IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2105

LOWER TRIBUNAL No. 80-341 CFA

ASKARI ABDULLAH MUHAMMAD,
FKA THOMAS KNIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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PRELIMINARY MATTERS

A. THE STATE'S ANSWER BRIEF DEMONSTRATES THAT MR MUHAMMAD IS ENTITLED TO AN EVIDENTIARY HEARING DUE TO IT'S RELIANCE ON NON-RECORD EVIDENCE TO REFUTE HIS FACTUAL ALLEGATION.

Initially, Mr. Muhammad submits that throughout it's Answer Brief, the State has demonstrated that an evidentiary hearing is warranted in this case. For example, as to Mr. Muhammad's claims that Florida's lethal injection protocol violates the eighth amendment, due to both the substitution of the first-drug and the inexplicable head shaking that occurred during the unusually lengthy execution on October 15, 2013, the State has repeatedly relied on non-record evidence to refute Mr. Muhammad's factual allegations and argue that Mr. Muhammad's claim be denied. In order to refute Mr. Muhammad's factual allegations, the State asserts: "In fact, one of the known effects of midazolam is involuntary movement." (AB at 53)(directing this Court to rely on non-record "evidence" to reject Mr. Muhammad's factual allegations and deny him an evidentiary hearing.).

Likewise, before the circuit court and in these proceedings, the State has relied on previous lethal injection protocols which were not before the Court to argue that Mr. Muhammad's claim be denied and procedurally barred. See AB at 54. Yet, there has been no evidentiary hearing to establish whether midazolam mixes in the body with other drugs in the protocol the same way the predecessor drug did.

The State's reliance on non-record evidence demonstrates that it is necessary to go outside the record to refute Mr.

Muhammad's factual allegations. This means the records and files in Mr. Muhammad's case do not refute his allegations, much less conclusively so. See McClain v. State, 629 So. 2d 320, 321 (Fla. 1st DCA 1993)("We consider the state's admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel without recourse to matters outside the record, warrants reversal of that portion of the order which denied appellant's ineffective assistance of counsel claims."); see also Long v. State, 118 So. 3d 798, 806 (Fla. 2013)("A defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief."). Thus, at a minimum, Mr. Muhammad is entitled to an evidentiary hearing in his claim that Florida's current lethal injection protocol violates the eighth amendment.

B. THE STATE'S STATEMENT OF FACTS ASSERTS IS INACCURATE AND FALSE.

The State summarizes the positions of the parties at the case management conference that occurred before Judge Roundtree on October 24, 2013, and later relies on her summary to argue that Mr. Muhammad should be foreclosed from obtaining public records (AB at 17, 33).[1] The State asserted: "Defendant insisted

[1]The hearing was not transcribed at the time that the State drafted its summary and argument based upon it, however, the State did not notify this Court that the summary and argument were based upon counsel's memory. Rather, as authority for the State's statements, the State cited to its summary that was inserted in it's response to the motion to stay, see PC-R4 523-4). Citing its previous summary is no substitute for citing the transcript. Indeed, that is why court reporters prepare

that the lower court should not set deadlines for filing of public records requests and responses or a public records hearing because he allegedly had 10 days to make public records requests and did not believe there would be any objections." (AB at 17). Mr. Muhammad's position at the hearing was clear:

> MS. McDERMOTT: ... [A]t this point, I do intend to file some public records requests. I will try to get those in - under the rule, I have ten days to file them, and then I think the State has ten days to respond, but I will try to get mine in, if I can, later this afternoon or first thing in the morning, although there may be some more that come later in the day tomorrow. So that's sort of what I have been working on, and I can assure everyone that that will happen within the next 24 hours or so.
>
> THE COURT: All right. So you do not intend to be scheduling any motions, hearings, challenges, or do you not yet know?
>
> MS. McDERMOTT: Oh, I think that I can feel pretty confidant that we will be filing a 3.851 motion, but I think that some of that is dependent, conceivably, on the records that we receive and some additional sort of review and investigation that's going to be happening in the next few days.
>
> THE COURT: All right. So as of now, though, you do not need me to schedule any hearing time?
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> MS. McDERMOTT: I'm not requesting anything be scheduled. I mean, I will try to get these requests filed, and then, I guess, if there's going to be objections, there might be a need of a hearing, but in the past, generally, the agencies have been very cooperative, very helpful when I've been under warrant. So I don't know that we've done some records hearings in the past, but that may be different in this case, depending on - you know, there's obviously different agencies involved in every case, so I would just say that conceivably we may need some time for a records hearing next week.

(Supp. T. 4-5). After which, the State requested that the Court set a schedule as to public records, Mr. Muhammad's 3.851, the

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transcripts that are placed in the record on appeal. Here the State's summary does not accurately reflect what occurred at the hearing.

State's response, a Huff hearing and dates for a potential evidentiary hearing. Mr. Muhammad made no objection to the State's request.

Later, the circuit court inquired as to when Mr. Muhammad could file his Rule 3.851 motion. Mr. Muhammad's counsel responded by noting the difficulties with the compressed schedule and expressed concern that Mr. Muhammad would "have to go forward on a motion prior even to possibly getting records or certainly, of course, having an opportunity to spend much time reviewing those records." (Supp. T. 9). The State then suggested the schedule, noting that the concerns about public records "seems to me to be anticipating a problem that may or not be -". (Supp. T. 10). Thus, it was based on the State's representation to the circuit court that a public records hearing was not scheduled, not Mr. Muhammad's "insistence" as the State suggests.

