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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2105

ASKARI ABDULLAH MUHAMMAD,
FKA THOMAS KNIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order summarily denying Mr. Muhammad's Rule 3.851 motion. The following symbols will be used to designate references to the record in this appeal:

"R." - record on direct appeal of the trial proceedings;

"PC-R." - record on appeal of the original postconviction proceedings;

"PC-R2." - record on appeal of the postconviction proceedings from the remand of the Florida Supreme Court;

"PC-R3." - record on appeal of the successive postconviction proceedings;

"PC-R4." - record on appeal of the current postconviction proceedings;

"T." - transcript of the case management conference on October 31, 2013.

REQUEST FOR ORAL ARGUMENT

Mr. Muhammad is presently under a death warrant with an execution scheduled for December 3, 2013. This Court has not hesitated to allow oral argument in other warrant cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved, as well as Mr. Muhammad's pending execution date. Mr. Muhammad, through counsel, urges that the Court permit oral argument.

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INTRODUCTION

On October 4, 2013, this Court's Clerk sent a list of one-hundred and forty-one (141) names of death sentenced individuals who had exhausted their initial postconviction appeals and were warrant eligible, to Governor Scott. A few weeks later, Mr. Muhammad's name was picked from the list and a warrant was signed. This was so despite the fact that Mr. Muhammad's death sentence which was used as an aggravator to obtain a death sentence in the case at hand is still subject to challenge in the federal courts – a valid reason to exercise discretion and wait to deny Mr. Muhammad's pending clemency petition. Mr. Muhammad's execution was scheduled for December 3, 2013. No notice was provided to Mr. Muhammad or his counsel that a warrant would be signed.

Mr. Muhammad's death warrant is not only the first warrant signed under the Timely Justice Act, but also followed on the heels of the Department of Corrections' (DOC), recent adoption of a new lethal injection protocol that was adopted on September 9, 2013. Significantly, DOC decided to substitute midazolam hydrochloride as the first-drug which had previously been pentobarbital, a barbituate, commonly used as an anesthetic. Midazolam hydrochloride is not commonly used as an anesthetic and no other state has experimented with the use of midazolam as an anesthetic. The substitution was made without debate or comment or justification.

Moreover, DOC's newly enacted protocol clung to the three-drug protocol which is quickly becoming obsolete in active death

penalty states. Again, the decision to stick with the use of three drugs was made without debate or comment or justification.

Shortly before Mr. Muhammad's execution was scheduled, William Happ was executed. Using midazolam for the first time, Mr. Happ was reported to have been moving his head from side to side, after the warden had already conducted the consciousness check, yet no further determination of consciousness was made.

Under the circumstances, this new three-drug protocol which caused Mr. Happ's execution to take twice as long and demonstrated that something was not right, would seemingly require that warrants cease and discovery, deliberation and decisions be made. To date, that has not happened. Instead, a compressed and burdensome time schedule was imposed and the State determined that secrecy, obstruction and rule breaking were the best policies to sweep Mr. Muhammad's legitimate, constitutional concerns under the carpet.

Mr. Muhammad found no succor in the circuit court, where a judge who had no familiarity or knowledge of Mr. Muhammad's case, rejected black letter law and accepted the State's representations as fact, when Mr. Muhammad was provided no opportunity to present evidence to refute the State's arguments.

And so, Mr. Muhammad now requests that this Court enforce its rules and law and remand his case for an evidentiary hearing on his claims.

STATEMENT OF THE CASE AND FACTS

Mr. Muhammad was charged by indictment October 24, 1980, with one count of first-degree murder in Bradford County, Florida (R. 1-2).

From the outset, Mr. Muhammad's mental competency was at issue in his capital trial. Initially, the court appointed Joseph Forbes and Susan Cary to represent Mr. Muhammad. They soon requested that a mental health expert be appointed to aid the defense and Dr. Jamal Amin was appointed (R. 4, 34-35). Shortly thereafter, Mr. Forbes withdrew and Judge Green removed Ms. Cary based upon the slanderous and baseless information he was told about her personal relationship with Mr. Muhammad. See Order of Recusal and Appendix, January 21, 1981. Stephen Bernstein was appointed to represent Mr. Muhammad.

During an appearance before Judge Green, Mr. Muhammad requested that he be permitted to conduct his defense pro se while also insisting that he be provided with the assistance of counsel (R. 63). Judge Green conducted a Faretta hearing and denied the motion citing to a defense motion describing Mr. Muhammad "as having `. . . a severely disabling mental illness' . . . `a major psychiatric illness' and has been committed to the state hospital as `incompetent.'" The court further observed that Mr. Muhammad "exhibits symptoms consistent with extreme paranoia." Judge Green proceeded to appoint Mr. Bernstein as "Attorney Ad Litem as well as attorney of record for the Defendant in this case and in such other matters, if any, as Stephen N. Bernstein, in his sole professional judgment shall

deem indicated." (R. 63, 1651-56).

Thereafter Judge Green recused himself because he realized that the State had tricked him into removing Ms. Cary and because he believed the State's interference with Mr. Muhammad's defense would cause him to be prejudiced against the State. See Order of Recusal and Appendix, January 21, 1981. Judge Carlisle, who was appointed to preside over the trial proceedings, conducted another Faretta hearing, and determined that Mr. Muhammad was competent to stand trial, but not competent to waive counsel (R. 10-25). Thereafter, Judge Carlisle recused himself.

The case was then assigned to Judge Chance. On June 7, 1982, a hearing was held before Judge Chance who proceeded to conduct a third Faretta hearing (R. 564-600). During this hearing Mr. Muhammad reiterated his wish to have the assistance of counsel (R. 581-82). Reversing Judge Green's and Judge Carlisle's earlier judgments that Mr. Muhammad was not competent to represent himself, Judge Chance accepted Mr. Muhammad's waiver of counsel and granted his request to proceed as his own counsel (R. 389).

Subsequently, Mr. Muhammad filed another pro se motion for the assistance of counsel (R. 396-97). During the hearing before Judge Chance on July 19, 1982, Mr. Muhammad again requested the assistance of counsel (R. 1673-76). Mr. Bernstein subsequently filed a motion to withdraw as counsel and the Public Defender was appointed as stand-by counsel (R. 1714-17). At the time of the Faretta inquiry, Mr. Muhammad asked for legal assistance in his case and was assured that Mr. Bernstein would be available to

assist him in the preparation of his case (R. 581-82). However, after Mr. Bernstein withdrew Judge Chance ordered the new stand-by counsel, Mr. Replogle, not to consult with his client (PC-R2. 913-4).

On October 19, 1982, Mr. Muhammad's capital trial began. On direct appeal, this court described the evidence presented at trial:

> Muhammad, awaiting execution on death row, fatally stabbed a prison guard in the late afternoon of October 12, 1980. The incident apparently arose out of Muhammad's frustration at being denied permission to see a visitor after he refused to shave his beard. In the past Muhammad had been issued a pass excusing him from shaving regulations for medical reasons. A guard checked with the medical department and determined that Muhammad had no current exemption from the rule. At that time Muhammad 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 Muhammad's cell, the defendant attacked Burke with a knife made from a sharpened serving spoon. Muhammad inflicted more than a dozen wounds on Burke, including a fatal wound to the heart. The weapon was bent during the attack, but Muhammad 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, Muhammad ceased his efforts and dropped the knife into a trash box.

Muhammad v. State, 494 So. 2d 969, 970 (1986). On October 26, 1982, the jury rendered a verdict of guilty (R. 1502).

On November 4, 1982, Mr. Muhammad entered the Bradford County courtroom prepared to proceed before the jury with the penalty phase of his trial. The courtroom, with seating for 80, had been packed with more than 100 uniformed correctional

officers (PC-R2. 1154-58). Mr. Muhammad clearly indicated on the record that he was intimidated and overwhelmed by their presence, as he assumed the jury would be (R. 1522, 1524). One reporter's account termed the scene "ominous" and noted this was the second time during the trial that DOC officers had showed up en masse (PC-R2. 1154-58).

Mr. Muhammad, acting as his own counsel, requested that the State do something about it. The State did not. Defense counsel asked that the court do something about it -- remove them. The court refused. Mr. Muhammad insisted that the overwhelming presence of the Department of Corrections employees in the courtroom was affecting him and chilling his right to an impartial jury penalty recommendation (R. 1524). As a result of these coercive circumstances, the jury was "waived" (R. 1526). Mr. Muhammad waived his right to a jury during the penalty phase and presented no evidence in mitigation (R. 1517, 1525, 1542).

On January 20, 1983, without a jury recommendation, Judge Chance imposed the death sentence (R. 1584-85).

On direct appeal, this Court affirmed. Muhammad v. State,494 So. 2d 969 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987).

On February 23, 1989, Mr. Muhammad filed a Rule 3.850 motion and on April 24, 1989, Mr. Muhammad filed his Consolidated Motion for Evidentiary Hearing, Supplement to and in Support of Motion for Rule 3.850 Relief, and Proffer in Support of Motion for Evidentiary Hearing and Motion to Vacate together with an Appendix.

On August 31, 1989, the trial court summarily denied relief

(PC-R. 1378-84). Mr. Muhammad timely appealed.

On June 11, 1992, this Court ordered that an evidentiary hearing be held on Mr. Muhammad's claims that the State violated Brady v. Maryland, 373 U.S. 83 (1963). See Muhammad v. State, 603 So. 2d 488, 490 (Fla. 1992).

An evidentiary hearing was held June 12 and June 13, 2000. On May 8, 2001, Judge Chance, who presided over Mr. Muhammad's trial in 1982, and originally sentenced Mr. Muhammad to death, entered his Order Granting Motion for Post-Conviction Relief in Part, vacating the death sentence and found that a new sentencing hearing was required (PC-R2. 904-11).

On appeal, this Court reversed the circuit court's order as to the grant of relief. State v. Muhammad, 866 So. 2d 1195 (Fla. 2003).

Mr. Muhammad filed a petition for writ of habeas corpus in federal district court on January 18, 2005. On March 29, 2007, the federal district court denied the petition. Muhammad v. McDonough, 2008 U.S. Dist. LEXIS 23939.

Mr. Muhammad appealed to the Eleventh Circuit Court of Appeals. On January 9, 2009, the Eleventh Circuit denied Mr. Muhammad a certificate of appealability. Muhammad v. Sec'y., Dept. of Corrs., 554 F.3d 949 (11th Cir. 2009). And, on January 25, 2010, the United States Supreme Court denied review. Muhammad v. McNeil, 559 U.S. 906 (2010).

While Mr. Muhammad's appeal proceeded in federal court, on July 28, 2008, he filed a successive 3.851 motion concerning the constitutionality of lethal injection (PC-R3. 1-32). On

September 9, 2008, the circuit court denied relief (PC-R3. 49-50).

Mr. Muhammad appealed to this Court. After briefing, by order, this Court denied all relief. Muhammad v. State, 22 So. 3d 538 (Fla. 2009).

On October 21, 2013, Governor Scott signed Mr. Muhammad's warrant and his execution was scheduled for December 3, 2013.

On October 23, 2013, a status hearing was conducted before the Honorable Robert E. Roundtree, Chief Judge for the Eighth Judicial Circuit. At the hearing, Mr. Muhammad was directed to file his Rule 3.851 motion by 4:00 p.m. on October 29, 2013. The State was directed to respond by 4:00 p.m. on October 30, 2013; and a case management conference was scheduled for 9:00 a.m. on October 31, 2013, before the Honorable Ysleta W. McDonald.

Mr. Muhammad filed public record requests pursuant to Rule 3.852(h)(3) and (i) on October 24 and 25, respectively (PC-R4. 5-6, 7-8, 9-10, 11-12, 13-14, 15-16, 74-79, 80-85, 86-91, 92-97, 98-123, 124-149). Agencies to which the public records requests were directed filed responses and objections (17-35, 69-73, 389-398, 399-404, 411-470, 471-473).

Mr. Muhammad filed his Rule 3.851 motion and appendix to the motion on October 29, 2013 (PC-R4. 150-218, 219-388). The State responded the following day (PC-R4. 476-505).

Mr. Muhammad also filed a Motion for Stay; a Motion to Allow Access to Execution Scheduled for November 12, 2013, and Autopsy (PC-R4. 508-510, 511-514, 515-516).

On October 30, 2013, Mr. Muhammad learned that his case had

been reassigned to the Honorable Phyllis M. Rosier, without explanation (PC-R4. 474).

The case management conference was held on October 31, 2013 (T. 1-144). Mr. Muhammad addressed the claims included in his Rule 3.851 motion and his public record requests and motions (T. 1-144).

The circuit court orally ruled on Mr. Muhammad's motion, citing her reasoning for the denial of all relief in open court on October 31, 2013 (PC-R4. 135-141).

On November 4, 2013, Mr. Muhammad received a written order that differed markedly from the circuit court's oral pronouncement (PC-R4. 535-545).

The following day, Mr. Muhammad filed a motion for rehearing (PC-R4. 548-562). The motion was denied a few hours later (PC-R4. 566-567), and Mr. Muhammad timely filed his notice of appeal (PC-R4. 568-569).

SUMMARY OF THE ARGUMENT

1. Mr. Muhammad has been denied due process by the complete denial of discovery, including the denial public records and access to evidence and information. The rules and law support Mr. Muhammad's requests, yet, the circuit court disregarded them in denying Mr. Muhammad's requests.

2. The circuit court erred in summarily denying Mr. Muhammad's claims that Florida's current lethal injection procedure violates the eighth amendment.

3. Mr. Muhammad was denied due process throughout his clemency proceeding when the State interfered with his counsel.

Further, the denial of a clemency hearing due to Mr. Muhammad's medical condition and the decision to execute Mr. Muhammad at a time when his medical condition became inconvenient for the State, demonstrates that the proceeding was in no way fair or reasoned.

4. Because of the inordinate length of time that Mr. Muhammad has spent on death row, spending years in solitary confinement, 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, as well as binding norms of international law.

5. The Timely Justice Act is unconstitutional in that it violates the separation of powers.

6. Mr. Muhammad is a paranoid schizophrenic. It violates the eighth amendment to execute him when he suffers from a severe mental illness.

STANDARD OF REVIEW

The circuit court summarily denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999).

Furthermore, because the claims presented in this appeal are constitutional issues involving mixed questions of law and fact *de novo* is required. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

ARGUMENT I

MR. MUHAMMAD WAS DENIED DUE PROCESS THROUGHOUT HIS POSTCONVICTION PROCEEDINGS. THE PROCEEDINGS BELOW WERE NEITHER FULL NOR FAIR.

I. THE HISTORY OF PUBLIC RECORDS

A. AVAILABILITY OF PUBLIC RECORDS TO CAPITAL DEFENDANTS IN COLLATERAL PROCEEDINGS

In Tribune v. Public Records, 493 So. 2d 480, 482 (Fla. 2nd DCA 1986), review denied 503 So. 2d 327 (Fla. 1987), public records were sought by two capital collateral defendants and two newspapers.[1] As the court there explained:

> Because of great public interest in the cases, including questions about the identity of the victim, several parties (including Miller and Jent who believed the requested information might exonerate them) sought access via the Public Records Act to the Miller and Jent case files held by the Pasco County Sheriff.

The Pasco County Sheriff then turned to the courts for guidance in responding to the public records requests:

> In a quandary about the several requests for public disclosure, the Pasco County Sheriff, custodian of the records, filed an action for declaratory judgment in Pasco County Circuit Court asking whether the records sought were exempt from disclosure to the public as active criminal investigative information pursuant to section 119.07(3)(d), Florida Statutes (1985), and whether Miller's and Jent's actions for post-conviction relief were appeals within the meaning of section 119.011(3)(d) 2, Florida Statutes (1985). The appellants, and others, were granted leave to intervene in the action before the circuit court.

This led to the decision that criminal investigative files were

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[1]Ernest Miller and William Jent had been convicted of first degree murder and sentenced to death in 1979. After the public records were provided to them, they were successful in seeking a new trial in federal habeas proceedings on the basis of violation of Brady v. Maryland.

closed, and thus discoverable public records, when a criminal conviction as to the criminal investigation was final. The court explained its reasoning as follows:

> If we follow the circuit court's reasoning, in order for Miller and Jent to acquire access to the custodian's secret information they must cease all post-conviction attacks on their convictions. Miller and Jent, however, seek the secret information for the very purpose of determining whether they were fairly treated by the criminal justice process. **To require them to cease all efforts to aid themselves by attacking their convictions, in order to find out whether the secret information will help them, puts them between a real-life Scylla and Charybdis. Miller and Jent are faced with an insoluble dilemma: they cannot help themselves without the information, yet they must not help themselves in order to obtain it.**
>
> On the other hand, **to restrict the public's access to the information depending upon whether (or when) Miller and Jent (or others on their behalf, now or even after they are executed, if executed they will be) seek post-conviction relief borders on obfuscation.** The limited purpose of the exemption for active criminal investigative information-to protect the apprehension and prosecution of persons accused of crime-has been fully satisfied in this case. Cannella, 438 So.2d at 523. Miller and Jent were long ago arrested, investigated, indicted, tried and convicted. **To lockstep the public's right to know depending on what Miller and Jent have done or might do simply goes beyond the bounds of reason. Once public records are open for inspection they cannot be withdrawn by subsequent court challenge.** Cannella, 458 So.2d at 1079.
>
> The public policy pervading this case is that public records must be freely accessible unless some overriding public purpose can only be secured by secrecy. Lorei v. Smith, 464 So.2d 1330, 1332 (Fla. 2d DCA 1985). **This public policy favoring open records must be given the broadest expression. Id. It is the exception which must be narrowly construed.** Bludworth, 476 So.2d at 780, n. 1.

Tribune, 493 So. 2d at 484 (emphasis added). Thus, the pendency of collateral proceedings did not render the records exempt from disclosure pursuant to a public records request.

This understanding of the provisions of Chapter 119 was adopted by this Court in State v. Kokal, 562 So. 2d 324 (Fla. 1990). There, Mr. Kokal's capital collateral counsel sought to obtain the trial prosecutor's files regarding Mr. Kokal's conviction after the Governor had signed a death warrant scheduling Mr. Kokal's execution.[2] The request had been made in order to facilitate the preparation of a Rule 3.850 motion:

> Thereafter, Kokal filed a motion for postconviction relief. Pending a hearing on this motion, Kokal moved to compel disclosure of the files of the state attorney pertaining to his prosecution under chapter 119, Florida Statutes (1987). In his motion, Kokal alleged that he had formally requested access to these files prior to filing his motion for postconviction relief and that thereafter the state attorney had declined to provide his lawyer with access to these files. The court stayed the postconviction hearing and ordered the state attorney to provide access to the files.

State v. Kokal, 562 So. 2d at 325.

One week after this Court's decision in Kokal, it issued its decision in Provenzano v. Dugger, 561 So. 2d 541, 543 (Fla. 1990):

> After the governor signed a death warrant, Provenzano filed a petition for postconviction relief under Florida Rule of Criminal Procedure 3.850. The trial court denied the motion without holding an evidentiary hearing. Provenzano appealed the order of denial to this Court and also filed with us a petition for habeas corpus. In order to give these matters full consideration, we entered an order staying Provenzano's

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[2]At that time, the Governor often signed death warrants before collateral proceedings had even been initiated. When Mr. Kokal's warrant was signed a Rule 3.850 motion had not been prepared, let alone filed. Under the Rule 3.851 (long since replaced), a capital defendant was required to file his Rule 3.850 motion within 30 days of the signing of 60 day or longer death warrant. It was in that 30 day period that Mr. Kokal's public records requests at issue in State v. Kokal were made.

execution.

Mr. Provenzano unsuccessfully sought public records from the State while preparing a Rule 3.850 motion. Without obtaining the public records, Mr. Provenzano pled a Brady claim in the Rule 3.850 motion, but within that claim said the it could not be fully pled until the public records were actually disclosed.[3] This Court explained:

> Provenzano makes no factual allegations in support of his contention that the prosecutor withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Rather, he contends that the court erred in refusing to require the state attorney to provide access to the state attorney's file on Provenzano's prosecution under the public records law, chapter 119, Florida Statutes (1989). Provenzano asserts that had his request to examine the state attorney's file been granted, he would then have been in a position to make specific Brady allegations. At this Court's request, the parties submitted supplemental briefs on this issue.
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> The state justifies the refusal to provide access to the state attorney's file upon section 119.07(3)(d), Florida Statutes (1989), which exempts the disclosure of active criminal investigative information and section 119.07(3)(o), Florida Statutes (1989), which exempts certain portions of attorney work product from disclosure until the conclusion of litigation. The state contends that both exemptions apply because Provenzano has now filed a motion for postconviction relief.

