IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-708

MICHAEL SEIBERT,
Appellant/ Cross-Appellee,

v.

STATE OF FLORIDA,
Appellee/ Cross-Appellant.

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

REPLY BRIEF OF APPELLANT/ ANSWER BRIEF OF CROSS-APPELLEE

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REPLY TO ARGUMENT I

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING AS REQUIRED BY FLA. R. CRIM. P. 3.851(f)(5)(A)[1] ON MR. SEIBERT'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND DURING THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

A. Introduction: The State has not raised any argument that would defeat Mr. Seibert's entitlement to a hearing.

On direct appeal, Mr. Seibert appealed the lower court's denial of the motion to suppress challenging the officers' forceable and warrantless entry into his home as well as the subsequent search conducted by the officers once they were inside. (Dir. App. In. Br. at 56). Appellate counsel recognized that in reviewing a ruling on a motion to suppress, this Court must defer to the trial court regarding historical questions of fact, but that review of the constitutional questions is *de novo*. (Id.)(citing *Conner v. State*, 803 So. 2d 598 (Fla. 2001)). Constrained by the limited and misleading information in the record, this Court upheld the lower court's denial of the Defendant's motion to suppress. *Seibert v. State*, 923 So. 2d 460 (Fla. 2006).

Claim VI of the motion for post-conviction relief was straightforward: trial counsel's failure to adequately and properly litigate the motion to suppress evidence obtained in violation of the Fourth Amendment resulted in prejudice to

[1] This was erroneously cited as 3.851(5)(B) in the Initial Brief.

the Defendant. (PC-R. 84-102). Trial counsel could have and should have conclusively established—based on the actual physical layout of the furniture and walls in the apartment—that the police version of how the warrantless search was conducted could not possibly be true and that Mr. Seibert's Fourth Amendment rights were violated. Mr. Seibert was entitled to a hearing on his Sixth Amendment claim that trial counsel's deficient performance in failing to utilize all available evidence to challenge the admissibility of evidence as a result of the search resulted in prejudice, i.e., had the motion to suppress been granted, the State would not have had the evidence to convict the Defendant. See Fla. R. Crim. P. 3.851(f)(5)(A)(requiring the circuit court to schedule an evidentiary hearing on claims listed as requiring a factual determination). The denial of the opportunity for full and fair litigation of the Fourth and Sixth Amendment issues is a violation of Mr. Seibert's rights under the United States Constitution. The State has not raised any issue that would defeat Mr. Seibert's right to a hearing; if anything, the State's arguments serve to bolster the Defendant's arguments. The claim is neither procedurally barred nor refuted by the record.

B. <u>The ineffective assistance of counsel claim is not refuted by the record.</u>

1. The lower court's reliance upon a "not to scale" drawing serves to establish the need for evidentiary development.

"A picture is worth a thousand words." (PC-R. 208)(emphasis added). Ironically, the lower court made the foregoing observation in the order denying post-conviction relief in reference to, and in reliance upon, a hand-drawn diagram that was clearly marked as "Not to scale." (PC-R. 208, 216; Exh. 48). In its Answer Brief, the State asserted Mr. Seibert is not entitled to an evidentiary hearing because the lower court properly found that Mr. Seibert's Sixth Amendment claim was "refuted by the record." (Answer at 40). Contrary to the State's suggestion, Mr. Seibert is not complaining simply because trial counsel failed to convince the court to rule in his favor as alleged by the State. (Id.). Rather, this claim is about trial counsel's failure to present the available evidence that would have shown—based on the actual layout of the apartment—that Officer Bales's description of his actions could not possibly be accurate. Unfortunately, because the trial court did not have the proper evidence in front of it at the hearing on the motion to suppress, the court mistakenly concluded that Officer Bales barely moved and that he was "literally taking a step back" when he saw a foot on the edge of the bathtub. (T. 1312).

The State's assertion that "[d]uring the hearing on the motion [to suppress], the trial court was given the opportunity to see the layout of the apartment and its dimensions" is belied by the actual record in this case. (Answer at 34). The truth is that nowhere in the record is there any information that provides the actual dimensions of the apartment. During the course of collateral proceedings, the lower court reviewed the evidence that was introduced both at the hearing on the motion to suppress as well as evidence that was introduced at the actual trial:

> This court viewed every photograph that was introduced into evidence at trial prior to preparing this order. Not a single photograph that was introduced into evidence at trial indicates that there was a pocket door. To the contrary, the photographs indicate that there was a hinged door, which is consistent with the testimony of Officer Bales.
>
> A blow-up of the layout of the apartment was introduced into evidence as the State's Exhibit 48 during the trial on November 15, 2002. **A picture is worth a thousand words. The layout clearly shows that the bathroom is in close proximity to the front door. All the office had to do was enter the main room of small studio apartment, take a couple of small steps, and turn his head to see the bathroom.**

(PC-R. 207-208)(emphasis added). The glaring problem is that the exhibit does not accurately depict the layout of the apartment.

At the trial, crime scene investigator Marsha Knowles explained that the purpose of creating the diagram (shown on Exh. 48) was to show the location in which pieces of evidence were found. (T. 3021). Knowles admitted that she did

not prepare the diagram that is clearly marked as being "Not to scale" and was admitted over trial counsel's objection. (T. 3021-22; Exh. 48). Furthermore, there are no measurements on the diagram to support the trial court's finding that Officer Bales took "a couple of small steps" and then turned his head to see into the bathroom. Nor is there any testimony in the record to support the finding that all Officer Bales had to do was take "a couple of small steps" and turn his head in order to see into the bathroom. Additionally, a review of the relatively few photographs that were submitted into evidence reveals that large pieces of furniture would have blocked Officer Bales's pathway into the little hallway.[2] But, on

[2] The record reflects that trial counsel did not enter any exhibits into evidence in support of the motion to suppress on October 31, 2002. However, the State offered the following photographs: Exh. # 1, ID 1I (photograph of the Ocean Reef Hotel Apts); Exh. # 2, ID 1G (photograph of the apartment with the television to the left and what appears to be the front door, slightly ajar); Exh. #3, ID 1E (photograph with view of a bed against a wall and what appears to be a dining room area in the back to the left); Exh. #4; (photograph of bathroom showing hinged doorjam and later used in trial as exhibit # 10).

