Corrections since 1985, and could have been interviewed by Mills' counsel at any time, Mills cannot establish that this "claim" is brought within the one-year period allowed under *Jones*. That procedural bar is not overcome by the fact that present counsel waited until the death warrant had been signed before interviewing Ashley. No attempt has been made to establish the timeliness of this claim, and that deficiency is an additional basis for the denial of relief. *Jones*.

To the extent that further discussion of the newly discovered evidence claim is necessary, Florida law is settled that, with respect to such claims:

> This Court has held that defendants must satisfy two requirements in order to have a conviction set aside on the basis of newly discovered evidence:
>
> First ... newly discovered ... evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of due diligence."
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial....
>
> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility.... The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly

> discovered evidence.
>
> *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998) (quoting *Torres-Arboleda v. Dugger,* 636 So.2d at 1324-25) (alteration in original) (citations omitted).

State v. Riechmann, 777 So. 2d 342 (Fla. 2000). In this case, it is significant that the trial testimony of Sylvester Davis was consistent with the trial testimony of Vincent Ashley -- both witnesses testified, in relevant part, that Ashley entered, and then exited, the victim's residence.[8] (R248-49; 106). That sort of convergent corroboration is significant, and is properly considered in assessing whether there is a reasonable probability of a different result. In this case, based upon this evidence, there is no such probability. The Circuit Court's ruling should not be disturbed.

Further, the inconsistent nature of this claim is readily apparent when Mills' penalty phase strategy is considered. At the penalty phase of his capital trial, Mills argued that:

> Vincent Ashley was in the classic sense a **co-Defendant of Gregory Mills**. Vincent Ashley was there. Vincent Ashley admitted his participation, having participation in all of the events which surround the killing of Mr. Wright.

(Supp. R. 96) [emphasis added]. Whatever Mills' guilt phase theory may have been, his penalty phase theory was that he should not be sentenced to death when an equally culpable co-defendant had received immunity for the crime. Rather than furthering that

---

[8]Davis testified about facts related to him by Mills. (R105).

theory, the "new" Ashley testimony significantly **reduces** Ashley's culpability. Because that is so, there is no reasonable probability of a different result had the "new" version of events been before the sentencing judge. There is no basis for relief.

To the extent that Mills may argue that Ashley's statement that "he might say anything" is "new evidence," that argument takes Ashley's comment out of context, as the Circuit Court found. (R541). The Circuit Court was in the best position to evaluate Ashley's credibility and demeanor, as well as the context of the comment at issue.[9] As this Court has said, in the same context:

> The cold record on appeal does not give appellate judges that type of perspective. It is clear to us that there is evidence in this record to support the trial court's decision. Therefore, this record does not establish an abuse of discretion by the trial judge.

State v. Spaziano, 692 So. 2d 174, 178 (Fla. 1997). The denial of relief in this case is supported by the record, and is not an abuse of discretion. That ruling should not be disturbed.

II. THE AGGRAVATING CIRCUMSTANCE OVERLAP CLAIM

The second claim contained in Mills' Rule 3.850 motion is a claim that "the State of Florida's concession that the 'during the course of a felony' aggravating circumstance constitutes an automatic aggravating circumstance warrants reconsideration of this

[9]While the "I might say anything" comment was not made in the Court's presence, Ashley did appear before the Court and engage in a colloquy with Judge Eaton when he refused to be sworn. Such can properly be considered by the Court in assessing Ashley's remark.

issue and warrants sentencing relief." The Circuit Court correctly found this claim procedurally barred. (R543).[10] That disposition is correct as a matter of law, and should not be disturbed.[11] To the extent that further discussion of the procedural bar holding is necessary, this Court's 1992 opinion is dispositive:

> Mills' second claim [that the felony-murder aggravator is an unconstitutional "automatic" aggravator] is also procedurally barred. We considered and rejected the substance of this claim on direct appeal. 476 So.2d at 178. Thus, we found the claim procedurally barred in Mills' first habeas corpus petition. 559 So.2d at 579. Again, *Stringer* is not a change in the law that warrants retroactive application, and Mills' second claim is procedurally barred.

Mills v. Singletary, 606 So. 2d 622, 623 (Fla. 1992). This claim is foreclosed by a triple layer of procedural bars. Alternatively and secondarily, without waiving the procedural bars, this claim is meritless.

