IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2105

THOMAS KNIGHT A/K/A
ASKARI ABDULLAH MUHAMMAD,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT IN AND FOR BRADFORD COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was charged by indictment filed on October 24, 1980, with the first degree murder of Corrections Officer Richard James Burke, which was alleged to have been committed on October 12, 1980. (DAR. 1-2)[1] After a trial at which Defendant represented himself, the jury found him guilty as charged. (DAR. 442) After Defendant waived a penalty phase jury and the trial court considered the penalty phase evidence, it imposed a sentence of death, finding 3 aggravating circumstances (under a sentence of imprisonment, prior capital felonies, and HAC) and no mitigating circumstances. (DAR. 455-63)

Defendant appealed to this Court, raising 5 issues:

> (1) the trial court erred in finding [Defendant] competent to stand trial as it had insufficient facts upon which to find him competent; (2) the trial court erred in allowing [Defendant] to represent himself at trial without first determining his competence to waive assistance of counsel and to represent himself; (3) the trial court erred in excluding [Defendant]

[1] The terms "DAR." and "DAT." will be used to refer to the record and transcript prepared on direct appeal, FSC case no. 63,343. The terms "PCR1." will refer to the record on appeal from the initial summary denial of the motion for post conviction relief, FSC case no. 75,055. The terms "PCR2." and "PCT2." refer to the record and transcript in the appeal from the denial of the first motion for post conviction relief after the evidentiary hearing, FSC Case No. SC01-1415. The terms "PCR3." and "PCT3." will refer to the record on appeal and transcript of proceedings in the appeal from the denial of Defendant's second motion for post conviction relief, FSC Case No. SC09-170. The terms "PCR4.," "PCT4." and "PCR4-SR." will refer to the record on appeal, transcript of proceedings and supplemental record on appeal in the instant appeal.

> from presenting any evidence of his insanity at trial because he refused to be examined by court-appointed psychiatrists in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution; (4) the trial court erred in finding as aggravating factors that [Defendant] was under sentence of imprisonment when he committed the murder and that he had a conviction for a prior felony; (5) the trial court erred in failing to consider in mitigation evidence of [Defendant's] mental status.

State v. Knight, 866 So. 2d 1195, 1198 n.2 (Fla. 2003). This Court affirmed Defendant's conviction and sentence. *Muhammad v. State*, 494 So. 2d 969 (Fla. 1986). In doing so, this Court found the following facts:

> [Defendant], awaiting execution on death row, [FN1] fatally stabbed a prison guard in the late afternoon of October 12, 1980. The incident apparently arose out of [Defendant's] frustration at being denied permission to see a visitor after he refused to shave his beard. In the past [Defendant] had been issued a pass excusing him from shaving regulations for medical reasons. A guard checked with the medical department and determined that [Defendant] had no current exemption from the rule. At that time [Defendant] was heard to say he would have to start "sticking people."
>
> James Burke, a guard on a later shift who had not been involved with the shaving incident, was routinely taking death row inmates one at a time to be showered. When he unlocked [Defendant's] cell, the defendant attacked Burke with a knife made from a sharpened serving spoon. [Defendant] inflicted more than a dozen wounds on Burke, including a fatal wound to the heart. The weapon was bent during the attack, but [Defendant] continued to stab Burke, who attempted to fend off the blows and yelled for help. The other guard on the prison wing saw the incident from a secure position and summoned help from other areas of the prison. When help arrived, [Defendant] ceased his efforts and dropped the knife into a trash box.

Two lawyers were initially appointed to represent [Defendant]. One, Susan Cary, had represented [Defendant] in matters related to his prior murder case. The other was a public defender. The public defender withdrew after differences arose with Cary. For reasons undisclosed in the record, the original trial judge, Judge Green, ended Cary's appointment and appointed Stephen Bernstein to represent the defendant from the beginning of 1981.

The first indication in the record that [Defendant] desired to proceed pro se is found in a transcript of a hearing that took place on January 12, 1981 before Judge Green. At the hearing, Bernstein moved to withdraw and, as the judge observed at the hearing, [Defendant] argued "eloquently and obviously with much thought and consideration" to represent himself. Judge Green, advising [Defendant] against proceeding pro se, noted [Defendant] seemed competent to do so, but asked him to "sleep on it" and write the judge a letter with his final decision. [Defendant] wrote the letter, electing to proceed pro se, but insisting, as he had at the hearing, that he wanted "assistance of counsel" in the sense of having a lawyer available to aid in preparation of the case. January 21, 1981, Judge Green recused himself for reasons not known by or raised before this Court, and also denied [Defendant's] motion to proceed pro se. Judge Green's order stated that [Defendant] did not have the capacity to conduct his own defense either because of the difficulty of preparing while on death row, or because of incompetence, or both.

[Defendant's] attorneys were concerned about his mental state from the start. Shortly after the murder, they had Dr. Amin appointed as a defense advisor pursuant to the newly adopted Florida Rule of Criminal Procedure 3.216(a). [FN2] Dr. Amin had examined [Defendant] in matters relating to his prior conviction. February 25, 1981, attorney Bernstein filed a notice of intent to claim the defense of insanity. June 10, 1981, Judge Carlisle, who had been appointed to replace Judge Green, filed an order appointing Doctors Barnard and Carrera, psychiatrists, to examine [Defendant] to determine his competency to stand trial and his sanity at the time of the offense.

Fla. R. Crim. P. 3.210(b) and 3.216(d). [Defendant] refused to meet the doctors when they tried to examine him July 4, 1981, and met them but refused to cooperate at a second attempt that November.

Based on [Defendant's] refusal to speak with the court-appointed experts, Judge Carlisle ruled in a hearing March 8, 1982, that [Defendant] would not be allowed to present expert testimony regarding his insanity defense but that he would be allowed to raise the defense. Two weeks prior to the trial date of May 24, 1982, Bernstein filed a written proffer of the evidence and testimony he planned to present relating to the insanity defense.

The proffer included a summary of findings by a psychiatrist and psychologist who treated the defendant during a hospitalization at Northeast Florida State Hospital in 1971, suggesting he was suffering from early stages of schizophrenia. A clinical psychologist diagnosed the defendant a paranoid schizophrenic in 1975 after an examination for a competency hearing before the trial for the prior murders. The diagnosis was echoed by another psychologist in a 1979 evaluation. Finally, Dr. Amin's findings as a defense expert were summarized, including a diagnosis of "schizophreniaform illness" but recommending further testing to rule out epilepsy.

At a hearing May 17, 1982, a week before trial, Bernstein requested a competency hearing. The judge agreed to a final effort to have the two appointed psychiatrists evaluate [Defendant]. At Bernstein's urging, the judge also appointed Dr. Amin as a third expert for the court evaluation. Bernstein also told the judge that [Defendant] had refused to meet with him for several months, and that Dr. Amin had not spoken with [Defendant] for almost one year, although Dr. Amin had made two attempts during that period.

A letter from Drs. Barnard and Carrera states they were again rebuffed May 18, 1982, and that they were unable to determine the defendant's competency to stand trial, despite "relevant case materials" provided by defense and prosecution attorneys. Dr. Amin was more successful, meeting with the defendant

and determining that he was competent to stand trial. A letter to that effect was filed May 19.

May 20, 1982, Judge Carlisle, Bernstein, the state attorney and [Defendant] were present at a competency hearing at Florida State Prison. The hearing was unrecorded, although the judge had requested a reporter when the hearing was set. The reconstructed record prepared by defendant's appellate counsel is sketchy, but states that "[b]ased upon [Defendant's] refusal to cooperate with Drs. Barnard and Carrera, and Dr. Amin's report, the court found [Defendant] competent to stand trial. What argument defense counsel made in opposition to the court's order is unknown." [Defendant] also raised anew his request to proceed pro se.

Trial was begun May 24, 1982. In a hearing before voir dire began, Judge Carlisle ruled that no evidence of any kind could be presented concerning [Defendant's] sanity at the time of the crime. [Defendant] again moved to proceed pro se and was denied. The trial ended in mistrial the next day for reasons unknown and not raised to this Court. Two days later, Judge Carlisle filed a recusal and Judge Chance was assigned to the case. Judge Chance conducted a hearing on [Defendant's] motion to proceed pro se June 7, 1982. The judge attempted to dissuade [Defendant], explaining in detail disadvantages and soliciting comment from [Defendant]. The hearing ended with the ruling that [Defendant] could represent himself. Bernstein was appointed as "standby" counsel, to step in should [Defendant] be unable to continue with trial. [Defendant] also, for the first time, complained about the competency interview with Dr. Amin. He stated that he thought Amin was meeting with him in his capacity as a defense advisor, not as a court-appointed expert. He said he probably would not have spoken with Dr. Amin had he known the true circumstances of the interview, just as he had not spoken to the other two experts. Although objecting to the determination of competency based on the Amin report, [Defendant] did not move to strike the report or suggest any other relief.

[Defendant] renewed his objection to the Amin

interview at a July 19, 1982 motion hearing.

Prior to trial the court allowed Bernstein to withdraw as standby counsel and appointed a public defender. September 3, 1982, [Defendant] filed a motion withdrawing his notice of intent to use the insanity defense. In a pretrial conference, the state withdrew its motion to strike the insanity defense and the judge granted [Defendant's] motion. At trial, [Defendant's] defense consisted solely of holding the state to its burden of proof by pointing out inconsistencies in the testimony of the state's witnesses. The jury found [Defendant] guilty as charged. He waived his right to a jury recommendation in the penalty phase and the trial judge sentenced him to death, finding nothing in mitigation and three aggravating circumstances: the defendant was under a sentence of imprisonment, he had been convicted of a prior capital felony, and the murder was heinous, atrocious or cruel.

* * * *

[FN1] [Defendant] had been sentenced to death for the murders of a Miami couple. *Knight v. State*, 338 So. 2d 201 (Fla. 1976). [Defendant's] original name was Thomas Knight. While imprisoned, the defendant adopted his new name pursuant to his beliefs in Islam. He insisted on use of the new name throughout the proceedings below and, after initial resistance from the judges, succeeded in having the new name placed on the caption of the case.

FN2. The rule reads:

(a) When in any criminal case counsel for a defendant adjudged to be indigent or partially indigent, whether public defender or court appointed, shall have reason to believe that the defendant may be incompetent to stand trial or that he may have been insane at the time of the offense, he may so inform the court who shall appoint one expert to examine the defendant in order to assist his attorney in the preparation of his defense. Such expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client

privilege.

Id. at 970-72. Defendant sought certiorari review in the United States Supreme Court, which was denied on February 23, 1987. *Muhammad v. Florida*, 479 U.S. 1101 (1987).