The following additional pertinent photographs or exhibits were entered into evidence for the trial but defense counsel did not use them to question Officer Bales regarding how he could possibly have seen into the bathroom without tripping over furniture and going into another room: Exh. # 48 (a poster that contains the "not to scale" sketch of the apartment in the middle surrounded by 14 photographs of items collected from the scene with notations on the drawing depicting the approximate area where the items were found); Exh. # 32 (poster sized photograph depicting a view of a black chair and table on the left, a door to a hallway with a dresser in what appears to be another room, and a television on the right. There is a green chair in the middle of the room); Exh. #3, ID 1-Q (photograph showing view of dining area with front door ajar and to the left); Exh. # 2, ID 1-S (photograph facing a window with what appears to be a bed to the left

Exhibit 48, the drawing is so distorted that it appears that the furniture is neatly tucked in the corner of the room.

If Mr. Seibert were granted a hearing, he would prove that trial counsel's performance was deficient. The failure of the trial attorney to provide any information whatsoever regarding the dimensions of the apartment and the actual distance that Office Bales had to walk from where he stood talking to Mr. Seibert to where he could see into the bathroom resulted in everyone having to guess as to what actually happened. Even though there are photographs, albeit not taken from a defense perspective, trial counsel never used those photographs to challenge or impeach the witnesses regarding the search of the apartment. During the pre-trial deposition of Officer Bales, trial counsel suggested he was trying to put himself in the officer's "shoes physically, geometrically in the place. . ." (PC-R. 89-90). Unfortunately, while that may have been the trial attorney's goal, he failed to

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and a black chair to the right); Exh. #10, ID 5Y (photograph of the bathroom showing the hinged door); Exh. # 56, ID 4Y (photograph of a black chair in the corner, also shows pair of sneakers in the middle of the room, another chair in the middle of the room, a coffee table of some sort, plants, etc.); Exh. 57, ID 5F (a photograph of a messy octagon shaped table); Exh. #58, ID 6D (photograph of a messy closet area with a number of items on the floor); Exh. 74, ID 1E (another photograph of the bathroom showing the hinged (not a pocket) door); Exh. # 77, ID 1A (photograph of a kitchen that appears to be a separate room); Exh. 78, ID IB (photograph of the dining area apparently from the kitchen); Exh. 80, ID 1O (photograph of the dining area capturing part of the kitchen).

The lower court attached a few of the exhibits to the order denying relief. (PC-R. 212-216). However, Mr. Seibert has been denied the opportunity to question anyone regarding these photographs.

provide the necessary information that would have allowed both the lower court, and this Court to do the same.

Mr. Seibert alleged below that trial counsel's deficiency in making a record concerning the layout in the apartment became painfully apparent during the oral argument on the direct appeal. (PC-R. 698-99). This Court made very clear at oral argument and in its opinion affirming the sentence and conviction that the question of the extent of the search was intricately tied to the dimensions of the apartment and the extent of Officer Bales's physical movement within the apartment. Justice Cantero stated that based on the record and the briefs, it was his impression that it was really not much more than the officer just being in the presence of the Defendant and then turning his head to look at what else was around. Justice Cantero invited appellate counsel to explain how Officer Bales's search which led to the discovery of the victim's body involved more than just a turning of his head, but appellate counsel was unfortunately constrained by the lack of record below and was therefore unable to describe to this Court the extent of the search. As a result, this Court ruled against Mr. Seibert:

> The officers' quick look around the apartment was not an extensive search because they did not open any containers or **even enter any other rooms.** . . . It was objectively reasonable for them to **glance around** to ensure that the apartment and Seibert were secure. Moreover, insufficient time had elapsed for the officers to determine that the exigency had passed. Although the officers observed upon their entry that Seibert appeared

> unharmed, the officers had not had sufficient time to determine that he was not preparing to harm himself.
>
> * * *
>
> **In the present case, the officer's look from the main room of the studio apartment into the open bathroom was a limited extension of the initial entry**, and since that entry was permissible, the subsequent actions of the officers were also lawful.

Seibert v. State, 923 So. 2d 460, 471 (Fla. 2006)(emphasis added).

In its Answer Brief, the State referred to the language in the circuit court order and asserted that "the lower court based both its findings[3] on the small size of the studio apartment and the resulting proximity of area in the apartment." (Answer at 43). But, nowhere in the record is there any recognition or appreciation by the lower court or the State that the diagram was not drawn to scale. There are not even any markings on the diagram that would assist anyone in determining whether the front door is on the north, south, east, or west side of the apartment. The diagram does not support the circuit court's finding, nor does it positively refute Mr. Seibert's allegation.

Mr. Seibert has pointed out that the trial court made different factual findings regarding the extent of the search, and that this confusion and change in findings illustrates the need for evidentiary development. But, in its Answer Brief, the State made light of the significance of the differing factual determinations

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[3] The State was referring to the denial of the pre-trial motion to suppress as well as the subsequent summary denial of post-conviction relief.

made by the circuit court. (Answer at 43). Throughout the pre-trial suppression hearing, the entire trial, and the direct appeal, the State maintained its position that Officer Bales did not search Mr. Seibert's apartment, arguing that Officer Bales "looked around himself" and that "as he looked around, [he] saw **in plain view** Ms. Adrianza's severed foot on the edge of the bathtub." (PC-R. 92-93) (citing Dir. App. An. Br. at 69) (emphasis added). Ultimately, based on the testimony presented at the suppression hearing and during trial, the trial court found that Officer Bales barely moved, that he was "literally taking a step back" when he saw a foot on the edge of the bathtub. (T. 1312). In its sentencing order, the trial court found the following: "**The officers sat down with the defendant in the living room area to talk. One of the officers then turned his head to the side**, and through the partially open door to the bathroom observed a severed foot on the side of the bathtub." (R. 796)(emphasis added).