To the extent that further discussion is warranted, this claim appears to be based upon an out-of-context portion of the oral argument in Mills' 2001 state habeas corpus proceeding. As this Court is well aware, one of the central issues in that proceeding was the applicability of the United States Supreme Court's decision

---

[10]The Circuit Court relied on *Medina v. State,* 573 So. 2d 293 (Fla. 1991) in support of its procedural bar holding. *Medina* is directly on point, and correctly states Florida procedural bar law.

[11]Florida's procedural bar rules are applicable to this claim. *Sireci v. State,* 773 So. 2d 34, 39 n.10 (Fla. 2000); *Johnson v. State,* 769 So. 2d 990, 1005 n.8 (Fla. 2000); *Brown v. State,* 755 So. 2d 616, 620 n.3 (Fla. 2000).

in *Apprendi v. New Jersey* to the Florida capital sentencing scheme. This Court rejected outright any contention that *Apprendi* has **any** application in that context. Mills' attempt to twist an alternative merits argument into something that helps his case does nothing more than illustrate the correctness of this Court's ruling on the *Apprendi* issue by highlighting why the *Apprendi* analysis is an apples-and-oranges comparison in the context of capital sentencing. When stripped of its pretensions, this claim is nothing more than a motion for rehearing based upon Mills' continuing disagreement with this Court's ruling -- this Court's April 12, 2001, opinion expressly held that no motion for rehearing would be entertained. Mills' attempt to circumvent that holding should not be entertained, either.[12]

This Court has repeatedly rejected the "automatic aggravator" claim raised by Mills, and, in addition to being procedurally barred, that claim is wholly meritless. *See, Arbelaez v. State,* 775 So. 2d 909 (Fla. 2000); *Freeman v. State*, 761 So. 2d 1055, 1072 (Fla. 2000); *Thompson v. State,* 759 So. 2d 650, 666 (Fla. 2000); *Blanco v. State*, 706 So. 2d 7 (Fla. 1997); *Banks v. State*, 700 So. 2d 363 (Fla. 1997); *Johnson v. State*, 660 So. 2d 637 (Fla. 1995); *Hunter v. State*, 660 So. 2d 244, 253 n.13 (Fla. 1995). This claim

[12]In addition to being procedurally barred, this claim is also subject to summary dismissal because it is no more than Mills' continuing criticism of this Court's prior decisions. *Eutzy v. State,* 536 So. 2d 1014, 1015 (Fla. 1988).

is not a basis for relief.

III. THE PUBLIC RECORDS ISSUES

The Circuit Court correctly resolved the public records issues -- that Court's disposition is correct as a matter of law, and should not be disturbed.

In pertinent part, the Circuit Court's order reads as follow:

> The defendant has filed demands for public records from at least fifteen agencies, one of which has several different offices, requesting a variety of public records. The demands purport to be filed under Rule 3.852(h)(3). However, the demands do not fall within the time frames established by that subsection of the rule and must be considered, if at all, under subsection (h)(3). That subsection regulates the production of *public records after a death warrant is signed.* [emphasis in original]
>
> Rule 3.852(h)(3) assumes that public records have been previously demanded under Rule 3.852(g) and limits additional public records to the following categories:
>
> 1. Records that were not previously the subject of an objection,
> 2. Records that were received or produced since the previous request, and
> 3. Records that were, for any reasons, not produced previously.
>
> The demands filed in this case are overly broad. For instance, many of the demands contain language such as "any and all" and designate documents by referring to "[a]ll notes, memoranda, letters, electronic mail, and/or files, drafts, charts, reports and/or other files generated or received by any and all members of your agency which are related to Gregory Mills."
>
> . . .
>
> Additionally, many of the demands in this case are for records that are of questionable relevance and unlikely to lead to discoverable evidence. For instance, the Department of State has been requested to produce "any

> and all files (regardless of form) that document any and all campaign contributions received by WILLIAM WOODSON, former Circuit Judge."
>
> After a death warrant has been signed there is insufficient time for a leisurely investigation. The rule relating to production of additional public records recognizes this. It was drafted to provide records that had not been created or received at the time of a previous demand or perhaps had been overlooked. it was not designed to require agencies to produce the same records for a second time. Reinvestigation of a case through the public records is not contemplated after the death warrant has been signed. The demands on file in this case far exceed the limited purpose of subsection 3.853(h)(3).
>
> Accordingly, the objections to production of public records filed herein are sustained and the further disclosure of public record is denied.