On February 23, 1989, Defendant filed a motion for post conviction relief, raising 16 claims:

> CLAIM I
>
> [DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS RETAINED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE, RESULTING IN A TRIAL AT WHICH [DEFENDANT] WAS INCOMPETENT AND ENTITLED TO A COMPETENCY HEARING, IN THE FAILURE TO ESTABLISH AN AVAILABLE INSANITY DEFENSE, AND IN THE DEPRIVATION OF [DEFENDANT'S] RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION.
>
> CLAIM II
>
> [DEFENDANT'S] FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT.
>
> CLAIM III
>
> [DEFENDANT'S] FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS PERMITTED TO PROCEED WITHOUT COUNSEL ALTHOUGH HE WAS NOT LEGALLY COMPETENT TO EXECUTE A WAIVER OF COUNSEL.
>
> CLAIM IV
>
> THE DEATH SENTENCE IS NOT RELIABLE AND MUST BE VACATED BECAUSE [DEFENDANT] WAS NOT COMPETENT TO WAIVE HIS SENTENCING JURY, BECAUSE THE TRIAL COURT FAILED TO CONDUCT PENALTY PHASE PROCEEDINGS BEFORE AN ADVISORY JURY, AND BECAUSE [DEFENDANT] FAILED TO PRESENT THE

WEALTH OF STATUTORY AND NONSTATUTORY EVIDENCE AVAILABLE CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM V

[DEFENDANT] WAS DENIED HIS FIFTH AMENDMENT PROTECTION OF DOUBLE JEOPARDY AS PROVIDED BY PRINCIPLES OF COLLATERAL ESTOPPEL IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM VI

[DEFENDANT] WAS DENIED EFFECTIVE, ADEQUATE AND MEANINGFUL ACCESS TO THE COURTS AND A FAIR OPPORTUNITY TO PRESENT HIS DEFENSES TO THE TRIAL COURT BY THE FAILURE OF THE STATE OF FLORIDA TO FULFILL ITS AFFIRMATIVE OBLIGATION OF PROVIDING A LAW LIBRARY WITH WHICH [DEFENDANT] COULD PREPARE DEFENSE IN VIOLATION OF [DEFENDANT'S] SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM VII

[DEFENDANT'S] SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS NOT POSSIBLE, THERE IS NO WAY TO ENSURE THAT THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL, AND THE JUDGMENT AND SENTENCE MUST BE VACATED.

CLAIM VIII

THE STATE'S DELIBERATE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE CONSTITUTED PROSECUTORIAL MISCONDUCT AND VIOLATED [DEFENDANT'S] BRADY AND FLORIDA DISCOVERY RIGHTS CONTRARY TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM IX

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN ADEQUATE FARETTA INQUIRY AS TO WHETHER [DEFENDANT] MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL.

CLAIM X

THE PROSECUTOR'S MISCONDUCT THROUGHOUT THE GUILT AND PENALTY PHASE DENIED [DEFENDANT'S] RIGHT TO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND

SENTENCING DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI

[DEFENDANT] WAS INDICTED BY A BIASED GRAND JURY, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XII

THE TRIAL COURT ERRED BY FAILING TO CONSIDER [DEFENDANT'S] MENTAL DEFICIENCIES AS MITIGATING CIRCUMSTANCES, WHICH MUST BE CONSIDERED REGARDLESS OF WHETHER THE MENTAL DEFICIENCIES RISE TO THE LEVEL OF STATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XIII

THE TRIAL COURT UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF WITH REGARD TO THE APPROPRIATENESS OF A SENTENCE OF LIFE IMPRISONMENT TO [DEFENDANT], IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XIV

[DEFENDANT'S] RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY IMPROPER CONSIDERATION OF THE VICTIM'S CHARACTER AND VICTIM IMPACT INFORMATION.

CLAIM XV

[DEFENDANT] WAS NOT PRESENT AT CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM RESULTING IN THE DEPRIVATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XVI

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT-INNOCENCE AND SENTENCING PHASES OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT INSTRUCTED MR. REPLOGLE THAT HE WAS NOT TO PROVIDE ASSISTANCE OF COUNSEL.

(PCR1. 10-141) On April 24, 1989, Defendant filed a supplement

to this motion, which reasserted claims I-IV and VI-XIV and made revisions to claims V, XV and XVI. (PCR1. 141-362) Additionally, the amended motion asserted the following additional claims:

> CLAIM XVII
> THE TRIAL COURT'S FAILURE TO GRANT [DEFENDANT'S] MOTION FOR CHANGE OF VENUE AND FOR INDIVIDUAL VOIR DIRE DEPRIVED HIM OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.
>
> CLAIM XIX [sic]
> THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO [DEFENDANT'S] CASE WITHOUT ARTICULATION OR APPLICATION OF A MEANINGFUL NARROWING PRINCIPLE, IN VIOLATION OF MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

(PCR1. 352, 359) The post conviction court summarily denied this motion on August 30, 1989, without requesting a response from the State. (PCR1. 1378-84) The court found that all of the claims were or could have been raised on direct appeal and were, thus, procedurally barred. *Id.*

Defendant appealed the summary denial of his motion for post conviction relief to this Court, raising 15 issues:

> 1) that summary denial was erroneous and the trial court erred in failing to either identify or attach the portion of the record that refutes each claim; 2) that [Defendant's] rights were violated because no reliable transcript of the trial exists and critical records were not included in the record on direct appeal; 3) that [Defendant] was denied effective assistance of counsel in violation of *Faretta*[*v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)]; 4) that [Defendant] was denied due process and equal protection because the appointed mental health expert failed to conduct a

> professionally competent evaluation and this in turn caused counsel to render ineffective assistance; 5) that [Defendant] was denied effective assistance of counsel by the court's order that defense counsel not present an insanity defense; 6) that [Defendant's] rights were abrogated because he was forced to undergo criminal judicial proceedings although he was not legally competent; 7) that the death sentence was unreliable because [Defendant] was not competent to waive his sentencing jury yet the penalty proceedings were not conducted before an advisory jury; 8) that [Defendant] was denied his rights as a pro se defendant at both the guilt and penalty phases of the trial; 9) that state misconduct throughout the guilt and penalty phases denied [Defendant's] right to a fundamentally fair and reliable capital trial and sentencing determination; 10) that the trial court's denial of [Defendant's] motions for change of venue and for individual, sequestered voir dire deprived him of his right to a fair and impartial jury; 11) that [Defendant] was indicted by a biased grand jury; 12) that the trial court erred in failing to consider [Defendant's] mental deficiencies as nonstatutory mitigating circumstances and in considering nonstatutory aggravating factors; 13) that the trial court unconstitutionally shifted the burden of proof with regard to the appropriateness of a sentence of life imprisonment; 14) that the jury and judge improperly considered the victim's character and "victim impact" information; and 15) that the "heinous, atrocious, or cruel" aggravating circumstance was applied without articulation or application of a meaningful narrowing principle in violation of *Maynard*[*v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988)].

Muhammad v. State, 603 So. 2d 488-89 (Fla. 1992)(footnotes omitted). The Court affirmed the summarily denial of Claims I-VIII, X-XV and the portion of Claim IX not raising a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), finding that these claims were procedurally barred. *Muhammad*, 603 So. 2d at 489.

However, the Court ordered an evidentiary hearing regarding the portion of claim IX that alleged the State violated *Brady* by suppressing allegedly "exculpatory statements of prison employees who witnessed the offense." *Id.* at 489.

On remand, Defendant delayed the evidentiary hearing by engaging in protracted public records litigation. (PCR2. 12-202, 203-321, 325-83, 389-98, 402-25, 433-74, 481-89, 507-10, 517-33, 548-51, 554-55, 558-59, 571-72) When the post conviction court attempted to schedule the evidentiary hearing in January 1999, Defendant moved for a determination of competency pursuant to *Carter v. State*, 706 So. 2d 873 (Fla. 1998). (PCR2. 322-24) As a result, the post conviction court appointed experts to evaluate Defendant's competency on February 10, 1999. (PCR2. 384-88) Both experts issued reports, finding Defendant competent. (PCR2. 426-32)

The evidentiary hearing was eventually conducted on July 12 and 13, 2000. (PCT2. 1-279) Throughout the evidentiary hearing and in his post hearing memorandum, Petitioner attempted to litigate matters other than the *Brady* claim on which this Court had ordered a hearing. (PCR2. 795-97, 905-06)

On May 8, 2001, the post conviction court issued its order denying relief with regarding to the guilt phase but granting relief with regard to the penalty phase. (PCR2. 904-11) In this

order, the court found that the only issue properly before it was Defendant's *Brady* claim. *Id.* In analyzing the *Brady* claim, the court assumed that the State possessed the evidence and that it suppressed that evidence without ever deciding if this was true. (PCR2. 909) The court stated that the evidence it was considering in conducting its materiality analysis were found in "depositions, incident reports, and interviews." (PCR2. 910) The court found that this evidence was material because the trial court did not review this information to find potential mitigation that was not presented by Defendant at trial because Defendant had waived mitigation and that this evidence might support a finding of statutory or nonstatutory mental mitigation. (PCR2. 909-11)

The State appealed the granting of sentencing relief, raising one issue:

> THE LOWER COURT ERRED IN FINDING THAT THE STATE HAD COMMITTED A *BRADY* VIOLATION BECAUSE THE LOWER COURT ASSUMED, CONTRARY TO THE EVIDENCE, THAT THE STATE SUPPRESSED THE EVIDENCE AND THE LOWER COURT RELIED UPON EVIDENCE THAT WAS DISCLOSED IN FINDING MATERIALITY.

Defendant cross appealed, raising one issue:

> [DEFENDANT] WAS DEPRIVED OF AN ADVERSARIAL TESTING PRE-TRIAL AND AT THE GUILT PHASE DUE TO A COMBINATION OF CONSTITUTIONAL ERROR RESULTING IN MULTI-FOLD PREJUDICE TO [DEFENDANT].

Defendant also filed a petition for writ of habeas corpus in

this Court, raising 5 claims:

I.

[DEFENDANT'S] RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE COURT INSTRUCTED MR. REPLOGLE THAT HE WAS NOT TO PROVIDE ASSISTANCE OF COUNSEL. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON APPEAL.

II.

[DEFENDANT] WAS NOT PRESENT AT CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM AND THE COURT ENGAGED IN EX PARTE COMMUNICATIONS WITH THE STATE, RESULTING IN THE DEPRIVATION OF [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON APPEAL.

III.

[DEFENDANT] WAS DENIED MEANINGFUL ACCESS TO THE COURTS AND A FAIR OPPORTUNITY TO PRESENT HIS DEFENSES AT TRIAL WHEN THE STATE OF FLORIDA FAILED TO FULFILL ITS AFFIRMATIVE OBLIGATION TO PROVIDE A LAW LIBRARY WITH WHICH [DEFENDANT] COULD PREPARE A DEFENSE; THIS FAILURE VIOLATED [DEFENDANT'S] SIXTH AND FOURTEENTH AMENDMENTS RIGHTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON APPEAL.

IV.

THE TRIAL COURT'S FAILURE TO GRANT [DEFENDANT'S] MOTION FOR CHANGE OF VENUE AND FOR INDIVIDUAL, SEQUESTERED VOIR DIRE DEPRIVED HIM OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON APPEAL.

V.

[DEFENDANT] WAS INDICTED BY A BIASED GRAND JURY, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON APPEAL.