On direct appeal, this Court relied on the lower court's fact-finding in upholding the search. *Seibert v. State*, 923 So. 2d 460, 471 (Fla. 2006). Without hearing any additional evidence during the collateral proceedings, the circuit court made a new factual finding: "All the officer had to do was enter the main room of small studio apartment, **take a couple of small steps**, and turn his head to see the bathroom." (Supp. PC-R. 208)(emphasis added). In its Answer Brief, the State offered a guess as to an explanation for the difference in factual findings:

> [t]he findings indicated that the lower court was discussing the number of steps necessary to see the bathroom from different points in the apartment. In the post conviction order, the lower court measured the number of steps from the front door. In denying the suppression motion, the lower court measured the number of steps from where Off. Bales was standing speaking to the Defendant.

(Answer at 43-44). Of course, this made-up explanation only raises more questions—questions that must be addressed at an evidentiary hearing. First, where in the record is there information that would allow anyone to figure out how many steps there are from the front door to a vantage point where the officer could see into the bathroom? Second, why would the lower court be concerned with how many steps it is from the door when the record reflects that the officers entered the apartment and were speaking with Mr. Seibert near the sofa on the far side of the apartment? The bottom line is that there are material facts in dispute and a hearing is required.

2. The continued confusion regarding the "pocket door" serves to establish the need for an evidentiary hearing.

The State was wrong in accusing Mr. Seibert of "castigating" the circuit court for "allegedly not understanding his argument concerning the importance of the pocket door." (Answer at 42). The Defendant was actually attempting to demonstrate to this Court how the lower court's complete misunderstanding demonstrates that the Sixth Amendment claim cannot be evaluated or adjudicated

without the benefit of a hearing. Mr. Seibert alleged below that Officer Bales could not have seen into the bathroom from where he said he was standing based on the following:

> [T]he physical layout of the apartment is such that the front door to the apartment opens into the main living room. **Mr. Seibert's day-bed was located in the southeast corner of the main living room. On the west wall of the main living room, there is a doorway with a pocket door that leads to a hallway. On the north side of the hallway is a storage area or closet. On the south side of the hallway is the door to the bathroom. The edge of the bathtub is not visible until one walks through the doorway from the main room into the hallway and either enters the bathroom or walks to the far west side of the door and looks through the space between the doorframe and the hinged side of the door.**
>
> Officer Bales could not have seen the edge of the bathtub from the main room, and would have had to walk across the room and down the hallway—considerably more than six feet from where he stood talking to Mr. Seibert—in order to peer into the bathroom to see the victim's body.

(PC-R. 94)(emphasis added). Mr. Seibert has no quarrel with the lower court's finding that there is a "hinged door" that leads to the actual bathroom; obviously the hinged door is visible in the photographs that the court attached to the order denying relief.[4] That is the door that the Defendant referred to in the rule 3.851 motion: "[o]n the south side of the hallway is the door to the bathroom."[5]

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[4] The order states:

The State asserted that "it was entirely appropriate for the lower court, after reviewing the evidence that showed that no pocket door impeded the officer's view, to find that the Defendant's claim was refuted by the evidence." (Answer at 42-43). The State fails to recognize that State's Exhibit 32, a poster sized photograph of Mr. Seibert's apartment looking westbound from the kitchen area to the bathroom area, depicts what appears to be a doorway with what appears to be a pocket door visible on the right-hand side of the doorway. (T. 2680; Exh. 32). Mr.

> If there was a pocket door, it would have been visible in State's Exhibit 3. It is not. This court viewed every photograph that was introduced into evidence at trial prior to preparing this order. Not a single photograph indicated that there was a pocket door. To the contrary, the photographs indicate that there was a hinged door, which is consistent with the testimony of Officer Bales. . . .
>
> Also, Exhibit 3, a copy of which is attached hereto, shows the view of the small studio apartment from the bathroom. The front door is clearly visible and close to the bathroom. Exhibit 10, a copy of which is attached, clearly shows that the bathroom had a hinged door. There is no pocket door.

(Supp. PC-R. 207-08).

[5] Mr. Seibert explained in his Initial Brief that he does not dispute that the bathroom door is a hinged door. The photographs showing that the bathroom door is a hinged door rather than a sliding pocket door do not conclusively refute Mr. Seibert's claim. They do, however, demonstrate that the circuit court's analysis about why this claim is refuted by the record is based on an utter misunderstanding of Mr. Seibert's allegation. (Initial Brief at 41). The State failed to recognize the distinction in its Answer Brief.

Seibert's claim that there was a pocket door between the living room area and the hallway leading to the bathroom is therefore not refuted by the record. It is important to note that it was law enforcement that took all the photographs that were entered into evidence. (T. 3014-15.) In other words, none of the photographs were taken by the defense on behalf of the Defendant. In fact, the State introduced more photographs into evidence at the hearing on the motion to suppress than the Defendant did. There are two significant points to make about the State's photographs of Mr. Seibert's apartment. First, none of the photographs are taken from the vantage point of where Officer Bales testified he was standing in the living room when he testified he looked into the bathroom and saw a severed foot on the edge of the bathtub. Second, despite the existence of a photograph depicting what appears to be a doorway with a pocket door separating the living room from the hallway, trial counsel failed to use this photograph to argue to the circuit court the extent of the officers' search. Rather, trial counsel objected to the admission of this exhibit at trial. (T. 2680).