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[3]As was the situation in State v. Kokal, the Governor signed Mr. Provenzano's death warrant before a Rule 3.850 motion had been prepared, let alone filed. Under the provision of then Rule 3.851, Mr. Provenzano had 30 days from the date the warrant was signed to file his Rule 3.850 motion and petition this Court for a writ of habeas corpus. Thus even in non-successor Rule 3.850 proceedings, this Court's rulings in State v. Kokal and Provenzano v. Dugger meant that all public records requests and public records disclosures had to be made early in the 30 day period provided under then Rule 3.851, so that the Rule 3.850 motion could be prepared, completed and filed within 30 days of the signing of the warrant.

> However, this Court has recently rejected these arguments in State v. Kokal, 562 So.2d 324 (Fla. 1990). Relying upon the rationale of Tribune Co. v. Public Records, 493 So.2d 480 (Fla. 2d DCA 1986), review denied, 503 So.2d 327 (Fla.1987), we held that criminal investigative information with respect to a defendant is no longer active when his conviction and sentence have become final. We also held that the exemption under section 119.07(3)(d) expired when the defendant's conviction and sentence became final.
>
> Thus, it appears that a substantial portion of the state attorney's files on Provenzano may be obtained under chapter 119. We recognize that as in Tribune Co., the ordinary legal recourse for obtaining public records is through a civil action. However, **where a defendant's prior request for the state attorney's file has been denied, we believe that it is appropriate for such a request to be made as part of a motion for postconviction relief. If nothing else, this will avoid the necessity of two separate actions.** In the event a disclosure is ordered, the defendant will then have an opportunity to amend his motion to allege any Brady claims which might be exposed.

Provenzano v. Dugger, 561 So. 2d at 546-47.

Shortly after this Court's decision in Provenzano, this Court issued its opinion in Jennings v. State, 583 So. 2d 316 (Fla. 1991). There following the signing of a death warrant, Mr. Jennings sought public records in order to investigate constitutional claims that could be presented in a Rule 3.850 motion. Some public records were disclosed, while some were withheld. While denying most of Mr. Jennings' Rule 3.850 claims, this Court found merit in Mr. Jennings' public records claim:

> We do find merit in Jennings' next claim that he is entitled to certain portions of the state's files as public records under chapter 119, Florida Statutes (1989). In State v. Kokal, 562 So.2d 324, 327 (Fla.1990), we held that
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> > that portion of the state attorney's files which fall within the provisions of the Public Records Act are not exempt from disclosure because Kokal's conviction and sentence have become final. Thus,

> the state attorney should have provided Kokal with these records upon his request. If he had a doubt as to whether he was required to disclose a particular document, he should have furnished it in camera to the trial judge for a determination. Of course, the state attorney was not required to disclose his current file relating to the motion for postconviction relief because there is ongoing litigation with respect to those documents.
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> Therefore, in accordance with Provenzano v. Dugger, 561 So.2d 541 (Fla.1990), the two-year time limitation of rule 3.850 shall be extended for sixty days from the date of the disclosure solely for the purpose of providing Jennings with the time to file any new Brady claims that may arise from the disclosure of the files.

Jennings v. State, 583 So. 2d at 319.

Because of this Court's decisions in Kokal and Provenzano allowing public records requests to be used as a discovery tool by collateral counsel when preparing Rule 3.850 motions, a number of capital defendants had either their conviction or death sentence vacated pursuant to Rule 3.851. See Roman v. State, 528 So. 2d 1169 (Fla. 1988); Gorham v. State, 597 So. 2d 782 (Fla. 1992); Garcia v. State, 622 So. 2d 1325, 1330 (Fla. 1993); Young v. State, 739 So. 2d 553 (Fla. 1999); Roger v. State, 782 So. 2d 373 (Fla. 2001); Hoffman v. State, 800 So. 2d 174 (Fla. 2001); Cardona v. State, 826 So. 2d 968 (Fla. 2002); Mordenti v. State, 894 So. 2d 161 (Fla. 2004); Floyd v. State, 902 So. 2d 775 (Fla. 2005); Johnson v. State, 44 So. 3d 51 (Fla. 2010); Swafford v. State, – So. 3d – (Fla. November 7, 2013).[4]

[4]This list is not exhaustive. Under the time parameters imposed by this Court due to the pending death warrant, undersigned counsel does not have the resources to conduct an exhaustive search for all capital defendants to have benefitted from access to the public records of state agencies involved in the criminal prosecution. Besides the case cited here, counsel

Federal habeas relief issue to James Agan on the basis of the public records disclosed by the Department of Corrections. Agan v. Singletary, 12 F.3d 1012, 1015-16 (11th Cir. 1994). Mr. Agan's case, just like Mr. Muhammad's case, arose from a prison killing at Florida State Prison in 1980.[5] A mentally ill Mr. Agan confessed to the murder and pled guilty.[6] He was then

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is aware that at least three capital defendants received Rule 3.850 relief from the circuit court, and either the State chose not to appeal, or this Court summarily affirmed without written opinion. These three individuals were Ernesto Suarez, who received relief in 1989, Juan Melendez, who received relief in 2001, and Rudolph Holton, who received relief in 2001 which was summarily affirmed by this Court in 2002.

[5]The homicide in Agan occurred on September 19, 1980, while the homicide at issue in Mr. Muhammad's case occurred at the same prison less than a month later on October 12, 1980. See Agan v. State, 445 So. 2d 326 (Fla. 1983); Muhammad v. State, 494 So. 2d 969 (Fla. 1986). Both homicides were investigated by the same employees of the Department of Corrections.

[6]The Eleventh Circuit set forth the evidence of Mr. Agan's mental problems as follows:

> A brief review of Agan's mental health records by either Stinson or Futch would have, at the very least, revealed that: (1) Agan's military records reflect various blackout incidents; (2) Agan was diagnosed as psychotic by three psychiatrists in the 1950's while he was incarcerated at the Georgia State Prison; (3) in 1956, Agan was transferred to Milledgeville State Hospital in Georgia for psychiatric examination and treatment; (4) while at Milledgeville, Agan received eighty-one electric shock treatments-standard procedure at the time for a person with a psychotic illness; (5) one Milledgeville psychiatrist diagnosed Agan as a low-grade psychopathic personality bordering on high grade mental deficiency while another doctor at Milledgeville diagnosed Agan as having psychoneurosis anxiety reaction with psychotic episodes.

Agan v. Singletary, 12 F.3d at 1015.

sentenced to death. During a federal evidentiary hearing in 1988, Mr. Agan's collateral counsel discovered that the prison investigator who had investigate the murder at issue was in possession of a file that had not been turned over to either Mr. Agan's trial or collateral counsel. See Agan v. State, 560 So. 2d 222 (Fla. 1990). Following the discovery of the file's existence, it was obtain by Mr. Agan's collateral counsel through a public records request.[7] The previously undisclosed file contained investigative notes concerning Michael Gross who had been threatening to kill the victim unless the victim paid him money and the fact that there was a witness who may have observed Gross commit the murder. Agan v. Singletary, 12 F.3d at 1015-16. On the basis of the fact that Mr. Agan's trial counsel was never apprised of the information contained in the undisclosed investigative file, Mr. Agan's conviction was vacated and federal habeas relief issued.[8]

It is clear that following Tribune v. Public Records that public records requests became an important tool for capital collateral counsel to pursue while investigating constitutional

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[7]By this time, this Court had affirmed the denial of Mr. Agan's first Rule 3.850 motion. Agan v. State, 503 So. 2d 1254 (Fla. 1987).

[8]The Agan case involved a murder at the same prison at virtually the same time and involved the same prison investigator as Mr. Muhammad's case. And Mr. Muhammad, like Mr. Agan, had a documented history of mental illness. The failure to disclose the investigative file in Agan to either trial counsel or collateral counsel until Mr. Agan's stumbled upon it during a federal evidentiary hearing should warrant extra care in Mr. Muhammad's case to make sure that similar misconduct did not occur in his case.

claims to be raised in a Rule 3.850 motion. As a result of public records requests, a number of capital collateral defendants received collateral relief. Certainly, it is in the public interest to have valid constitutional claims discovered and relief granted when warranted. It increases the public's confidence in the reliability of a judgment and sentence when an execution is carried out in the State of Florida. In White v. State, 664 So. 2d 242, 245 (Fla. 1995) (Anstead, J., dissenting), Justice Anstead, joined by Justices Kogan and Shaw, wrote:

> The thoroughness and quality of this Court's review is relied upon by our society as an important safeguard for preventing executions where a serious question remains as to the fairness of the proceedings leading up to the imposition of the death penalty. That reliance is to be expected, even though it places an enormous burden on this Court.

Thus, collateral counsel, this Court, and state agencies bear an enormous burden in order to insure the reliability of the decision to carry out an execution.

B. AVAILABILITY OF PUBLIC RECORDS IN SUCCESSIVE UNDER WARRANT COLLATERAL PROCEEDINGS

Not only did this Court require public records disclosed to capital collateral counsel prior to the filing of the initial Rule 3.850 motion, this Court also held that collateral counsel was entitled to access to public records before filing a successor Rule 3.850 motion under the exigencies of a death warrant. In Roberts v. State, 678 So. 2d 1232 (Fla. 1996), public records had been obtained before Mr. Roberts' first Rule 3.850 motion was filed in 1989. When a death warrant was signed in early 1996, Mr. Roberts again sought access to the public

records to make sure everything had previously been turned over and in light of the affidavit obtained from a State's witness at trial indicating that Brady impeachment evidence had been withheld from trial counsel. This Court granted a stay of execution and reversed the summary denial of Rule 3.850 relief. This Court explained:

> We also find error as to the public records issue. Roberts claims that the State obstructed his efforts to depose witnesses regarding public records and withheld other public records. After this Court denied the state attorney's petition to review the order relating to Roberts' public records request,[9] we ordered that the depositions proceed forthwith and that any proceedings pending in the trial court be transferred to the criminal division of the circuit court where Roberts' rule 3.850 motion would be considered. When several deponents refused to answer questions on the advice of the state attorney, Roberts' counsel certified the questions and filed a motion to compel the deponents to answer. The State filed a motion to transfer the proceedings to the original trial judge. Based upon this Court's order, the administrative judge who heard the State's motion granted the motion to transfer and refused to hear the public records issue. Thus, Roberts raised the deposition issue in his 3.850 motion.
>
> The State contends that the certified questions exceed the scope of the public records deposition and made this same argument at the hearing below. It is apparent from the transcript of the hearing that the judge denied this claim without reviewing the questions to determine if the deponents should be compelled to answer. The trial court is the appropriate place for the initial evaluation of the merits of a rule 3.850 motion. Parker v. Dugger, 660 So.2d 1386, 1389 (Fla.1995). Thus, on remand the court should make a determination as to the certified questions.
>
> The court's failure to hold an evidentiary hearing and

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[9]This Court's order affirming the circuit court's order directing the State to provide Mr. Roberts' collateral counsel access to public records under warrant and in anticipation of a the filing of a successive Rule 3.850 motion appears at Office of the State Attorney v. Roberts, 678 So. 2d 1232 (Fla. 1996).

> to consider the public records issue is exacerbated by the nature of the order entered here. Rule 3.850(d) requires that "[i]n those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief shall be attached to the order." While we have found failure to attach the pertinent portion of the files and record not to be reversible error in some instances, see, e.g., Goode v. State, 403 So.2d 931, 932 (Fla.1981) (finding trial court's order denying relief not procedurally defective where it referenced specific pages of record in lieu of attachment of portion of files and record), we cannot reach that conclusion in this case. Here, the order denies Roberts' motion for postconviction relief after "having considered the Motion [to Vacate Judgment and Sentence], the State's Answer thereto, the files and records in this cause, and arguments of counsel, and being otherwise fully advised in the premises." There are no records or files attached, no citation to the portions of the record that the judge relied upon in denying relief, nor any explanation for the basis of the court's ruling. Thus, we can only speculate as to the court's basis for denying the motion.
>
> For the reasons expressed above, we remand this cause to the Circuit Court of the Eleventh Judicial Circuit for an evidentiary hearing on the issue of Haines' recanted testimony and for consideration of the public records issue. The court is directed to conduct this hearing within sixty days of this opinion. We have by separate order issued a stay of Roberts' execution.

Roberts v. State, 678 So. 2d at 1235-36.

In White v. State, 664 So. 2d 242 (Fla. 1995), collateral counsel sought public records from the State after a death warrant was signed in order to investigate whether all public records had previously been disclosed in preparation for filing a successive Rule 3.850 motion. Under the exigencies of a pending death warrant, access to public records was provided and previously undisclosed records were discovered. On the basis of the previously undisclosed records, collateral counsel presented a Brady claim in a successive Rule 3.850 motion. The State

conceded that the records in question had inadvertently not been disclosed previously and stipulated to collateral counsel's diligence, as this Court explained:

> White asserts that the trial court erred in denying relief on his claim under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that the State withheld exculpatory evidence. For purposes of expediency, the State conceded below that the materials in issue constituted newly discovered evidence cognizable under rule 3.850.

White v. State, 664 So. 2d at 243.

In Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995), collateral sought public records from the State after a death warrant was signed in order to investigate whether all public records had previously been disclosed. At that time, the State asserted that it did have documents, not previously disclosed, that it asserted were not public records. These documents were submitted to the circuit court for in camera review. On appeal, this Court affirmed saying:

> We agree that the public records claim is not procedurally barred. Nevertheless, we have independently reviewed the materials in question and find (a) that they constitute notes of the State Attorney's investigations, and annotated photocopies of decisional law, both of which are exempt from public disclosure because they are not "public records," State v. Kokal, 562 So.2d 324, 327 (Fla.1990), and (b) that in any event Atkins could not have been prejudiced by withholding of the materials in question because they were of no use to his defense and in fact tended to refute Atkins' theory of the case.

Atkins v. State, 663 So. 2d at 626.

In Medina v. State, 690 So. 2d 1241 (Fla. 1997), collateral sought public records from the State after a death warrant was signed in order to investigate whether all public records had

previously been disclosed. There, the State conceded that not all public records had previously been disclosed. The previously undisclosed records were discovered when the State complied with the new under warrant public records request. On the basis of the newly disclosed records, collateral counsel presented a Brady claim. Though the majority of this Court affirmed the summary denial of this Brady claim, Justice Anstead, joined by Justices Shaw and Kogan, wrote:

> It is undisputed at this point that the State possessed evidence that implicated Joseph Daniels in the murder and failed to disclose this evidence to the defendant. In fact, and incredible as it now appears, the record actually demonstrates that the State represented on the record in earlier postconviction proceedings that absolutely everything in its files was furnished to the defendant. That "everything" was actually packaged together and placed in the record. However, recently, and to the State's credit, it has acknowledged that not "everything" was furnished at that time.

Medina v. State, 690 So. 2d at 1252 (Anstead, J., dissenting).[10]

C. AVAILABILITY OF PUBLIC RECORDS IN METHODS LITIGATION

This Court has authorized collateral counsel for capital defendants to have access to public records, not just for the investigation of challenges to the trial proceedings. Access to public records has also been permitted in connection with the investigation of method of execution challenges. In Jones v.

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[10]After Judy Buenoano's death warrant was signed, her collateral counsel also sought and obtained public records from state agencies that had previously provided public records in order to ascertain whether all the available public records had been previously provided to collateral counsel. When the State Attorney inadvertently disclosed confidential records, it appealed to this Court to have those documents returned. See State v. Buenoano, 707 So. 2d 714 (Fla. 1998).

Butterworth, 695 So. 2d 679 (Fla. 1997), this Court noted that Mr. Jones' collateral counsel had been provided access to the newly adopted protocol for executions in the electric chair, as well as documents from the execution of Pedro Medina. Because counsel for Mr. Jones had not received full access to the records in preparation for the evidentiary hearing that had been conducted, the case was remanded so that the evidentiary hearing could be reopened in order to permit counsel to have a full opportunity to use the public records in litigating the constitutionality of the electric chair. Following the second remand, this Court noted:

> By subsequent order, we permitted Jones's experts to examine Florida's electrocution equipment and to witness the testing thereof by appropriate Florida officials. We also permitted Jones's attorneys to have access to certain requested evidentiary items concerning Medina's execution.

Jones v. State, 701 So. 2d 76, 77 (Fla. 1997). Though this Court affirmed the circuit court's conclusion that the electric chair was not unconstitutional, this was only after providing Mr. Jones' collateral counsel access to the public records necessary for a full and fair hearing on the issue.

Subsequently when modifications were made to the electric chair, collateral counsel for Thomas Provenzano presented a new challenge to the electric chair based upon newly disclosed public records. Provenzano v. State, 739 So. 2d 1150 (Fla. 1999). While affirming the summary denial of the challenge to Florida's electric chair, this Court wrote:

> However, we deem it appropriate that the results of any and all tests and any other records generated relating

> to the operation and functioning of the electric chair be promptly submitted to this Court, the Attorney General's Office, the regional offices of the Capital Collateral Regional Counsel (CCRC), and the capital cases statewide registry of attorneys, on an ongoing basis. By this, we contemplate an open file policy relating to any information regarding the operation and functioning of the electric chair. In light of the recent history regarding the execution of persons sentenced to death, we further direct DOC to certify prior to the execution of Provenzano and all other inmates under death warrant that the electric chair is able to perform consistent with the "Execution Day Procedures" and "Testing Procedures for Electric Chair." DOC must send copies of this certification to the Attorney General's Office and the attorney representing the inmate under death warrant.

Provenzano v. State, 739 So. 2d at 1154.[11]

Following the issuance of the Provenzano v. State opinion, Allen Davis was executed. Due to problems during that execution, this Court stayed Mr. Provenzano's execution and ordered an evidentiary hearing on his challenge to the constitutionality of Florida's electric chair. Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999). Pursuant to this Court's ruling in Provenzano v. State, 739 So. 2d at 1154, DOC was required to disclose all public records concerning the Davis execution to collateral counsel for Mr. Provenzano. After the evidentiary hearing had been conducted and the circuit court denied relief, this Court by

[11]The execution of Allen Davis was schedule for the day after Mr. Provenzano's execution. Collateral counsel for Mr. Davis presented the same electric chair challenge that Mr. Provenzano presented. In denying Mr. Davis' claim, this Court relied upon and adopted its ruling in Provenzano. Davis v. State, 742 So. 2d 233, 236 (Fla. 1999). Subsequently, Mr. Provenzano's execution was delayed until after Mr. Davis' execution. As a result, Mr. Provenzano was then able to litigate the constitutionality of the electric chair in light of the events occurring during Mr. Davis' execution.

a 4-3 margin affirmed.

After issuing its opinion in Provenzano v. Moore, this Court rejected an identical claim in an unpublished order in Bryan v. Moore, 744 So. 2d 452 (1999). With a death warrant pending and his execution imminent, Bryan sought certiorari review in the US Supreme Court. On October 26, 1999, the US Supreme Court issued a stay and a writ of certiorari in order consider the constitutional challenge to Florida's electric chair. Bryan v. Moore, 528 U.S. 960 (1999). In the wake of the US Supreme Court's action, Governor Bush convened a special legislative session to consider a change to Florida's method of execution. At that time, lethal injection was adopted. Because of the change in method of execution, the US Supreme Court dismissed the writ of certiorari. Bryan v. Moore, 528 U.S. 1133 (2000).

Following the adoption of lethal injection as Florida's method of execution, an Eighth Amendment challenge to lethal injection was heard in Sims v. State, 754 So. 2d 657 (Fla. 2000). Mr. Sims was the first execution scheduled following the adoption of lethal injection. Mr. Sims' collateral counsel was provided full access to the public records concerning the procedures that DOC adopted to carry out a lethal injection so that Mr. Sims could present his constitutional challenge and have a full and fair evidentiary hearing on that challenge. Indeed, this Court when hearing Mr. Sims' subsequent appeal wrote:

> The record reveals that Sims obtained a copy of the "Execution Day Procedures" created by the Florida Department of Corrections (DOC) on January 28, 2000.FN16 The record also indicates that the DOC disclosed to Sims on February 7, 2000 the chemicals to

> be used during the execution. At the evidentiary hearing, the State presented three witnesses from the DOC who provided specific details about the chemicals to be administered and the procedure for carrying out the execution.FN17 Sims' attorney had full and fair opportunity to question these witnesses about their knowledge of the procedure and their respective roles in administering the lethal injection. Finally, the record reflects that the trial court set aside several days for the hearing and gave the defense considerable latitude in presenting witnesses.

Sims v. State, 754 So. 2d at 665-66.

Following the execution of Angel Diaz in December of 2006, CCRC-South filed a petition in this Court on behalf of all of its clients challenging the State's lethal injection procedures based on the circumstances of Diaz' execution. Because Ian Lightbourne's name was the first named petitioner, this Court relinquished jurisdiction and remanded the matter to the circuit court for an evidentiary hearing in an unpublished order. This was subsequently explained in Lightbourne v. McCollum, 969 So. 2d 326, 329 (Fla. 2007), in the following fashion:

> On December 14, 2006, this Court entered an order allowing Lightbourne to designate a representative to attend the Diaz autopsy and relinquishing jurisdiction to the circuit court for an immediate determination of Lightbourne's request for an independent autopsy and "all other issues raised" by Lightbourne. By our order of December 14, 2006, we essentially ruled on two of Lightbourne's requests in his petition, first by addressing the issue of the autopsy and then by relinquishing to the trial court to decide the issues that required factual development.