The State's recitation of the facts is completely rebutted by the record - the circuit court did set deadlines for Mr. Muhammad's requests for public records. The reason a hearing was not scheduled was due to the State's representation that scheduling the hearing "seems to me to be anticipating a problem ..." (Supp. T. 17). Furthermore, the State failed to mention, that on October 29, 2013, at 12:11 p.m., even before the deadline for filing public records requests, the circuit court sent all counsel of record an e-mail scheduling a public records hearing: "On Thursday, October 31, 2013, Judge McDonald will allow all counsel to present oral argument on each Demand for Production of Additional Public Records ..." Appendix A.

Mr. Muhammad complied with all of the deadlines scheduled in his case. The State's representation that the court did not set deadlines for public records requests or a public records hearing is false.

Furthermore, Mr. Muhammad's records requests made pursuant to Rule 3.852(h)(3) complied with the rule and cited the plain language of the rule.

As to the State's summary of the arguments made at the October 31, 2013, hearing, the State asserts that Mr. Muhammad "insisted that this Court had ordered the production of types of records he sought every time a protocol changed or a defendant claimed that there had been an incident during a prior execution." (AB at 23). However, the pages cited by the State do not support the assertions that have been made. Indeed, Mr. Muhammad's argument was completely in accordance with this Court's law:

> BY MS. McDERMOTT: I would just say that in terms of the Valle case, when they changed, when DOC changed the first drug from sodium thiopental to pentobarbital, the Florida Supreme Court remanded and had an evidentiary hearing. When the Florida Supreme - I'm sorry, when Diaz challenged the second drug, the pancuronium bromide changed to vecuronium bromide, the Florida Supreme Court did not order an evidentiary hearing, saying it was not a substantial change. The basis of this distinction is that the first drug has always been recognized as the most important drug in terms of the constitutional inquiry as to whether or not the lethal injection protocol will cause - or is deemed cruel and unusual punishment. So the fact that the first drug has now changed to a drug that's completely not even in the same class as sodium thiopental and pentobarbital, based on Florida Supreme Court law, we are entitled to these records, because they ordered in Valle that the records relating to the pentobarbital be turned over. And so I think that ... we have shown [relevance] by our reliance on Valle."

(T. 63-4).[2] Contrary to the State's false summarization, Mr. Muhammad did not argue that "every time" the protocol changed or a mishap occurred did this Court order disclosure of records.

The State also asserted that, as to the need for an evidentiary hearing, Mr. Muhammad "insisted that this Court had held that an evidentiary hearing was required any time a protocol changed or a defendant claimed an irregularity regarding an execution." (AB at 23). However, a review of the cited pages of the transcripts clearly refutes the State's assertion. Mr. Muhammad informed the Court that: "And so those are instances where hearings have been required on the lethal injection claim because there has been a problem. There's been hearings required where there have been changes in the protocol." (T. 82). Mr. Muhammad's counsel then discussed the specific cases where an evidentiary hearing was ordered, never once suggesting that an evidentiary hearing was required any time the protocol changed. See T. 82-86. Instead, Mr. Muhammad argued that when a change as substantive as the one made in the September 9, 2013, revision was made, an evidentiary hearing has been ordered, particularly when combined with the irregularity reported during the Happ execution.

Moreover, contrary to the State's argument that Mr. Muhammad "insisted that he was entitled to litigate anything and everything regarding lethal injection" (AB at 23), Mr. Muhammad

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[2]Likewise, as to the medical examiner's records, Mr. Muhammad relied on this Court's ruling following the Diaz execution. See T. 65-6.

correctly argued that, pursuant to this Court's opinion in Lightbourne v. McCollum, 969 So. 2d 326, 350-1 (Fla. 2007),:

> 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.

And, Mr. Muhammad correctly pointed out that the first-drug was critical to the eighth amendment determination. See T. 86-89, 92.

The State also faults Mr. Muhammad for correctly referencing the Baze Court's reliance on the fact that the three-drug protocol was the norm in 2007, when it rejected Baze's lethal injection challenged. See AB at 24. However, the Baze Court made clear that 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.**

Baze v. Rees, 551 U.S. 34, 52 (2007)(emphasis added)(citations omitted).

ARGUMENT I

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

A. INTRODUCTION

In the late afternoon of October 21, 2013, Mr. Muhammad's postconviction counsel was notified that Mr. Muhammad's warrant had been signed and his execution was scheduled for December 3, 2013. There was no prior notice to Mr. Muhammad or his counsel. Thus, Mr. Muhammad and his counsel were thrust into active death warrant litigation and the attendant rules and extremely compressed litigation schedule.