This Court considered the appeal and cross appeal of the order on motion for post conviction relief and the state habeas petition together. *State v. Knight*, 866 So. 2d 1195 (Fla. 2003). This Court reversed the portion of the order granting sentencing relief, finding that the post conviction court had failed to determine if the State had, in fact, suppressed any evidence and had been incorrect in determining that Defendant had shown that the allegedly suppressed information was material. *Id.* at 1200-03. For similar reasons, this Court affirmed the denial of guilt phase relief. *Id.* at 1203. Regarding the habeas petition, this Court considered the claims all to be based on ineffective assistance of appellate counsel and denied the petition. *Id.* at 1203-10. This Court determined that appellate counsel was not ineffective for failing to raise any of these issues, as they were unpreserved and meritless. *Id.* Defendant again sought certiorari review in the United States Supreme Court, which was denied on May 24, 2004. *Muhammad v. Florida*, 541 U.S. 1066 (2004).

On January 18, 2005, Defendant filed a petition for writ of habeas corpus in the Middle District of Florida. Petition, Case No. 3:05-cv-00062-TJC (M.D. Fla. Jan. 18, 2005). On March 28, 2008, the district court denied the petition. *Muhammad v. McDonough*, 2008 WL 818812 (M.D. Fla. Mar. 26, 2008). The

district court denied Defendant leave to appeal. The Eleventh Circuit also denied leave to appeal in a published opinion. *Muhammad v. Sec'y, Dept. of Corrections*, 554 F.3d 949 (11th Cir. 2009). Defendant sought certiorari review of that decision, which was denied on January 25, 2010. *Muhammad v. McNeil*, 559 U.S. 906 (2010).

On July 28, 2008, while the federal habeas proceedings were pending, Defendant filed a successive motion for post conviction relief in the trial court, raising one claim:

> THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

(PCR3. 1-32) On September 9, 2008, the state post conviction court summarily denied the claim as meritless. (PCR3. 49-50)

Defendant appealed the denial of his successive motion for post conviction relief to this Court, raising one issue:

> THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

On November 9, 2009, this Court affirmed the summary denial of successive motion. *Muhammad v. State*, 22 So. 3d 538 (Fla. 2009).

On October 21, 2013, the Governor signed a warrant scheduling Defendant's execution for December 3, 2013. (PCR4. 1-4) On October 23, 2013, this Court entered a scheduling order

that required all proceedings in the lower court to be concluded by noon on November 5, 2013.

On October 24, 2013, the lower court held a case management conference regarding the death warrant. At that hearing, Defendant indicated that he planned to request public records. (PCR4. 523) The State suggested that the lower court needed to set deadlines for the filing of public records requests and responses, deadlines for the filing of a motion for post conviction relief and response, a public hearing, a *Huff* hearing and a tentative evidentiary hearing. (PCR4. 523-24) Defendant insisted that the lower court should not set deadlines for filing of public records requests and responses or a public records hearing because he allegedly had 10 days to make public records requests and did not believe there would be any objections. *Id.* As a result, the lower court ordered that any successive post conviction motions be filed by 4 p.m. on October 29, 2013, and any response be filed by 4 p.m. on October 30, 2013. (PCR4. 405-06) It set the *Huff* hearing for 9 a.m. on October 31, 2013, and the evidentiary hearing for November 1 and 4, 2013. *Id.* However, it did not set deadlines for public records requests or responses or a public records hearing. *Id.*

At approximately 8:30 p.m. that night, Defendant emailed the State requests for additional public records pursuant to

Fla. R. Crim. P. 3.852(h)(3) directed to the Department of Corrections (DOC), the Florida Department of Law Enforcement (FDLE), the State Attorney for the Eighth Judicial Circuit, the State Attorney for the Eleventh Judicial Circuit, the Miami-Dade Police Department (MDPD) and the Eighth District Medical Examiner. (PCR4. 5-16) Defendant did not serve these requests electronically on the agencies other than the State Attorney for the Eighth Judicial Circuit. *Id.* Each of these requests sought production of "any" records produced or received since his last request but gave no indication of whether a prior request had been made, the scope of the prior request or when records had allegedly last been produced. *Id.*

At approximately 3:15 p.m. on October 25, 2013, Defendant served additional public records requests pursuant to Fla. R. Crim. P. 3.852(i) to DOC, FDLE, the Attorney General, the Governor, the Office of Executive Clemency and the Eighth District Medical Examiner. (PCR4. 74-149) These requests sought documents regarding clemency and lethal injection. *Id.*

All of the agencies except MDPD objected to the requests. (PCR4. 17-35, 59-66, 69-73, 389-404, 411-73, PCR4-SR. 4-18) MDPD certified it had no new records. (PCR4. 532-34)

On October 29, 2013, Defendant filed a successive motion for post conviction relief, raising 7 claims:

I.

[DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT. AND RULE 3.852, FLA. R. CRIM. P. [DEFENDANT] CANNOT PREPARE AN ADEQUATE RULE 3.851 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

II.

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

III.

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CREATES A SUBSTANTIAL RISK OF SERIOUS HARM.

IV.

THE CLEMENCY PROCESS IN [DEFENDANT'S] CASE WAS APPLIED IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

V.

BECAUSE OF THE INORDINATE LENGTH OF TIME THAT [DEFENDANT] HAS SPENT ON DEATH ROW, ADDING HIS EXECUTION TO THAT PUNISHMENT WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND BINDING NORMS OF INTERNATIONAL LAW.

VI.

THE TIMELY JUSTICE ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SEPARATION OF POWERS AND INTERFERES WITH

THE GOVERNOR'S WARRANT DISCRETION IN SIGNING DEATH WARRANTS.

VII.

[DEFENDANT] IS EXEMPT FROM EXECUTION UNDER THE EIGHTH AMENDMENT BECAUSE HE SUFFERS FROM SUCH SEVERE MENTAL ILLNESS THAT DEATH CAN NEVER BE AN APPROPRIATE PUNISHMENT.

(PCR4. 150-388) The State responded that the claims were untimely, insufficiently plead and without merit as a matter of law. (PCR4. 476-505) It also pointed out that the motion was neither sworn by Defendant nor accompanied by a motion requesting a competency determination. (PCR4. 476)

After the State served its response, Defendant served a verification signed by Defendant. (PCR4. 506-07) He also served a motion for discovery, a motion for stay and a motion for access to the Kimbrough execution. (PCR4. 508-16) In the motion for stay, Defendant noted that he had filed public records requests and that the agencies had objected. (PCR4. 508-10) He insisted that his alleged need for discovery required that his execution be stayed. *Id.*

In his motion for discovery, Defendant sought disclosure of identities of the execution team members, the identity of the individuals involved in writing the protocol and the sources of all the lethal injection drugs, as well as deposition of all the individuals whose identities were disclosed and the Medical Examiner for the Eighth District. (PCR4. 511-14) In his motion

for access, Defendant sought to be permitted to videotape the Kimbrough execution, to name a witness to the execution, to have an expert of his choosing in the execution chamber and to have a medical examiner of his choosing conduct Kimbrough's autopsy or be present when the autopsy was conducted. (PCR4. 515-16) The State responded in opposition to all Defendant's motions. (PCR4. 517-34)

At the beginning of the case management conference, the lower court heard arguments regarding the public records requests. (PCT4. 6-79) Regarding the requests pursuant to Fla. R. Crim. P. 3.852(h)(3), Defendant acknowledged that he was satisfied with the response from MDPD. (PCT4. 7) Regarding the other agencies, Defendant argued that he had previously made requests for records from each of the agencies from whom he had requested records. (PCT4. 7-15, 46) He averred that since he had parroted the language of the rule regarding updates to the previously produced records, he was entitled to have the agencies either provide records or to certify that they had no new records without regard to the overbreath of his request or the lack of any showing of relevancy. (PCT4. 8, 22, 24-25, 26-27, 28-29, 31, 32-34, 39-40, 44-45, 48-50)

DOC responded that the only documents that Defendant had requested from it since the promulgation of Rule 3.852 concerned

personnel files of prior employees, which would not be relevant. (PCT4. 18-19, 21, 26) It noted that it had produced its entire investigative file regarding this murder before the first motion for post conviction relief was final. (PCT4. 18) It also argued that requiring it to produce decades of documents from an inmate's file under a death warrant was overly burdensome. (PCT4. 20-22) Both State Attorneys, FDLE and the Medical Examiner all argued that the requests to them were overly broad and that they had no new investigative materials regarding the case. (PCT4. 29-32, 35-37, 40, 41-44, 48)

Regarding the requests from records regarding clemency made pursuant to Fla. R. Crim. P. 3.852(i), Defendant insisted that he had a valid claim and that some records regarding clemency should be discoverable or should be produced for in camera review. (PCT4. 52-54) He further insisted that this Court's precedent regarding disclosure of clemency records had been overruled. (PCT4. 54-55) He contended that his request was timely because clemency had just concluded. (PCT4. 59)

The State responded that Defendant was not entitled to the records because this Court had already ruled that courts did not have jurisdiction to order production of clemency records. (PCT4. 55) It also argued that the requests were untimely because they were made more than a year after the last event

Defendant was relying upon as support for his claim. (PCT4. 55-56)

Regarding the request for records about lethal injection, Defendant asserted that he was entitled to all the records he had requested because the protocol had changed and he had alleged that William Happ had moved during his execution. (PCT4. 62-63) He insisted that this Court had ordered the production of the type of records he sought every time a protocol changed or a defendant claimed that there had been an incident during a prior execution. (PCT4. 63-66, 74-77) The State responded that this Court had not ordered the type of records production Defendant sought in the cases in which this Court had affirmed the last two protocol changes. (PCT4. 66-68) Instead, this Court had ordered only limited production of records and had affirmed the denial of the type of requests Defendant was making. *Id.*

During the *Huff* hearing, Defendant argued that he was entitled to an evidentiary hearing regarding lethal injection because the protocol had changed and Happ had moved during his execution. (PCT4. 81-86) He insisted that this Court had held that an evidentiary hearing was required any time a protocol changed or a defendant claimed an irregularity regarding an execution. *Id.* He stated that at such a hearing, he was entitled to litigate anything and everything regarding lethal injection.