In Lightbourne v. McCollum, this Court outlined the resulting proceedings in circuit court which provided Mr. Lightbourne's collateral counsel with access to all of the public records in DOC's possession regarding the Diaz execution and the adoption of the lethal injection protocol and proposed revisions

to the protocol as follows:

> Although this Court relinquished jurisdiction in the Lightbourne proceedings in December 2006, the trial court appropriately waited until after the Governor's Commission studied the matter and issued its report before it held evidentiary hearings on the claims raised. **The evidentiary hearings lasted thirteen days, and approximately forty witnesses testified, resulting in a record exceeding 6,500 pages.** The testimony and evidence focused on three main topics: (1) whether Diaz suffered pain during his execution; (2) what deficiencies existed in the lethal injection procedures and how those alleged deficiencies contributed to the complications; and (3) whether the risk of pain in future executions had been sufficiently minimized by changes made to the protocol as a result of the Diaz execution.
>
> On July 22, 2007, **the trial court verbally issued a temporary stay of any death warrant for Lightbourne and ordered the State to revise its lethal injection procedures in accord with the DOC's testimony about anticipated revisions to the protocol and the trial court's comments.** The trial court expressed its concerns regarding the qualifications, training, licensure, and credentials for members of the execution team. The trial court commented on the need for training for contingencies, as well as the need for creating checklists, providing for periodic review of DOC procedures, providing for certification of readiness by the DOC to carry out an execution according to the protocol, and providing clear directions that any observed problems or deviations from the protocols should be immediately brought to the attention of the warden.
>
> **The DOC again revised its lethal injection procedures in response to the trial court's comments and in line with its anticipated revisions, submitting its revised procedures** (the "August 2007 procedures") which provided more detail as to the qualifications of the execution team members, more clarification that the warden is to ensure that the team members are properly trained, and procedures that require the team members to report any problems or concerns to the warden. After this revision, the parties were allowed to present additional evidence to the trial court.

Lightbourne v. McCollum, 969 So. 2d at 330-31 (emphasis added).

Thus, after the disclosure of all public records, over 13 days of

testimony and court ordered revisions in DOC's lethal injection protocol, the circuit court denied Lightbourne's constitutional challenge to Florida's lethal injection procedures. Lightbourne appealed. This Court affirmed saying:

> After considering the findings of the DOC investigative teams, the findings of the Governor's Commission, the most recently adopted procedures, and all of the witnesses and evidence presented below, the trial court concluded that there was no Eighth Amendment violation. Based on our analysis of the evidence presented as discussed above and, based on the application of the law to the evidence as discussed below, we agree.

Id. at 349.

This Court specifically noted that the Governor had created a commission to publicly "review the method in which the lethal injection procedures are administered by the Department of Corrections." Id. at 330. The transcripts of the proceedings conducted by the Commission were made available to Mr. Lightbourne's collateral counsel, as were the Commission's findings. The Commission found that during the execution of Diaz, DOC failed to follow its protocols, failed to ensure successful intravenous access and failed to have guidelines in place for handling complications. Id. It was the subsequent DOC's revisions to the procedures at the trial court's direction that "provided more detail as to the qualifications of the execution team members, more clarification that the warden is to ensure that the team members are properly trained, and procedures that require the team members to report any problems or concerns to the warden. Id at 331. It is noteworthy that the drugs used in the protocol remained the same as those that were identified

in Sims – sodium thiopental, pancuronium bromide and potassium chloride. Id at 345. Indeed, the Court specifically stated:

> It is important to review these claims in conjunction with each other since the chemicals used , the training and certification, and the assessment of consciousness all affect each other. ... In reviewing the alleged risk of an Eighth Amendment violaion, whether framed as a substantial risk, an unnecessary risk, or a foreseeable risk of extreme pain, the interactions of these factors must be considered.

Id. at 350-1.

On June 8, 2011, due to the shortage of sodium thiopental, DOC adopted a new lethal injection protocol. A death warrant was then signed for the execution of Manuel Valle. Thereupon, Mr. Valle's collateral counsel challenged the new protocol which replaced the first drug, sodium thiopental with another barbituate, pentobarbital. On the basis of this change, this Court entered a stay of execution and ordered an evidentiary hearing. See Valle v. State, 70 So. 3d 525, 525-6 (Fla. 2011). The Court also ordered DOC to disclose "correspondence and documents it has received from the manufacturer of pentobarbital concerning the drug's use in executions, including those addressing any safety and efficacy issues." Id. at 526.

D. THE ADVENT OF RULE 3.852

In 1996, this Court first proposed Rule 3.852 to govern the procedure for providing capital defendants in collateral proceedings the means of obtaining public records. See In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production, 673 So. 2d 483 (Fla. 1996). There, this Court wrote:

> In order to provide orderly procedures to govern the process of considering public records requests in the context of capital postconviction proceedings, the Court on its own motion has determined to promulgate a new Rule of Criminal Procedure, to be numbered rule 3.852.

Subsequently following the publication of the proposed rule and a comment period, this Court undertook to address objections to the proposed rule when it formally adopted the rule. There, this Court wrote:

> We specifically address the comments of those who are concerned that the rule will unconstitutionally limit a capital postconviction defendant's right to production of public records pursuant to article I, section 24, Florida Constitution, and chapter 119, Florida Statutes (1995). We conclude that the rule does not invade those constitutional and statutory rights.

In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production, 683 So. 2d 475, 475-76 (Fla. 1996). Justice Anstead, joined by Justices Grimes and Kogan, wrote in a special concurrence:

> As a practical matter, and for this rule to work as we hope, capital defendants should utilize this rule to conduct all discovery, including the discovery that was previously conducted pursuant to chapter 119, and the State and its agencies should respond to their obligations to provide discovery in accord with the spirit of Florida's open records policy. As noted by the majority opinion, **this rule in no way diminishes the right of an individual Florida citizen, including a capital defendant, to access to public records pursuant to article I, section 24, Florida Constitution, and chapter 119, Florida Statutes (1995).** Trial courts must be mindful of our intention that a capital defendant's right of access to public records be recognized under this rule. **If there is any category of cases where society has an interest in seeing that all available information is disclosed, it is obviously in those cases where the ultimate penalty has been imposed.**
>
> > In these proceedings, we have received many assurances of cooperation. **For example, the State and its agencies have indicated they will**

> **essentially follow an "open file" policy.** However, both sides have cited instances of adversary system abuses where gamesmanship and partisanship have worked to unreasonably delay the underlying proceedings or to obstruct the release of information. The intent of this rule is to eliminate these practices. While the trial court will have the supervisory responsibility to see that there is an orderly flow of information under the scheme we have devised, the ultimate success or failure of this rule will largely rest on the voluntary and good faith efforts of the parties to resist the pressures of partisanship.

Id. at 477 (emphasis added).

In 1998, the Florida Legislature created a records repository for public records in capital cases and repealed the version of Rule 3.852 then in effect. In response, this Court wrote:

> We turn now to other issues raised in this proceeding. To adequately address those issues, we must evaluate and apply the recently enacted legislation concerning CCRC. In Senate Bill 898, the legislature repealed rule 3.852 effective October 1, 1998. In Senate Bill 1330, the legislature directed that a repository for archiving capital postconviction public records must be established by the Secretary of State. Under that bill, a procedure is established for primarily executive branch agencies to send public records to the repository within a short time after this Court issues its mandate in a capital case. This process is intended to assist in eliminating the often lengthy disputes over public records production in capital cases that frequently involve those agencies.

Amendments to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production (Time Tolling), 719 So. 2d 869, 870 (Fla. 1998). Accordingly, this Court established a special committee charged with promulgating a new Rule 3.852 in light of the creation of the records repository.

A few months later, this Court adopted a new Rule 3.852 on an emergency basis. Amendments to Florida Rules of Criminal

Procedure -- Rule 3.852 (Capital Postconviction Public Records Production) and Rule 3.993 (Related Forms), 723 So. 2d 163 (Fla. 1998). When this Court finalized the revised Rule 3.852 following a comment period, this Court wrote:

> We intend for this rule to **serve as a basis for providing to the postconviction process all public records that are relevant or would reasonably lead to documents that are relevant to postconviction issues**. We emphasize that it is our strong intent that there be efficient and diligent production of all of the records **without objection** and without conflict....

Amendments to Florida Rules of Criminal Procedure -- Rule 3.852 (Capital Postconviction Public Records Production) and Rule 3.993 (Related Forms), 754 So. 2d 640, 642-43 (Fla. 1999)(emphasis added).

With this background in mind, it is clear that the position taken by the State and DOC below and accepted by the circuit court completely guts the principle first recognized in Tribune v. Public Records, which was subsequently adopted by this Court in State v. Kokal and Provenzano v. Dugger, and which was followed in multitude of cases throughout the 1990's and throughout the various methods of execution challenges presented in the past 15 years. Indeed, it was the underlying basis for the promulgation Rule 3.852. And now at direction of the Attorney General's Office, the State, DOC, and the Governor, all are using the language in Rule 3.852 to roll back Mr. Muhammad's constitutional and statutory rights to public records. With the circuit court's action in this case, denying Mr. Muhammad of access to any public records, the form of Rule 3.852 has been permitted to trump the substance, the right of access to public

records.

> The public policy pervading this case is that public records must be freely accessible unless some overriding public purpose can only be secured by secrecy. Lorei v. Smith, 464 So.2d 1330, 1332 (Fla. 2d DCA 1985). **This public policy favoring open records must be given the broadest expression. Id. It is the exception which must be narrowly construed.** Bludworth, 476 So.2d at 780, n. 1.

Tribune v. Public Records, 493 So. 2d at 484 (emphasis added). Given the number of capital defendants who have obtained Rule 3.850 relief due in whole or in part to their ability to access public records, it is clear the reliability of those sentences of death that have been carried out in the State of Florida have been enhanced by virtue of Tribune v. Publics and State v. Kokal and their progeny. In White v. State, 664 So. 2d 242, 245 (Fla. 1995) (Anstead, J., dissenting), Justice Anstead, joined by Justices Kogan and Shaw, wrote:

> The thoroughness and quality of this Court's review is relied upon by our society as an important safeguard for preventing executions where a serious question remains as to the fairness of the proceedings leading up to the imposition of the death penalty. That reliance is to be expected, even though it places an enormous burden on this Court.

Indeed, the thoroughness and reliability of the criminal justice system has been greatly improved through the use of Chapter 119 in capital collateral proceedings. Thus, the burden placed upon collateral counsel, this Court, and state agencies by virtue of Chapter 119 and its use to enhance the reliability of death sentences imposed in this State has been but a small price to pay to insure the reliability of the decision to carry out an execution.

However, it is now clear that the Attorney General's Office, the State, DOC and the Governor, no longer wish to carry the burden of open government. The promise that was made to this Court of an open file policy has been abandoned and forgotten. In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production, 683 So. 2d at 477 ("For example, the State and its agencies have indicated they will essentially follow an 'open file' policy."). The proceedings in circuit court quite clearly establish that there is no "open file" policy for Mr. Muhammad.[12]

II. MR. MUHAMMAD'S CASE

A. THE CIRCUIT COURT ERRED BY REFUSING TO GRANT MR. MUHAMMAD ACCESS TO PUBLIC RECORDS

On October 24 and 25, 2013, Muhammad sent public records requests, pursuant to rule 3.852(h)(3) and 3.852(i), to state agencies, including: the Florida Department of Corrections; the Florida Department of Law Enforcement; the Office of the State Attorney for the Eighth Judicial Circuit; the Miami-Dade Police

[12]Based upon the number of capital defendants who obtained collateral relief through public records and the number of hearings that have been required on method of execution claims due to problems in specific executions or changes in the protocol, the State clearly has come to believe that secrecy is the best policy. In order to keep convictions and death sentences intact, the State has learned to oppose public records request and to disclose the minimal that it can. This is hardly in keeping the principles enunciated in Berger v. United States, 295 U.S. 78, 88 (1935) (a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done").

Department; the Office of the State Attorney for the Eleventh Judicial Circuit; the Office of the Medical Examiner for the Eighth District; the Office of the Attorney General; the Florida Parole Commission; and the Executive Office of the Governor.

Only a single agency, the Miami-Dade Police Department, complied with Muhammad's request, stating that they conducted a search and that no new records existed. An affidavit was filed as required by the rule and notice was provided to the parties. However, all of the other agencies made a mockery of Florida's mantra and long-held desire for "government in the sunshine". The State's noxious game-playing and dilatory behavior when Mr. Muhammad's life is at stake is yet another example of the arbitrary and capricious nature of death penalty litigation and an attempt to create an unequal playing field. See Dillbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994) ("No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved."). However, the circuit court encouraged the agencies obfuscatory behavior and failure to follow the rules by denying Mr. Muhammad records to which he is entitled.

1. Florida Rule of Criminal Procedure 3.852 (h)(3).

Mr. Muhammad's requests that were served on October 24, 2013, were directed to the Department of Corrections (DOC); Florida Department of Law Enforcement (FDLE); the Office of the State Attorney for the Eighth Judicial Circuit; Office of the Medical Examiner for the Eighth District (ME); and Office of the State Attorney for the Eleventh Judicial Circuit (SAO - 11).

These requests were made pursuant to Florida Rule of Criminal Procedure 3.852 (h)(3). Rule 3.852 (h)(3) states:

> 3) Within 10 days of the signing of a defendant's death warrant, collateral counsel may request in writing the production of public records from a person or agency from which collateral counsel has previously requested public records. **A person or agency shall copy, index, and deliver to the repository any public record**:
>
> (A) that was not previously the subject of an objection;
>
> (B) that was received or produced since the previous request; or
>
> (C) that was, for any reason, not produced previously.
>
> The person or agency providing the records shall bear the costs of copying, indexing, and delivering such records. If none of these circumstances exist, the person or agency shall file with the trial court and the parties an affidavit stating that no other records exist and that all public records have been produced previously. **A person or agency shall comply with this subdivision within 10 days from the date of the written request or such shorter time period as is ordered by the court.**

(Emphasis added).

Mr. Muhammad complied with the rule in that he timely filed his requests to agencies from which he had previously requested records. Furthermore, Mr. Muhammad sought only records that were not produced previously, i.e., that had not been turned over previously, and not subject to a valid exemption or objection, or were newly produced.

Pursuant to the rule, the agencies were required to conduct a diligent search and produce the records: "**A person or agency shall copy, index, and deliver to the repository any public record.**" Fla. R. Crim P. 3.852 (h)(3). Yet despite the clear language of Rule 3.852 (h)(3), the agencies sought to sidestep

their duties and responsibilities by manufacturing various objections, ranging from: Mr. Muhammad did not previously request records (ME and DOC), to the records are not relevant under 3.851 (I) (FDLE, SAO - 8), to the records requested are overly broad and unduly burdensome (SAO - 11, SAO - 8). However, while neither the facts nor the rules and law supported the objections, the circuit court upheld the objections.

a. Department of Corrections

Mr. Muhammad requested that DOC produce an update of the Inspector General's investigative file, his medical records and his classification or inmate records (PC-R4. 7-8).

DOC objected citing the fact that Mr. Muhammad had not previously requested records from these DOC departments. (PC-R4. 17-35)("Save the filing of the instant demand, the Department has not received any other demands for public records."). However, DOC conceded that Mr. Muhammad had, upon promulgation of Rule 3.851, requested records from DOC, but they were personnel records. Thus, DOC requested that the circuit court interpret the rule narrowly: "The only records available under (h)(3) are those of like type and kind that were previously requested ...". (PC-R4. 17-35). Therefore, according to DOC, Mr. Muhammad was not entitled to an update of his own medical records, his own inmate files or the investigation conducted after Correctional Officer Richard Burke was killed.

At the case management conference on October 31, 2013, Mr. Muhammad demonstrated that the representation made by DOC that no public records had been previously requested, was patently false.

Mr. Muhammad demonstrated that at the time Mr. Muhammad was litigating his initial 3.851 motion, he requested the Inspector General's records, his medical records and his classification or inmate records.[13] In its written order, the circuit court made no mention of the fact that Mr. Muhammad had actually filed a civil suit in Leon County in order to obtain public records from DOC. Thus, even assuming that the circuit court read Rule 3.852 narrowly, Mr. Muhammad established that he was entitled to the records.[14] Pursuant to the plain language of the rule, Mr. Muhammad is entitled to an update and/or any previously undisclosed records that were not properly exempted of the Inspector General's file, his medical records and his classification or inmate records.

In denying, Mr. Muhammad's request, the circuit court latched onto off-the-cuff comments made by the attorney for DOC that the request was overly broad and unduly burdensome. Indeed, only when it was clear that DOC's representation to the court was false, did the attorney for DOC reference that the request was

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[13]The exhibits Mr. Muhammad submitted at the case management conference were not included in the record on appeal. Mr. Muhammad intends to request that the record be supplemented to include the exhibits.

[14]Once DOC realized that the representations were false, DOC asserted that Rule 3.852 (h)(3) requires that the request be made pursuant to the rule and not before. But, this has never been the interpretation of the rule. Indeed, Mr. Muhammad did re-request records after the promulgation of the 3.852, and the circuit court had denied his requests based on the fact that he had already received the records. Thus, DOC's interpretation must be incorrect or Mr. Muhammad was wrongly denied records in 1998-9.

"overly broad and unduly burdensome". However, those comments were directed to the timeframes under the rule and the amount of inmate/medical files that existed in Mr. Muhammad's case. Thus, it was not that the request was overly broad or unduly burdensome, but that DOC could not comply with the request under the timeframes set forth in the rule.[15]

Moreover, in sustaining DOC's objection, the circuit court misunderstood the argument made on behalf of DOC. There were three distinct requests made: a request for anything new to the Inspector General file; a request for an update of Mr. Muhammad's medical records; and a request for an update of Mr. Muhammad's inmate/classification records. The attorney for DOC specifically indicated that he had reviewed the Inspector General's file and that there was nothing "relevant".

First, the circuit court misapplied Rule 3.852(h)(3) because it does not require that Mr. Muhammad establish relevance in order to obtain an update of the public records. And, of course, DOC is not in a position to determine the relevance of

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[15]DOC suggested that Mr. Muhammad should have filed requests every year for updates of his file in order to alleviate the burden on the agency. But of course, there is no mechanism under Rule 3.852 to request inmate or classification records and medical records on an annual basis in order to prepare for a death warrant. Thus, such a suggestion flies in the face of the justifications for adopting the rule - the orderly administration of obtaining public records. See In re AMENDMENT TO FLORIDA RULES OF CRIMINAL PROCEDURE-CAPITAL POSTCONVICTION PUBLIC RECORDS PRODUCTION., 673 So. 2d 483 (Fla. 1996)("In order to provide orderly procedures to govern the process of considering public records requests in the context of capital postconviction proceedings, the Court on its own motion has determined to promulgate a new Rule of Criminal Procedure, to be numbered rule 3.852.").

information since DOC has not been involved with the substantive litigation in Mr. Muhammad's case and was even unaware that the Inspector General conducted the investigation into the death of Correctional Officer Richard Burke until shortly before the objection was filed.[16]

Secondly, the attorney for DOC did not conduct any review of Mr. Muhammad's medical records or inmate/classification records. Thus, the Court's finding that DOC had reviewed the records is not supported by the record. The circuit court erred.

b. Florida Department of Law Enforcement

Mr. Muhammad requested that FDLE produce an update of the forensic file generated by FDLE (PC-R4. 15-16).

FDLE's response made clear that FDLE construed Mr. Muhammad's request pursuant to 3.852(i) and simply cut and paste a previous objection to a request for records. Thus, FDLE relied on three opinions that discussed public records being sought in active death warrant litigation: Valle v. State, 70 So. 3d 530, 548-49 (Fla. 2011), Glock v. Moore, 776 So. 2d 243, 253 (Fla. 2001), and Sims v. State, 753 So. 2d 66, 70 (Fla. 2002). In Valle, the capital defendant sought records pertaining to lethal injection and the opinion contains nothing of relevance to the interpretation of 3.852(i). As to Glock and Sims, in those cases, this Court made clear that a capital defendant could not seek public records previously disclosed and that under Rule

[16]In a phone conversation, David Arthmann insisted to Mr. Muhammad's counsel that FDLE conducts the investigations when a homicide occurs in a correctional institution.

3.852(h)(3), only an update of previously produced records could be sought. Specifically, in Glock, this Court held:

> 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.