Indeed, as to the proceedings before the circuit court and public records collection, this Court has crafted specific rules for what is to occur once a death warrant has been signed. Mr. Muhammad complied with all of the rules. The State has not. First, pursuant to 3.852 (h)(3), Mr. Muhammad was permitted to request "the production of public records from a person or agency from which collateral counsel ha[d] previously requested records" within 10 days of the signing of the death warrant. Fla. R. Crim P. 3.852(h)(3).[3] The rule required Mr. Muhammad to comply with

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[3]When this Court promulgated Rule 3.852 in 1998, Mr. Muhammad's mandate had issued. Pursuant to the Rule, Mr. Muhammad was only permitted to seek public records that he had not previously sought. Fla. R. Crim. P. 3.852(h)(2). Thus, he was not permitted to re-request records that he had previously obtained, like the Inspector General's file relating to the investigation of the crime that occurred in his case, or the Office of the State Attorney for the Eighth Judicial Circuit's file relating to the prosecution of his case. While Mr. Muhammad was precluded from re-requesting records that he had previously obtained, he was promised an "update" of the records if and when

two simple requirements: First, he must request records from an agency or person from whom he had previously requested records. Second, he must only request an update of records, i.e., he is entitled to any records, not subject to a valid exemption, that have not been previously produced or "produced since the previous request."[4]

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his warrant was signed. See Rule 3.852(h)(3). Presumably, the "update" provides a fail-safe for warrant litigation so that any records that had not been previously produced, for whatever reason, or any new records not subject to a valid exemption would be disclosed so that any claims could be made. Undoubtedly, the fail-safe was constructed in order to feel confidant that Florida's death penalty was exercised in a reliable and consistent manner.

[4]When this provision went into effect, it was after the creation of the records repository. This is significant because from that point on the records repository would have copies of the previously disclosed public records which could be used to determine through comparison whether any public records had been inadvertently excluded from the initial disclosures of public records. However in Mr. Muhammad's case, the previously disclosed public records were provided before the records repository existed, and thus, there is no place wherein the comparison can be made to determine if anything was inadvertently left out of the previous public records disclosures. So in Mr. Muhammad's case, the rationale behind the limitation set forth in (h)(3) does not apply. Indeed, Mr. Muhammad's situation is quite similar to the circumstances in the 1990's when after a death warrant was signed, revisiting the previous public records disclosures revealed that often documents had been inadvertently withheld. See Medina v. State, 690 So. 2d 1241 (Fla. 1997); Roberts v. State, 678 So. 2d 1232 (Fla. 1996); White v. State, 664 So. 2d 242 (Fla. 1995); Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995). Thus by virtue of Rule 3.852 Mr. Muhammad does not have the same opportunity to ascertain whether the prior disclosures were complete that this Court provided to Mr. Medina, Mr. Roberts, Mr. White, and Mr. Atkins. Further in another pre-records repository case which was not litigated under the exigencies of a death warrant in the 1990's, inadvertently undisclosed public records were obtained in repeated public records requests and served in part as a basis for this Court's determination that Roy Swafford was entitled to a new trial. See Swafford v. State, - So.3d - , 2013 WL 5942382 (Fla. November 7, 2013).

Mr. Muhammad complied with Rule 3.852 (h)(3), in that within three days of his warrant being signed, he requested records from six (6) state agencies from which he had previously requested records and he limited his requests to an update of the records. Thus, pursuant to the rule, the state agencies "shall copy, index and deliver, to the repository any public record" not previously disclosed or recently received or produced, not subject to a valid exemption[5].

All but one of the state agencies failed to comply with the rule. In it's Answer brief, the State seeks to shift the blame for the agencies non-compliance to Mr. Muhammad, arguing that he was required to prove relevance, diligence and that the request was not overly broad - none of which the rule requires. Indeed, though following the rules to a "T", the State accuses Mr. Muhammad of attempting to delay his execution by seeking the disclosure of public records. This new trend asserted by the State to obfuscate and hide and then point the finger at Mr. Muhammad is completely inapposite of this Court's rule and caselaw.[6]

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[5]Of course, if the state agencies claimed an exemption, Mr. Muhammad was entitled to request an *in camera* review in order to determine if the exemption was well-taken and if information constituted Brady material.

[6]Moreover, counsel discovered yesterday on the DOC website, a "Timeline" page. When the "1980-1986" is hit, a page pops up focused on the year 1980. See Appendix B. This page includes a discussion of the homicide for which Mr. Muhammad stands convicted and a day by day account of the aftermath to the homicide at Florida State Prison. This web page reveals public information that DOC never previously provided Mr. Muhammad. It indicates that the October 12, 1980, homicide shook the

In addition, Rule 3.851(h) specifically addresses the procedures to occur once a death warrant has been signed. See Fla. R. Crim. P. 3.851(h). The rule requires that a case management conference shall be held as soon as reasonably possible in order to schedule a date for a successive Rule 3.851 to be filed and a "hearing to determine whether an evidentiary hearing should be held and hear argument on any purely legal claim." Fla. R. Crim. P. 3.851(h)(6). Again, Mr. Muhammad complied with all of the scheduled dates and deadlines imposed by the circuit court.

The State's baseless accusations of Mr. Muhammad's conduct are intended to deflect this Court from applying the plain language of the rules and black letter law to the State. Mr. Muhammad is entitled to the public records he sought.

B. RULE 3.852(h)(3) AND THIS COURT'S INTERPRETATION OF THE RULE.

The State insists that this Court re-write its rule to

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institution to its core and provided all involved with a myriad of motives to tailor the evidence against Mr. Muhammad and obtain a death sentence at any cost. Smith v. Sec'y Dep't of Corr., 572 F.3d 1327, 1343 (11th Cir. 2009)("evidence that could be useful in impeaching prosecution witnesses must be disclosed"). In follow up to this DOC web page, Mr. Muhammad has ascertained that hearings regarding and investigations of the brutal violence then occurring at Florida State Prison were held. One of the legislative hearings was chaired by Rep. Arnett Girardeau. These hearings and investigations regarding the extremely violent and brutal conditions at Florida State Prison in 1980 have not been provided to Mr. Muhammad's counsel. Besides creating motives to fabricate evidence against Mr. Muhammad in order to quell the ongoing investigations of the prison and prison personnel, the circumstances under which Mr. Muhammad was being held would constitute viable mitigation which this Court has previously recognized as a basis for a life sentence. Christian v. State, 550 So. 2d 450 (Fla. 1989).