(PCT4. 86-89, 92) He also insisted that Florida should be required to change to a single drug protocol simply because other states had done so without showing that the protocol created a substantial risk of serious harm. (PCT4. 89-92)

The State responded that this Court had actually affirmed the summary denial of a lethal injection protocol claim the last time the protocol changed and that this Court had only granted a limited evidentiary regarding the change in protocol in *Valle*. (PCT4. 93) As such, it argued that only issues regarding the 2013 change in protocol and the Happ execution were properly before the court. (PCT4. 93) It further asserted that Defendant had not sufficiently alleged a claim regarding the 2013 protocol or the Happ execution because he had not presented any allegations to show that the new protocol created a substantial risk of serious harm or that Happ suffered. (PCT4. 93-94) It also argued that Defendant had not plead a sufficient claim regarding the one drug protocol. (PCT4. 95)

Regarding the clemency claim, Defendant insisted that the fact that a motion to remove his post conviction counsel as registry counsel had been made within the last two years showed that he had been denied due process during clemency proceedings. (PCT4. 98-100) He also insisted that he had not had prior clemency proceedings in this case. (PCT4. 100-01) The State

responded that the claim was untimely because all of the events on which Defendant relied had occurred more than one year earlier and that the claim was without merit because Florida law precluded post conviction counsel from serving as clemency counsel, Defendant's counsel had nonetheless been permitted to continue to represent him, Defendant had been given access to clemency proceeding both recently and in the past and this Court had repeatedly rejected due process claims regarding the manner in which clemency proceedings were conducted. (PCT4. 101-04)

Regarding the claim about being on death row too long, Defendant insisted that the claim was based on new evidence because it was based on the passage of time and meritorious because of statements regarding the denial of certiorari petitions. (PCT4. 107-08) He also insisted that the State was at fault for the delays he caused because it did not enact stricter time limits and allegedly refused to disclose public records. (PCT4. 108-11) The State responded that the claim was untimely, that claim was meritless because it had been repeatedly rejected and that Defendant had caused the delays by waiting to file pleadings and request records. (PCT4. 111-13)

Regarding the Timely Justice Act, Defendant insisted that the statute required the Governor to sign his death warrant within 30 days of receiving this Court's list of defendants who

had completed an initial round of post conviction litigation and that it impeded his ability to engage successive post conviction litigation. (PCT4. 116-18) The State responded that the claim was meritless because the statute only required the Governor to sign a death warrant when clemency proceedings were concluded and the Governor decided when clemency proceedings were concluded and the statute said nothing about successive post conviction litigation. (PCT. 118-19)

Regarding the claim about mental illness, Defendant insisted that the mentally ill should be treated the same as the retarded and noted that the United States Supreme Court had recently granted certiorari regarding an issue about the definition of retardation. (PCT4. 119-20) The State responded that the claim was untimely because the law had not changed and the claim was not based on newly discovered evidence and that the claim had been repeatedly rejected. (PCT4. 120) Defendant then insisted that he would be innocent of the death penalty if the law changed. (PCT4. 120-21)

Regarding the motion for stay, Defendant insisted that the lower court had jurisdiction to enter a stay and that one was warranted so that he could seek discovery and litigate his claims. (PCT4. 121) He also asserted that he was entitled to the discovery he sought because he allegedly had no other means of

obtaining information. (PCT4. 122, 124-25) The State responded that Defendant was not entitled to a stay because he had not presented a substantial claim. (PCT4. 123) Regarding discovery, the State pointed out that this Court had required post conviction claims to be fully plead when filed and that the type of discovery Defendant was seeking had been repeatedly rejected, including in *Valle*. (PCT4. 125-36)

Defendant then insisted that he needed to have an expert and videographer present during the Kimbrough execution because he was unable to present sufficient allegations about the constitutionality of a lethal injection protocol until he obtained evidence. (PCT4. 127-28) The State pointed out that the access Defendant was seeking violated Florida law and that Defendant had not shown good cause to be entitled to the discovery. (PCT4. 129)

After taking a recess, the lower court orally announced that it was denying all of Defendant's public records requests, all of the claims in his third motion for post conviction relief and all of his other motions. (PCT4. 134-41) On November 4, 2013, the lower court entered its written orders. (PCR4. 535-48) On November 5, 2013, Defendant moved for rehearing. (PCR4. 548-62) After receiving the State's response, the lower court denied the motion. (PCR4. 563-67) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court did not abuse its discretion in denying Defendant's overly broad and unduly burdensome public records requests that sought records that were not relevant to a colorable claim, untimely and sought information that was not subject to discovery. The lower court also did not abuse its discretion in denying Defendant's other discovery motions.

The lower court properly summarily denied Defendant's lethal injection claim because it sought to relitigate matters that did not concern any evidence or factual development and was insufficiently plead regarding the new matters. It also rejected Defendant's assertions regarding a one drug protocol.

The lower court also properly summarily denied Defendant's claims regarding clemency, the length of time he has been on death row and mental illness being an exemption from the death penalty because they were untimely and without merit as a matter of law. It properly rejected the claim regarding the Timely Justice Act because it was not cognizable and meritless.

ARGUMENT

I. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S PUBLIC RECORDS REQUESTS AND OTHER DISCOVERY MOTIONS.

Defendant asserts that the lower court erred in denying his requests for additional public records and other discovery

motions. Regarding the requests made pursuant to Fla. R. Crim. P. 3.852(h)(3), Defendant insists that the lower court should have found that he was entitled to request public records in an overly broad manner without regard to the potential relevance of the documents. Regarding his other public records requests, Defendant insists that the lower court should have found that the requests were proper. Regarding the discovery motions, Defendant simply complains that he believes that he was entitled to the discovery. However, the lower court did not abuse its discretion in denying these requests and motions.[2]

While Defendant insists that the lower court abused its discretion in rejecting his requests pursuant to Fla. R. Crim. P. 3.852(h)(3), this is not true. Defendant premises his argument that the lower court abused its discretion on the assertion that this subsection of the rule permits him to request any records from an agency from which he has previously made a request for records without any showing that the requested records would lead to a colorable claim for post conviction relief so long as he phrases the request in terms of seeking an update. However, this premise is contrary to this

[2] This Court reviews trial court rulings regarding public records requests for an abuse of discretion. *Pardo v. State*, 108 So. 3d 558, 565 (Fla. 2012). The same standard applied to trial court rulings on post conviction discovery requests. *Reaves v. State*, 942 So. 2d 874, 881 (Fla. 2006).

Court's case law regarding the subsection.

In *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000), this Court rejected the assertion that Fla. R. Crim. P. 3.852(h)(3) allowed a defendant to make overly broad requests for public records simply because a death warrant was signed:

> 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."**

Id. at 70 (emphasis added). Since making that statement, this Court had repeatedly applied this holding to requests made

pursuant to both Fla. R. Crim. P. 3.852(h)(3) and (i) and has added a requirement that the defendant show why he waited until after his death warrant was signed to make the request. *Diaz v. State*, 945 So. 2d 1136, 1149-50 (Fla. 2006); *Mills v. State*, 786 So. 2d 547, 551-52 (Fla. 2001); *Tompkins v. State*, 872 So. 2d 230, 243-44 (Fla. 2003); *Glock v. Moore*, 776 So. 2d 243, 253-54 (Fla. 2001); *Bryan v. State*, 748 So. 2d 1003, 1006 (Fla. 1999).

Further, this Court has consistently held that requests for any and all records are improperly overly broad regardless of the particular subsection of Rule 3.852 under which the requests were made. *Diaz*, 945 So. 2d at 1148-50; *Dennis v. State*, 109 So.3d 680, 699 (Fla. 2012); *Rimmer v. State*, 59 So. 3d 763, 774-75 (Fla. 2010); *Hill v. State*, 921 So. 2d 579, 584-85 (Fla. 2006). Given this extensive body of precedent, the lower court did not abuse its discretion in rejecting Defendant's argument that he was permitted to make overly broad requests without any attempt to show relevance simply because he made the requests under Fla. R. Crim. P. 3.852(h)(3).

Moreover, applying this body of law to Defendant's requests, the lower court did not abuse its discretion in finding the requests improper. In each of his h(3) requests, Defendant asked each agency for "any files, records, letters, memoranda, notes, drafts and/or electronic mail in the

possession or control of your agency pertaining to [Defendant] that were received or produced by your agency since [Defendant's] previous request; and/or any documents that were, for any reason, not produced previously." (PCR4. 5-16) Defendant made no attempt to assert when his prior requests had been made or what the prior request concerned. *Id.* He offered no reason to believe that the agencies in question would have new records or how these new records might pertain to a claim for post conviction relief that would be remotely timely.

Further, there was nothing in the court records in this case that showed that Defendant had ever previously requested records from the Medical Examiner. While there were documents showing that Defendant had requested access to DOC's investigative file regarding this murder and personnel files of DOC employees (PCR2. 12, 13, 82-128, 172-78, 367-74, 488-89, 507-10, 558-59, 571-72), there was nothing in the court file in this case at the time the requests were made to show that Defendant had requested access to files related to his incarceration. As the agencies explained at the public records hearing, they had not done any new investigation regarding this matter or Defendant's other capital case. (PCT4. 18, 29-32, 35-37, 40, 41-44, 48) While Defendant presented documentation showing that he had previously requested his inmate files and

medical records in 1988 and 1991 in this case at the *Huff* hearing and DOC acknowledged that it had provided copies of Defendant's inmate files to the repository in 1999 in connection with Defendant's other capital case, Defendant offered no reason why he then waited until 2013 to seek an update. (PCT4. 14-15, 20) Given these circumstances, the lower court did not abuse its discretion in rejecting these requests because they were overly broad and not calculated to lead to the discovery of relevant evidence. *Diaz*, 945 So. 2d at 1149-50; *Mills*, 786 So. 2d at 551-52; *Tompkins*, 872 So. 2d at 243-44; *Glock*, 776 So. 2d at 253-54; *Sims*, 753 So. 2d at 70; *Bryan*, 748 So. 2d at 1006. The lower court should be affirmed.

In fact, the manner in which Defendant made and litigated his h(3) requests show that they were "nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry." *Sims*, 753 So. 2d at 70. Defendant's death warrant was signed on October 21, 2013, and immediately served on Defendant and his counsel. On October 23, 2013, this Court entered a scheduling order requiring that proceedings in the lower court be concluded by November 5, 2013 at noon. Yet, when the lower court held a scheduling hearing on October 24, 2013, Defendant successfully resisted scheduling deadlines for public records requests and

responses or a public records hearing.

When Defendant finally sent out his h(3) requests at approximately 8:30 p.m. on October 24, 2013, he electronically served the State's representatives in this case but did not electronically serve the agencies or their counsel. When the agencies filed objections, Defendant still did not request a public records hearing. Instead, he filed a claim in his post conviction motion noting that the agencies had objected and insisting that it was improper from them to have done without presenting any argument addressing the case law cited in the objections or citing a single case decided under Fla. R. Crim. P. 3.852 that supported his assertion that the objections were improper.

When Defendant was required to explain how any of the records regarding agencies that had been involved in the investigation and prosecution of his case might lead to a colorable claim, Defendant insisted that the agencies might have some new record or some old, unproduced record that would suggest that Defendant was not properly convicted. (PCT4. 32-34, 39-40) However, beginning with his direct appeal and continuing through the litigation of Defendant's initial motion for post conviction relief, Defendant has repeatedly insisted that the only viable defense in this matter was insanity because the fact

that Defendant had stabbed Off. Burke to death was unassailable. Initial Brief, Florida Supreme Court Case No. SC63343, at 34; (PCR1. 32, 99, 143, 169, 170, 188, 190, 192, 193, 267, 327, 329, 337, 338, 1392); Initial Brief, Florida Supreme Court Case No. SC75055, at 52-53, 54; (PCR2. 879); Answer Brief of Appellee/Initial Brief of Cross Appellant, Florida Supreme Court Case No. SC01-1415, at 25, 26, 37. Thus, by requesting documents regarding alleged further investigation of the circumstances of the crime, Defendant was requesting documents that were not relevant to any viable claim.

Given Defendant's delay in filing the requests, his service of those requests in a manner to delay a response, his insistence that public records litigation deadlines and hearings not be set, his failure to request a public records hearing when he received objections and his requests for information that would not have been relevant to what he had repeatedly asserted was the only possible defense in this matter, Defendant's h(3) requests were not being used to conduct a focused investigation into a viable post conviction claim. Instead, Defendant made the requests to create a basis for seeking a stay of his execution, as is evident from the fact that Defendant's motion for stay was based entirely on the public records issue. (PCR4. 508-10) Since this Court had held that this is an improper use of h(3)

requests, *Sims*, 753 So. 2d at 70, the lower court did not abuse its discretion in denying the requests. It should be affirmed.