776 So. 2d at 253 (emphasis added). Thus, the reason that Glock was unable to obtain the public records he sought under Rule 3.852(h)(3) was that he had not requested an update, but all of the records, even those he had previously south. Id. Here, Mr. Muhammad did not make that mistake and requested only an update.

Likewise, in Sims, the reason Sims was unable to obtain the public records he sought under Rule 3.852(h)(3) was that he had not previously requested records from the agencies. 753 So. 2d at 69-70 ("Based on the emphasized language, the State argues Sims' requests for production of public records are overbroad because he failed to demonstrate that he had "previously" requested public records from these agencies and individuals. We agree and affirm the decision of the trial court."). Here, Mr. Muhammad did not make that mistake and had previously requested records

from FDLE.[17]

Moreover, the circuit court erred in accepting FDLE's representation that the agency played a "limited role" in the prosecution and "that there is nothing substantive that they would have in their records relevant to this case", as true, when it was clear that the FDLE attorney had no knowledge of the history or issues raised in Mr. Muhammad's case. Again, it is Mr. Muhammad's assessment of relevance that matters. And, under the rule, relevance is not required. Even if it were, someone not familiar with the court records from the past 30 years would not be in a position to assess the relevancy of any particular public records in FDLE's possession.

Furthermore, the circuit court was in no position to judge the relevance of the records because she never saw them and had been assigned to Mr. Muhammad's case for just over twenty-four (24) hours when she upheld FDLE's objection. The circuit court erred.

c. The Office of the State Attorney for the Eighth Judicial Circuit & the Office of the State Attorney for the Eleventh Judicial Circuit.

[17]FDLE never disputed that records had been requested from the agency previously.

Mr. Muhammad requested that the SAO-8[18] and the SAO-11[19]

[18]The Office of the State Attorney for the Eighth Judicial Circuit objected to Mr. Muhammad's request for records citing Glock, Sims and Valle. As Mr. Muhammad as previously demonstrated, the State's reliance on those opinions is misplaced. It was not until the hearing, that the State Attorney claimed that he had no records that had not been previously produced.

[19]The Office of the State Attorney for the Eleventh Judicial Circuit originally objected to Mr. Muhammad's request for records citing Glock for it's position that the request was overly broad and unduly burdensome. At the case management conference, after Mr. Muhammad's counsel demonstrated that the State's reliance on Glock was misplaced, the State argued that it was also relying on Diaz v. State, 945 So. 2d 1136, 1149-50 (Fla. 2006). However, the State did not describe the specific requests made in Diaz, as described by this Court:

> In this case, the trial court held that the various post-warrant requests were either of questionable relevance, not likely to lead to discoverable evidence, or overbroad. The record supports these findings by the trial court. Similar to the pre-warrant requests made on November 1, the November 17 requests broadly asked for "any and all files." **Examples of their sweeping breadth include requests that the Miami-Dade Police Department produce records relating to Diaz, his co-defendant Toro, and forty-two other individuals, that the Florida Department of Law Enforcement produce records of any and all information pertaining to forty-four listed individuals, and that the State Attorney's Office produce records relating to Diaz, Toro, and forty-two other individuals. The trial court denied other post-warrant requests because the records demanded were not likely to lead to discoverable evidence. The trial court did not abuse its discretion in making this determination, as some of the requests relate to issues that Diaz previously raised and litigated unsuccessfully. Examples of these requests include demands that the Division of Elections and the Judicial Qualifications Commission produce records pertaining to the circuit court judge presiding over Diaz's case. However, the issue of purported judicial bias was litigated years ago and denied.** Furthermore, this Court

produce an update of the prosecution's records (PC-R4. 5-6, 11-12).

The circuit court denied Mr. Muhammad's requests finding that the offices "have indicated that has received everything that they have relevant to his request." (PC-R4. 538). In permitting the agencies to simply state that they had disclosed everything relevant to Mr. Muhammad's request, the circuit court failed to enforce this Court's rule. Rule 3.852(h)(3) required that the offices submit an affidavit attesting to the fact that "all public records have been produced previously". Allowing the agencies to violate the rules is clear error and must be reversed.

d. Medical Examiner for the Eighth Judicial Circuit.

Mr. Muhammad requested that the Medical Examiner produce an update of the records related to CO Burke's autopsy (PC-R4. 9-10). The circuit court held that because the ME represented that all the relevant records had been disclosed.

> has held that the production of public records is not intended to be a "procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief." Rutherford v. State, 926 So.2d 1100, 1116 (Fla.2006) (quoting Sims v. State, 753 So.2d 66, 70 (Fla.2000)).

(Empahsis added). Thus, Diaz' request was nothing like Mr. Muhammad's. Mr. Muhammad simply requested an update of the files relating to the State's prosecution of him and did not request a single file on another individual. Likewise, Mr. Muhammad narrowly tailored his requests to relevant agencies, focusing on what he believed the six most critical agencies that had previously produced records in his case. The State failed to candidly inform the circuit court of the circumstances underlying this Court's opinion in Diaz.

However, in permitting the ME to simply state that they had disclosed everything relevant to Mr. Muhammad's request, the circuit court failed to enforce this Court's rule. Rule 3.852(h)(3) required that the ME submit an affidavit attesting to the fact that "all public records have been produced previously". Allowing the ME to violate the rule is clear error and must be reversed.

2. Florida Rule of Criminal Procedure 3.852 (i).

Mr. Muhammad's requests that were served on October 25, 2013, were directed to the Department of Corrections (DOC); Florida Department of Law Enforcement (FDLE); Office of the Medical Examiner for the Eighth District (ME); Office of the Attorney General (AG); Florida Parole Commission (Commission); and Executive Office of the Governor (Governor). These requests were made pursuant to Florida Rule of Criminal Procedure 3.852 (i). Rule 3.852 (i) states:

> (1) In order to obtain public records in addition to those provided under subdivisions (e), (f), (g), and (h) of this rule, collateral counsel shall file an affidavit in the trial court which:
>
> (A) attests that collateral counsel has made a timely and diligent search of the records repository; and
>
> (B) identifies with specificity those public records not at the records repository; and
>
> (C) establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence; and
>
> (D) shall be served in accord with subdivision (c)(1) of this rule.
>
> (2) Within 30 days after the affidavit of collateral counsel is filed, the trial court shall order a person

> or agency to produce additional public records only upon finding each of the following:
>
> (A) collateral counsel has made a timely and diligent search of the records repository;
>
> (B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
>
> (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and
>
> (D) the additional records request is not overly broad or unduly burdensome.

Mr. Muhammad complied with the rule in that he specifically determined that the records had not previously been disclosed, identified the records he requested and established relevance by linking the requests to colorable claims that he pursued through his 3.851 motion. Indeed, some of the records requests concerned the method of execution in Florida. The relevant agencies simply cannot deny that the protocol has recently been altered, replacing pentobarbital, the first drug, to midazolam hydrochloride; or that the recent execution of William Happ resulted in reported irregularities. Likewise, the agencies cannot deny that in both of those circumstances, Florida courts have directed that records be produced.[20] Further, the other requests that were made relate to the clemency process that occurred in Muhammad's case. Again, pursuant to the caselaw,

[20]Interestingly, none of this Court's opinions requiring production were cited by the agencies. Mr. Muhammad submits that this lack of candor with the circuit court is troubling, to say the least.

Muhammad's claim is cognizable and production of records on this matter is required.

All of the agencies objected. Many of the agencies took it upon themselves to argue against Mr. Muhammad's yet-to-be-filed claims stating that the claims were not colorable because Mr. Muhammad cannot prevail on the yet-to-be-submitted evidence. However, this argument is illogical and demonstrates that the records must be produced to Mr. Muhammad as a review of the agencies' arguments make it clear that he has established the requirements to order production as to his requests concerning Florida's method of execution and clemency.

a. Department of Corrections, Florida Department of Law Enforcement and Medical Examiner for the Eighth Judicial Circuit.

As to the request concerning the new lethal injection protocol and the execution of William Happ, the circuit court denied Mr. Muhammad's requests after making a finding of fact that:

> **there is no evidence that a problem occurred with the execution of William Happ**, the first inmate to be executed using the new drug such that discovery of these records would lead to a colorable claim. Defendant has failed to allege that Happ experienced pain or suffered during the execution under the new protocol and drug. Though Defendant does allege that Happ appeared to take longer to lose consciousness, this fact alone does not mean that he experienced pain and suffering. *See Valle v. State*, 70 So. 3d 530, 543 (Fla. 2011) cert. denied, 132 S.Ct 1 (U.S. 2011).

(PC-R4. 539). The circuit court continued that the requested records will not lead to a colorable claim (PC-R4. 539).

First, the United States Supreme Court's held in Baze v. Rees, 551 U.S. 34 (2007), that a challenge to a lethal injection

protocol is a colorable claim. In Baze, the United States Supreme Court considered Kentucky's procedure for lethal injection which included a three-drug protocol, using sodium thiopental as the first drug and anesthetic, pancuronium bromide as the second drug and paralytic and potassium chloride as the third drug which interferes with heart function. See Baze, 553 U.S. at 45. Thus, Baze makes clear that a challenge to a state's lethal injection protocol is colorable. Further, this Court has considered numerous challenges to the method of execution in Florida, granting discovery and evidentiary development when the lethal injection protocol substantially changes or a problem occurs during an execution. See Valle v. State, 70 So. 3d 525, 525-6 (Fla. 2011); Lightbourne v. McCollum, 969 So. 2d 326, 329 (Fla. 2007); Provenzano v. State, 761 So. 2d 1097, 1098 (Fla. 2000); Sims v. State, 754 So. 2d 657, 659 (Fla. 2000); Jones v. Butterworth, 695 So. 2d 679, 680 (Fla. 1997).

Next, the circuit court has confused the relevancy standard Mr. Muhammad must establish to obtain records with the standard he must meet to prove that the current lethal injection protocol violates the eighth amendment. Indeed, the circuit court has employed "putting the cart before the horse" logic to require that Mr. Muhammad must prove that Mr. Happ experienced pain in order to obtain records that he believes will prove that Mr. Happ experienced pain. This is simply not what this Court intended when promulgating Rule 3.852.

When Rule 3.852 was promulgated this Court wanted to find a way to orderly administer the disclosure of public records, not

provide the State with a shield to prevent a defendant from obtaining relevant, discoverable information. Indeed, the "hide the ball" mentality of the various state agencies places Mr. Muhammad in a proverbial catch-22 where he must produce evidence to prove his claim before he has the opportunity to obtain the evidence that will prove his claim. This distortion of public records laws cannot be what this Court intended unless the orderly administration in capital cases means that a capital defendant is not entitled to any records.

Mr. Muhammad has alleged that Mr. Happ experienced pain and suffering on October 15, 2013, when the midazolam hydrochloride, which is not used as an anesthetic, did not work as an anesthetic. Mr. Muhammad's facts must be taken as true and clearly entitle him to the disclosure of the public records he requested. The Court's fact finding that "there is no evidence that a problem occurred with the execution of William Happ", is correct only to the extent that there is no evidence of a problem because there is no evidence of anything.

The circuit court erred. Mr. Muhammad has established relevancy and is entitled to the requested records.

b. The Governor, Office of Executive Clemency and Office of the Attorney General.

In denying Mr. Muhammad's requests for records, the circuit court stated in a single sentence: "The representative for the Governor's office and Office of Executive Clemency stated that the record request is overly broad and does not relate to a colorable claim." (PC-R4. 539). The circuit court did not

address the request to the Office of the Attorney General.

The circuit court erred. In Ohio Adult Parole Authority, et. al v. Woodard, 523 U.S. 272, 288 (1998), in a plurality opinion, the United States Supreme Court made clear that due process applies to clemency proceedings. Justices O'Connor's opinion controlled and she reasoned that as long as the condemned person is alive, he had an interest in his life that the Due Process Clause protects. Woodard, 523 U.S. at 288-89, 291-92. Justice O'Connor also provided an example of a proceeding that would be unconstitutional when she wrote that "a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." Id. at 289.

Thus, contrary to the circuit court's opinion, the Supreme Court has held that due process applies in a clemency proceeding and that allegations that due process was violated establishes a colorable postconviction claim. Indeed, this Court has repeatedly addressed claims that a postconviction defendant had been denied due process in his clemency proceedings on the merits as to specific circumstances surrounding his clemency process. See Gore v. State, 91 So. 3d 769, 778-9 (Fla. 2012)(holding that due process was not violated when defendant was not notified that a clemency update was being conducted); Rutherford v. State, 940 So. 2d 1112, 1122 (Fla. 2006)(holding that the denial of a second clemency proceedings did not violate due process); Bundy v. State, 497 So. 2d 1209, 1211 (Fla. 1986)(holding that denial of counsel for second clemency proceeding did not violate due

process). This Court's previous rulings, on the merits of claims similar to Mr. Muhammad's make clear that his claim was "colorable".

Furthermore, in his public record requests specifically identified the circumstances that denied him due process in his clemency proceeding: the conflict with a member of the clemency board due to her direct interference with his representation; the failure to hold a hearing when Mr. Muhammad could be heard; and the fact that clemency was denied at a time when DOC had acknowledged that Mr. Muhammad's vocal chords were permanently damaged due to the surgery performed last year.

Mr. Muhammad tied his request for records to specific circumstances that occurred in his clemency proceeding, thus, establishing relevance.

And, the circuit court's finding that Mr. Muhammad's request was overly broad is not supported by the record. Mr. Muhammad requested that each of the three agencies produce public records that were produced since January 1, 2010, related to Mr. Muhammad's clemency proceedings. Thus, Mr. Muhammad narrowed the timeframe and the subject matter to the request.

The circuit court erred. Mr. Muhammad has established relevancy and is entitled to the requested records.

B. THE CIRCUIT COURT ERRED BY REFUSING TO GRANT MR. MUHAMMAD's MOTION FOR DISCOVERY AND TO ALLOW ACCESS DARIUS KIMBROUGH'S EXECUTION

Mr. Muhammad requested discovery related to DOC's newly enacted lethal injection protocol and to the William Happ execution (PC-R4. 511-514). Mr. Muhammad also requested that he

be allowed access to Mr. Kimbrough's execution, either through videotape or a representative of his legal team attending the execution (PC-R4. 515-516). The circuit court denied Mr. Muhammad's requests without any reasoning (PC-R4. 546-547).

As to Mr. Muhammad's motion for discovery, he specifically requested:

- that the Court order that the Department of Corrections identify all members of the execution team for the execution of William Happ on October 15, 2013, including medical personnel, correctional officers, representatives from the Florida Department of Law Enforcement and any other individuals who were present and permit their depositions;

- that the Court order that the Department of Corrections identify all individuals who had any responsibility for the development, drafting review or approval of the revisions to the leathl injection protocol that issued on September 9, 2013, and permit their depositions;

- that the Court permit a deposition of William Hamilton, Medical Examiner for the Eighth Judicial Circuit;

- that the Court direct the Department of Corrections to identify the person or persons in the FDOC Pharmacy who are responsible fo maintaining the supply of the lethal injection drugs;

- that the Court direct the Department of Corrections to identify the manufacturer of the midazolam hydrochloride used by Florida for lethal injections, state the lot number and expiration dates of the midazolam presently available for use by the lethal injection team;

- that the Court direct the Department of Corrections to identify the manufacturer of the vercuronium bromide used by Florida for lethal injections, state the lot number and expiration dates of the vercuronium bromide presently available for use by the lethal injection team;

- that the Court direct the Department of

> Corrections to identify the manufacturer of the potassium chloride used by Florida for lethal injections, state the lot number and expiration dates of the potassium chloride presently available for use by the lethal injection team;

(PC-R4. 511-514).

In State v. Lewis, 656 So. 2d 1248, 1260 (Fla. 1994), this Court held that discovery was available in postconviction litigation. At issue in Lewis was whether the defendant could depose the trial judge because some of the defendant's claims concerned an alleged bias of the trial judge. Id. at 1249. In Lewis, this Court identified some of the factors to be considered in determining is good cause has been shown, including: 1) the issues presented; 2) the elapsed time between the conviction and postconviction hearing; 3) any burdens placed on the opposing party and witnesses; and 4) the alternative means of securing the evidence. Id. at 1250.

Under the circumstances, Mr. Muhammad's request satisfies the requirements in Lewis. First, based on Mr. Muhammad's 3.851 motion that was filed October 30, 2013, the issues presented established that there is a factual issue in dispute relating to the constitutionality of Florida's lethal injection protocol. Further, the time between the conviction and Mr. Muhammad's request, though lengthy, shows that he timely filed his claims related to lethal injection because the protocol was not adopted until September 9, 2013. The burdens on the opposing parties would be minimal as Mr. Muhammad's counsel can schedule the depositions at the parties' and witnesses' convenience, i.e., the

date, time and place that accommodates the parties and witnesses. Also, the information requested is likely stored electronically and can be obtained with the click of a button. Finally, because the Department of Corrections, Florida Department of Law Enforcement and Medical Examiner for the Eighth Judicial Circuit have refused to produce a single record related to the current lethal injection protocol or the execution of William Happ, Mr. Muhammad has no alternative to obtain information relating to his challenged to lethal injection.

The circuit court did not address the Lewis factors in denying Mr. Muhammad's motion and stated no basis for the denial. Mr. Muhammad established that he is entitled to discovery under Lewis. The circuit court erred in denying his motion.

In addition, Mr. Muhammad requested that he be permitted access to Mr. Kimbrough's execution and autopsy:

- that the Court permit a certified expert evidence photographer, designated by Mr. Muhammad, to videotape the execution;
- that the Court permit an individual, designated by Mr. Muhammad, to witness the execution;
- that the Court permit a qualified expert, designated by Mr. Muhammad, access to Mr. Kimbrough during his execution to monitor Mr. Kimbough's physiological responses throughout the execution;
- that the Court permit a qualified expert, designated by Mr. Muhammad, access to Mr. Kimbrough's body after the execution in order to perform a full and complete autopsy of the body, or in the alternative, to attend and photograph the autopsy of Mr. Kimbrough's body if performed by a state agent.

(PC-R4. 515-516).

Before the circuit court, Mr. Muhammad averred that access to Mr. Kimbrough's execution and autopsy was necessary in light of Mr. Muhammad's claims that the State of Florida's lethal injection protocol is unconstitutional. The circuit court denied Mr. Muhammad's claim (PC-R4. 546-547).

Mr. Muhammad submits that due to his challenge to DOC's newly enacted three-drug protocol, using midazolam hydrochlorida, rather than another barbituate, and the descriptions of William Happ's execution requires that he be permitted access to Mr. Kimbrough's execution.

C. CONCLUSION

Mr. Muhammad requests that this Court enter a stay of execution and direct the state agencies to disclose the public records he requested and allow him to amend his claims once he has had the opportunity to review and investigate the public records. In addition, Mr. Muhammad requests that this Court allow him to obtain discovery relating to the lethal injection protocol and access to Mr. Kimbrough's execution.

ARGUMENT II

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. MUHAMMAD'S CLAIM THAT 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.

A. MR. MUHAMMAD'S CLAIM

In his Rule 3.851 motion, Mr. Muhammad alleged that the State of Florida, through the Department of Corrections (DOC), on September 9, 2013, had adopted a new lethal injection procedure.

Critically, DOC substituted midazolam hydrochloride for pentobarbital as the first-drug in the three-drug protocol. As this Court has previously recognized, the first-drug is the most critical in determining whether DOC's lethal injection protocol violates the eighth amendment:

> ...we now turn to Valle's challenge to the DOC's substitution of pentobarbital for sodium thiopental. In the lethal injection context, "**the condemned inmate's lack of consciousness is the focus of the constitutional inquiry**." Ventura, 2 So.3d at 200; see also Schwab, 995 So.2d at 924, 927 (adopting the trial court's order, which stated that "the critical Eighth Amendment concern is whether the prisoner has, in fact, been rendered unconscious by the first drug"). As we explained in Lightbourne, "[i]f the inmate is not fully unconscious when either pancuronium bromide or potassium chloride [the second and third drugs in the protocol] is injected, or when either of the chemicals begins to take effect, the prisoner will suffer pain." 969 So.2d at 351; see also Baze, 553 U.S. at 53, 128 S.Ct. 1520 *540 ("[F]ailing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.").

Valle v. State, 70 So. 3d 530, 537 (Fla. 2011)(emphasis added).

Indeed, the last time DOC changed the first-drug, this Court reversed the circuit court's summary denial, entered a stay of execution and remanded for an evidentiary hearing. See Valle, 70 So. 3d at 546.[21]

In his Rule 3.851 motion, Mr. Muhammad alleged that midazolam hydrochloride is a short-acting benzodiazepine better

[21]This Court also ordered DOC to disclose "correspondence and documents it has received from the manufacturer of pentobarbital concerning the drug's use in executions, including those addressing any safety and efficacy issues." Id. at 526.

known by the trade name of Versed. Benzodiazepines are a class of drugs which are primarily used for treating anxiety and which includes drugs such as diazepam (Valium), lorazepam (Ativan) and alprazolam (Xanax). It is not a barbituate, as was pentobarbital and sodium thiopental. Midazolam is a controlled substance and listed as a Schedule IV drug by the DEA. It is often used as a sedative prior to the induction of anesthesia in surgical settings. The new protocol calls for two injections of 250 milligrams of midazolam hydrochloride solution as the first drug in DOC's current protocol.