require Mr. Muhammad to link his requests to a colorable claim for postconviction relief (AB 29-30). The State relies on this Court's opinion in Sims v. State, 753 So. 2d 66, 70 (Fla. 2000), wherein this Court upheld the denial of Sims' requests for records because they were characterized as a "fishing expedition". Id. However, though the State quoted this Court's opinion, the State completely ignored the text that was not emboldened, i.e., "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." Id. Thus, this Court interpreted the rule with the plain language of the rule - requests were permitted only to persons and agencies who were previously the subject of a records request. See Medina v. State, 690 So. 2d 1241 (Fla. 1997); Roberts v. State, 678 So. 2d 1232 (Fla. 1996); White v. State, 664 So. 2d 242 (Fla. 1995); Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995). Mr. Muhammad complied with this provision in that the six (6) records requests filed pursuant to Rule 3.852(h)(3) were directed to agencies from which he had previously requested records.[7]

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[7]The Medical Examiner for the Eighth Judicial Circuit disputed whether Mr. Muhammad had ever previously requested records. While counsel informed the Court that she could not locate the request she did have a log indicating that the records had been requested. The circuit court rejected the ME's assertion that records had not previously been requested (PC-R4. 539). The Department of Correction argued that Mr. Muhammad had not previously requested the type of records he now requested. DOC's assertion was patently false and refuted at the October 31,

Secondly, also cited by the State, but ignored, this Court interpreted Rule 3.852(h)(3), to mean that a defendant can only seek an "update of information previously received or requested." A review of Mr. Muhammad's requests makes clear that he complied with the rule in this regard, too.[8] He simply asked for an update of the records. So, Sims was a re-affirmance of the two requirements set forth in the rule and refutes the State's position before this Court.

The State also insists that Mr. Muhammad had the burden to demonstrate why he waited until his death warrant was signed to file his requests (AB at 33).[9] However, Mr. Muhammad submits that based on Sims, if the requests are only to persons or agencies from which Mr. Muhammad had previously requested records and if they are simply for an update, no such burden exists. Indeed, in several of the cases cited by the State, the courts construed the requests as 3.852(i) requests because they did not comply with Rule 3.852 (h)(3). See Mills v. State, 786 So. 2d 547, 551-2 (Fla. 2001)(noting that Mills requested all records, not just an update); Glock v. Moore, 776 So. 2d 243, 253-4 (Fla.

2013, hearing. See 2Supp. R4. 19-48.

[8]Again this clear purpose of these provision is for a capital defendant to ascertain whether the previous public records disclosure was not complete. See Medina v. State, 690 So. 2d 1241 (Fla. 1997); Roberts v. State, 678 So. 2d 1232 (Fla. 1996); White v. State, 664 So. 2d 242 (Fla. 1995); Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995).

[9]Though not required to do so, Mr. Muhammad did explain that his DOC files, both his medical file and inmate file, were relevant to issues regarding his challenge to lethal injection and a potential competency claim which does not become ripe until a warrant is signed (T. 16).

2001)("It is clear from a review of the record and the hearing that most of the records are not simply an update of information previously requested but entirely new requests."); Bryan v. State, 748 So. 2d 1003, 1006 (Fla. 1999)(holding that filing a "plethora of demands... to nearly every public agency that had any contact" with the Bryan, required that Bryan identify specific concerns or issues to the trial court that would warrant relief).

Furthermore, as explained in Mr. Muhammad's Initial Brief, the State's reliance on Diaz v. State, 945 So. 2d 1136, 1149-50 (Fla. 2006), is misplaced. In Diaz, this Court stated:

> 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 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)).

(Emphasis 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.[10]

Moreover, Mr. Muhammad submits that he used the language contained in Rule 3.852(h)(3) which specifically requires that agencies copy "any public record" that was not previously produced. See Medina v. State, 690 So. 2d 1241 (Fla. 1997); Roberts v. State, 678 So. 2d 1232 (Fla. 1996); White v. State, 664 So. 2d 242 (Fla. 1995); Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995). Therefore, Mr. Muhammad's request for an update of any and all records was consistent with what the rule requires, i.e., obligations by both Mr. Muhammad and the state agencies.

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[10]The State's insistence that Mr. Muhammad was required to establish relevance for his requests under Rule 3.852(h)(3) is not supported by the rule or Sims. In an illogical attempt to demonstrate that no investigative records could be relevant to Mr. Muhammad's case, the State argues that because insanity was Mr. Muhammad's only viable defense, no records about the investigation or circumstances of the crime could ever be relevant (AB at 34-5). The State's argument is flawed and irrelevant to the issue - whether Mr. Muhammad complied with Rule 3.852(h)(3). See Christian v. State, 550 So. 2d 450 (Fla. 1989); Davis v. Alaska, 415 U.S. 308 (1974); Kyles v. Whitley, 514 U.S. 419, 442 n. 13 (1995)(evidence showing the motive for an important government witness to come forward is impeachment evidence covered by the Brady rule); Young v. State, 739 So.2d 553 (Fla. 1999). He did and he is entitled to the records he requested. See also, Habeas Petition, Muhammad v. Crews, Case No. SC13-2160.

Here, the agencies failed to follow the rule.