The lower court also did not abuse its discretion in denying the requests made pursuant to Fla. R. Crim. P. 3.852(i). In arguing that the lower court should have found that the records requested were related to a colorable claim for post conviction relief, Defendant insists that the fact that a claim has been repeatedly found not to be meritorious indicates that the claim is colorable. However, this Court had held that records are not likely to lead to a colorable claim for post conviction relief when this Court has found the claim not to be meritorious. *Mann v. State*, 112 So. 3d 1158, 1163 (Fla. 2013); *Walton v. State*, 3 So. 3d 1000, 1013-14 (Fla. 2009). This Court has also determined that records are not related to a colorable claim when the claim for which the documents were sought was subject to a procedural bar. *Diaz*, 945 So. 2d at 1149-50. Since Defendant's definition of a colorable claim is contrary to the manner in which this Court has used that term, the lower court did not abuse its discretion in rejecting Defendant's definition.

Additionally, the lower court's refusal to order production of records regarding clemency was not an abuse of discretion. In *Parole Comm'n v. Lockett*, 620 So. 2d 153 (Fla. 1993), this Court

granted a writ of prohibition quashing a trial court's order requiring production of records regarding clemency on the basis that ordering production of records regarding clemency violated the separation of powers doctrine under the Florida Constitution. In *Agan v. Florida Parole Comm'n*, 649 So. 2d 859 (Fla. 1994), this Court rejected the argument that *Brady v. Maryland*, 373 U.S. 83 (1963), nonetheless entitled to capital defendants to review the clemency files. Since this Court has held that clemency files are not subject to production as public records, the lower court did not abuse its discretion in denying Defendant's requests. It should be affirmed.

Moreover, the lower court did not abuse its discretion in rejecting Defendant's assertion that the lower court was free to disregard this Court's binding case law based on *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998). In *Woodard*, the Court stated nothing about a court ordering access to records in violation of separation of powers. Moreover, the United States Supreme Court has made it clear that the Constitution does not create a general right to discovery even at a criminal trial. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). As such, Defendant's suggestion that the Court, *sub silentio*, overruled this Court on an issue of state constitutional law is meritless. The lower

court did not abuse its discretion in rejecting it.

Further, it should be remembered that Defendant's request was not even timely. In seeking records about clemency, Defendant relied on a series of events that had all occurred more than a year earlier. This Court has previously affirmed the rejection of public records requests when the requests were untimely. *See Buenoano v. State*, 708 So. 2d 941, 952-53 (Fla. 1998). While Defendant suggested that the requests were timely because the records allegedly remained confidential until a final decision was reached, this contention is unsupported by the law. While Defendant attempted to analogize clemency files to state attorney's files, this analogy is inapt. In finding that state attorney's files were subject to disclosure after a conviction was final, this Court relied on the plain language of the statutory exemptions to public records disclosure regarding active criminal investigation records and work product. *State v. Kokal*, 562 So. 2d 324, 325-27 (Fla. 1990). However, no such temporal limitation exists regarding the clemency files. As such, Defendant's requests were untimely, and the lower court did not abuse its discretion in denying them.

Finally, the lower court did not abuse its discretion in denying Defendant's requests regarding lethal injection. In his public records requests about lethal injection, Defendant sought

public records without limitation regarding how lethal injection protocols had been promulgated since January 1, 2010 and regarding the sources of lethal injection drugs. (PCR4. 74-79, 98-149) While Defendant insisted that this Court had previously order the production of this type of records after the 2011 and 2012 protocols, this is not true. In fact, this Court affirmed the denial of public records requests that sought the type of information Defendant was seeking. *Pardo v. State*, 108 So. 3d 558, 565-66 (Fla. 2012); *Valle v. State*, 70 So. 3d 530, 547-49 (Fla. 2011). Moreover, Defendant clearly demonstrated that he had received a copy of the new protocol by attaching it to his request. (PCR. 111-23, 137-49) This Court had previously recognized that disclosure of the protocol is sufficient to allow a defendant to present a lethal injection claim. *Bryan v. State*, 753 So. 2d 1244, 1251-53 (Fla. 2000). As such, the lower court did not abuse its discretion in denying Defendant's requests. It should be affirmed.

The lower court also did not abuse its discretion in denying Defendant's other discovery motions. Defendant did not even make these motions until after the State had responded to his motion for post conviction relief. However, this Court has required that post conviction motions be fully plead when filed, which has already occurred. *Doorbal v. State*, 983 So. 2d 464,

484-85 (Fla. 2008); *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002). Moreover, this Court held that discovery should generally only be granted in a post conviction proceeding when a defendant has shown good cause to permit the discovery. *State v. Lewis*, 656 So. 2d 1248, 1249-50 (Fla. 1994).

Here, Defendant's only attempt to show good cause was to assert that this Court has granted discovery of the type he sought in *Valle*. However, the lower court did not abuse its discretion in denying this motion because this assertion was not true and did not show good cause.

In this motion, Defendant seeks disclosure of the identity of everyone involved in the execution of William Happ and deposition of these individuals, disclose of everyone involved in promulgating the lethal injection protocol and depositions of these individuals, a deposition of the Eighth District Medical Examiner and disclosure of the source of the lethal injection drugs and the individual responsible for maintaining the drugs. (PCR4. 511-14) In *Valle*, the Court actually affirmed the rejection of requests for discovery regarding the sources of lethal injection drugs. *Valle*, 70 So. 3d at 549. It actually affirmed the refusal to allow Defendant to present testimony from individuals regarding the manner in which the protocol was written. *Id.* at 546-47. Further, the Florida Supreme Court has

previously affirmed the denial of requests for discovery regarding the execution team members and upheld the provisions of Florida law, which makes this information confidential. *Bryan v. State*, 753 So. 2d 1244, 1251-53 (Fla. 2000). Given these circumstances, the lower court did not abuse its discretion in rejecting Defendant's discovery motion.

Similarly, the lower court did not abuse its discretion in denying the motion for access to the Kimbrough execution. In this motion, Defendant's only attempt to show good cause was to note that he was raising a lethal injection claim. (PCR4. 515-16) Not only did this assertion not show good cause for discovery but it ignores that Defendant's request sought to have the trial court authorize a violation of §922.11(2) &(3), Fla. Stat. governing the witnesses to an execution and manner in which an executed inmate is autopsied. Given these circumstances, the lower court did not abuse its discretion in rejecting this motion.

This is all the more true, as the United States Supreme Court has upheld the constitutionality of laws like §922.11(2). In doing so, the Court has stated that the "number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of newspapers . . . are regulations which the legislature, in its wisdom, and for

the public good, could legally prescribe." *Holden v. Minnesota*, 137 U.S. 483, 491 (1890). In *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978)(plurality), the Court explained that the question of whether penal institutions should be open "is clearly a legislative task which the Constitution has left to the political processes." The Court noted that requests to force open prisons improperly invite "the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes." *Id.* at 13.

Additionally, the request also sought to violate the protocol itself. Pursuant to ¶11(d) of the protocol, the only individuals permitted to be in the execution chamber during an execution are "the team warden, one additional execution team member and one FDLE monitor." (PCR4. 230) Capital inmates often allege that prison officials do not follow the protocols rigorously enough and use any deviation from the protocols as a basis of an Eighth Amendment challenge. A court order allowing additional persons who are not listed in the protocols would give rise to additional claims that DOC is not following their protocols. The lower court did not abuse its discretion.

In addition to violating the statute, there are practical concerns with allowing a videophotographer and an "expert" to be in the execution chamber during the execution. The chamber is

not a large room. The gurney with the inmate lying on top of it takes up a significant amount of the room. Moreover, there are three other individuals in the chamber in addition to the inmate on the gurney. The team leader, who is in charge of the execution, is present throughout the execution supervising and speaking on a telephone to the Governor's office. An FDLE agent is also present, as is another team member. The videophotographer's presence and equipment would interfere with the sight and movements of these necessary personnel. Nor could the videophotographer be allowed to move in a manner that blocks the witnesses' view. The twelve statutorily authorized witnesses must have a clear line of sight throughout the entire execution to fulfill their function.

Additionally, any expert with access to Kimbrough during his execution to monitor his physiological responses throughout the execution is likely to interfere even more with the execution team. The team is monitoring and conducting consciousness checks. This second monitor would interfere with the first monitor - the monitor who is statutorily authorized and required to perform that function according to the established protocols. Given these circumstances, the lower court did not abuse its discretion in denying this motion. It should be affirmed.

II & III. THE LETHAL INJECTION CLAIMS WERE PROPERLY DENIED.

Defendant asserts that the lower court erred in summarily denying his claims regarding lethal injection. He insists that he was entitled to an evidentiary hearing regarding lethal injection that covered all issues about lethal injection, including those that had previously been rejected, because there was a change in the procotol and he had alleged there was an irregularity during the execution of William Happ. He also insists that the lower court should have forced the State to adopt a one drug protocol. However, the lower court properly summarily denied this claim.[3]

While Defendant insists that he was entitled to an evidentiary hearing on all aspects of lethal injection simply because he alleged that the protocol had changed and that Happ moved, the lower court properly rejected this argument. Defendant premises his argument on the assertion that this Court has always ordered an evidentiary hearing any time an execution protocol has changed or a defendant has relied on an incident in a prior execution. However, this is not true.

In September 2012, the State changed its lethal injection protocol to substitute vecuronium bromide for pancuronium

[3] This Court reviews a lower court's decision to deny a post conviction claim summarily *de novo*. *Carroll v. State*, 114 So. 3d 883, 886 (Fla. 2013).

bromide as the second drug. *Pardo*, 108 So. 3d at 561. Thereafter, Manuel Pardo brought a challenge to the new protocol while under a death warrant. *Id.* at 560, 561. He supported his challenge with a declaration from a medical expert. *Id.* at 564. The lower court summarily denied this challenge, and this Court affirmed. *Id.* at 560, 561-65.

In doing so, this Court recognized that a claim based on "evidence that did not previously exist or on new factual developments" were not procedurally barred. *Id.* However, this Court stressed "that a defendant is not entitled to relitigate claims that have previously been rejected without relying on new evidence or new factual developments." *Id.* at 563. This Court then stressed that the defendant bore a heavy burden of presenting factual allegations that showed that the protocol created a substantial risk of serious harm, which required a showing that the conditions presenting the risk were "'sure or very likely to cause' to cause serious illness or needless suffering." *Id.* at 562-63 (quoting *Baze v. Rees*, 553 U.S. 35, 49-50 (2008)). Applying this standard, this Court rejected assertions regarding the constitutionality of the protocol that concerned aspects of the protocol that had not changed and had previously been rejected and found the allegations regarding the remaining aspects of the protocol insufficient. *Id.* at 563-65.