Midazolam hydrochloride does not last as long as other benzodiazopines, certainly its efficacy is of a much shorter duration than the barbituates: sodium thiopental and pentobarbital. Further, it is not fast-acting, like sodium thiopental, and thus, takes much more time to take effect.

Thus, here, DOC has substituted a drug from an entirely different class which is rarely used for the induction and maintenance of anesthesia, without any justification for the selection of such a drug.

Furthermore, Mr. Muhammad has alleged that the only use of midazolam hydrochloride in the lethal injection context has produced a result that it was not designed to produce. On October 15, 2013, without any discovery or judicial review, the State of Florida executed William Happ using midazolam hydrochloride as the first-drug. According to reports regarding Mr. Happ's execution, "the official overseeing the execution tugged at Happ's eyelids and grasped his shoulder to check for a

response." At that point there was no response. However, "**a minute later, Happ's head began moving back and forth . . . ".** See Brendan Farrington, *Fla. Executes Man For Illinois Woman's 1986 Murder*, Miami Herald (October 15, 2013)(emphasis added). Had Mr. Happ been properly anesthetized he would have been unable to move; the fact that he was moving suggests that he was not unconscious and that he could feel pain. The Daily Mail reported that appearances suggested that Happ remained "conscious for a greater length of time and made more body movements after losing consciousness than people executed by the old formula which usually kills the prisoner within seven minutes." See, *Florida Murderer Who Raped And Killed Woman Is Left Writhing In Agony And Takes Twice As Long To Die As He Is Executed Using New Untried Lethal Injection Drug*, Daily Mail (October 15, 2013).

Previously, this Court has not hesitated to grant an evidentiary hearing on a method of execution claim when a mishap has occurred. See Jones v. Butterworth, 695 So. 2d 679, 680 (Fla. 1997)[22]; Provenzano v. Moore, 744 So. 2d at 413[23]; Provenzano v.

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[22]The execution of Pedro Medina preceded Mr. Jones' execution. During Mr. Medina's execution it was reported that: "[b]lue and orange flames up to a foot long shot from the right side of Mr. Medina's head and flickered for 6 to 10 seconds, filling the execution chamber with smoke." See, *Condemned Man's Mask Bursts Into Flame During Execution*. New York Times (June 9, 2000). This Court's unpublished order directing the evidentiary hearing issued on April 10, 1997, and is referenced in Jones v. Butterworth, 695 So. 2d at 680 in the following fashion:

> By order dated April 10, 1997, this Court relinquished jurisdiction to the trial court to conduct an evidentiary hearing on the petitioner's claim that electrocution in Florida's electric chair in its

State, 761 So. 2d 1097, 1098 (Fla. 2000)[24]; Lightbourne v.

> present condition is cruel and unusual punishment. Following a four-day hearing, the trial court entered an order dated April 21, 1997, denying petitioner's claim.

[23]On the morning of July 8, 1999, Alan Davis was strapped in to the electric chair. According to reports, "After the executioner flipped the switch, 'there was blood appearing on his shirt as well as the face of the executed man,' said John Koch, a reporter for Florida's Radio Network. This execution of Tiny Davis was not bloodless. The man obviously suffered.'" See *Uproar Over Bloody Electrocution/Florida Supreme Court Delays Next Execution for Hearing on Electric Chair*, Los Angeles Times (July 9, 1999). After Davis' bloody execution, this Court immediately stayed the execution of Thomas Provenzano, which was set for the next day. This Court issued an unpublished order directing the circuit court to hold an evidentiary hearing in order to give the Provenzano's constitutional challenge to Florida's method of execution "full consideration." Provenzano, 744 So. 2d at 413 (Fla. 1999).

[24]Just months after this Court approved of DOC's new lethal injection protocol, see Sims v. State, 754 So. 2d 657 (Fla. 2000), Bennie Demps was executed on June 7, 2000. When "the curtain between the execution chamber and witnesses was opened, witnesses said that Mr. Demps pleaded with his lawyer to investigate the way the state's executioners had handled him." See, Rick Bragg, *Florida Inmate Claimed Abuse in Execution*, New York Times (June 9, 2000). Sims told witnesses that he had been "butchered" and was in a lot of pain; he said his groin had been cut and his leg. Id.

The events that occurred during the Demps execution were the subject of evidentiary development when Thomas Provenzano shortly thereafter claimed that lethal injection in the State of Florida constituted cruel and unusual punishment. Provenzano v. State, 761 So. 2d 1097, 1098 (Fla. 2000). This Court subsequently explained:

> The circuit court below held a two-day hearing in order to give Provenzano an opportunity to present testimony relating to the Demps execution. The hearing included expert testimony from both parties as well as eyewitness testimony from individuals who were present during the Demps execution.

McCollum, 969 So. 2d 326, 329 (Fla. 2007)[25]; Schwab v. State, 969 So. 2d 318 (Fla. 2007)[26]. Thus, this Court has made clear that

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[25]On December 13, 2006, Angel Diaz was executed. Within hours of the scheduled execution, reports surfaced that irregularities occurred during the execution: "Angel Diaz winced, his body shuddered and he remained alive for 34 minutes, nearly three times as long as the last two executions. Department of Corrections officials said they had to take the rare step of giving Diaz a second dose of drugs to kill him." See Chris Tisch and Curtis Krueger, *Executed Man Takes 34 Minutes to Die*, St. Pete Times, December 13, 2006.

The next day, CCRC-South filed a petition in this Court on behalf of all of its clients challenging the State's lethal injection procedures based on the circumstances of Diaz' execution. Because Ian Lightbourne's name was the first named petitioner, this Court relinquished jurisdiction and remanded the matter to the circuit court for an evidentiary hearing in an unpublished order. This was subsequently explained in Lightbourne, 969 So. 2d at 329, in the following fashion:

> On December 14, 2006, this Court entered an order allowing Lightbourne to designate a representative to attend the Diaz autopsy and relinquishing jurisdiction to the circuit court for an immediate determination of Lightbourne's request for an independent autopsy and "all other issues raised" by Lightbourne. By our order of December 14, 2006, we essentially ruled on two of Lightbourne's requests in his petition, first by addressing the issue of the autopsy and then by relinquishing to the trial court to decide the issues that required factual development.

[26]Mark Schwab's warrant had been signed after DOC revised the lethal injection protocol during the Lightbourne litigation. In Schwab, this Court addressed Schwab's nearly identical Eighth Amendment challenge to Florida's lethal injection procedures in light of the Diaz execution. In Schwab, this Court ruled that "when an inmate presents an Eighth Amendment claim which is based primarily upon facts that occurred during a recent execution, the claim is not procedurally barred." Id. at 321-22. This Court also indicated that Schwab, who had presented his lethal injection claim in a Rule 3.851 motion, had been entitled to have the circuit court either 1) take judicial notice of the evidence presented in the Lightbourne proceedings, or 2) conduct an evidentiary hearing on the claim. See Schwab, 969 So. 2d at 322-3. (emphasis added). However, the error was deemed harmless

when irregularities, or botches, occur during an execution, full and fair development is required when those irregularities are challenged.

Thus, Mr. Muhammad requested an evidentiary hearing based both on the change of the lethal injection protocol, which replaced the use of a barbituate, pentobarbital, with a benzodiazepine, midazolam hydrochloride, to induce unconsciousness and the suspect events that occurred during Mr. Happ's execution.

B. THE CIRCUIT COURT'S ORDER

In but a paragraph of it's written order, the circuit court summarily denied Mr. Muhammad's claim. After finding that Mr. Muhammad's claim "regarding the portions of the lethal injection protocol that have not changed are barred as untimely" (PC-R4. 540), the circuit court held:

> As the State noted in its response, "the only change between the 2012 protocol and the 2013 protocols is the substitution of midazolam for pentobarbital as the first drug in the protocol." As for the change, defendant's claim of "substantial risk of serious harm is based on nothing more than speculation and conjecture. For that reason, it is without merit.

(PC-R4. 540).

The flaws in the circuit court's order begin with the idea that Mr. Muhammad's challenge to the new protocol are barred because some elements of the protocol have not changed. Rather, this Court has specifically held that:

"because Schwab has not presented any argument as to specific evidence he wanted to present in this case that had not been presented in the Lightbourne proceeding." Id. at 323, n. 2.

> It is important to review these claims in conjunction with each other since the chemicals used, the training and certification, and the assessment of consciousness all affect each other. ... In reviewing the alleged risk of an Eighth Amendment violation, whether framed as a substantial risk, an unnecessary risk, or a foreseeable risk of extreme pain, the interactions of these factors must be considered.

Lightbourne v. McCollum, 969 So. 2d 326, 329 (Fla. 2007). Certainly, the interaction between the drugs or the type of consciousness check conducted, or the executioners qualifications or preparation of the midazolam hydrochloride are not barred because the language of the protocol did not change. The fact that the first-drug is no longer a barbituate, but and benzodiazepine that is often used to relieve anxiety and not for anesthetic purposes impacts other areas of the protocol. The circuit court's erroneous ruling is not supported by the law or logic.

Furthermore, the Court's acceptance of the State's representation as fact when there was no evidence before the court was also erroneous as a matter of law. Under this Court's precedent, the circuit court was required to accept Mr. Muhammad's facts as true, to the extent that they were not refuted by the record, not the State's. See Rutherford v. State, 926 So. 2d 1100, 1108 (Fla. 2006). Indeed, the protocol was not evidence before the circuit court. Thus, nothing refutes Mr. Muhammad's allegations, yet, the circuit court relied not on evidence, but on argument to summarily deny Mr. Muhammad's claim.

And, Mr. Muhammad's claim was not based on speculation, and conjecture, but factual allegations. Indeed, as to midazolam

hydrochloride, Mr. Muhammad alleged specific facts relating to its use in a surgical setting and clear shortfalls in an executions setting; shortfalls that include that the drug does not last as long as other benzodiazopines or the barbituate, pentobarbital, for which it is replacing. Further, it is not fast-acting and thus, takes much more time to take effect.

Before October 15, 2013, no state had ever used midazolam hydrochloride before in it's lethal injection procedure. Further, of late, many of the active death penalty states have considered alternative drugs and protocols. Of the few states[27] that have proposed using midazolam hydrochloride in their upcoming executions, it would only be used as a back-up drug or as another option. Even then, those states have proposed using the midazolam in conjunction with hydromorphone (an opiate) as a single-drug cocktail and not as an anesthetic. In other words, those three states have determined that midazolam is not an effective anesthetic and therefore are not using it in conjunction with known painful drugs like vecuronium bromide and potassium chloride, the other two drugs used in the Florida's current lethal injection protocol.

The circuit court erred in discounting Mr. Muhammad's allegations. Clearly, the differences between midazolam hydrochloride and pentobarbital are significant. The use of

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[9]Mr. Muhammad is aware of three other states that have proposed experimenting with the use of midazolam as part of the lethal injection protocol and they are Ohio, Kentucky, and Missouri. All of these states chose alternative drugs to use in executions.

midazolam hydrochloride will not effectively anaesthetize Mr. Muhammad which will cause him excruciating pain and suffering once the other two drugs are administered. The decision to experiment with an untested benzodiazepine instead of a barbiturate for the purpose of inducing anesthesia represents a substantial change to the protocol; one that warrants discovery, investigation, and judicial review. See Sims, Lightbourne, and Valle. Because the files and records (of which there are none because none were disclosed and no evidence was taken), do not refute Mr. Muhammad's allegations, much less conclusively so, an evidentiary hearing is required.

And, though the circuit court failed to address Mr. Muhammad's claim that the description of Mr. Happ's execution evidences that he experienced serious pain because the midazolam did not properly anesthesize him. Mr. Muhammad alleged that Mr. Happ was moving his head from side-to-side after the consciousness check occurred and that no further consciousness check occurred. It is Mr. Muhammad's position that Mr. Happ experienced serious pain and that due to the use of midazolam Mr. Muhammad faces a substantial risk of serious harm. This fact cannot be refuted by the record because there is no record in this case, or any other relating to the use of midazolam as the first-drug or what occurred during the Happ execution.

The conflux introducing a new drug, which is not a barbituate, but falls into the category of drugs referred to as benzodiazepines, and the irregularities that occurred in the execution of Mr. Happ demonstrate that the circuit court erred in

denying Mr. Muhammad an evidentiary hearing

ARGUMENT 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.

A. BAZE v. REES

In Baze v. Rees, a plurality of the United States Supreme Court set forth the standard for establishing that a method of execution constitutes cruel and unusual punishment. 553 U.S. 35 (2008). Specifically, in Baze, the Supreme Court considered whether or not Kentucky's three drug protocol, which was substantially similar to Florida's protocol at the time, violated the eighth amendment. Baze's challenge rested "on the contention that [the petitioners] have identified a significant risk of harm that can be eliminated by adopting alternative procedures, such as a one-drug protocol that dispenses with the use of" the paralytic and potassium chloride "and additional monitoring by trained personnel to ensure that the first dose of sodium thiopental has been adequately delivered. Id at 51.

The plurality agreed that such a challenge was indeed cognizable and indicated the burden that must be met in order to demonstrate that the challenged method violated the eighth amendment:

> Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. **If a State refuses to adopt such an alternative in the face of these documented advantages, without a**

> **legitimate penological justification for adhering to its current method of execution, then a state's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.**

Id. at 52 (emphasis added)(citations omitted).

The plurality rejected Baze's claim because at the time "[n]o State uses or has ever used the alternative one-drug protocol ..." Id.at 53.[28]

B. LETHAL INJECTION IN FLORIDA

Under Florida law, a death sentence is to be "executed by lethal injection . . . under the direction of the Secretary of Corrections or the secretary's designee." Fla. Stat. § 922.105(1). The statute prescribes no specific drugs, dosages, drug combinations, or the manner of intravenous access to be used in the execution process; nor does the statute require any certification, training, licensure, experience, or demonstrated competence of those who participate in the execution process. All of the details of the execution process are to be determined by the Defendant Secretary. The procedures and protocols are developed by the Department of Corrections in secrecy and with unfettered ability to be revised whenever the Department wishes. The execution procedures and protocols are exempt from Florida's Administrative Procedure Act. Fla. Stat. § 922.105(7).

On September 9, 2013, Michael D. Crews, Secretary of the Department of Corrections approved a novel lethal-injection

[28]Of course as presented to the circuit court, that is no longer the situation as a number of states have moved to a one drug protocol.

protocol that, for the first time, prescribed midazolam hydrochloride to be used as the first drug injected into the condemned. Midazolam hydrochloride is a short-acting benzodiazepine better known by the trade name of Versed. Benzodiazepines are a class of drugs which are primarily used for treating anxiety and which includes drugs such as diazepam (Valium), lorazepam (Ativan) and alprazolam (Xanax). It is not a barbituate, as was pentobarbital and sodium thiopental. This new protocol was sprung without any advance notice and comment, any indication of advice from medical professionals, and any evidence that the State's personnel would be familiar with the drug or complications related to its particular pharmacological properties.[29] Despite the Secretary's representation that the protocol is compatible with evolving standards of decency and advances in science, research, pharmacology, and technology, that is plainly not the case.

The September 9, 2013, protocol calls for serial administration of three chemical substances: (i) midazolam hydrochloride, a benzodiazepine; (ii) vecuronium bromide, a drug which paralyzes all voluntary muscles, including those which control respiration; and (iii) potassium chloride, a chemical which interferes with the heart's electrical activity, causing

[29]When questioned about the new drug protocol, DOC spokesperson, Misty Cash stated that DOC "did research and determined that this is the most humane and dignified way to do the procedure", yet, she refused to identify a research laboratory or source for such data. See Bill Cottrell, *Florida To Execute Man Using Untried Drug For Lethal Injection*, Reuters, October 14, 2013.

cardiac arrest, and which inflicts excruciating pain upon administration because it activates the nerve fibers lining the veins.

The use of midazolam hydrochloride and the continued use of an anachronistic and barbarous three-drug regime renders Florida's lethal injection scheme unconstitutional.

C. COMMUNITY CONSENSUS

In April 2008, when the United States Supreme Court decided Baze v. Rees, 553 U.S. 35, "at least 30 [states] (including Kentucky) use[d] the same combination of three drugs in their lethal-injection protocols." Id. at 44. At the same time, no State used a one drug protocol for lethal injection. Id. at 57. Justice Stevens predicted that the Baze decision would "generate debate . . . about the constitutionality of the three-drug protocol, and specifically about the justification for the use of a paralytic agent." Id. at 71 (Stevens, J., concurring). It did.

In just five short years since the Supreme Court's decision in Baze, thirteen of the states across the country—Arizona, Arkansas, California, Georgia, Idaho, Kentucky, Louisiana, Missouri, Ohio, South Dakota, Tennessee, Texas, and Washington—have adopted or announced that they will adopt a single drug protocol.[30] See Michael Kiefer, *Arizona Switching to 1 Drug for Next Execution*, The Arizona Republic (Feb. 27, 2012); Rhonda Cook, *Expired Drugs Led to Cancellation of Execution by*

[30]Arizona, South Dakota, and Texas have retained the option of a three-drug protocol as an alternative to the one drug protocol.

Lethal Injection, The Atlanta Journal-Constitution (August 2, 2012); Associated Press, *Idaho Switches Execution Protocol to Single-Drug Lethal Injection*, The Spokesman-Review (May 18, 2012); Associated Press, *Ky. Alters Execution Protocol*, The Herald-Dispatch (Feb. 16, 2010); Ariane De Vogue & Dennis Powell, *Ohio Killer Executed in First Use of Single-Drug Lethal Injection*, ABC News (Dec. 8, 2009); John Hult, *Execution Options Added, Sioux Falls Argus Leader* (Oct. 22, 2011); Brandi Grissom, *Texas Will Change Its Lethal Injection Protocol*, The Texas Tribune (July 10, 2012); Associated Press, *Washington State Switches to One Drug Method of Execution*, The Seattle Times (Mar. 2, 2010).

And, Montana has recently had it's lethal injection procedure struck down by a court. In response, Montana has proposed a two drug protocol that is currently being challenged.

This is a cataclysmic shift in the legal landscape, particularly given that eighteen states and the District of Columbia do not have the death penalty at all, and another seven states have not executed anyone in the last twelve years[31], and thus they are unlikely to have faced the decision of whether to adopt a single-drug protocol.[32] That leaves only eleven states

[31]Neither Kansas nor New Hampshire has executed anyone in the modern era of the death penalty.

[32]Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin do not have the death penalty. Colorado, Kansas, Nebraska, New Hampshire, Oregon, Pennsylvania, and Wyoming have not executed anyone in the last twelve years.

that are active death penalty states that continue to use a three-drug protocol.[33] And in a number of these state, executions remain on hold due to ongoing litigation.

The very state that Florida emulated in developing its three-drug protocol, Kentucky, is currently amending its regulations to outlaw its three-drug procedure and replace it with a single-drug protocol. See Proposed Revisions to 501 Ky. Admin. Regs. 16:330. On remand from the Supreme Court, the Kentucky courts in the Baze litigation have acknowledged that "recent developments in the use of the one-drug protocol in other states" have demonstrated the existence of "well-established alternatives" to the three-drug protocol. Baze v. Dep't of Corr., et al., 2012 WL 1473425 (Ky. Cir. Ct. Apr. 25, 2012).

In the last two years, 31 executions in the United States using a one-drug lethal-injection protocol were accomplished without incident. States are moving to a one drug protocol because the risks of serious pain when using three drugs are significant and well documented. A one-drug protocol avoids the unconstitutional pain inflicted by three drug protocols because it relies simply on a large dose of an appropriate barbiturate, which accomplishes a quick and painless death without use of a paralytic or potassium chloride.

Additionally, the U.S. Military has not conducted an execution for over a decade.

[33]Only Alabama, Delaware, Florida, Indiana, Mississippi, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia fall into this category.

DOC adopted the September 9, 2013, three drug protocol in Florida without considering the medical utility of the specific chemicals in the context of an execution. DOC did not consider, in adopting the three drug protocol, whether the chemicals involved were necessary to properly and painlessly conduct an execution by lethal injection. And at this point, the decision in Baze is out of date in that a large number of states have or are about to adopt a one drug protocol, and a number of one drug executions have occurred without incidence. As a result, there is no longer a justification for utilizing the three-drug sequence.