Likewise, the State's argument that Mr. Muhammad was required to explain why the agencies may have new records or how they might pertain to a postconviction claim (AB at 32) is simply not required by Rule 3.852(h)(3) or this Court.[11]

As to the specific requests to the agencies, the State argues that Mr. Muhammad did not establish that a previous request for records had been made to the Medical Examiner (AB at 32). First, this was not the basis for the circuit court's denial of the records. And, Mr. Muhammad asserted that the log of requests relating to his case reflects that a request was made (T. 46).

As to the Department of Corrections, the State argues that there was nothing to show that Mr. Muhammad had requested his inmate file (AB at 32). This is simply not true. On January 23, 1989, the Central Files Administrator certified that copies of Mr. Muhammad's file had been provided to him (2Supp. PC-R4. 43). And, on July 16, 1991, Mr. Muhammad requested a complete copy of Mr. Muhammad's "**inmate and medical files.**" (2Supp. PC-R4.

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[11]Through Rule 3.852(h)(3) it has come to light that state agencies have conducted additional DNA testing in a case that had never been previously disclosed. Contrary to the State's position, Mr. Muhammad would have no knowledge as to what new records were received or produced by various state agencies or why or what records had not previously been disclosed. Only the agencies would have this information. When Mr. Muhammad's counsel noted that his Dade County sentence of death had been overturned by the federal district court and that may have caused some investigation or preparation for a new sentencing proceeding, the State mocked collateral counsel. See T. 33-6. The State's behavior is reminiscent of the childhood games - "I've got a secret."

45)(emphasis added). Therefore, the State's assertion is false.

The State also argues that Mr. Muhammad's records requests demonstrate that he is attempting to obtain a delay in his case due to the "manner in which he made and litigated his h(3) requests" (AB at 33). As stated previously, the State argument is based on a faulty recollection of the October 24, 2013, hearing and a distortion of the record. See supra at p. 2-4. Mr. Muhammad filed his Rule 3.852(h)(3) requests three (3) days after the warrant was signed, seven (7) days before the deadline set forth in the rule and five (5) days before the deadline set by the circuit court. Additionally, at the October 24, 2013, hearing Mr. Muhammad's counsel explained that a public records hearing may be necessary depending on the responses from the agencies (Supp. T. 4-5). It was the State that thwarted scheduling a public records hearing on October 24, 2013, stating: "seems to me to be anticipating a problem that may or not be -". (Supp. T. 10).

Moreover, even before Mr. Muhammad had filed his Rule 3.851 motion, the circuit court informed the parties that a public records hearing would be held on October 31, 2013.[12]

Mr. Muhammad complied with all of the deadlines scheduled in his case. The State's representation that the court did not set

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[12]Without any authority, the State faults Mr. Muhammad for failing to cite caselaw in his public records claim that was contained in his Rule 3.851 motion (AB at 34). However, Mr. Muhammad cited the public records rules themselves which are clear as to what was required of him and what was required of the state agencies. Mr. Muhammad met his burdens. The state agencies failed to meet theirs.

deadlines for public records requests or a public records hearing is false and cannot serve a basis to deny Mr. Muhammad the records to which he is entitled.

In requesting that this Court affirm the circuit court's denial of Mr. Muhammad's public records requests, the State is requesting that this Court in effect abolish Rule 3.852(h)(3) and require all additional requests for production of public records pursuant to Rule 3.852(i).

C. RULE 3.852(i) AND THIS COURT'S INTERPRETATION OF THE RULE.

The State asserts that this Court has denied requests under Rule 3.852(i) if a movant, like Mr. Muhammad cannot prevail on his claim (AB at 36). The State cites to Mann v. State, 112 So. 3d 1158 (Fla. 2013), and Walton v. State, 3 So. 3d 1000 (Fla. 2009), in support of its argument. However, neither of these opinions support the State's argument in relation to the circumstances in Mr. Muhammad's case. First, as to Walton, this Court reviewed Walton's claim that he was entitled to public records relating to lethal injection. This Court held:

> Walton has not alleged any specific problems with Florida's lethal injection protocol following the Schwab and Henyard executions that might support a different Eighth Amendment claim than the one previously rejected in *Lightbourne*. See Tompkins, 994 So.2d at 1090. Thus, the record contains competent, substantial evidence that supports the circuit court's decision to deny the request.

Id. at 1014. Thus, because nothing had changed as to the lethal injection protocol and no mishaps had occurred since the Diaz' execution, which was developed in the Lightbourne litigation, Walton could not establish the required relevance of his request.

That is not the case here. Indeed, the opposite is true and therefore under Walton, Mr. Muhammad has established that he is entitled to the records, i.e., the protocol has substantially changed and a mishap has occurred.

Likewise, the claim at issue in Mann, was the Governor's warrant signing discretion. In Mann, this Court held that such a claim was "not cognizable" Mann, 112 So. 3d 1163. However, in Mr. Muhammad's case, his requests under Rule 3.852(i) related to the constitutionality of the new lethal injection protocol and the Happ execution and whether Mr. Muhammad's right to due process was violated during his clemency process, both of which are colorable claims. See Baze v. Rees, 551 U.S. 34 (2007); Ohio Adult Parole Authority, et al. v. Woodard, 523 U.S. 272 (1998).