The significance of the pocket door is that it demonstrates that when Officer Bales stepped from the living room into the hallway, he passed through a doorway into another room. The pocket door would have blocked the officer from simply stepping back into the hallway area where he could see into the bathroom. On direct appeal, this Court reasoned that the officers' "quick look around the

apartment was not an extensive search because they did not open any containers **or even enter any other rooms**." *Seibert v. State*, 923 So. 2d 460, 471 (Fla. 2006) (emphasis added). The pocket door is an example of how trial counsel could have and should have used the physical layout of the apartment to attack the credibility of the officer's testimony regarding his search of the apartment, i.e., it demonstrates that rather than simply looking from the main room into the bathroom, the officer must have walked from the living room, through the doorway with the pocket door, into the hallway, and then looked through the crack between the bathroom door and doorway in order to see into the bathroom. In fact, the crime scene investigator's testimony at trial indicated that there is more than one room and that there was a door that led to the bathroom area. (T. 3018, PC-R. 208). If granted a hearing, Mr. Seibert could and would demonstrate that Bales did enter another room in conducting his search of the apartment.

3. The confusion regarding the location of the severed foot is but one example of trial counsel's deficient performance.

Mr. Seibert alleged in Claim VI of his rule 3.851 motion that he was deprived of his constitutional right to the effective assistance of counsel due to his attorney's failure to adequately argue that the search of the apartment was in violation of the Fourth Amendment. Mr. Seibert has the burden of proving that trial counsel rendered deficient performance. *Strickland v. Washington,* 466 U.S. 668, 685 (1984). To that end, Mr. Seibert provided specific examples of issues

and/or facts that trial counsel failed to address in challenging the extent of the search in the apartment. One of those issues was the fact that despite Officer Bales's repeated testimony about finding the victim's body after seeing a severed foot with a white bone sticking out of it on the edge of the bathtub, none of the photographs of the bathroom depict a severed foot on the edge of the bathtub. (PC-R. 96). The State's attempt to treat this issue as some kind of stand-alone "claim" is misguided and only confuses the matter. (Answer at 41-42).

Mr. Seibert alleged that trial counsel was ineffective for failing to pick up on the glaring inconsistency between Officer Bales's testimony and the crime scene photographs and for failing to question Officer Bales about where he saw the foot at any time during deposition, the suppression hearing, or the trial, and for failing to make this argument to the court. The circuit court did not address this issue in its written order, but in orally announcing its order, the court stated that "It would be obvious, also, from one of the photographs that I attached, that from the blood smear that had been up there, that the likelihood was that the foot had been there, just as Officer Bales had said." (PC-R. T. 337). But, the Defendant maintains that the photographs of the body in the bathtub show that the right foot was not severed, and the severed left foot appeared to be wedged firmly under the victim's left lower leg bone. (PC-R. 96). The severed foot is not on the edge of the tub nor does it have a big white bone sticking out of it; the only thing that is obvious from

the photograph to which the circuit court refers is that there is no severed foot on the edge of the bathtub. There is absolutely no evidence in the record that the foot was moved due to the activity around the victim's body between the time that Officer Bales said he saw the foot on the edge of the bathtub and the time when crime scene technicians photographed the foot on the bottom of the bathtub.

Despite the foregoing, the State has presented an alternative view of the evidence in the Answer Brief. (Answer at 41-42). The fact that the State has proposed an alternate version of the evidence establishes the need for a hearing under Rule 3.851(f)(5)(A).

4. The State's reliance on *Maryland v. Buie* is misplaced.

This Court recognized that a warrantless search of a home is per se unreasonable and thus unconstitutional under the Fourth Amendment. *Seibert v. State,* 923 So. 2d 460, 468 (Fla. 2006)(citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)). In *Coolidge,* the United States Supreme Court noted that there are "only a few specifically established and well-delineated exceptions" to the warrant requirement:

> The exceptions are 'jealously and carefully drawn.' And there must be a showing by those who seek exemption. . . that the exigencies of the situation made that course imperative.' 'The burden is on those seeking the exemption to show the need for it.' In times of unrest, whether cause by crime or racial conflict or fear of internal subversion, this basis law and the values that it represents may appear unrealistic or 'extravagant' to

> some. But the values were those of the authors of our fundamental constitutional concepts.

Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). The State, as the party with the burden of establishing that the search fell under one of the few recognized exceptions to the warrant requirement, has maintained that the search of Mr. Seibert's apartment fell within the "plain-view" exception.[6] "[T]he police may seize any evidence that is in plain view during the court of their legitimate emergency activities." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); *see also Arizona v. Hicks*, 480 U.S. 321 (1987); *Davis v. State*, 834 So. 2d 322, 327 (Fla. 5th DCA 2003); *Anderson v. State*, 665 So. 2d 281, 283 (Fla. 5th DCA 1995).

On direct appeal, the State explained its theory that foot was in "plain view" based on the limited record:

> The officers had entered the apartment to make sure that Defendant was not attempting to kill himself. To do so, **they looked around themselves** to make sure that Defendant did not have anything available to use to kill himself and to ensure their own safety as they spoke to Defendant to assess his mental condition. **As the trial court found, Off. Bales barely moved as he looked around himself. As he looked around, Off. Bales saw in plain view Ms. Adianza's severed foot on the edge of the bathtub.** . . . Here, the emergency justified entry into Defendant's studio apartment as argued above. **Off. Bales observed the severed foot from that room.**

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[6] While Mr. Seibert does not agree that the initial entry into the apartment was legally permissible, in these proceedings, he only seeks to challenge the subsequent search.