Similarly, in June 2011, the State changed its lethal injection protocol to substitute pentobarbital for sodium thiopental as the first drug and an inmate under a death warrant challenged the protocol. *Valle*, 70 So. 3d at 534. The defendant sought a plenary evidentiary hearing regarding all aspects of lethal injection, including aspects that had not changed since this Court had last affirmed the lethal injection protocol. *Id.* at 538-46. While this Court granted the defendant a limited evidentiary hearing regarding whether the change presented a substantial risk of serious harm, *Id.* at 537, this Court found that the portions of the claim that were unrelated to the change had been properly summarily denied and upheld that the lower court's refusal to expand the evidentiary hearing beyond evidence concerning the change. *Id.* at 545-47. Since this Court has not granted plenary evidentiary hearings every time a protocol has changed or a defendant claimed there was an incident during a lethal injection, the lower court properly rejected the argument that this Court has done so.

In an attempt to suggest that this Court has ordered such an evidentiary hearing in each case, Defendant relies extensively on his version of what he calls the history with method of execution challenges. In doing so, he cites to decisions regarding the electric chair and the adoption of

lethal injection before 2008 and relies heavily on statements contained in dissenting and concurring opinions. However, in doing so, Defendant ignores that there have been legal developments since that time that limit this Court's ability to order evidentiary hearings regarding methods of execution.

As this Court has acknowledged, the Florida Constitution was amended in 2002 to require that this Court consider Eighth Amendment claims in conformity with decisions of the United States Supreme Court. *Lightbourne v. McCollum*, 969 So. 2d 326, 334-35 (Fla. 2007); *see also Pardo*, 108 So. 3d at 563; *Valle*, 70 So. 3d at 538-39. In 2008, the United States Supreme Court decided the standard that applied to Eighth Amendment challenges to lethal injection protocols. *Baze v. Rees*, 553 U.S. 35 (2008).

In doing so, the Court held that an inmate was required to show that the protocol created a "substantial risk of serious harm" that was "objectively intolerable" to demonstrate that a lethal injection protocol was unconstitutional. *Id.* at 49-50. To meet this standard, the Court required a showing that "the conditions presenting the risk must be 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n.9 (1994)). It noted that the mere fact that an execution method "may result in pain,

either by accident or as an inescapable consequence of death" did not meet this standard. *Id.* at 50. It also held that that "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Id.* It required a defendant claiming that a risk of serious harm could be avoided by a different method of execution to show that there was a feasible alternative that addresses a substantial risk of serious harm. *Id.* at 52. It held that stays of execution to permit litigation of lethal injection challenges were not allowed unless the standard was met. *Id.* at 60. Further, in *Brewer v. Landrigan*, 131 S. Ct. 445 (2010), the Court held that speculation was insufficient to satisfy a defendant's pleading burden.

Given the constitutional amendment and the development of United States Supreme Court precedent, Defendant's reliance on pre-2008 case law to assert that he was entitled to a plenary evidentiary hearing on all aspects of lethal injection simply because a protocol had been altered and he alleged an incident occurred during an execution is misplaced. As such, the lower court properly rejected this reliance.

Moreover, applying the standard actually set forth in *Baze*,

Landrigan, *Pardo* and *Valle*, the lower court properly summarily denied Defendant's claim. In his motion, Defendant alleged that Florida had changed its protocol in 2013 by substituting midazolam hydrochloride for pentobarbital as the first drug, that midazolam was from a different class of drugs than the first drugs Florida had previously used, that the use of midazolam was untested, that midazolam is not used as an anesthetic in surgical settings, that midazolam takes longer to take effect that sodium thiopental, that midaolam's effects do not last as long as the effects of barbiturates, that other states did not use midazolam, that other states had adopted a one drug protocol, that Happ moved during his execution, that the movement "suggested" Happ might not have been unconscious, that potassium chloride causes cardiac arrest and pain in conscious individuals, that vecuronium paralyzes the inmate, that vecuronium is unnecessary, that vecuronium would cause suffering if a person was conscious, that vecuronium is not used in animal euthanasia, that the level of training and expertise required for the members of the execution team who establish the IV and assess the defendant's consciousness are inadequate, that the assessment of consciousness is inadequate, and that the protocol should not permit the insertion of a central line or performance of a cut down to obtain venous access. (PCT4. 172-

76, 178-87) Applying *Baze*, *Landrigan*, *Pardo* and *Valle*, the lower court did not err in finding these assertions provided no basis for an evidentiary hearing because they either concerned claims that had previously been rejected and were not based on new evidence or factual development or were not sufficient.

All of Defendant's claims about potassium chloride, vecuronium, the training and qualifications of the execution team members, the assessment of consciousness and venous access have been previously considered and rejected by this Court and the *Baze* Court. *Baze*, 553 U.S. at 53-61; *Pardo*, 108 So. 3d at 563-56; *Valle*, 70 So. 3d at 545-46; *Lightbourne*, 969 So. 2d at 347-49, 351-53. Since these aspects of the claim had already been rejected and were not based on new evidence or factual developments, the lower court properly summarily denied them. *Pardo*, 108 So. 3d at 563; *Valle*, 70 So. 3d at 545-46. It should be affirmed.

Moreover, the claims about midazolam were also properly summarily denied because they were facially insufficient. While Defendant alleged that midazolam was from a different class of drugs that the ones the State had previously used as the first drug, that it had a different time and length of effect and that it was new, untested and not used by other states, he presented nothing to show affirmatively that, as a result of these

conditions, the use of midazolam is sure or very likely to cause serious illness and needless suffering. In fact, he presents no allegation that he would be conscious after the injection of midazolam, and, unlike Pardo and Valle, Defendant does not even present a report from a medical expert. Instead, the gravamen of Defendant's claim about midazolam appears to be that there was a lack of knowledge about midazolam. However, as this Court has held, an assertion about a lack of knowledge is insufficient to raise a claim regarding a lethal injection protocol. *Pardo*, 108 So. 3d at 564; *Valle*, 70 So. 3d at 541. As such, the lower court properly found that these allegations were insufficient to state a claim and properly summarily denied them. It should be affirmed.

Additionally, the lower court properly found that Defendant's allegations regarding the Happ execution were insufficient. In his motion, Defendant alleged that Happ moved after the consciousness check and averred that this "suggested" that Happ was conscious. (PCT4. 174-76) As such, Defendant's suggestion that Happ was even conscious after the administration of midazolam was nothing more that speculation. However, speculation is insufficient to state a facially sufficient claim. *Landrigan*, 131 S. Ct. at 445; *Pardo*, 108 So. 3d at 564-65. This is particularly true, as the United States Supreme

Court has required a showing that there is something systematic about a lethal injection protocol that makes it sure or very likely to cause serious illness or needless suffering to state a claim and held that an isolated mishap is insufficient. *Baze*, 553 U.S. at 50. Yet, other than noting that Happ moved and speculating that he might have been conscious, Defendant presented nothing to show that Happ even suffered serious illness or needless pain; much less that there is something systematic about the protocol that made this sure or very likely to occur. The summary denial of the claim as insufficiently plead should be affirmed.

This is all the more true because even Defendant's speculation about movement showing consciousness is inconsistent with the law. In *Baze*, the defendant suggested that the use of a paralytic as the second drug in a three drug protocol was unconstitutional because it was not necessary. *Baze*, 553 U.S. at 57. The Court rejected that claim:

> The state trial court, however, specifically found that pancuronium serves two purposes. **First, it prevents involuntary physical movements during unconsciousness that may accompany the injection of potassium chloride. App. 763. The Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress.** Second, pancuronium stops respiration, hastening death. Ibid. Kentucky's decision to include the drug does not offend the Eighth Amendment

Id. at 57-58 (emphasis added). As such, the Court has expressly recognized that physical movements do not necessarily show that an inmate was conscious. In fact, one of the known effects of midazolam is involuntary movement. http://www.rxlist.com/ midazolam-injection-drug/indications-dosage.htm.

Moreover, this Court has previously rejected a claim based on allegations that inmates moved during lethal injections. In *Valle*, the defendant sought to bolster his claim that the use of pentobarbital was unconstitutional by relying on similar reports of alleged movements during executions as evidence that pentobarbital created a substantial risk of serious harm. *Valle*, 70 So. 3d at 542. However, this Court found that evidence that the inmates allegedly moved was insufficient to satisfy the *Baze* standard. *Id.* at 542-45; *see also DeYoung v. Owens*, 646 F.3d 1319, 1325-27 (11th Cir. 2011). As such, Defendant's statement that a newspaper reporter claimed that Happ moved does not show that Defendant has a facially sufficient claim. Since Defendant did not present a facially sufficient claim, the summary denial was proper and should be affirmed.

In an attempt to avoid this result, Defendant insists that the lower court failed to accept his allegations of fact regarding the Happ execution and improperly found that the only change in the protocol concerned the substitution of midazolam.

However, these arguments do not provide a basis for reversal.

Regarding the Happ execution, the lower court specifically noted that Defendant had failed to allege that Happ actually experienced pain and suffering and instead was relying of speculation based on movement. (PCR4. 539, 540) As argued above, the lower court is entirely correct in its observations. While Defendant alleged as fact that Happ moved, he presented mere speculation that this movement "suggested" Happ was conscious and presented no facts to show that Happ experienced pain. (PCT4. 174-76) As such, Defendant's assertion that the lower court did not accept his factual allegations about Happ should be rejected and the denial of the claim affirmed.

Additionally, while Defendant insists that the new protocol and details of the old protocol were not before the lower court, Defendant ignores that he, himself, attached the new protocol to both his public records requests and his motion. (PCR4. 111-23, 137-49, 222-34) As this Court has recognized, a trial court may consider matters in the court file in denying a post conviction claim. *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000). Having placed the new protocol before the lower court, Defendant cannot be heard to complain that the lower court considered it. *See Boyd v. State*, 910 So. 2d 167, 186-87 (Fla. 2005); *San Martin v. State*, 705 So. 2d 1337, 1348 (Fla. 1997); *White v. State*, 446

So. 2d 1031, 1036 (Fla. 1984). Moreover, the details of the old protocols are presented in this Court's opinions. As such, Defendant's complaint about the lower court acknowledgement of the nature of the change in protocol is frivolous. This is all the more true, as Defendant, himself, alleged that the change in protocol was the substitution of the new drug without mentioning any other change.[4] (PCT4. 172-74, 178-79) Given these circumstances, Defendant's complaint about the consideration of the nature of the change should be rejected, and the denial of the claim affirmed.

In another attempt to suggest that he has a claim, Defendant insists that Florida has a record of mistakes during lethal injection protocols. In support of this assertion, Defendant relies on newspaper accounts of the Demps and Diaz executions and statements by attorneys about things they did not see during executions in 2006, 2009, 2011. However, these assertions do not make the claim facially sufficient because they are barred and meritless.

While this Court has held that they are not barred when they are based on alleged problems during an execution, it has done so on the basis that the alleged problem constitutes newly

[4] Defendant's failure to mention any other change, even now on appeal, is clearly attributable to the fact that there was no other change.

discovered evidence. *Schwab v. State*, 969 So. 2d 318, 321 (Fla. 2007). Claims based on newly discovered evidence must be filed within one year of when the evidence could have been discovered through an exercise of due diligence to be timely. *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008). Here, Defendant makes no attempt to explain how events occurring between 2000 and 2011 could not have been discovered until October 29, 2012, one year before he filed this claim. In fact, even the attorney affidavits on which Defendant relies are dated in September 2012. Given these circumstances, this claim is untimely and should be denied as such.