Specifically as to the records relating to the State's interference with Mr. Muhammad's clemency proceedings, the State submits that the records are confidential and not subject to disclosure pursuant to Brady v. Maryland, 373 U.S. 83 (1963) (AB at 36-7). However, the cases cited by the State pre-date Woodard and the US Supreme Court's determination that due process does apply to clemency proceedings. Thus, surely, if due process applies to clemency proceedings, then Brady, must apply to clemency proceedings.

Furthermore, as Mr. Muhammad submits that the documents to which he is entitled did not concern the Governor's decision about clemency, but the State's interference in the clemency process. Thus, Mr. Muhammad is entitled to the requested documents that reflect that the State of Florida, through the

Attorney General (who is also a member of the clemency board), attempted to interfere with Mr. Muhammad's clemency process.

Finally, the State argues that any claim related to clemency is not timely, therefore the circuit court correctly denied the requests (AB at 38). The State's argument is incorrect. Mr. Muhammad's requests and claim are timely. There is simply no procedure for raising a claim under Rule 3.851 in relation to ongoing proceedings. Thus, given that Mr. Muhammad's clemency proceedings had not yet concluded, in addition to there being no prejudice at that point, there was simply no authority for Mr. Muhammad to seek the records before his warrant was signed.

As to Mr. Muhamamd's requests relating to his lethal injection challenge, the State argues that this Court has previously affirmed the denial of similar requests when the lethal injection protocol has changed and cites to Pardo v. State, 108 So. 3d 558 (Fla. 2012) (AB 39). However, in Pardo, this Court held that Pardo had not established the requisite relevance to obtain the records. Id. at 565-6. However, here Mr. Muhammad has established relevance by identifying specific issues related to the first-drug and to the Happ execution that require that the records be disclosed. The circuit court erred in denying Mr. Muhammad's requests.

Likewise, the State's reliance on Bryan v. State, 753 So. 2d 1244, 1251-53 (Fla. 2000), is also misplaced (AB at 39). In Bryan, a great deal of evidence was submitted to Bryan concerning lethal injection: "In response to Bryan's request for 'any and all' records concerning lethal injection, the State disclosed the

chemicals and procedures that will be used to carry out Bryan's execution by, among other things, **submitting evidence developed in State v. Sims.**" Id. at 1251 (emphasis added). Here, the State has not disclosed a single sheet of paper, not even the protocol[13] and there is no evidence because no hearing has been held on the current protocol.

Furthermore, Bryan's execution was scheduled after Sims' and Sims' had received a full review of the lethal injection protocol, including disclosure of public records and evidentiary development. The protocol had not changed between Sims and Bryan's executions and therefore this Court accepted the State's disclosure of records and information that had been the basis for the litigation in Sims.

And, again, Mr. Muhammad also established relevance by linking his requests to the Happ execution where a mishap occurred. In Bryan, there was no such mishap.

D. DISCOVERY.

The State argues that the circuit court properly denied Mr. Muhammad's requests for discovery (AB at 39-40). Mr. Muhammad submits that he has established good cause based on the mishap of the Happ execution and the US Supreme Court's determination in Baze that: "If a State refuses to adopt such an alternative in

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[13]The current lethal injection protocol was provided to Todd Scher during his representation of Marshall Gore, though DOC informed Mr. Scher that the new protocol would not be used in Mr. Gore's execution. When Mr. Muhammad's warrant was signed, neither the State nor DOC made Mr. Muhammad aware that a new protocol had been adopted on September 9, 2013, though the State and DOC must have been aware that Mr. Muhammad's counsel did not represent Mr. Gore.

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." Baze v. Rees, 553 U.S. 35, 52 (2008). Here, the State has chosen not to change to a one-drug protocol, despite the fact the active death penalty states are rapidly abandoning a three-drug protocol and numerous executions have already been carried out, without incident, using this alternative. Therefore, the State of Florida's change of protocol substituting the first-drug for an untested midazolam, and continuing to cling to the three-drug protocol warrant discovery so that Mr. Muhammad can further establish that Florida lethal injection protocol violates the eighth amendment.

E. CONCLUSION.

The State and state agencies' promise that they would maintain an "open file policy" and cooperate has been horribly breached in Mr. Muhammad's case. See In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production, 683 So. 2d 475, 477 (Fla. 1996)(Anstead, J., specially concurring). Furthermore, this Court's intention has been perverted in Mr. Muhammad's case to cut off his statutory and constitutional right to access to public records:

> 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). Mr. Muhammad is entitled to the records and discovery he requested. Relief is warranted.

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.

The circuit court erred in failing to grant Mr. Muhammad an evidentiary hearing on his claim that the substitution of the first drug in Florida's lethal injection protocol and the circumstances surrounding the execution on October 15, 2013, establishes that Mr. Muhammad faces a substantial risk of serious harm if executed pursuant to the current protocol.

Initially, the State insists that this Court's caselaw prior to 2008 possesses no precedential value as to whether Mr. Muhammad was wrongly denied an evidentiary hearing because, this Court is required to analyze Mr. Muhammad's claim pursuant to the standard set forth in Baze - whether Mr. Muhammad has proven that Florida's lethal injection protocol creates a substantial risk of serious harm.[14] (AB at 47). However, while Baze controls the standard for prevailing on a claim challenging lethal injection,

[14]Mr. Muhammad submits that this Court has always applied the standards set forth by the US Supreme Court in deciding methods of execution challenges over the past twenty (20) years.

it does not control whether or not Mr. Muhammad is entitled to an evidentiary hearing in order to present evidence in support of his claim.[15] First, Mr. Muhammad's factual allegations in a Rule 3.851 must be taken as true under Florida law. Lightbourne v. Duggger, 549 So.2d 1364 (Fla. 1989). Baze did not change Florida law in that regard.