(Dir. App. An. Br. at 69-70)(emphasis added). It is interesting that the State even sought to distinguish the instant case from the situation in presented in *United States v. Brand*, 556 F. 2d 1312 (5th Cir. 1977), where the police responded to a call regarding a drug overdose and found the victim unconscious in the living room. The court suppressed narcotics that had been seized from the bedroom during a search of the home, finding that the medical emergency justified the officer's presence in the living room, but that the defendant retained an expectation of privacy in the remainder of his house. The State wrote that the "court indicated that if the items had been in plain view from the living room, they would have been properly considered." (Dir. App. An. Br. at 70). The State persisted in the theory that Officer Bales "did not go into areas outside the area in which they were speaking [to Mr. Seibert]" and that the officer did "little more that look around himself while barely moving." (Id. at 70-71). Of course, Mr. Seibert has now alleged that Officer Bales could not possibly have seen into the bathroom from the living area where they were conducting the interview.

This Court, based on the record provided, accepted the State's theory that the severed foot was in plain view. The challenged search was not upheld based on any theory that Officer Bales conducted a "protective sweep" under *Maryland v. Buie*, 494 U.S. 325 (1990). In *Buie*, the United States Supreme Court was faced with the question of "what level of justification is required by the Fourth and

Fourteenth Amendments before police officers, while **effecting the arrest of a suspect in his home pursuant to an arrest warrant**, may conduct a warrantless protective sweep of all or part of the premises." *Id*. at 327. The Court determined that:

> as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Id. *Buie* deals with searches incident to an arrest. *Id*. at 333 (pointing out that "[a] *Terry*[7] or *Long*[8] frisk occurs before a police-citizen confrontation has escalated to the point of arrest" whereas "[a] protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime.").

The following testimony was elicited from Officer Bales at the hearing on the motion to suppress held on October 31, 2002:

> A As I recall we had Michael Seibert sit down on a couch or a bed. Sergeant Zeifman was standing to his right and I was standing in front of Michael, may be four or five feet away from Michael.

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[7] *Terry v. Ohio*, 392 U.S. 1 (1968).

[8] *Michigan v. Long,* 463 U.S. 1032 (1983).

*   *   *

Q Okay. Now, as you stood there in the living room area of the apartment, did you have any additional conversation with Mr. Seibert?

A I remember saying as I was backing up, asking Michael is there anybody else in this apartment.

Q Is that also standard operating procedures in this situation, in this type of call?

A That is what we called it in the academy many years as [sic] ago.

Q You have been a police officer for how many years?

A Twenty three years.

Q Is that what you ask any time you are –

A That and I also had people jump out behind me.

Q Why is it important to know whether or not there are other people in the apartment?

A So, they don't hurt us.

Q So, when you ask Mr. Seibert whether or not there was anybody else in this apartment, did he respond to you?

A I don't recall what the response was.

Q Let me ask you this Officer Bales, at this point you seeing [sic] Mr. Seibert is not bleeding, he is not cut, why did you stay in the apartment?

A We stayed in the apartment to make sure there is nobody else in the apartment and yes, you are right, we saw nothing on him.

> Q Did you know whether or not he had any weapons in the apartment?
>
> A No.
>
> Q So, what did you do at that point?
>
> A As I said is there anybody else in this apartment, I turned to my right and I was standing right next to the bathroom. When I turned to the right, between the open door of the bathroom, the crack of the door and the doorjamb, I saw a severed foot with a big white bone coming out of it on the edge of the tub.

(T. 1085, 1087-89).

The search of Mr. Seibert's apartment cannot be upheld as a reasonable protective sweep of the premises incident to effect an arrest with a warrant under *Buie* because the officers had no warrant for the arrest of anyone, were not on the premises to make an arrest, and, prior to making the search, had no probable cause to effect an arrest of any kind. Mr. Seibert argued on direct appeal that a "protective sweep" could not be justified on the facts presented. (Dir. App. In. Br. 62-63). *See also Runge v. State* 701 So. 2d 1182 (Fla. 2nd DCA 1997)(where there was no testimony regarding the size of the apartment, etc., there was insufficient evidence to support a protective sweep); *Vasquez v. State*, 870 So. 2d 26 (Fla. 2nd DCA 2003); *Gonzalez v. State*, 578 So. 729 (Fla. 3rd DCA 1991)(finding *Buie* inapplicable in the absence of an arrest warrant or probable cause for an arrest); *Newton v. State*, 378 So. 2d 297 (Fla. 4th DCA 1979). This Court acknowledged on direct appeal, "[a]t no point did [the officers] have any reason to believe that a

crime was occurring—their stated purpose in entering was to ensure that Seibert was not attempting to commit suicide." *Seibert v. State*, 923 So. 2d 460, 469 (Fla. 2006). Nor did the officers have knowledge of any facts whatsoever that would justify a suspicion that anyone else was present in the Mr. Seibert's apartment. *Buie* is not applicable on the facts of this case.

C. **The Sixth Amendment ineffective assistance of counsel claim was not and could not have been raised on direct appeal; there is no procedural bar.**

The State asserted that the circuit court correctly denied Claim VI on the grounds that it is procedurally barred. (Answer at 33-40). On direct appeal, Mr. Seibert argued that the circuit court erred in denying his pre-trial motion to suppress the evidence discovered as a result of the officers' entry and subsequent search of Mr. Seibert's apartment in violation of the Fourth Amendment. The postconviction claim goes to trial counsel's failure to use the evidence available to make a record of the full extent of Officer Bales's search of Mr. Seibert's apartment. Since this Sixth Amendment claim of ineffective assistance of counsel is based on facts outside of the record on direct appeal, the claim simply could not have been raised on direct appeal.