The recent developments in this area across the United States reflect this nation's evolving standards of decency which are rapidly moving away from the three-drug protocol. Trop v. Dulles, 356 U.S. 86 (1958).

D. FLORIDA'S CURRENT THREE DRUG PROTOCOL USING MIDAZOLAM HYDROCHLORIDE, A BENZODIAZEPINE, AS THE FIRST DRUG IS UNCONSTITUTIONAL

The State of Florida's three-drug lethal-injection protocol, which it plans to use to kill Mr. Muhammad on December 3, 2013, presents objectively intolerable risks of pain and suffering given the existence of proven, feasible alternatives. Florida's use of midazolam hydrochloride, as well as its use of potassium chloride and vecuronium bromide create these intolerable risks of serious harm to Mr. Muhammad. Indeed, the fact that no other state in this nation has gone this route or carried out an execution using midazolam hydrochloride as part of a three drug protocol with potassium chloride and vecuronium bromide is

evidence that the risks of pain and suffering arising from such a protocol is not tolerated anywhere else in this country.

First, midazolam hydrochloride is a short-acting benzodiazepine better known by the trade name of Versed. Benzodiazepines are a class of drugs which are primarily used for treating anxiety and which includes drugs such as diazepam (Valium), lorazepam (Ativan) and alprazolam (Xanax). It is not a barbituate, as were both pentobarbital and sodium thiopental. Midazolam is a controlled substance and listed as a Schedule IV drug by the DEA. It is often used as a sedative prior to the induction of anesthesia in surgical settings. First, it is not fast-acting, like sodium thiopental; it takes a longer period of time to take effect. Second, the effects of midazolam hydrochloride do not last as long as the effects other benzodiazopines. It is effective for a shorter duration because it also dissipates faster than does the barbituates, sodium thiopental or pentobarbital.

Prior to DOC's inclusion of midazolam hydrochloride in Florida's lethal injection protocol adopted on September 9, 2013, the drug had never been used in an execution of any human being. At the time, the use of midazolam hydrochloride in state sanctioned executions was completely untested. The use of midazolam hydrochloride in this untested dose was thus in essence experimental, as reported by news sources, when it was used in the October 15, 2013 execution of William Happ. *Florida Murderer Who Raped And Killed Woman Is Left Writhing In Agony And Takes Twice As Long To Die As He Is Executed Using New Untried Lethal*

Injection Drug. Daily Mail (Oct. 16, 2013). The use of this drug as an anesthetic as part of a three-drug protocol in combination with the neuromuscular blocking agent and potassium chloride was unprecedented in the United States. Of the few states[34] that have proposed using midazolam hydrochloride in their upcoming executions, it would only be used as a back-up drug or as another option. And even then, those states only discussed using midazolam hydrochloride in conjunction with hydromorphone (an opiate) as a single-drug cocktail and not as an anesthetic. In other words, those three states—unlike Florida—in their consideration of midazolum hydrochloride only considered it a protocol that intolerable reduced the risk of substantial harm that is present in its use in Florida's three-drug protocol.

Furthermore, the death agent that Florida plans to use is potassium chloride, which induces cardiac arrest by interfering with the heart's electrical activity. When injected in the concentration used in executions, it causes excruciating pain in the veins and lungs. The level of pain is similar to that of a surgical incision in the abdomen. In order to avoid the intolerable pain that goes along with an injection of potassium chloride, the State would have to ensure that a person being executed will be placed into and maintained in a surgical plane of anesthesia for the complete duration of the execution, despite

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[2]Muhammad is aware of three other states that have proposed experimenting with the use of midazolam as part of the lethal injection protocol and they are Ohio, Kentucky, and Missouri. However in all of three of these states, an alternative drug was chose to be used in executions.

the speed at which the effectiveness of midazolum hydrochloride is known to dissipate.

In addition to the death agent (potassium chloride), the State plans to also inject Mr. Muhammad with vecuronium bromide. There simply is no scientific reason for using a paralytic drug, such as vecuronium bromide, in its lethal-injection protocol, and doing so presents serious dangers. Vercuronium bromide increases the risk that the Mr. Muhammad will suffer a torturous and painful death silently because this drug will mask any effectiveness of the midazolum hydrochloride. Vecuronium bromide is a neuromuscular blocking agent that paralyzes all voluntary muscles, including the diaphragm, without affecting consciousness or the perception of pain. Administered by itself as a "lethal dose," vecuronium bromide would not result in a quick death; instead, it would cause death by conscious asphyxiation over the course of roughly a dozen minutes. It thus creates the danger that, if not properly anesthetized, Mr. Muhammad will be unable to convey the horrific pain and suffering he is suffering as a result of the dry drowning of death by asphyxiation or the extreme pain associated with the injection of potassium chloride he would receive. In other words, the vecuronium bromide could leave Mr. Muhammad entirely aware of this extreme pain and suffering, but entirely unable to inform the attendants of his misery. Without the use of vecuronium bromide, Mr. Muhammad would at least be able to signal that he was still conscious or had regained consciousness or awareness before the potassium chloride was administered.

Vecuronium bromide has another deleterious effect. It makes the detection of awareness, and verification of anesthetic depth, much more difficult even for properly trained medical personnel, and impossible for personnel without advanced training in anesthesia.

These issues are significant because it is beyond dispute that an insufficiently anesthetized person who is injected with a paralytic and potassium chloride will feel agonizing pain but will be unable to outwardly express that pain. See, e.g., Baze v. Rees, 553 U.S. 35, 53 (2008).

Florida's use of vecuronium bromide in its execution protocol is especially troubling because, even as the State of Florida characterizes its three-drug protocol as "humane," it prohibits the use of paralytic drugs on non-human animals in performing euthanasia. Fla. Stat. § 828.058(3) ("any substance which acts as a neuromuscular blocking agent . . . may not be used on a dog or cat for any purpose[,]" even by a trained veterinarian performing animal euthanasia); see also Fla. Stat. § 828.065 (proscribes the same for euthanasia of warm-blooded animals offered for sale, or obtained for sale by pet shops). In other words, it would be illegal for a Florida veterinarian to put a dog to death by the same method the state plans to use to kill Mr. Muhammad next month.

Florida's use of a three drug lethal-injection protocol that injects human beings with vecuronium bromide and potassium chloride creates unnecessary risks of pain and suffering.

E. FLORIDA'S NEWLY ENACTED LETHAL INJECTION PROTOCOL

DEMONSTRATES A RECKLESS INDIFFERENCE TO MR. MUHAMMAD

The lethal-injection protocol established by DOC does not establish sufficient qualifications or expertise for personnel performing critical portions of the lethal injection process. Indeed, Florida's protocol shares two of the three flaws that the Montana First Judicial District Court identified in striking down Montana's lethal-injection a year ago. See Smith v. Montana Dep't of Corr., No. BDV-2008-303, at 23-24 (Sept. 6, 2012).

Florida's lethal-injection protocol does not ensure that the executioner designated for administering the IV is properly trained and experienced. The Florida protocol provides that the team warden can select an individual to administer the IV from a number of different occupational categories, including categories of professionals that encompass individuals without an IV endorsement or sufficient experience with IV placement. For example, Florida's lethal-injection protocol allows Emergency Medical Technicians to be responsible for achieving and monitoring peripheral venous access, but to be licensed in the State of Florida, an EMT does not need to demonstrate IV proficiency. See Fla. Stat. § 401.23 (11) ("'Emergency medical technician' means a person who is certified by the department to perform basic life support pursuant to this part"); Fla. Stat. § 401.23 (7) (providing a skill set for "basic life support" that makes no mention of intravenous proficiency).

The Florida lethal-injection protocol also allows for central venous line placement if peripheral venous access is not possible. However, medical experts recognize that venous line

procedures should only be done "in a hospital setting where if a complication . . . arises it can be dealt with immediately because it's critical." Transcript of Testimony by Dr. Denise Stewart Clark, The Governor's Commission on Administration of Lethal Injection (February 5, 2007). Because central line placement is an invasive procedure that carries risks of immediate, painful complications, it must be performed by a professional medically-trained in such a procedure. Allowing someone without proper training to place a central line would unreasonably cause unnecessary pain and risk severe and potentially agonizing complications.

The Florida lethal-injection protocol specifically permits use of a "venous cutdown" procedure to place a central venous line. A venous cut-down is an extremely invasive procedure that involves surgical incisions to expose a vein and insert a cannula into the vein. Despite that there is significant potential for pain and complications in the use of a venous cut-down, the Florida lethal injection protocol allows venous cut-downs "at one or more sites." Florida's protocol stands as an outlier in continuing to allow the use of venous cut-downs as part of the lethal injection procedure.

Also, Florida's lethal injection protocol provides that "the team warden will assess whether the inmate is unconscious" and thereby determine whether the intravenous flow of the paralytic drug can begin. The protocol does not make the team warden's assumption of this all-important task contingent on any medical training at all. While the protocol requires the team warden to

make his consciousness determination "after consultation" —presumably with unnamed execution participants— there is no requirement that these participants have adequate medical training and experience to meaningfully "consult," and eyewitness testimony suggests that on repeated occasions, such consultation has not occurred at all. In Mr. Happ's execution, after the consciousness check was conducted and Mr. Happ began to move, DOC took no action to re-assess consciousness.

Furthermore, there is no provision in Florida's lethal injection protocol that requires any assessment of consciousness throughout the remainder of the execution process. Because an inmate must remain in a surgical plane of anesthesia for the duration of the execution to avoid experiencing agonizing pain, but will be paralyzed after receiving the vecuronium, any assessment of anesthetic depth must be performed by an individual qualified and sufficiently trained to monitor anesthetic depth in paralyzed patients. While basic heart rate monitors are supposed to be observed throughout the execution, eyewitness testimony suggests that the required equipment may not be employed. This failure is particularly problematic in light of the events reported as occurring in the October 15, 2013, execution of William Happ.[35]

[35]The facts reported as occurring during Mr. Happ's execution demonstrate a substantial risk that the condemned will not be rendered unconscious for the duration of the execution. Indeed, Mr. Happ's execution is the only one in which midazolum hydrochloride was used, and in the one execution, it appeared that Mr. Happ was not rendered unconscious and unable to feel the pain associated with the potassium chloride.

F. FLORIDA'S RECORD OF MALADMINISTRATION OF ITS LETHAL INJECTION PROTOCOLS COMPOUNDS THE DANGER

DOC in Florida has a disturbing history of maladministration of the death penalty by lethal injection, including the most recent execution of William Happ.[36]

When Bennie Demps was executed on June 8, 2000, he was strapped to a gurney for 33 minutes while, according to his final words, members of the Florida State Prison execution team repeatedly attempted to insert the IV. Demps stated that the members of the execution team "butchered" him, "cut [him] in the groin[,]" and "cut him in the leg[,]" leaving him "bleeding profusely[.]" Rick Bragg, *Florida Inmate Claimed Abuse in Execution*, NY Times, June 8, 2000.

Angel Diaz's execution in Florida on December 13, 2006, lasted an agonizing 34 minutes and required an injection of a second dose of lethal drugs. *Botched Execution Likely Painful, Doctors Say*, MSNBC News, Dec. 16, 2006. Instead of delivering the drug into his veins, the needles penetrated the blood vessels into the surrounding tissue, causing Diaz chemical burns on both arms. Eyewitnesses observed that "Diaz was moving as long as 24 minutes after the first injection, including grimacing, blinking, licking his lips, blowing and attempting to mouth words." Id. According to their reports, Diaz was squinting his eyes and tightening his jaw as if in pain and "gasping for air for 11

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[36]While of course Mr. Happ's execution as the only one so far employing the September 9th protocol is the most relevant, DOC's disturbing history provides the context in which this new protocol was adopted.

minutes." Chris Tisch & Curtis Krueger, *Executed Man Takes 34 Minutes to Die*, Tampa Bay Times, Dec. 13, 2006. Because the anesthetic drug had been injected subcutaneously, Diaz's death was likely due to asphyxiation while conscious or partly conscious.

D. Todd Doss, who witnessed the Florida DOC's execution of Clarence Hill by lethal injection in September 2006, does not recall any consciousness check being performed on Mr. Hill during the course of the entire procedure. Further, he did not observe any heart monitoring equipment attached to Mr. Hill. This was in direct contravention of the August 16, 2006, Florida DOC lethal injection protocol, which expressly mandates the use of two heart monitors and requires that they be monitored throughout the execution process.

Neal Dupree witnessed the Florida DOC executions of Wayne Tompkins in February 2009, and Manuel Valle in September 2011. The required heart monitoring equipment and corresponding observation was not visible to Mr. Dupree in those two executions either.

G. FLORIDA'S REFUSAL TO ADOPT A ONE DRUG PROTOCOL FOR LETHAL INJECTION AND ITS USE OF MIDAZOLUM HYDROCHLORIDE IN A THREE DRUG PROTOCOL CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Florida's three drug lethal-injection protocol, as described in the Execution by Lethal Injection Procedures document, calls for (i) the use of an insufficient, improperly designed, and improperly administered procedure for inducing and maintaining loss of consciousness and sensation prior to execution, and (ii) the use of chemicals that cause severe pain in the process of

causing death, in conjunction with chemicals used specifically and for no other purpose than to mask that severe pain, such that there is substantial risk that Muhammad will suffer serious harm in violation of his right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution.

The three drug lethal injection protocol employed by the State of Florida does not comport with "evolving standards of decency that mark the progress of a maturing society," as demonstrated by the fact that thirteen states across the country have adopted or announced that they will adopt a single-drug protocol that does not pose the substantial risks of serious harm that are present in Florida's three drug protocol.

Moreover, the multitude of experiences that states now have had with single drug executions—where condemned inmates have died without apparent complication using a large dose of a barbiturate without administration of a paralytic or potassium chloride—demonstrates that the substantial risks of severe pain presented by Florida's three drug protocol are objectively intolerable and readily avoidable.

H. THE CIRCUIT COURT'S ORDER

The circuit court grouped Mr. Muhammad's lethal injection claims together and did not distinguish what portion of the single paragraph denial applied to which claim. However, there is no doubt that much has changed since the United States Supreme Court's decision in Baze, or recent monumental shift from a

three-drug protocol to a one-drug protocol. Those facts are neither speculative nor barred. Furthermore, the facts Mr. Muhammad relies upon relating to midazolam hydrochloride and the execution of William Happ are likewise not speculative or barred but demonstrate the reckless indifference of the State of Florida. Thus, the circuit court erred in denying Mr. Muhammad an evidentiary hearing.

ARGUMENT IV

THE CLEMENCY PROCESS IN MR. MUHAMMAD'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.

On October, 21, 2013, undersigned counsel, Linda McDermott, received a letter from Julia McCall, a Coordinator at the Office of Executive Clemency, dated the same day (PC-R4. 377). The letter indicated that Mr. Muhammad had been denied clemency. However, Mr. Muhammad submits that he was not afforded due process in his clemency proceedings, and his sentence of death must be vacated.

A. MR. MUHAMMAD WAS DEPRIVED OF DUE PROCESS THROUGHOUT HIS CLEMENCY PROCEEDINGS

On October 13, 2011, Ms. McDermott was contacted by Assistant Public Defender Alan Chipperfield. Mr. Chipperfield explained that the Office of the Public Defender for the Eighth Judicial Circuit had been appointed to represent Mr. Muhammad in his clemency proceedings. Mr. Chipperfield was aware that Ms. McDermott represented Mr. Muhammad as his court appointed counsel in federal court and requested some basic information about Mr.

Muhammad's case.

That same day Ms. McDermott received a phone call from a representative from the Florida Parole Commission, Michelle Whitworth. Ms. Whitworth inquired as to whether Ms. McDermott would be interested in representing Mr. Muhammad in his clemency proceedings. Ms. McDermott agreed and was informed that actions would be taken to have Ms. McDermott appointed to represent Mr. Muhammad as his clemency counsel.

The following day, Ms. McDermott received a facsimile from Mr. Chipperfield attaching a *proposed* order permitting the Office of the Public Defender to Withdraw and appointing Ms. McDermott as Mr. Muhammad's clemency counsel. A few weeks later, Ms. McDermott received a signed order appointing her as Mr. Muhammad's clemency counsel. Thereafter, Ms. McDermott coordinated a date for the clemency hearing with Ms. Whitworth, engaged an investigator and began to prepare Mr. Muhammad's petition for clemency.

On December 29, 2011, Ms. McDermott received a telephone message from Thomas Winokur, Assistant General Counsel at the Executive Office of Governor Rick Scott. Mr. Winokur requested that Ms. McDermott return his phone call. The following day, Ms. McDermott and Mr. Winokur spoke. Mr. Winokur informed her that it was his understanding that a motion would be filed, though he did not know who would file it. This motion would be seeking to have Ms. McDermott removed as Mr. Muhammad's clemency counsel.

During the conversation Mr. Winokur commented that Ms. McDermott was probably aware "where this was coming from". Ms.

McDermott, confused by this comment, mentioned that she had recently requested an extension of time in a case where a brief was due in the Florida Supreme Court. In that motion, she mentioned that she was serving as clemency counsel for Mr. Muhammad as one of the examples of her workload at the time the motion was filed. Ms. McDermott wondered if the filing of that motion, informing the State of her representation of Mr. Muhammad in his clemency proceedings, was the impetus for the effort to remove her as Mr. Muhammad's clemency counsel.[37] Mr. Winonkur made the comment: "You know my friends at the Attorney General's Office."

A few weeks later, on January 9, 2012, the Florida Parole Commission (hereinafter "the Commission"), filed a motion requesting that this Court appoint Mr. Muhammad new clemency counsel. In the course of Ms. McDermott's conversations with the attorney for the Commission, Sarah Rumph, Ms. Rumph asked Ms. McDermott if she knew why the effort was being made to remove her. When Ms. McDermott responded that she did not know, but had some suspicions based on her conversation with Mr. Winokur, Ms. Rumph made the comment that: "He used to work for the Attorney General's Office." Ms. McDermott indicated that she was aware of Mr. Winokur's former employment because he had served as opposing counsel on a few of her cases.

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[37]Indeed, the circumstances of the effort to have undersigned removed as Mr. Muhammad's clemency counsel appeared to be a calculated effort on behalf of the Office of the Attorney General to interfere with Mr. Muhammad's clemency proceedings.

The State, i.e., the party-opponent to the substantive postconviction litigation, sought to interfere with Mr. Muhammad's clemency proceedings, in violation of due process. Particularly egregious was the fact that the Attorney General sought to interfere with Mr. Muhammad's clemency proceedings, given that the Attorney General is a member of the Cabinet that considered and denied Mr. Muhammad's clemency petition.[38] Such action makes clear that the proceeding was no a "fail safe", but a sham and violated Mr. Muhammad's right to due process.

Furthermore, in the summer of 2012, after the issue of representation was resolved Mr. Muhammad underwent surgery to remove a goiter and a mass from his chest. Because of the size and location of the goiter, its removal caused Mr. Muhammad to lose his voice. Initially, Mr. Muhammad was told by DOC medical personnel that they believed the damage to his vocal chords was temporary. Mr. Muhammad was instructed not to speak or strain his vocal chords.

Shortly after the surgery, Ms. Whitworth attempted to schedule Mr. Muhammad's clemency interview for September 6, 2012. Mr. Muhammad requested that the interview be rescheduled for a later date so that he would be able to participate in the interview. He based his request on the fact that he was physically unable to speak in more than a whisper, and that he understood that the medical staff did not want him speaking in

[38]Of course, there has been recent news coverage that the Attorney General has placed a higher priority on political fundraising than her duties in carrying out an execution.

order to permit healing. The Commission denied Mr. Muhammad's request citing a letter Ms. Whitworth had obtained from Mr. Muhammad's treating physician indicating that Mr. Muhammad was not instructed not to speak, but simply to rest his vocal chords by "reduced talking" (See PC-R4. 379). Based upon the inconsistent medical advice and Mr. Muhammad's medical condition, he did not appear for his clemency interview.

Recently, prior to the signing of his death warrant, Mr. Muhammad was informed that permanent damage was done to his vocal chords as a result of the surgery. In order to permit Mr. Muhammad to obtain a second opinion, he was offered an opportunity to meet with a specialist to determine if there was any way to repair the damage. Clearly in these circumstances, there was a looming question of DOC liability for the permanent damage done to his vocal chords, not to mention the cost of providing access to a specialist. Conveniently for DOC, it was at this juncture that clemency was denied and a death warrant was signed. A determination of whose death warrant should be signed on the basis of the medical cost associated with maintaining the condemned alive smacks of the things that went on in Germany in the 1930s and early 1940s. It is not consistent with American due process.