Second, in Baze, the petitioner was permitted to fully develop his claim in the state court in support of his challenge - he was not required to prove his claim through his written pleadings. Baze v. Rees, 553 U.S. 35, 40 (2008)("The trial court held extensive hearings and entered detailed Findings of Fact and Conclusions of Law."). In Baze a full evidentiary hearing had been conducted. It can hardly stand for the proposition that evidentiary hearings are no longer required.

Here, Mr. Muhammad has established that his claim was timely filed and that the records and files do not conclusively show

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[15]The State, like the circuit court insists that Mr. Muhammad has not produced evidence in order to meet the Baze standard (AB at 49-51). However, Mr. Muhammad has not been provided the opportunity to produce evidence and the State has hidden the evidence from him in the State's possession. The State and the circuit court at the State's urging has failed to grasp that it is at an evidentiary hearing that Mr. Muhammad would present the evidence supporting his factual allegations. See Lightbourne v. Dugger. And, contrary to the State's insistence, Mr. Muhammad is not claiming that there is a lack of knowledge concerning midazolam (AB at 51), rather, Mr. Muhammad's claim is that what is known about midazolam - that it is not commonly used as an anesthetic, that its efficacy is of a much shorter duration than the barbituates: sodium thiopental and pentobarbital, that it is not fast-acting, like sodium thiopental and takes much more time to take effect and that it must be titrated slowly and administered slowly to be effective establishes that an evidentiary hearing is warranted in order to prove that the use of midazolam creates a substantial risk of serious harm to Mr. Muhammad.

that he is entitled to no relief. See Long v. State, 118 So. 3d 798, 806 (Fla. 2013).[16]

In addition, in order to demonstrate that the circuit court did not err, the State maintains the faulty premise that Mr. Muhammad's claim is dependent upon a legal rubric that permits evidentiary development "any time an execution protocol has changed or a defendant has relied on an incident in a prior execution." (AB at 44). However, that was not Mr. Muhammad's interpretation of the caselaw before the circuit court and it is not his interpretation of the caselaw before this Court.

Here, what the State cannot deny, is that when the first-

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[16]Brewer v. Landrigan, 131 S.Ct. 445 (2010), does not hold that "stays of execution [are] not allowed unless the [Baze] standard [is] met." First, it is important to note that Brewer v. Landrigan was a federal 1983 proceeding. In federal 1983 proceedings, there are issues of federal statutory law that are not present here. In Brewer, the US Supreme Court vacated a stay that was issued when the petitioner claimed that the source of the drug, in and of itself, created a substantial risk of harm. The drug had been previously approved (it was sodium thiopental), so the only challenge in the 1983 proceeding was to the source of the drug. And, while the district court ordered discovery from the State, the US Supreme Court vacated the stay because "[t]here [was] no evidence in the record to suggest that the drug obtained from a foreign source [was] unsafe. The district court granted the restraining order because it was left to speculate as to the risk of harm.". Landrigan, 131 S.Ct. 445. Thus, the decision rested on the pleading requirement in a federal 1983 proceeding. Here, Mr. Muhammad has presented several details that make clear that there is substantial risk of serious harm in using an experimental drug, like midazolam, in the context of lethal injection when it is a benzodiazepine, when its efficacy is of a much shorter duration than the barbituates: sodium thiopental and pentobarbital and it is not fast-acting, like sodium thiopental, and thus, takes much more time to take effect. Indeed, according to the source cited by the State midazolam must be titrated slowly and administered slowly. The executioner must have the necessary qualifications to understand these issues. And under Florida law, those factual allegations must be taken as true. Lightbourne v. Dugger.

drug of the three-drug protocol has changed, this Court has permitted evidentiary development. See Valle v. State, 70 So. 3d 530, 546 (Fla. 2011). Here, the substitution of the first-drug is a substantial change due to the fact that the drug is in an entirely different class of drugs and not commonly used as an anesthetic. Therefore, contrary to the State's argument, Baze, Landrigan, Pardo and Valle all support Mr. Muhammad's argument that he is entitled to an evidentiary hearing on his claim.

And, while the State argues that Mr. Muhammad's claim must be restricted to only "new evidence or factual developments", which the State interprets only to the use of the midazolam hydrochloride as the fist-drug, the State is incorrect (AB at 48-9, 55). The first-drug is critical because "the condemned inmate's lack of consciousness is the focus of the constitutional inquiry." Ventura v. State, 2 So. 3d 194, 200 (Fla. 2009). And, as this Court recognized in Lightbourne v. McCollum:

> 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.

969 So. 2d 326, 350-1 (Fla. 2007).

Moreover, a review of the website cited by the State to argue that William Happ's movements during the execution were simply caused by the midazolam, demonstrates that issues concerning training and expertise are relevant to the inquiry of whether using midazolam as the first-drug is constitutional. For

example, the website cited by the State indicates:

> When used for sedation/anxiolysis/amnesia for a procedure, dosage must be individualized and titrated. **Midazolam should always be titrated slowly; administer over at least 2 minutes and allow an additional 2 or more minutes to fully evaluate the sedative effect. Individual response will vary with age, physical status and concomitant medications, but may also vary independent of these factors.**

See http://www.rxlist.com/midazolam-injection-drug/indications-dosage.htm (emphasis added).[17] Therefore, the State's own source makes clear that using midazolam for sedative purposes requires that measures must be followed in order for the drug to work effectively. So, contrary to State and the circuit court's order, this is precisely the reason for reviewing the claims in conjunction, as this Court stated in Lightbourne.