(R534-537). That ruling, which the Circuit Court incorporated in its final order of April 18, 2001, is not an abuse of discretion, and should not be disturbed.

In *Sims v. State,* 753 So. 2d 66 (Fla. 2000), this Court held:

> The language of section 119.19 and of rule 3.852 clearly provides for the production of public records after the governor has signed a death warrant. However, it is equally clear that this discovery tool is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief. To prevent such a fishing expedition, the statute and the rule provide for the production of public records from persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey. The use of the past tense and such words and phrases as "requested," "previously," "received," "produced," "previous request," and "produced previously" are not happenstance.
>
> This language was intended to and does convey to the reader the fact that a public records request under this rule is intended as an update of information previously received or requested. To hold otherwise would foster a

> procedure in which defendants make only a partial public records request during the initial postconviction proceedings and hold in abeyance other requests until such time as a warrant is signed. Such is neither the spirit nor intent of the public records law. Rule 3.852 is not intended for use by defendants as, in the words of the trial court, "nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry."

Sims v. State, 753 So. 2d at 70. Subsequently, in deciding yet another under-warrant public records issue, this Court cited the above portion of *Sims*, and held:

> In this case, the scope of Glock's public records request is quite broad. (FN11) Many of the records Glock requested were in fact produced by the various agencies, but some agencies claimed exemptions. It is clear from a review of the record and the hearing that most of the records are not simply an update of information previously requested but entirely new requests.
>
> Nonetheless, Glock has not made a showing as to how any of the records he has requested and has not received relate to a colorable claim for postconviction relief or to a "focused investigation into some legitimate area of inquiry." *Id.* Moreover, Glock has not shown good cause as to why he did not make these public records requests until after the death warrant was signed. *See Bryan v. State*, 748 So.2d 1003, 1006 (Fla. 1999); *Buenoano v. State,* 708 So.2d 941, 947 (Fla. 1998). Accordingly, based upon the record before us, we hold that the trial court did not abuse its discretion in denying the motions to compel and in determining that Glock's right to public records was not denied under section 119.19, *Florida Statutes*, and rule 3.852.
>
> > (FN11.) Indeed, Glock made multiple public records requests of agencies or persons, including:
> >
> > 1. Chief of Police, Palmetto Police Department
> > 2. Director, Division of Elections, Department of State
> > 3. Chief of Police, Fort Myers Police Department

4. Michael W. Moore, Secretary, Department of Corrections
5. Chief of Police, Dade City Police Department
6. Secretary, Department of Business and Professional Regulation.
7. Secretary, Department of Children and Families
8. Records Custodian, Pasco County Jail
9. Records Custodian, Pasco County Sheriff's Department
10. Records Custodian, Florida Department of Law Enforcement
11. Honorable Bernie McCabe, Office of the State Attorney, Sixth Judicial Circuit
12. Records Custodian, Office of the Medical Examiner, District Six
13. Honorable Wayne L. Cobb, Circuit Court Judge, Sixth Judicial Circuit
14. Records Custodian, Pasco County Sheriff's Department
15. Secretary, Agency for Health Care Administration
16. Chief of Police, Lake Worth Police Department
17. Sheriff, Palm Beach County Sheriff's Office
18. Records Custodian, Florida Highway Patrol
19. Regional Administrator, Florida Parole Commission
20. Office of Executive Clemency

Glock v. Moore, 776 So. 2d 243 (Fla. 2001).

Moreover, as the Circuit Court noted, whatever problems may exist with respect to the public records repository, nothing "preclude[s] counsel from going to the repository and reviewing the records there." (R543-544). The trial court's ruling on Mills' public records requests is in accord with settled Florida law, is not an abuse of discretion, and should be affirmed in all respects.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the State submits that the ruling of the Circuit Court of Seminole County should be affirmed in all respects.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Florida Bar #438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax (904) 226-0457

CERTIFICATE OF FONT

This brief is typed in Courier New 12 point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Response has been furnished by Facsimile and U.S. Mail to Todd G. Scher, Litigation Director, Capital Collateral Regional Counsel, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, on this _____ day of April, 2001.

Of Counsel