In addition, Mr. Muhammad has recently learned that the Florida Parole Commission failed to follow its rules in conducting its clemency investigation. Rule 15B of the Rules of Executive Clemency requires the Florida Parole Commission to conduct an investigation in a particular way:

> In all cases where the death penalty has been imposed, the Florida Parole Commission may conduct a thorough and detailed investigation into all factors relevant to the issue of clemency and provide a final report to the Clemency Board. The investigation **shall include**, but not be limited to, (1) **an interview with the inmate, who may have clemency counsel present, by the Commission;** (2) an interview, if possible, with the trial attorneys who prosecuted the case **and defended the inmate;** (3) **an interview, if possible, with the presiding judge** and; (4) **an interview, if possible, with the defendant's family.** The Parole Commission shall provide notice to the Office of the Attorney General, Bureau of Advocacy and Grants, that an investigation has been initiated. The Office of the Attorney General, Bureau of Advocacy and Grants shall then provide notice to the victims of record that an investigation is pending and at that time shall request written comments from the victims of record. Upon receipt of comments from victims of record or their representatives, the Office of the Attorney General, Bureau of Advocacy and Grants shall forward such comments to the Parole Commission to be included in the final report to the Clemency Board.

(Emphasis added). Here, the Florida Parole Commission did not interview Mr. Muhammed, his trial attorneys, or members of his family who were readily available, despite the fact that the rules mandate interviews in conducting the clemency process.

B. EVALUATING MR. MUHAMMAD'S CLAIM

In its order addressing this issue, the circuit court denied Mr. Muhammad's claim as untimely on the basis that Mr. Muhammad had the opportunity for a clemency interview on September 6, 2012, and the fact that Florida's clemency procedures do not call for further input after the initial interview has been known for years (PC-R4. 540). Mr. Muhammad submits, contrary to the circuit court's determination, that a clemency proceeding does not stop when an interview occurs. In fact, Mr. Muhammad continued to submit documents to the Office of Executive Clemency

well after his scheduled interview (See PC-R4. 558-562). For instance, counsel for Mr. Muhammad was asked to provide additional documents to the Florida Parole Commission on October 23, 2012 (PC-R. 559). Counsel provided the requested documents and thereafter provided additional supplemental information in support of his petition for clemency on December 3, 2012 (PC-R4. 561-62).

Additionally, in its order the circuit court also adopted the State's point that this Court has repeatedly rejected challenges to Florida's clemency procedures (PC-R4. 541). However, as Mr. Muhammad's counsel explained at the case management conference, his due process claim must be considered based on the facts of his case:

> Further, under Woodard, the question is whether or not minimal due process was complied with. And I recognize that the state's relying on other cases in which the court had said in this case minimal due process had {sic} been denied, but none of those other cases had the circumstances here, and that required a factual determination and it's fact specific. What about this case?
>
> Now, there's also - - on page 19 of the response, there's a discussion about Gore and Johnston and the fact the Florida Supreme Court has been unwilling to find a due process violation regarding clemency proceedings when a defendant has had a full clemency proceeding earlier and is complaining about his ability to participate in a second proceeding. Again, that's not the circumstances here.
>
> In Gore, for example, he had received a death warrant after clemency was denied back in the eighties. And so there had been a full clemency proceeding that ended, and a death warrant was signed. Subsequently, a resentencing was ordered and he had a resentencing and, after the resentencing, he was comlaining about not having another clemency proceeding. That's not the situation here.

(T. 100-01).

Mr. Muhammad has a constitutional right to due process during his clemency proceedings, and that right was violated in this case. The United States Supreme Court has recognized that the importance of the clemency process in a capital case cannot be understated: "Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" Harbison v. Bell, 129 S.Ct. 1481, 1490 (2009). When the clemency process is rendered meaningless and/or reduced to that of a milemarker on the road to an execution, as it was here, Florida's death penalty scheme is rendered constitutionally defective. In Ohio Adult Parole Authority, et. al v. Woodard, 523 U.S. 272, 288 (1998), Justices O'Connor and Stevens' opinions reasoned that as long as the condemned person is alive, he had an interest in his life that the Due Process Clause protects. Woodard, 523 U.S. at 288-89, 291-92.[39] Both cited examples of behavior that would at least raise a question as to whether a defendant had received adequate clemency access under the due process clause: Justice O'Connor wrote of "a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." Id. at 289. Justice Stevens criticized Chief Justice Rehnquist's opinion because it would tolerate "procedures infected by bribery,

[39]It is important to note that there was no majority opinion in Woodard as to this aspect of the decision and its reasoning.

personal or the deliberate fabrication of false evidence," Id. at 290-91, and the use of "race, religion, or political affiliation as a standard for granting or denying clemency." Id. at 292.

Justice O'Connor drew a distinction between noncapital cases, in which the clemency applicant's liberty interest in being free from confinement has been extinguished by a fair conviction and sentence, and capital cases, in which the life interest protected by the due process clause lasts as long as the condemned person is still alive. Id. at 289. Justice Stevens suggests that clemency proceedings have become "an integral part of its system for finally determining whether to deprive a person of life," id. at 292, with the effect that under Evitts v. Lucey, 469 U.S. 387, 396 (1985), a state is obliged to adhere to the Due Process Clause. He also reasons that the life interest in capital clemency proceedings requires a higher standard of due process protection than the rights of appellants, probationers, and parolees, because of the qualitative and quantitative differences between death and all other punishments. Woodard, 523 U.S. at 293-94, citing Gardner v. Florida, 430 U.S. 349, 357 (1977). Additionally, in Herrera v. Collins, 506 U.S. 390 (1995), Justice O'Connor made clear that she regarded clemency as an essential backstop to judicial remedies, both concurring with Chief Justice Rehnquist who discussed it at great length, 506 U.S. at 409-17, and specifically mentioning it in her critical two-vote concurrence. Id. at 421.

In Woodard, Justice O'Connor found that the specific flaws Woodard cited did not rise to the level which would trigger a

cognizable due process challenge, i.e that he was only given 3 days notice of his interview; and that he did not have enough time to prepare a clemency petition. Id. at 289-90. Each of these criticisms dealt with the internal structuring of a clemency hearing and are minor in comparison to the problems presented in Mr. Muhammad's situation. For example, one of the very individuals Mr. Muhammad was appealing to in seeking clemency was attempting to interfere with his proceedings, to remove his counsel, and making it clear that the proceedings were not meaningful in any way. Indeed, the proceedings here reflected an arbitrary process where the Attorney General interfered with the process, medical information was manipulated to prevent a hearing, clemency rules were not followed, and the medical costs and liability arising from his damaged vocal chords provide a fiscal interest in denying Mr. Muhammad's request for clemency.

Due process and equal protection demands that Mr. Muhammad be afforded a complete investigation and an impartial review of his case. Here, the Clemency Board and the Governor did not make an informed or impartial decision about whether to grant clemency, and could not have made one given the manipulation of the process short circuiting Mr. Muhammad's due process rights as outlined herein.

This Court has recognized that a clemency proceeding is "part of the overall death penalty procedural scheme in the state." Remeta v. State, 559 So. 2d 1132, 1135 (Fla. 1990). This Court has likewise recognized that the basic requirement of due

process in an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice". Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Where that requirement is tainted, the death penalty procedural scheme is obviated. Here, an evidentiary hearing is required, and thereafter relief will be warranted.

ARGUMENT V

BECAUSE OF THE INORDINATE LENGTH OF TIME THAT MR. MUHAMMAD 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.

Mr. Muhammad has been on death row for over 38 years.[40] The Eighth Amendment's prohibition on cruel and unusual punishment precludes the execution of a prisoner who has spent so much time on death row. This conclusion is derived from the fact that the Eighth Amendment requires that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976). Punishments that entail exposure to a risk that "serves no 'legitimate penological objective'" and that results in gratuitous infliction of suffering violate the Eighth Amendment. Farmer v. Brennan, 511 U.S. 825, 833 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 548 (1984) (Stevens, J.,

[40]Mr. Muhammad was sentenced to death on April 21, 1975, for the murders of Lillian and Sidney Gans. While on death row, he received another death sentence in the instant case on January 20, 1983.

concurring in part and dissenting in part).[41]

Life on death row is psychologically devastating with the punishment of incarceration multiplied exponentially by the psychological torture of waiting for execution. Life on death row is further punishing in that the inmates are isolated for all but a few hours a week and have significantly fewer rights than inmates in the general population.

In Mr. Muhammad's case, his time on death row has been far more difficult than that of the average death row inmate. After the crime was committed in the instant case, Mr. Muhammad was placed in solitary confinement in an area called Q Wing (T. 2271, 3535). While all inmates at Florida State Prison, regardless of their sentence, are housed in single-man cells, their cells are adjacent to those of others; the inmates can communicate through the bars with other inmates on the same corridor, and are allowed yard privileges (T. 2295, 3536). Death-row inmates are allowed yard privileges (or at least may congregate in the area of the corridor outside their cells) for two hours a week and have a television set in their cells (T. 2256).

Q Wing is different. During his confinement there, Mr. Muhammad was completely isolated (T. 2297). He had no yard

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[41]Where, as here, the inherent cruelty of living under a sentence of death is prolonged for over 38 years, such suffering cannot be considered incidental to the processing of the appeals. It is unnecessary and thus unconstitutional. Such long-term suffering becomes a separate form of punishment, which is equivalent to or greater than an actual execution. See Coleman v. Balkom, 45 1 U.S. 949, 952 (1981)(Stevens, J., concurring in denial of certiorari); cf. In re Medley, 134 U.S. 160, 172 (1890).

privileges and no television (T. 2296, 3547). Unlike the cells on death row, this cell did not look out onto a corridor, but was completely enclosed. It had a sort of foyer with an outer solid door (T. 3536). The door would be opened a few times each day, for a minute or so, in order to check on the inmate (T. 3548). Mr. Muhammad stayed in that cell for nine years (T. 3536). He finally succeeded in being transferred back to death row in 1989 (T. 3536), and his yard privileges were restored in 1992 (T. 2296, 2314-15).

In Lackey v. Texas, Justice Stevens wrote:

> Though novel, petitioner's claim is not without foundation. In *Gregg v. Georgia*, this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers and (2) the death penalty might serve "two principal social purposes: retribution and deterrence".
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley, 134 U.S. 160, 172, 33 L. Ed. 835, 10 S. Ct. 384 (1890)*. If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, that description should apply with even greater force in the case of delays that last for many years. Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

514 U.S. 1045 (1995) (J. Stevens, memorandum respecting denial of certiorari) (citations omitted).[42]

In a subsequent denial of certiorari review in another case, Justice Breyer echoed the concerns voiced by Justice Stevens in Lackey. Justice Breyer wrote in a case involving a defendant who had been on Florida's death row over 23 years that: "After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise may provide a necessary constitutional justification for the death penalty." Elledge v. Florida, 119 S. Ct. 366 (1998)(J. Breyer, dissenting). And, in Mr. Muhammad's appeal to the U.S. Supreme Court from his conviction and sentence of death in Dade County, Justice Breyer stated:

> Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades. See *Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc)* (Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence).

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[42]Certainly, the Framers of the United States Constitution would not have envisioned that a condemned man would spend over 38 years awaiting execution. The Eighth Amendment's prohibition on cruel and unusual punishment in the 1776 Virginia Declaration of Rights was based on the 1689 English Bill of Rights. Harmelin v. Michigan, 501 U.S. 957, 966 (1991). The English Bill of Rights said "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" when executions took place within weeks of a death sentence, and if a delay in carrying out the execution was unduly prolonged, it could be commuted to a life sentence. Riley v. Attorney Gen. of Jamaica, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarsman, dissenting); Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc).

Knight v. Florida, 528 U.S. 990, 995 (1999)(J. Breyer, dissenting from the denial of certiorari). Justice Breyer described the psychological impact of a long stay on death row:

> It is difficult to deny the suffering inherent in a prolonged wait for execution -- a matter which courts and individual judges have long recognized....The California Supreme Court has referred to the "dehumanizing effects of . . . lengthy imprisonment prior to execution." In *Furman v. Georgia, 408 U.S. at 288-289* (concurring opinion), Justice Brennan wrote of the "inevitable long wait" that exacts "a frightful toll." Justice Frankfurter noted that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."

Knight, 528 U.S. at 994-995.

More recently, in a concurring opinion denying certiorari review, Justice Stevens explained:

> In sum, our experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out an execution after the lapse of so much time, reinforces my opinion that contemporary decisions "to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process."

Thompson v. McNeil, 129 S.Ct. 1299, 1300 (2009)(Stevens, J., concurring in judgment)(citation omitted).

Additionally, a review of international law strongly suggests that the execution of a condemned individual after over 38 years on death row is not consistent with evolving standards of decency. For example, in 1993 two Jamaican death row inmates challenged their death sentences on the basis that their 14 year incarceration on death row violated the Jamaican Constitution's

prohibition against inhuman punishment. The Privy Council of the United Kingdom invalidated their death sentences and indicated that a stay on death row of more than five years would be excessive, and commuted their sentence from death to life in prison. Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc).

As a result of the prolonged stays on death rows in the United States, combined with the inhumane conditions typical of death row, some foreign jurisdictions have refused extradition of criminal suspects to the United States where it was likely that a death sentence would result, on the grounds that the experience of years of living on death row would violate international human rights treaties. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989). In Soering, the European Court of Human Rights held that the extradition of a capital defendant, a German national, to the United States would violate Article 3 of the European Convention on Human Rights, which bars parties to the Convention from extraditing a person to a jurisdiction where they would be at significant risk of torture or inhumane punishment. The court cited the risk of delay in carrying out the execution, which in Virginia averaged between six and eight years. The court found that "the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." Id. at §106. Since the U.S. government could not assure that the death penalty would not be sought in the Virginia courts, extradition was barred by the United Kingdom.

Additionally, a proscription against "torture or cruel, inhuman, or degrading treatment or punishment," is contained in both the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treament or Punishment. Since the early 1990s, the United States has been a signatory of both treaties. Under the Supremacy Clause, those two treaties are binding on the states as well as the federal government. See Missouri v. Holland, 252 U.S. 416 (1920).[43] Numerous leading international law tribunals have held that the prohibition against "cruel, inhuman or degrading punishment or treatment" prohibits a state from keeping a condemned person on death row for an inordinate period of time. See, e.g., Pratt & Morgan v. Attorney General of Jamaica, 2 A.C.

[43]The U.S. has filed "reservations" with respect to both treaties, which contend that the U.S. understands the language "torture or cruel, inhuman or degrading punishment or treatment" to mean the same thing as the phrase "cruel and unusual punishments" in the Eighth Amendment. See David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DePaul L. Rev. 1183 (Summer 1993). No other signatory nation has filed a "reservation" or otherwise objected to that particular language in the treaty. Michael H. Posner & Peter Shapiro, Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1209, 1216 (Summer 1993). Numerous signatory nations have lodged objections to the U.S. "reservations" in the United Nations. The fact that well over 100 nations are signatories of the International Covenant on Civil and Political Rights, see id. at 1212, means that the language in Article VII of the Covenant has assumed the status of a "peremptory norm" of international law, or jus cogens. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715-16 (9th Cir. 1992). Such a fundamental norm of international law is binding on the federal government and the states even in the absence of a treaty. See The Paquete Habana, 175 U.S. 677, 700 (1900).

1 (British Privy Council 1993) (en banc) (citing numerous decisions of courts around the world); Soering v. United Kingdom, 11 European Human Rights Reporter 439 (1989)(extradition to U.S. to face capital murder charges refused because of time on death row if sentenced to death); Vatheeswarren v. State of Tamil Nadu, 2 S.C.R. 348 (India, 1983)("dehumanizing character of delay"); Sher Singh v. State of Punjab, 2 SCR 582 (India 1983)(Prolonged delay in the execution an important consideration in considering whether sentence should be carried out); Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimbabwe 1993) [reported in 14 Human Rights L. J. 323 (1993)].

Here, to execute Mr. Muhammad after he has already had to endure over 38 years of incarceration under sentence of death, would be unconstitutionally cruel and unusual punishment. See, e.g., Schabas, Execution Delayed, Execution Denied, 5 Crim. L. Forum 180 (1994); Lambrix, The Isolation of Death Row in Facing the Death Penalty, 198 (Radelet, ed. 1989); Millemann, Capital Postconviction Prisoners' Right to Counsel, 48 MD. L. Rev. 455, 499-500 (1989)("There is little doubt that the consciousness of impending death can be immobilizing... this opinion has been widely shared by [jurists], prison wardens, psychiatrists and psychologists, and writers.")(Citing authorities); Mello, Facing Death Alone, 37 Amer. L. Rev. 513, 552 and n. 251 (1988)(same)(citing studies); Wood, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U. L. Rev. 35, 37-39 (1986)("The physical and psychological pressure present in capital inmates has been widely noted... Courts and commentators

have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself or is an element in making the death penalty cruel and unusual punishment.")(citing authorities); Stafer, Symposium on Death Penalty Issues: Volunteering for Execution, 74 J. Crim. L. 860, 861 & n.10 (1983)(citing studies); Holland, Death Row Conditions: Progression Towards Constitutional Protections, 19 Akron L. Rev. 293 (1985); Johnson, Under Sentence of Death: The Psychology of Death Row Confinement, 5 Law and Psychology Review 141, 157-60 (1979); Hussain and Tozman, Psychiatry on Death Row, 39 J. Clinical Psychiatry 183 (1979); West, Psychiatric Reflections on the Death Penalty, 45 Amer. J. Orthopsychiatry 689, 694-695 (1975); Gallomar and Partman, Inmate Responses to Lengthy Death Row Confinement, 129 Amer. J. Psychiatry 167 (1972); Bluestone and McGahee, Reaction to Extreme Stress: Impending Death By Execution, 119 Amer. J. Psychiatry 393 (1962); Note, Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L. Rev. 814, 830 (1972); G. Gottlieb, Testing the Death Penalty, 34 S. Cal. L. Rev. 268, 272 and n. 15 (1961); A. Camus, Reflections on the Guillotine in Resistance, Rebellion and Death, P. 205 (1966)("As a general rule, a man is undone waiting for capital punishment well before he dies."); Duffy and Hirshberg, Eighty-Eight Men and Two Women, P. 254 (1962) ("One night on death row is too long, the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.")(Quoting former warden of California's San

Quentin Prison).

Moreover, it is important to note that the many years of delay in Mr. Muhammad's case are attributable in large part to various deficiencies in Florida's death penalty system and errors committed by the State. See O'Neil v. McAninch, 115 S.Ct. 992, 998 (1995) ("the State normally bears responsibility for the error that infected the initial trial," and, thus, must bear responsibility for the delay between the initial trial and retrial); see also State v. Richmond, 886 P.2d 1329, 1333 (Ariz. 1994) (death row inmate not responsible for delay resulting from a successful post-conviction appeal). It was the State's denial of a constitutional sentencing that led to a series of extensive delays in Mr. Muhammad's original case.[44] Further, errors by the State led to extensive delay in the instant case. Because the trial court erroneously failed to grant an evidentiary hearing on Mr. Muhammad's 3.850 motion filed in 1989, this led to a reversal and remand by the Florida Supreme Court in 1992. See Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992) ("However, we agree with Muhammad that summary denial was improper as to the State's alleged failure to disclose exculpatory employee statements in

[44]While Mr. Muhammad was sentenced to death for the murders of Lillian and Sidney Gans in 1975, his death sentences were reversed 13 years later by the Eleventh Circuit Court of Appeals because the trial court unconstitutionally restricted consideration of nonstatutory mitigating evidence. Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988). Mr. Muhammad's resentencing proceeding did not occur for another 8 years. As the Eleventh Circuit recently commented, "To learn about the gridlock and inefficiency of death penalty litigation, look no further than this appeal." Muhammad v. Secretary, Case No. 12-16243 at 1 (11th Cir. 2013).

violation of *Brady v. Maryland*"). Following the remand, it was not until 2000 that Mr. Muhammad finally received the evidentiary hearing he sought and was entitled to in 1989. In addition, Mr. Muhammad's appeals in both state and federal court have been exhausted since January 25, 2010. Thus, for over the past 3 and a half years, Mr. Muhammad has been warrant eligible and has had no pleadings pending in any court.[45]

In its order addressing this issue, the circuit court denied relief on the basis that this Court has repeatedly rejected this claim (PC-R4. 541-42). In doing so, however, the circuit court ignores the specific circumstances of Mr. Muhammad's incarceration, i.e., that he is a paranoid schizophrenic and was housed in solitary confinement for nine (9) years. See Swafford v. State, 679 So. 2d 736, 742 n.8 (Fla. 1996) (Wells, J., dissenting) ("I take notice of Florida Department of Corrections' material which states that prisoners who have been sentenced to death are maintained in a six- by nine-foot cell with a ceiling nine and one-half feet high. See Florida Department of Corrections, An Information Services Fact Sheet (June 1994). These prisoners are taken to the exercise yard for two-hour

[45]The deficiencies in Florida's death penalty system are evident by the fact that in a recent death warrant, an execution was actually delayed so that the Attorney General could attend a political fundraiser. See Adam C. Smith, *Execution rescheduled to accommodate Pam Bondi fundraiser*, Tampa Bay Times (September 9, 2013); *Pam Bondi fundraiser led to execution date change*, The Associated Press (September 9, 2013); *Attorney General Pam Bondi sorry for requesting delay in execution*, News Service Florida (September 24, 2013); Brendan McLaughlin, *Fundraiser for Attorney General Pam Bondi bumps execution off the calendar, Bondi apologizes*, ABC Action News (September 10, 2013).

intervals twice a week. Otherwise, these prisoners are in their cells except for medical reasons, legal or media interviews, or to see visitors (allowed to visit from 9 a.m. to 3 p.m. on weekends only). These facilities and procedures were not designed and should not be used to maintain prisoners for years and years."). Here, not only is Mr. Muhammad's time on death row longer than any other individual raising this claim in Florida, but, the additional torturous conditions he experienced make his claim unique and meritorious. Relief is warranted.