The fact that the Fourth Amendment claim was litigated at trial and challenged on direct appeal does not mean, as alleged by the State, that Mr. Seibert is somehow attempting to "relitigate a claim that was raised and rejected on direct

appeal under the guise of ineffective assistance of counsel." (Answer at 33). Mr. Seibert is mindful of the case law cited by the State; that is precisely why he listed specific deficiencies in trial counsel's performance that led to the denial of his Fourth Amendment claim at trial.[9] Clearly established federal case law demonstrates that it is entirely appropriate to raise a Sixth Amendment challenge to trial counsel's performance in arguing a motion to suppress. For example, in the case of *Owens v. United States*, 387 F. 3d 607 (7th Cir. 2004), it was determined that trial counsel was ineffective in a drug case for failing to adequately move to suppress evidence seized pursuant to a search of the defendant's house. *See also Smith v. Zant*, 887 F. 2d 1407, 1417 (11th Cir. 1989)(Tjoflat, J., concurring) (The district court should have looked at whether the trial attorney had rendered

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[9] Mr. Seibert sought an evidentiary hearing in order to prove that Officer Bales could not have seen the edge of the bathtub from the main room, and would have had to walk across the room and down the hallway—considerably more than six feet from where he stood talking to Mr. Seibert—in order to peer into the bathroom to see the victim's body. (PC-R. 87-102). Specifically, it was alleged that the physical layout of the apartment is such that the front door to the apartment opens into the main living room. (PC-R. 93-94). Mr. Seibert alleged that counsel failed to argue that it defies common sense to think that Officer Bales walked backwards into potential harm and that trial counsel failed to make this argument. (PC-R. 96). Mr. Seibert alleged that trial counsel failed to point out to the circuit court that despite the testimony that the first thing Bales saw when he looked into the bathroom was a severed foot with a big white bone sticking out of it on the edge of the bathtub, none of the photographs taken at the crime scene depict a severed foot on the edge of the bathtub. (PC-R. 96). Finally, Mr. Seibert also alleged in his rule 3.851 motion that trial counsel failed to file a motion requesting a walk-through of the crime scene with the court. (PC-R. 94-95).

deficient performance based on the *Strickland* analysis in failing to present evidence of the defendant's cognitive defects and mental retardation to the fact finder.). The rule 3.851 motion was clear; even though the attorneys challenged the warrantless entry and subsequent search, they did not do so in a way that would protect their client's rights.

This Court upheld the search based on the "plain view" exception to the warrant requirement. That exception clearly contemplates that there was no search: this Court found that Officer Bales "did not even enter any other rooms." *Seibert v. State*, 923 So. 2d 460, 471 (Fla. 2006). Mr. Seibert seeks an evidentiary hearing at which he will prove that trial counsel's performance was deficient because he did not present evidence to the contrary.

ANSWER REGARDING THE CIRCUIT COURT ORDER TO TURN OVER RECORDS AND DOCUMENTS AS REQUIRED BY THE PRINCIPLES OF DUE PROCESS.

A. Answer to the State's Statement of Case and Facts Regarding the Issue on Cross-Appeal.

Mr. Seibert does not dispute the time-line of events in the State's statement of the case and facts section regarding the public records issue. The State, however, misrepresented Mr. Seibert's arguments below and does not make clear the basis of the circuit court's order. First, the State asserted that "Defendant responded that he believed the [circuit court] judge in *Lightbourne* [*v. McCollum*] was committing error in its orders on the records and that litigating the issues in

this case could result in a different ruling because there was a different judge." (Answer at 16). Not only is this a misrepresentation of the record, but the State also failed to point out that the circuit court first ordered the State to turn over public records indicating that the lethal injection procedures are flawed or will fail in June of 2007—two months before the Department of Corrections (hereinafter "DOC") disclosed the "Dyehouse Memoranda" in *Lightbourne*. (PC-R. T. 136, 246); *Lightbourne v. McCollum*, 969 So. 2d 326, 332 (Fla. 2007). The transcript of the public records hearing on June 15, 2007 reflects that Mr. Seibert simply pointed out that the circuit court was not bound by any orders of another circuit court judge. (PC-R. T. 124-25).

Additionally, although the State's entire argument was based on the proposition that *Brady v. Maryland,* 373 U.S. 83 (1963) does not support the circuit court's order, the State failed to adequately explain that the circuit court did not base its order squarely on *Brady*. A more detailed recitation of the facts is critical to this Court's analysis of the issue.

On January 16, 2007, Mr. Seibert served public records demands pursuant to rule 3.852(i) on the DOC, the Office of the Attorney General, and the Governor's Office. (Supp. PCR. 33-36; 63-66; 86-89). The agencies objected to producing the public records sought and the circuit court held a public records hearing on June 15, 2007. During the public records hearing, Mr. Seibert asked the circuit court to

order the DOC to turn over public records created during the promulgation of the lethal injection procedures that contained information that there were problems with the old or newly promulgated procedures. (PC-R. T. 129). The State objected that such evidence could not be *Brady* material. (PC-R. T. 131). The circuit court surmised

> If in fact—let me ask you this, I think a scenario would be as they are coming up with protocol, someone says to you, we put this down on the protocol, but there's no way in heck we can ever go ahead and have this filed, it's not going to work, but they need the protocol, let's give them the protocol. Would that not be Brady?

(PC-R. T. 131). The circuit court further stated:

> Let's talk about reality. If people from the Department of Corrections, the A.G.'s Office, the Medical Examiner's Office, the Florida State Prison, whatever they are, are sitting around and they are going, we have to come up with a new protocol. This protocol is not working very well. We are getting bad publicity. People aren't dying the way they are supposed to die, and this is much more humane than the electric chair. Let's come up with a protocol.
>
> As they are sitting around sending emails, they say, you know, it's going to look good on paper. It's never going to work.
>
> Is that not discover[able]? Is there something wrong if that scenario takes place, and if that scenario takes place, how does the person that is executed find out?
>
> * * *
>
> **…I think there will be a requirement by the attorneys to look at the information that has been requested, see if there's something in there that shows that there's**

something that people knew ahead of time that the protocol was not going to be successful, and I do think that is discoverable.

How is that not discoverable if five of us have to come up with some protocol for evacuating the jail in case of a fire and we say, you know, there has been a fire in one cell up in Deland, Florida. It looks bad. They are getting all kind of bad stuff. We have to come up with a protocol so we can release it to the press.