Moreover, a similar claim about Florida's alleged history of problems during executions was raised and rejected in *Valle*. *Valle*, 70 So. 3d at 545. As such, Defendant's attempt to relitigate the issue again is improper. *Pardo*, 108 So. 3d at 563; *Valle*, 70 So. 3d at 545-46. The summary denial of the claim should be affirmed.

Further, it should be remembered that the claims regarding the Diaz and Demps executions have been considered and rejected. *Lightbourne*, 969 So. 2d at 343-53; *Provenzano v. State*, 761 So. 2d 1097 (Fla. 2000). Defendant's other alleged problems are specious. While Defendant avers that Todd Doss did not see a consciousness check during the 2006 Hill execution, Defendant

ignores that the consciousness check was not added to the protocol until the 2007 version of the protocols. *Lightbourne*, 969 So. 2d at 346. Thus, the fact that Mr. Doss did not see a consciousness assessment being performed before the performance of a consciousness check was part of the protocol does not show a problem at all. While Defendant notes that Neil Dupree did not see heart monitoring equipment, Mr. Dupree admitted that the inmates' chests were covered by a sheet and not visible to him. Under the protocol, the heart monitoring equipment is attached to the inmate's chest and is monitored from the executioner's room. (PCR4. 229, 230) Thus, the fact that Mr. Dupree did not see what he was in no position to see does not show that there was a problem. The lower court properly summarily denied this claim and should be affirmed.

Finally, the lower court properly summarily denied the claim that Florida should be forced to adopt a one drug protocol because other states have done so was properly denied. The United States Supreme Court has held that the "Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters." *Harris v. Alabama*, 513 U.S. 504, 509 (1995)(quoting *Spaziano v. Florida*, 468 U.S. 447, 464 (1984)). Moreover, both this Court and the United States Supreme Court have recognized that it is not the function

of the courts to micromanage the manner in which executions are conducted. *Baze*, 553 U.S. at 51; *Valle*, 70 So. 3d at 546 n.16. As such, the United States Supreme Court has required a defendant to show that his proposed alternative eliminates a substantial risk of serious harm and that the alternative is feasible to show an Eighth Amendment violation based on the failure to adopt an alternative protocol. *Baze*, 553 U.S. at 51, 61. As argued above, Defendant has not show that the protocol as written creates a substantial risk of serious harm. As such, the fact that other states have adopted a one drug protocol or use different drugs does not state an Eighth Amendment claim. *Ferguson v. Warden, Florida State Prison*, 493 Fed. Appx. 22, 25 (11th Cir. 2012); *see also Pardo v. Palmer*, 500 Fed. Appx. 901, 904 (11th Cir. 2012). The summary denial of the lethal injection claim should be affirmed.

IV. THE CLEMENCY CLAIM WAS PROPERLY DENIED.

Defendant asserts that the lower court erred in summarily denying his claim regarding clemency. However, the lower court properly summarily denied this claim as untimely and meritless.[5]

For a claim in a successive motion to be considered timely, it must be based on a new, retroactive change in law or newly discovered evidence. *Jimenez*, 997 So. 2d at 1064; Fla. R. Crim.

[5] This Court reviews a lower court's decision to deny a post conviction claim summarily *de novo*. *Carroll*, 114 So. 3d at 886.

P. 3.851(d). Even when a claim purports to be based on newly discovered evidence, the claim is still untimely unless it is filed within one year of when the evidence could not have been discovered through an exercise of due diligence. *Jimenez*, 997 So. 2d at 1064. Here, the lower court properly rejected this claim as untimely.

In his motion, Defendant made no attempt to suggest that his claim was based on a newly recognized constitutional right that had been held to be retroactive. While he cited to a number of events that occurred in 2011 and 2012 in support of this claim, the latest of these events was the September 6, 2012 clemency interview that Defendant refused to attend. Defendant did not file his motion until October 20, 2013. As such, all of the events had occurred more than a year earlier. Given these circumstances, the lower court properly determined that this claim was untimely and should be affirmed.

In an attempt to avoid this result, Defendant insisted that he could not have raised the claim earlier because he needed to know that he had been denied clemency before he could raise the claim. However, this Court rejected this same argument in *Ferguson v. State*, 101 So. 3d 362, 366 (Fla. 2012). There, the defendant claimed that a challenge to his clemency proceedings could only be raised when his death warrant was signed and the

denial of clemency was announced. However, this Court held that "[c]laims raised pursuant to rule 3.851 must meet either the timeliness requirements provided in section (d)(1) or the exceptions provided in section (d)(2)." *Id.* As such, the lower court properly rejected this claim as untimely and should be affirmed.

This is particularly true, as the result is entirely consistent with the law regarding the nature of claims regarding clemency proceedings. Both the United States Supreme Court and this Court have recognized that a defendant cannot seek judicial review of the discretionary decision whether to grant or deny clemency. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463-67 (1981); *Sullivan v. Askew*, 348 So. 2d 312 (Fla. 1977). Thus, Defendant's claim could not be based on fact that he was denied clemency. While four justices of the United States Supreme Court did recognize that a defendant could raise a due process challenge to a clemency proceeding if the proceeding failed to provide some minimal level of procedural safeguards in clemency in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), the Court did not premise the ability to raise that challenge on the denial of clemency. In fact, in *Woodward*, the defendant filed his §1983 complaint raising the due process claim before the clemency hearing was even scheduled to take

place. *Id.* at 277. Given these circumstances, the lower court's finding that the claim was untimely should be affirmed.

Moreover, the lower court's denial of the claim on the merits was also proper. This Court has repeatedly rejected challenges to Florida's clemency procedures. *E.g.*, *Wheeler v. State*, 38 Fla. L. Weekly S495, S504 (Fla. Jun. 27, 2013); *Carroll v. State*, 114 So. 3d 883, 888-89 (Fla. 2013); *Pardo*, 108 So. 3d at 568; *Gore v. State*, 91 So. 3d 769, 778-79 (Fla. 2012); *Grossman v. State*, 29 So. 3d 1034, 1044 (Fla. 2010); *Johnston v. State*, 27 So. 3d 11, 25-26 (Fla. 2010); *Marek v. State*, 8 So. 3d 1123, 1129-30 (Fla. 2009); *Rutherford v. State*, 940 So. 2d 1112, 1121-23 (Fla. 2006); *King v. State,* 808 So. 2d 1237, 1241 n.5, 1246 (Fla. 2002); *Glock*, 776 So. 2d at 252; *Provenzano v. State*, 739 So. 2d 1150, 1155 (Fla. 1999). Given this body of precedent, the lower court properly determined that this claim was without merit as a matter of law. It should be affirmed.

This is all the more true as Defendant's claim is particularly frivolous. While Defendant acts as if there was no basis to seek his counsel's removal as clemency counsel, Defendant's counsel had previously been appointed as Defendant's post conviction counsel. Pursuant to §27.711(11), Fla. Stat., a defendant's post conviction counsel is precluded from also serving as his clemency counsel. This Court has previously

determined that statutes limiting post conviction counsel to filing post conviction proceedings are proper. *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998). Even when this Court permitted post conviction counsel to file federal civil rights suits regarding lethal injection protocols, this Court continued to uphold the restriction on the ability of post conviction counsel to engage in clemency litigation. *Darling v. State*, 45 So. 3d 444, 445 (Fla. 2010). Given these circumstances, the motion to remove Defendant's counsel as clemency counsel amounts to little more than an attempt to enforce Florida law. Further, it should be remembered that despite the fact that §27.711(11), clearly precluded Defendant's post conviction counsel from representing Defendant in clemency proceedings, Defendant's counsel was permitted to continue to represent Defendant. Given these circumstances, the lower court properly determined that this motion did not deprive Defendant access to clemency proceedings. It should be affirmed.

Moreover, Defendant's other complaints about clemency were also properly rejected. As Defendant admitted in his motion, his request to delay his clemency interview based on his alleged medical condition was denied after it was determined that Defendant was medically able to participate in a clemency interview. (PCR4. 193) Thereafter, Defendant simply refused to

be interviewed. *Id.* Given these circumstances, the lower court properly determined that Defendant was not permitted to complain about the lack of an interview in which he refused to participate. *See Boyd*, 910 So. 2d at 186-87; *San Martin*, 705 So. 2d at 1348; *White*, 446 So. 2d at 1036. It should be affirmed.

Finally, it should be remembered that Defendant was given full access to clemency proceedings before his initial motion for post conviction relief was filed. (PCR1. 1011-57) This Court has been particularly unwilling to find a basis for post conviction relief based on an alleged denial of access to clemency proceedings when a defendant has already had access to clemency proceedings earlier. *Gore*, 91 So. 3d at 778-79; *Johnston*, 27 So. 3d at 24-26; *Bundy v. State*, 497 So. 2d 1209, 1211 (Fla. 1986). While Defendant suggests that the prior access to clemency should have been ignored because clemency was being considered regarding Defendant's other capital case, this Court rejected this argument in *Bundy*, 497 So. 2d at 1211. As such, the lower court properly determined that this claim was without merit as a matter of law. It should be affirmed.

V. THE CLAIM REGARDING THE LENGTH OF TIME THAT DEFENDANT HAS BEEN ON DEATH ROW WAS PROPERLY DENIED.

Defendant next contends that the lower court erred in summarily denying his claim that his execution is

unconstitutional because he has been on death row too long. However, the lower court properly denied this claim because it was untimely and meritless.[6]

A claim cannot be brought in an untimely, successive motion for post conviction relief unless it is based on a new, retroactive constitutional right or evidence that could not have been discovered through an exercise of due diligence until less than one year before the motion is filed. *Jimenez*, 997 So. 2d at 1064; Fla. R. Crim. P. 3.851(d). Since Defendant's claim satisfied neither of these exceptions, the lower court properly denied the claim as untimely.

Here, Defendant's claim is not based on any case from this Court or the United States Supreme Court that recognized a new right. Instead, it is based on *Lackey v. Texas*, 514 U.S. 1045 (1995), a statement regarding the denial of a certiorari petition that was issued in 1995, and concerned an inmate who had been on death row for 17 years. As the Court has recognized, such statements have no precedential value and do not constitute holdings of the Court. *Teague v. Lane*, 489 U.S. 288, 296 (1989). As such, the claim is not based on a new, retroactive constitutional right. *See Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Moreover, Defendant reached the point of being on

[6] This Court reviews a lower court's decision to deny a post conviction claim summarily *de novo*. *Carroll*, 114 So. 3d at 886.

death row for 17 years in 2000. Thus, the basis for raising this claim was available to Defendant for years. Since the claim did not satisfy either of the exception, the lower court summarily denied this untimely claim. The lower court should be affirmed.

