IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-708

MICHAEL SEIBERT,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

REPLY BRIEF OF CROSS-APPELLANT

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STATEMENT OF CASE AND FACTS

The State will rely on the statement of case and facts contained in its Answer Brief of Appellee/Initial Brief of Cross-Appellant dated October 6, 2008.

SUMMARY OF THE ARGUMENT

The State properly represented both Defendant's position and the lower court's ruling. Moreover, that ruling is based on an error of law, which necessarily constitutes an abuse of discretion, and should be reversed.

ARGUMENT

VI. THE LOWER COURT ABUSED ITS DISCRETION IN ORDERING THE STATE TO PRODUCE RECORDS UNDER THE "PRINCIPLES OF *BRADY*."

In response to the State's argument that the lower court abused its discretion in ordering the State to disclose information that it found was not properly requested pursuant to Fla. R. Crim. P. 3.852(i) under the principles of *Brady*, Defendant asserts that the State misrepresented his position in the lower court and misrepresented the nature of the lower court's order. He then argues that under a proper analysis of the nature of the lower court's order, it did not abuse its discretion. However, none of these arguments have any merit.

While Defendant asserts that the State misrepresented that he had argued that he believed the judge in *Lightbourne* had committed errors in its rulings on public records and was litigating the issues in this case so as to get a different ruling from a different judge, the record fully supports the State's argument. Defendant directly told the lower court that "[t]he importance of the new public records request is due to the Lightbourne hearing because we were shut down getting the records in Lightbourne." (PCT. 144) He also stated "[t]here could be a situation in Mr. Lightbourne's case he's not getting the records and the evidentiary hearing in the middle of May

[may] not be a full and fair hearing because Judge Angel may have erred in denying the records, where Your Honor may hear argument to say, of course you are entitled to these records." (PCT. 123) Thus, the State did not misrepresent Defendant's position.

Defendant also suggests that the fact that he received the Dyehouse memos after the lower court verbally announced the order here somehow contributes to the misrepresentation of his position. However, Defendant does not explain how the later receipt of the Dyehouse memos shows that Defendant did not state to the lower court that he was pursuing his public records request in this case to obtain a different ruling from a different judge. In fact, as pointed out in the State's reply regarding the interlocutory review petition in this case, Defendant's counsel obtained the order that lead to his receipt of the Dyehouse memos by using the verbal ruling in this case. Reply, *State v. Seibert*, SC07-1891, at 2. Thus, the later receipt of the Dyehouse memos actually shows that the State was correct about Defendant's position. This is particularly true, as this Court has ruled that the Dyehouse memos do not show that the lethal injection protocol is flawed or would fail. *Lightbourne v. McCollum*, 969 So. 2d 326, 352 (Fla. 2007). Thus, the Dyehouse memos would not have been discoverable under the

lower court's order. Defendant's assertion that the State has misrepresented his position should be rejected.

Further, the State also did not misrepresent the nature of the lower court's ruling. While Defendant insists that the lower court did not base its order on *Brady v. Maryland*, 373 U.S. 83 (1963), the lower court directly stated that it was requiring the production was because it "could be *Brady* material." (PCT. 131) Even after the State cited to case law from the United States Supreme Court showing that *Brady* did not cover the materials Respondent sought, the lower court continued to rely upon *Brady* and did so in the order under review. (PCT. 137-39, PCR. 615) Thus, the record supports the assertion that the lower court relied upon *Brady*.

Moreover, as pointed out in the State's Answer/Cross-Initial Brief, Defendant's argument that the "principles of *Brady*" extends further than the scope of *Brady*, is incorrect. Answer/Cross Initial Brief at 70-71. The United States Supreme Court has limited the scope of *Brady* materials because to do otherwise "'would entirely alter the character and balance of our present systems of criminal justice.' *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (dissenting opinion)." *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985). Thus, Defendant's argument that the lower court could properly rely on the

"principles of *Brady*" even where *Brady* does not apply merely shows that the lower court committed an error of law in believing the "principles of *Brady*" extend further than the *Brady* doctrine. By committing an error of law, the lower court abused its discretion. *Johnson v. State*, 969 So. 2d 938, 949 (Fla. 2007) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). As such, the order should be reversed.

CONCLUSION

For the foregoing reasons, the September 12, 2007 order on public records should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Roseanne Eckert, Assistant CCRC, 101 NE Third Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this ____ day of January 2009.

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SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

_____
SANDRA S. JAGGARD
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