We sit down and start talking about the protocol to evacuate the jail in case of the fire. It sounds good on paper and some people are saying, let me tell you, it sounds good. It has a talking point. The press will love it. Cover our butts. But there's no way it's ever doing to work because of A, B and C.

If that is not discoverable, then I guess all we need to do, as long as the Good Housekeeping Seal of Approval is put on by the Government, that's it.

(PC-R. T. 132, 135-36)(emphasis added). Thereafter, the circuit court concluded:

> I am going to ask—this is what I think is fair: I think it's fair to go through those items that have been requested. I am not saying for you to turn them over. **I am saying it's fair, whether it's [counsel for DOC] or the A.G.'s Office, to go though these items, and, under a Brady type finding, if there appears to be information that says that the protocol was put into effect, there was skepticism or issues raise where it was not going to be successful for a painless, quick lethal injection, then, in fact, that I think is discoverable information.**
>
> * * *
>
> …**I think if there's information in the minutes or notes of the meetings or records of things that are in the Department of Corrections possession from those**

> **meetings that indicate that there was problems as they were putting together this procedure and protocol, then I do think that is something that some court should decide about.**

(PC-R. T. 136-37)(emphasis added).

On June 4, 2007, Mr. Seibert served additional public records demands relating to the newly promulgated May 9, 2007 lethal injection procedures. (Supp. PCR. 162-174). The agencies objected to producing the records sought and the circuit court held another public records hearing on June 22, 2007. At that hearing, Mr. Seibert again argued that the circuit court should order the agencies to turn over any public records indicating that there were problems with the lethal injection procedures. (PC-R. T. 244). Again, the State objected that *Brady v. Maryland* did not require such records to be disclosed. (PC-R. T. 245). The circuit court asked:

> **So, in other words, if the State is doing a sham and saying, we are going to do this because we want to get back into the business of executing people and we have to make sure that the Governor knows what we're going to do it like, so [we're] giving it a "New and Improved Tide," so to speak, quote, unquote, and this is our new procedure of how to execute people although we know it's not going to work, if those communications existed, we don't have to tell anyone about it?**

(PC-R. T. 245)(emphasis added). The circuit court then ruled that

> If there is [sic] communications that you have in your possession to show that the protocol that was instituted in May of 2007, and experts that the State has been in touch

> with or that helped them with said it will not be any better than what has occurred in the past, then I think that's discoverable, whether you want to call it Brady or something else.

(Id.).

The circuit court never ruled that *Brady v. Maryland,* 373 U.S. 83 (1963) applies; rather, the court ruled that "**under the principle announced in *Brady***," the agencies have an obligation to turn over such records. (PC-R. 615)(emphasis added). The circuit court repeatedly explained that its ruling did not rely squarely on *Brady*, describing it as "a ***Brady* type finding**" (PC-R. T. 136)(emphasis added) and stating "I don't care what we want to call it…." (PC-R. T. 138). The circuit court recognized that, even if *Brady v. Maryland* itself is not applicable, due process would not be served by the State's suppression of evidence favorable to a claim that a method of execution violates the Eighth Amendment: "I think that's discoverable, **whether you want to call it Brady or something else**." (PC-R. T. 246)(emphasis added). The circuit court further clarified,

> There's no Brady as to his conviction. We are not raising it as to the sentence. There seems to me, I don't care what we want to call it, if there was something amiss to begin with and people knew it was amiss, and I am not saying there was, but that surely is a fair request for either [counsel for DOC], or [the State] to review and then give it to them…

(PCR-T. 138). The fact that the circuit court did not rely fully on the United States Supreme Court's *Brady* opinion, but rather on the principles of due process that shaped that decision, is crucial to an analysis of the issue.

The circuit court entered a written order regarding the public records on September 12, 2007. (PC-R. 614-17). The State petitioned this Court for review of that order on October 10, 2007, arguing that the circuit court had departed from the essential requirements of law and that the order would cause an injury to the State that could not adequately be corrected on appeal from the final order. (PC-R. 742-55). Mr. Seibert responded to the petition on January 4, 2008, (PC-R. 757-72), and the State filed a reply to the response on January 25, 2008. (PC-R. 774-78).

On February 7, 2008, this Court, on its own motion, entered a stay of the proceedings regarding the interlocutory appeal pending the United States Supreme Court's disposition of *Baze v. Rees*. (PC-R. 704). On February 13, 2008, Mr. Seibert filed a motion to stay the proceedings in the circuit court. (PC-R. 700-04). Mr. Seibert cited Fla. R. App. P. 9.142(b)(9), which states that "during the pendency of a review of a nonfinal order, unless a stay is granted by the supreme court, the lower tribunal may proceed with all matters, except that the lower tribunal may not render a final order disposing of the cause pending review of the nonfinal order." He argued that this Court's disposition of the State's petition for

review of the nonfinal order would affect three of the claims raised in his 3.851 motion—the claim regarding public records, the claim regarding lethal injection, and the claim regarding cumulative error. (Id.).

The circuit court denied the motion and entered its final order denying Mr. Seibert's rule 3.851 motion at a hearing held on February 28, 2008. (Supp. PC-R. 196-222). On March 6, 2008, the State filed a motion to voluntarily dismiss its interlocutory appeal. (PC-R. 780-81). On March 7, 2008, Mr. Seibert simultaneously filed a motion for rehearing of the circuit court's order denying the rule 3.851 motion and a motion to compel production of public records from the State and the Department of Corrections in compliance with court order. (PC-R. 735-81; 731-33). The State responded to the motions on March 11, 2008, asserting that it had already disclosed documents responsive to Mr. Seibert's public records requests in the *Lightbourne* litigation. (PC-R. 788). The circuit court denied Mr. Seibert's motion for rehearing on March 18, 2008. (PC-R. 792).