Further, the lower court also properly summarily denied this claim because it is without merit as a matter of law. This Court has repeatedly determined that this claim is without merit as a matter of law. *Carroll*, 114 So. 3d at 889-90; *Pardo*, 108 So. 3d at 569; *Ferguson*, 101 So. 3d at 366-37; *Gore*, 91 So. 3d at 780; *Valle*, 70 So. 3d at 552; *Johnston*, 27 So. 3d at 27-28; *Marek*, 8 So. 3d at 1131; *Tompkins v. State*, 994 So. 2d 1072, 1085 (Fla. 2008); *Elledge v. State*, 911 So. 2d 57, 76 (Fla. 2005); *Booker v. State*, 969 So. 2d 186, 200 (Fla. 2007); *Gore v. State*, 964 So. 2d 1257, 1276 (Fla. 2007); *Lucas v. State*, 841 So. 2d 380, 389 (Fla. 2003); *Foster v. State*, 810 So. 2d 910, 916 (Fla. 2002); *see also Thompson v. Sec'y for the Dep't of Corrections*, 517 F.3d 1279, 1283-84 (11th Cir. 2008); *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996). Thus, the claim was also meritless. Since the claim was without merit as a matter of law, the lower court properly summarily denied this claim, and the denial should be affirmed.

This is all the more true as Defendant has contributed substantially to the delay. After his conviction and sentence

became final, Defendant took two years to file any post conviction pleadings. In that post conviction motion, Defendant raised numerous procedurally barred claims. (PCR1. 10-362) That motion was summarily denied within months of being filed. (PCR1. 1378-84) On post conviction appeal, Defendant insisted that he had exculpatory statements of prison employees who witnessed the offense in his possession to prove that the State suppressed evidence. Yet, when this Court sent this claim back for an evidentiary hearing in 1992, Defendant claimed to be unable to present the evidence that was allegedly in his possession without spending years seeking public records. (PCR2. 12-202, 203-321, 325-83, 389-98, 402-25, 433-74, 481-89, 507-10, 517-33, 548-51, 554-55, 558-59, 571-72) As a result, the evidentiary hearing was delayed for almost eight years. (PCT2. 1-279)

When the evidentiary hearing was finally conducted, the evidence that Defendant presented as having been suppressed by the State consisted of "seven typed unsigned, undated, and unattributed statements." *Knight*, 866 So. 2d at 1200, 1201. The only way to identify who might have made the statements was to compare the contents of the alleged *Brady* materials to depositions of the witnesses that the defense had conducted prior to trial, which made the statements cumulative and not material. After this Court determined that Defendant had not

shown that the State committed any *Brady* violation, Defendant waited a year before filing his federal habeas petition.

Despite the fact that §27.711(11), Fla. Stat. precludes registry counsel from representing defendants in clemency proceedings, Defendant's counsel insisted upon representing Defendant during his clemency proceedings. As a result, the issue of her ability to represent Defendant had to be litigated, which delayed consideration of clemency in this matter. Even after counsel was permitted to continue to represent Defendant in contravention of the statute, Defendant sought to delay the clemency process further by refusing to allow Defendant to participate in a clemency interview. Given Defendant's responsibility for the delays in this matter, the lower court properly found this claim meritless. It should be affirmed.

VI. THE CLAIM REGARDING THE TIMELY JUSTICE ACT WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in summarily denying his claim that the Timely Justice Act violates the separation of powers doctrine. However, the lower court properly summarily denied this claim as it was not cognizable in a motion for post conviction relief and was meritless.[7]

As this Court has long recognized, the Florida rules

[7] This Court reviews a lower court's decision to deny a post conviction claim summarily *de novo*. *Carroll*, 114 So. 3d at 886.

authorizing motions for post conviction relief are intended merely to provide a defendant with a judicially efficient mechanism for challenging a judgment and sentence based on grounds that are not cognizable on direct appeal. *Christopher v. State*, 416 So. 2d 450, 453 (Fla. 1982); *Ratliff v. State*, 256 So. 2d 262, 264 (Fla. 1st DCA 1972); *see also* Fla. R. Crim. P. 3.850(a). Here, Defendant made no attempt to assert that anything about the alleged constitutional problems with the Timely Justice Act resulted in his conviction or sentence being infirmed. Instead, he simply sought a declaration that the act was unconstitutional because it allegedly compelled the Governor to sign his death warrant at this time. As such, the lower court was correct to find that this claim was not cognizable. It should be affirmed.

Even if the claim was cognizable, the lower court would still have properly summarily denied it as it is without merit as a matter of law. Although far from a model of clarity, the gravamen of Defendant's complaint about the Timely Justice Act appears to be that the Timely Justice Act amended §922.05, Fla. Stat. to require the Governor to sign a defendant's death warrant at a particular point in time. However, this argument is based on a misreading of the new language of that section. As amended, §922.05, Fla. Stat. only requires the Governor to sign

a defendant's death warrant at any particular time "if the executive clemency process has concluded." As this Court has previously recognized, the Governor controls clemency and, thus, determines when clemency is completed. *See Sullivan v. Askew*, 348 So. 2d 312 (Fla. 1977). As such, the determination of when to sign a death warrant remains in the complete discretion of the Governor. This Court has repeatedly held that the fact that the Governor has discretion to determine which inmate's death warrant to sign and when provides no basis to grant a defendant post conviction relief. *Wheeler*, 38 Fla. L. Weekly at S504; *Carroll*, 114 So. 3d at 887-88; *Mann*, 112 So. 3d at 1162-63; *Ferguson*, 101 So. 3d at 366; *Gore*, 91 So. 3d at 780; *Valle*, 70 So. 3d at 551-52; *Marek v. State*, 14 So. 3d 985, 998 (Fla. 2009). As such, Defendant's claim that the Timely Justice Act is unconstitutional because it compels the signing of a death warrant automatically is meritless and was properly summarily denied.

The same is true of Defendant's suggestion that the Timely Justice Act affects this Court's rulemaking authority. Nothing in the act abrogates any existing rule or compels the adoption or amendment of a rule. While Defendant speculated that the passage of the Act may result in a death warrant being issued before a defendant has an opportunity to litigate a successive

motion for relief, the possibility that future litigation can be foreclosed by an execution is not anything new or unique to the Act since the Governor has always had authority to sign a death warrant at any time. The issuance of a death warrant does not preclude or prohibit successive litigation any more than the imposition of a death sentence itself places a practical "limit" -- defined by a theoretical date of execution -- on successive litigation. Given these circumstances, Defendant's claim was properly denied as without merit as a matter of law. The denial should be affirmed.

Moreover, Defendant's suggestion that the Timely Justice Act is similar to the Death Penalty Reform Act that the Court held unconstitutional in *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000), is frivolous. The Death Penalty Reform Act actually repealed Fla. R. Crim. P. 3.851 and imposed a new post conviction procedure under which a defendant had to pursue post conviction relief while his case was still pending on direct appeal. *Allen*, 756 So. 2d at 55-57. As such, it "drastically change[d] Florida's postconviction death penalty proceedings." *Id.* at 55. The Timely Justice Act of 2013, on the other hand, does not address postconviction litigation in any respect or bring any changes to the death penalty cases pending in this Court or throughout the trial courts of this State. As such,

Allen is inapplicable.

Moreover, Defendant's suggestion that his right to challenge an aggravator in this case is being impinged is meritless. The aggravating circumstance at issue is that Defendant "was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." §921.141(5)(b), Fla. Stat. Thus, the applicability of this aggravator is based on whether a defendant had been convicted; not the sentence for that prior conviction. *Jackson v. State*, 502 So.2d 409, 411 (1986). Moreover, the intent to challenge the conviction does not make the aggravator inapplicable. *Id.*

Here, the claims presented to the federal district court in Defendant's other case only concerned his sentence. *Muhammad v. Tucker*, 905 F. Supp. 2d 1281 (S.D. Fla. 2012). The same is true of the claims before the Eleventh Circuit. *Muhammad v. Sec'y, Florida Dept. of Corrections*, 2013 WL 5305326 (11th Cir. Sep 23, 2013). As such, resolution of these claims would have no affect on the finding of the aggravator in this case. Thus, Defendant's suggestion that he is being deprived of an ability to challenge an aggravator in this case because litigation is ongoing in his other case is meritless. The lower court properly summarily denied this claim and should be affirmed.

VII. THE CLAIM THAT ALLEGED MENTAL ILLNESS BARRED A DEATH SENTENCE WAS PROPERLY DENIED.

Defendant asserts that the lower court erred in summarily denying his claim that he could not be subject to the death penalty because he is allegedly mentally ill. However, the lower court properly summarily denied this claim as it was untimely and without merit as a matter of law.[8]

A claim cannot be brought in an untimely, successive motion for post conviction relief unless it is based on a new, retroactive constitutional right or evidence that could not have been discovered through an exercise of due diligence until less than one year before the motion is filed. *Jimenez*, 997 So. 2d at 1064; Fla. R. Crim. P. 3.851(d). Since Defendant's claim does not meet either of these exceptions, the lower court properly denied this claim as untimely.

In his motion for post conviction relief, Defendant did not rely on any precedent from this Court or the United States Supreme Court that had held that subjecting an allegedly mentally ill person to the death penalty was unconstitutional. (PCR4. 210-16) Instead, he relied on a 2006 ABA resolution and dissenting and concurring opinions from other states. *Id.* However, this Court has held that the only entities that can

[8] This Court reviews a lower court's decision to deny a post conviction claim summarily *de novo*. *Carroll*, 114 So. 3d at 886.

recognize a change in law that would qualify for retroactive application were this Court and the United States Supreme Court. *Witt*, 387 So. 2d at 930. As such, Defendant's claim did not qualify for the retroactive change in law exception to the time bar.

Moreover, Defendant did not cite to any evidence that was not available to him until less than a year before this successive motion was filed. (PCR4. 210-16) Instead, Defendant relied on reports about his mental state[9] that have existed since the 1970's and that he had provided with his first motion for post conviction relief in this matter. (PCR4. 201-16, PCR1. 809-13, 1059-60) As such, the claim did not meet the newly discovered evidence exception either. Since neither exception was met, the claim was untimely and summarily denied as such. The lower court should be affirmed.

The lower court also properly denied this claim as it is without merit as a matter of law. This Court has repeatedly held that the mentally ill are not exempt from execution. *Simmons v. State*, 105 So. 3d 475, 510-11 (Fla. 2012); *Johnston v. State*, 70

[9] Defendant characterizes these reports as proving that Defendant is schizophrenic. However, that characterization is not consistent with all of the mental state evidence Defendant has presented. Further, while the State has accepted Defendant's characterization of his mental state at this stage of the litigation, the evidence Defendant relies upon had been subject to adverse factual findings in Defendant's other case.

So. 3d 472, 484-85 (Fla. 2011); *Seibert v. State*, 64 So. 3d 67, 83 (Fla. 2010); *Schoenwetter v. State*, 46 So. 3d 535, 563 (Fla. 2010); *Johnston*, 27 So. 3d at 26-27; *Nixon v. State*, 2 So. 3d 137, 146 (Fla. 2009); *Power v. State*, 992 So. 2d 218, 222 (Fla. 2008); *Evans v. State*, 975 So. 2d at 1052; *Lawrence v. State*, 969 So. 2d 294, 300 n.9 (Fla. 2007); *Connor v. State*, 979 So. 2d 852, 867 (Fla. 2007); *Diaz*, 945 So. 2d at 1151; *Hill*, 921 So. 2d at 584; *see also Gill v. State*, 14 So. 3d 946, 965 (Fla. 2009). As such, the lower court properly summarily denied this claim and should be affirmed.

CONCLUSION

For the foregoing reasons, the trial court's denial of post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to Linda McDermott, lindammcdermott@msn.com, this 13th day of November 2013.

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CERTIFICATE OF COMPLIANCE

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

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