ARGUMENT VI

THE TIMELY JUSTICE ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SEPARATION OF POWERS DOCTRINE AND INTERFERES WITH THE GOVERNOR'S WARRANT DISCRETION IN SIGNING DEATH WARRANTS.

During the regular session of 2013, the Legislature passed the Timely Justice Act, in an effort to accelerate the frequency of death warrants and limit the capital postconviction process. During the debate prior to the bill's passage, lawmakers argued that it is not about guilt or innocence, its about timely justice, Bill Cotterell, *Florida Legislators Approve Measure To Speed Up Executions*, Reuters, April 29, 2013, that [o]nly God can judge. But we sure can set up the meeting, Rania Khalek, *Florida Lawmakers Pass Bill To Speed Up Executions*, Dispatches From The Underclass, May 14, 2013, that when you kill someone, we kill you back, *House OKs bill to speed up capital punishment*, The Tampa Tribune, April 25, 2013, that [v]engeance is mine, sayeth the lord, Jessica Palombo, *Fla. House Passes Timely Justice Act To Cut Death Row Wait Time*, WFSU, April 25, 2013, and that [i]f man

sheds blood, by man shall his blood be shed. Id. It can only be said that such arguments are founded on political considerations without regard for constitutional requirements and/or Eighth Amendment jurisprudence.

Upon its effective date of July 1, 2013, the Act struck a heavy blow to this Court's authority to dictate how it and its Clerk oversee Florida's use of the death penalty. It will also devastate the due process provided by this Court in its rule regime. Judicial principles have been discarded, and hard-earned protections have been lost.

Despite the fact that litigation is pending relating to the constitutionality of the Timely Justice Act, based on the provisions in the Act, the Governor was forced to schedule Mr. Muhammad's execution following the delivery to him of the October 4, 2013, letter from the Clerk of this Court.[46] (See PC-R4. 381-86). Indeed, Mr. Muhammad is the first of over 140 individuals, who, under the Timely Justice Act, are now required to receive dates of execution within the next few months.

In its order denying this issue, the circuit court stated, "[T]his Court agrees with the State's point in its response that 'the Florida Supreme 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.'" (PC-R4. 542). The circuit court's

[46]Indeed, the Clerk's letter to the Governor was in compliance with a provision of the Timely Justice Act.

order, however, ignores the basis of Mr. Muhammad's claim, which concerns the fact that the warrant-issuance provision of the Timely Justice Act violates Article II §3 of the Florida Constitution by usurping, interfering with, and reassigning to the Governor judicial powers held solely by this Court. The principle of Separation of Powers is embodied in Article II § 3 of the Florida Constitution, which states that [n]o person belonging to one branch [of government] shall exercise any powers appertaining to either of the other branches . . . . The Florida Supreme Court adheres to a strict separation of powers doctrine which encompasses [the] two fundamental prohibitions that no branch may encroach upon the powers of another and no branch may delegate to another branch its constitutionally assigned power. Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004)(citing Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991)).

The Timely Justice Act amends Florida Statute § 922.052 to make issuance of death warrants automatic upon completion of initial postconviction proceedings. § 922.052 requires the Clerk of this Court to provide a certification to the Governor upon completion of federal habeas proceedings and the Governor within 30 days to sign a warrant scheduling an execution date within 180 days.[47] The Governor is given sole discretion to determine if

[47]As the Clerk noted in his October 4th letter to the Governor, "the majority of this information [the information on which he relied to prepare the list] comes from sources other than Florida Supreme Court case files." (PC-R4. 382). Accordingly, the Clerk noted that he could not say that the information on which he relied "is not subject to dispute." (PC-R4. 382). Thus, this list as required by the Timely Justice Act,

the Clerk of this Court has performed its task correctly,[48] and, if not, to issue a death warrant without a prior certification.

Florida Statute § 922.052, as amended by the Timely Justice Act, violates the constitutional principle of Separation of Powers in four distinct but related ways. First, the provision infringes on this Court's rule making authority by usurping it. This violation is constitutionally indistinguishable from the Legislature's 2000 attempt to reform Florida's death penalty system by arbitrarily speeding it up – the Death Penalty Reform Act – which this Court struck down as unconstitutional. See, 756 So. 2d 52, 66-67 (Fla. 2000).

Second, the provision infringes on this Court's judicial power because it conflicts with case law and interferes with the operation of court rules. Even if § 922.052 did not represent a brazen legislative attempt to exercise the judicial power of rulemaking, it would still be unconstitutional because it conflicts with and undermines that power and the power of judicial review over constitutional matters.

Third, the provision infringes on this Court's constitutional authority to oversee and direct the Clerk by requiring the Clerk to adhere to a certification procedure dictated by the Legislature and by placing the Governor in an

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which is then used to schedule executions, may or may not be reliable. Such a cavalier disregard for reliability renders the Timely Justice Act in violation of the Eighth Amendment.

[48]This is a clear judicial function which the Timely Justice Act assigns to the Governor in violation of the separation of powers doctrine arising from the Florida Constitution.

oversight role in which he assesses the Clerk's compliance.

Fourth, the provision infringes upon the Governor's power by placing time limits on his authority to schedule executions under warrants issued in response to certifications from the Clerk. While there is no time limitation on his authority to schedule executions under warrants issued independently, the Legislature infringes upon the Governor's power in that regard by making that authority contingent on and controlled by the Clerk's assessment of the completion of initial proceedings in other jurisdictions.

Each of these violations require that the warrant-issuance provision of the Act be struck down. At a minimum, and even though mitigating the effects of the Separation of Powers violation does not cure the constitutional problem, the automatic-warrant provision, which schedules executions without regard for judicial proceedings, must be subject to exceptions being carved out by the judiciary to accommodate constitutional requirements (such as for cases with unresolved successive proceedings pending under this Courts Florida Rules of Criminal Procedure 3.851(d)(2) and (e)(2)).

In Mr. Muhammad's case, the Timely Justice Act has worked to strip the Governor of his discretion to allow Mr. Muhammad to fully litigate the case used as an aggravator in the Bradford County case.[49] At Mr. Muhammad's penalty phase proceeding in the

[49]On October 4, 2013, the Clerk of the Florida Supreme Court delivered to the Governor a "Certification" of inmates who had completed their initial postconviction proceedings (PC-R4. 381-86). Mr. Muhammad's name appeared for the Bradford County conviction and sentence of death with a footnote indicating that

Bradford County case, the State introduced evidence that Mr. Muhammad had been convicted and sentenced to death for a double homicide in Dade County in 1974 (T. 1531). The court relied on that evidence to sentence Mr. Muhammad to death.

On December 8, 1988, the Eleventh Circuit Court of Appeals reversed Mr. Muhammad's sentence and directed that he be resentenced within a reasonable period of time. Knight v. Dugger, 863 F. 2d 705 (11th Cir. 1988).

In January, 1996, Mr. Muhammad was re-sentenced to death. But, in 2012, Mr. Muhammad's sentence was again reversed by the federal district court. See Muhammad v. Tucker, 905 F. Supp. 1282 (S. Dist. Fla. 2012). The reversal rested on the district court's conclusion that this Court had erred in holding that Mr. Muhammad's claim that he was denied his sixth amendment right to confrontation was procedurally barred. After conducting a de novo review, the District Court held that Mr. Muhammad' rights to confrontation had been violated. Id.

On September 23, 2013, a split panel of the Eleventh Circuit issued an opinion reversing the decision of the district court and entering judgment for the State. Muhammad v. Secretary, Case No. 12-16243 (11th Cir. 2013). The Eleventh Circuit held that the Confrontation Clause did not apply to capital sentencing proceedings. This holding conflicts with this Court's caselaw

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he had obtained relief in the Dade County case. Id. Pursuant to the Timely Justice Act, the Governor was required to issue Mr. Muhammad's death warrant within 30 days of receipt of the list, which he did.

which recognizes that the Confrontation Clause of the Sixth Amendment apples at the penalty phase of a capital case. See Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989); Tompkins v. State, 502 So. 2d 415, 420 (Fla. 1986); Walton v. State, 481 So. 2d 1197, 1200 (Fla. 1985).

Mr. Muhammad has timely filed a motion for rehearing in the Eleventh Circuit. His Dade County sentence of death is not final. However, due to the Timely Justice Act, the Governor's discretion to allow Mr. Muhammad to litigate a critical issue in a case that is inextricably intertwined with his sentence of death in this case has been stripped.

The Timely Justice Act's requirement that the Clerk provide the Governor with a certification of those condemned individuals whose cases have completed an initial round of collateral review injects unreliability into Florida's capital sentencing scheme in violation of the Eighth Amendment. As the Clerk noted in his October 4th letter to the Governor, he is not in a position to know definitively who should be certified under the Timely Justice Act and who should not be. As Clerk of the Florida Supreme Court, he simply does not have access to the records necessary to make that determination.[50] (See PC-R4. 382, fn 4). Certainly, the uncertainty expressed by the Clerk as to the accuracy of the information he possessed when he prepared the

[50]Certainly, the Timely Justice Act does not explain why the Clerk of the Florida Supreme Court, who is not in a position to know definitively the status of collateral proceedings not pending in the Florida Supreme Court, was designated to be the arbiter of who gets certified and who does not.

list of names set forth in his October 4th letter does not comport with the heightened reliability requirement the Eighth Amendment imposes in capital cases.

It is precisely in circumstances such as these, that heightened reliability is constitutionally required. It is exactly this type of situation where the Governor must be permitted to have and to exercise his discretion in order to ensure that the death penalty is applied fairly, consistently and reliably. The Timely Justice Act violates the Eighth Amendment and violates the separation of powers doctrine which serves as a cornerstone to the Florida Constitution. A death warrant issued pursuant to the Timely Justice Act cannot stand. Relief is warranted.

ARGUMENT VII

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

Mr. Muhammad is exempt from execution under the Eighth Amendment to the United States Constitution because he suffers from such severe mental illness that death can never be an appropriate punishment.[51] Mr. Muhammad's severe mental illness places him within the class of defendants, like those who were under the age of eighteen at the time of the crime and those with

[51]Mr. Muhammad recognizes, as the circuit court noted in its order (PC-R4. 542), that this Court has previously held that the mentally ill are not exempt from execution. Mr. Muhammad respectfully request that this Court revisit this issue and consider whether his severe mental illness constitutes a bar to his execution.

mental retardation, who are categorically excluded from being eligible for the death penalty. Cf. Roper v. Simmons, 543 U.S. 551 (2005)(holding that the death penalty is unconstitutional for defendants under 18 at the time of the crime); Atkins v. Virginia, 536 U.S. 304 (2002)(holding that the death penalty is unconstitutional for mentally retarded defendants).

The United States Supreme Court has long cautioned that the Eighth Amendment's prohibition against cruel and unusual punishment is not simply a fixed ban on certain punishments, but rather depends on evolving standards of decency for its substantive application. Trop v. Dulles, 356 U.S. 86, 100 (1958) (noting that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); Weems v. United States, 217 U.S. 349, 368 (1910)(recognizing that the words of the Eighth Amendment are not precise, and that their scope is not static.). The 2006 American Bar Association's Resolution 122A, urging states to exempt from the death penalty those defendants with severe mental illness at the time of their crimes as described in the resolution, evinces an evolution in standards of decency which must be considered in a proper Eighth Amendment analysis.[52]

[52]It bears noting that prior to the United States Supreme Court's decisions holding that mentally retarded defendants and defendants under the age of eighteen at the time of the crime are categorically excluded from eligibility for the death penalty, the ABA passed resolutions urging the exemption of both classes of defendants from the death penalty. See American Bar Association, Report with Recommendations No. 107 (adopted February 1997); American Bar Association, Recommendation (adopted February 1989); American Bar Association, Recommendation (adopted

Mr. Muhammad has suffered continuously from a severe mental illness, paranoid schizophrenia, since before the time of the crime for which he was convicted and sentenced to death.[53] Paranoid schizophrenia, like all types of schizophrenia, requires a showing of symptoms of the disorder occurring for a period of six months. During one of these months, active-phase symptoms of the illness must manifest. These include disorganized speech, hallucinations, delusions, disorganized or catatonic behavior, and negative symptoms like affective flattening, alogia, or avolition. See DSM-IV, pp.298-302. Similar to mental retardation, schizophrenics suffer cognitive and emotional dysfunctions in perception, inferential thinking, language and communication, behavioral monitoring, affect, fluency and productivity of thought and speech, hedonic capacity, volition and drive, and attention. See Id. at pg. 299. Someone suffering from schizophrenia exhibits several of these symptoms. One symptom is not enough to justify this diagnosis. See Id. at p. 301.

Mr. Muhammad has been diagnosed with paranoid schizophrenia since 1971. During his struggle with schizophrenia, Mr. Muhammad has been delusional, incoherent, and aggressive. His symptoms have been documented by several different doctors. Furthermore, his inability to receive consistent medical treatment and drug

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August 1983).

[53]Mr. Muhammad's mental illness is exacerbated by his drug abuse and resulting signs of organic brain damage.

abuse make the effects of this disease much worse.

In 1979, just months prior to the instant offense, Mr. Muhammad was described as: "high strung, suspicious and somewhat disoriented." He was noted to have "symptoms and characteristics consistent with a diagnosis of paranoid schizophrenia." It was suggested that he receive appropriate medication to "reduce unpredictability, disorientation, and general disorder of thought that he currently exhibits."

After an evaluation of Mr. Muhammad in August, 1979, Dr. Brad Fisher opined:

> This is clearly a man with a major psychiatric problem in need of appropriate medication and treatment responses. I diagnose him as paranoid schizophrenic and only wonder why the medication and treatment previously given to him for this condition has not been continued during this incarceration. The presence of a major thought disorder is clear, concomitant with the need for appropriate psychiatric responses (including psychotropic medication) . . . It may well be that appropriate medication (even without other treatment) will be enough to greatly reduce the present unpredictability, disorientation, and general disorder of thought that he currently exhibits.

Mr. Muhammad falls within the class of persons who are so much less morally culpable and deterrable than the "average murderer" as to be categorically excluded from being eligible for the death penalty, no matter how heinous the crime. Cf. Simmons, supra; Atkins, supra. Given his severe mental illness, Mr. Muhammad is constitutionally protected from execution because the death penalty is an unconstitutionally excessive punishment for the same reasons delineated in Atkins and Simmons. In Gregg v. Georgia, 428 U.S. 153, 183 (1976), the United States Supreme Court identified retribution and deterrence of capital crimes by

prospective offenders as the social purposes served by the death penalty. In Atkins, the Supreme Court stated that "[u]nless the imposition of the death penalty on a mentally retarded person measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." 526 U.S. at 320, quoting Enmund v. Florida, 458 U.S. 782, 798 (1982). The Atkins Court ultimately found that neither justification for the death penalty was served by its imposition on mentally retarded individuals.

As to the first justification, retribution, the Court concluded that the legislative trend against imposition of the death penalty on mentally retarded offenders "provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." Id. at 316. The Atkins Court opined that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." 526 U.S. at 319. The Court explained some reasons for the lesser culpability of mentally retarded offenders:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. ... [T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their

> deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318. Similarly, in Simmons, the Supreme Court listed several reasons for juveniles' diminished culpability:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, ... "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and illconsidered actions and decisions." It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior."
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> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.
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> * * *
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Simmons, 543 U.S. at 569-570 (internal citations omitted).

The reasoning in Atkins and Simmons applies with equal force to severely mentally ill offenders such as Mr. Muhammad, as some judges across the county have begun to recognize.[54] Mr.

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[54]In a concurring opinion in State v. Ketterer, 855 N.E. 2d 48 (Ohio 2006), Justice Stratton addressed the ABA resolution and noted that "[t]here seems to be little distinction between executing offenders with mental retardation and offenders with severe mental illness, as they share many of the same characteristics." Id. at ¶ 245. He concurred in the court's judgment upholding the death sentence of a severely mentally ill offender, however, because "while [he] personally believe[s] that the time has come for our society to add persons with severe mental illness to the category of those excluded from application of the death penalty, [he] believe[s] that the line should be drawn by the General Assembly, not by a court." Id. at ¶ 247. See also Corcoran v. State, 774 N.E. 2d 495, 502 (Ind. 2002)

Muhammad's severe mental illness causes him to suffer from the very same deficits in reasoning, judgment, and control of impulses that lessen his culpability and render the penological justification of retribution ineffective against him.

As to the deterrence justification for capital punishment, the Atkins Court also found that as a result of the limitations on the ability of a person with mental retardation to reason and control himself, the death penalty would have no deterrent effect on his actions. Id. at 2251. Specifically, the Court found that a mentally retarded individual's "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" makes it less likely that he will conform his conduct to avoid the possibility of execution. Id. Similarly, in Simmons, the Court noted that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." 543 U.S. at 571. In particular, the Court opined,

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(Rucker, J., dissenting) ("I respectfully dissent because I do not believe a sentence of death is appropriate for a person suffering a severe mental illness. Recently the Supreme Court held that the executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment of the United States Constitution. There has been no argument in this case that Corcoran is mentally retarded. However, the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency.") (internal citations omitted); State v. Scott, 748 N.E. 2d 11 (Ohio 2001) (Pfeifer, J., dissenting) ("As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so…. I believe that executing a convict with severe mental illness is a cruel and unusual punishment.").

"[t]he likelihood that the teenage offender has made the kind of costbenefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." Id. at 572, quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988).

Likewise, the justification of deterrence is not served by executing severely mentally ill individuals, as severe mental illness can impair an individual's ability to control impulses or understand long-term consequences. For instance, because of his mental illness, Mr. Muhammad is likely to snap under stressful circumstances. As one psychologist commented in a report from the early 1970's regarding Mr. Muhammad:

> . . . Deep underlying paranoid fantasies seem to represent a fear that his father will kill him because of the patient's love for his mother, and in a psychotic state this patient could kill a male in a delusional defense from the murderous onslaught of the father represented by the male. . . .We would regard this patient as a latent schizophrenic **who could decompensate under environmental stress or under the toxic effects of certain drugs.**

(Emphasis added). Mr. Muhammad was additionally described by experts as "highly unpredictable", "explosive under minor stress", and with grossly impaired judgment and insight.

Capital punishment's twin goals of retribution and deterrence would not be served by executing Mr. Muhammad. The extensive and compelling evidence of Mr. Muhammad's severe mental illness demonstrates that his significant impairments in reasoning, judgment, and understanding of consequences puts him in the same class as mentally retarded and juvenile offenders in terms of diminished culpability.

Additionally, mental illness, like mental retardation and

youth, can impair a defendant's ability to consult with and assist counsel at trial. Cf. Atkins, 536 U.S. at 321 ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel…"). Mr. Muhammad was so mentally ill that he was not only unable to communicate with his counsel and aid in his defense, he refused to see him altogether in the final three months preceeding his first trial. In fact, Mr. Muhammad was so impaired that he represented himself due to his inability to relate to counsel. In an earlier proceeding, one judge commented that "the Court is faced with an obviously intelligent man who exhibits symptoms consistent with extreme paranoia" (R. 63).

Because severely mentally ill defendants, mentally retarded defendants, and juvenile defendants are similarly situated with respect to the goals served by capital punishment, and because there is no rational basis for distinguishing severely mentally ill defendants from mentally retarded and juvenile defendants, executing Mr. Muhammad would not comport with equal protection under the United States Constitution. See e.g., City of Cleburne, Texas, et al.v. Cleburne Living Center, Inc., et al., 473 U.S. 432, 439 (1985), citing to Plyler v. Doe, 457 U.S. 202, 216 (1982)("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."). Mr. Muhammad's severe mental illness renders him ineligible for the death penalty under the Eighth

Amendment and the Supreme Court's reasoning in Atkins and Simmons. Relief is warranted.

CONCLUSION

Based upon the record and his arguments, Mr. Muhammad respectfully urges the Court to reverse the circuit court, order a resentencing, and/or impose a sentence of life imprisonment, and/or remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic transmission to all counsel of record on November 8, 2013.

CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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