B. Answer to Argument VI

The State correctly noted that the trial court's ruling in this matter should only be disturbed upon a finding of an abuse of discretion. (Answer at 67, n. 6) (citing *Johnson v. State*, 904 So. 2d 400 (Fla. 2005)). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would

take the view adopted by the trial court." *White v. State*, 817 So. 2d 799, 806 (Fla. 2002)(citing *Trease v. State,* 768 So. 2d 1050, 1053 n.2 (Fla. 2000)). In reviewing the lower court's ruling, this Court

> must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). The State has the burden of establishing that the circuit court in this case abused its discretion in requiring the disclosure of documents that would show that Florida's lethal injection protocols are flawed. *Lopez v. State*, 696 So. 2d 725 (Fla. 1997).

The State has alleged that the circuit court erred in ordering the Attorney General's Office, the DOC, and the Governor's Office to turn over any public records considered during the adoption of the 2006 and 2007 lethal injection protocols that indicate that the protocols are flawed or will fail. (Answer at 67). In support of its position, the State asserted that a "trial court is only allowed to order production of records if it can find that the defendant" has met the requirements set forth under Florida Rule of Criminal Procedure 3.852(i)(2). (Answer at 67). However, *Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998)

stands for the proposition that circuit courts are not limited by rule 3.852 in dealing with postconviction discovery matters. In *Johnson*, this Court explained that "upon request, the State is obligated to disclose any document in its possession which is exculpatory" and that the "obligation exists regardless of whether a particular document is work product or exempt from chapter 119 discovery." *Id.* at 986.

The State argued that because the lower court determined that Mr. Seibert's demands did not meet the requirements under rule 3.852, it was error to nonetheless order disclosure of documents under the principles of *Brady*. (Answer at 68). The State maintained that it has no obligation to turn over the records at issue, as they have "nothing to do with Defendant's guilt or the fairness of his trial." (Answer at 70). The circuit court's order, however, was based on the principle that due process entitles criminal defendants to fair proceedings in which the government must disclose evidence favorable to the defendant. The State's argument that *Brady v. Maryland* itself does not require the State to disclose the public records at issue rings hollow. The principles of due process—out of which the United States Supreme Court fashioned the *Brady* doctrine—require that information favorable to a capital postconviction defendant's cognizable postconviction claim be disclosed to him, regardless of what label is applied to the records.

Fla. R. Crim. P. 3.851 is the means by which death-sentenced inmates may challenge the propriety of their convictions and sentences. This Court's precedent has expanded the purview of Fla. R. Crim. P. 3.851 to include challenges to methods of execution. *See, e.g., Sims v. State*, 754 So. 2d 657 (Fla. 2000). Post-conviction litigation is governed by principles of due process. *See Holland v. State*, 503 So. 2d 1250, 1252 (Fla. 1987). Due process requires that where a death-sentenced inmate may make an Eighth Amendment challenge under rule 3.851, the State must disclose information that is favorable to that death-sentenced inmate's Eighth Amendment challenge. The circuit court's order that the Attorney General's Office, the DOC, and the Governor's Office disclose to Mr. Seibert any records indicating that Florida's lethal injection procedures are flawed or will fail was not, therefore, an abuse of discretion.

The United States Supreme Court's line of cases beginning with *Mooney v. Holohan*, 294 U.S. 103 (1935) and ending with *Brady v. Maryland*, 373 U.S. 83 (1963) identified an important class of due process rights now commonly referred to as the *Brady* doctrine. In this series of cases, the Court made clear that the prosecution's presentation of evidence that is false or that is known to create a false impression, and the suppression of evidence that is favorable or exculpatory to the defense violates a defendant's due process rights. *See Napue v. Illinois*, 360 U.S. 264, 268 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317

U.S. 213, 216 (1942). The *Brady* doctrine is, at its core, a rule that promotes truth-seeking as a means of ensuring fair proceedings against criminal defendants. The *Brady* Court cautioned against the prosecution withholding favorable evidence from the defendant because it "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id*. at 88.

The Court has also commented on the special duties of prosecutors:

> The United States Attorney 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.

Berger v. United States, 295 U.S. 78, 88 (1935). *Cf. Imbler v. Pachtman*, 424 U.S. 409 (1976) (noting that "after a conviction the prosecutor… is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.").

In addition to the prosecution's special obligation to ensure that justice shall be done, the State likewise has a special interest in ensuring that its method of execution comports with the requirements of the Eighth Amendment to the United States Constitution and corresponding provisions of the Florida Constitution. The states have a duty to ensure that society's ultimate penalty is not imposed except in appropriate cases and that the sentence is not arbitrary or the result of a mistake. *Gregg v. Georgia*, 428 U.S. 153 (1976). The constitutionality of the death penalty

depends "on the opinion of an informed citizenry." *Id.* at 231-232 (1976) (Marshall, J., dissenting). *See also Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002)(stating that independent public scrutiny plays a significant role in the proper functioning of capital punishment); *Baze v. Rees*, 128 S. Ct. 1520, 1537 (2008)(noting that "State efforts to implement capital punishment must certainly comply with the Eighth Amendment…"). The State's cross-appeal is nothing more than an objection to turning over "public records considered during the adoption of the 2006 and 2007 lethal injection protocols that indicates [sic] that the protocols are flawed" and public records "that show that the protocols will fail." (PC-R. 615). If public records exist indicating that Florida's lethal injection procedures are flawed or will fail, justice is certainly not served by the State's suppression of them.

CONCLUSION

In light of the foregoing arguments, and the arguments presented in Mr. Seibert's Initial Brief, Mr. Seibert submits that he is entitled to have the lower court's order reversed and his case remanded to the circuit court for an evidentiary hearing on his claims. Mr. Seibert also submits that he should not be executed in a manner that constitutes cruel and unusual punishment and that he is entitled to public records that would assist him in proving his Eighth Amendment claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail, first class postage prepaid, to Sandra S. Jaggard, Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131 this ___ day of December, 2008.

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Counsel certifies that this brief is typed in Times New Roman 14-point font.

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