Furthermore, as to Mr. Happ's execution, contrary to the State's position (AB at 51), Mr. Muhammad has alleged that Happ was moving his head from side-to-side after the consciousness check occurred and that no further consciousness check occurred.[18] It is Mr. Muhammad's position that the shaking of

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[17]The fact that the State has gone outside of the record in order to support it's position demonstrates the need for an evidentiary hearing. McClain v. State, 629 So. 2d 320, 321 (Fla. 1st DCA 1993).

[18]The State asserts that Mr. Happ's movements were simply related to the fact that involuntary physical movements occur during unconsciousness (AB at 52). First, the State overlooks the reports which indicated that Mr. Happ was conscious for a longer period of time. Further, the State cannot explain why a second consciousness check did not occur, or why someone shaking there head "no" would constitute an involuntary movement. Mr. Happ did not have a seizure. He was clearly signaling that he was experiencing pain. It is the State, rather Mr. Muhammad who is speculating as to the reason for Mr. Happ's movement. And, the State's assertion that this Court rejected movement as an

one's head from side to side demonstrates consciousness, as opposed to convulsion that are seen in epileptic seizures. It is Mr. Muhammad's position that a conscious Mr. Happ experienced serious harm and that due to the use of midazolam, Mr. Muhammad faces a substantial risk of serious harm.[19]

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.

The State fails to address the facts Mr. Muhammad has set forth as to the change in the legal landscape since the US Supreme Court issued the Baze opinion. Now, thirteen of the

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indication of pain in Valle, ignores the fact that the movements that occurred in the executions in Georgia and Alabama that Valle presented at his evidentiary hearing occurred **before** the consciousness check. Here, the movement came after the consciousness check, presumably upon injection of the paralytic. Thus, Mr. Happ's movement is more troubling than the movement explored in Valle. The State's argument also raises the increased need for public records to be disclosed and discovery in order to determine when and what drugs were administered to Mr. Happ in relation to his movement. Finally, the cases relied upon by the State as to how the courts considered the movements of the condemned, Valle and DeYoung v. Owens, 646 F.3d 1319 (11th Cir. 2011), were both the subject of evidentiary hearings. Thus, the State's position, that this court should disregard Mr. Happ's movement, after the consciousness check as being nothing other than a reaction to the midazolam, is not supported by the cases it cites as evidentiary development was permitted there.

[19]Again, contrary to the State's submission (AB at 54), Mr. Muhammad alleged that "The most recent failed experiment undoubtedly brought excruciating pain to Happ ..." (PC-R4. 176). The timing of the Mr. Happ's movement makes clear that he was conscious when the second-drug, a painful paralytic, was administered. See Baze, 553 U.S. at 44 (The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs.").

states active death penalty states have adopted a one-drug lethal injection protocol. And, more than thirty (30) executions have occurred using one-drug with no discernable problems. This cataclysmic shift has direct bearing on the Supreme Court's pronouncement in Baze that:

> 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.**

Baze, 553 U.S. at 52 (emphasis added)(citations omitted). There can be no doubt that 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). Pursuant to Baze, the mere adoption of a three-drug protocol in light of the community consensus to move to a one-drug protocol violates the eighth amendment.

Furthermore, the choice of midazolam, in light of what is known about the drug creates a substantial risk of serious harm. That harm was demonstrated in Mr. Happ's execution and will be repeated at Mr. Muhammad's. See supra pages 24, 26-7.

In addition, Mr. Muhammad has submitted a plethora of information concerning Florida's botched executions due to flawed protocols, improper deviations from the protocol and unqualified personnel executing the protocol. The State responds that this

court should not "micromanage" the manner of executions, relying on federal district court orders relating to a protocol that pre-dated the one at issue here (AB at 58). However, Mr. Muhammad is not asking this Court to "micromanage" the manner of executions. He is asking this Court to permit him an opportunity to present evidence which will establish that a three-drug protocol, using miadazolam hydrochloride as the first-drug violates Mr. Muhammad's eighth amendment right.

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.

In its Answer Brief, the State asserts that Mr. Muhammad's claim was untimely because it was not raised within one year of when the relevant events occurred (AB at 58-59). Specifically, according to the State, Mr. Muhammad cited to a number of events in support of his claim, the latest of which was on September 6, 2012 (AB at 59). Yet, according to the State, Mr. Muhammad did not file his postconviction motion until October 20, 2013, thereby making his claim untimely (AB at 59).

Mr. Muhammad submits that the State's argument is akin to requiring collateral counsel to raise a claim within one year of the actual moment of trial counsel's ineffectiveness at trial, even though the direct appeal proceedings may still be ongoing; or requiring collateral counsel to challenge trial counsel's ineffectiveness at the guilt phase within one year of his deficiency even where the case has been remanded for a

resentencing proceeding. However, there is simply no procedure for raising a claim under Rule 3.851 in relation to ongoing proceedings. Thus, given that Mr. Muhammad's clemency proceedings had not yet concluded, in addition to there being no prejudice at that point, there was simply no avenue for Mr. Muhammad to raise a claim. That the State fails to grasp this point is evident by its reliance on Ohio Adult Parole Authority, et. al v. Woodard, 523 U.S. 272, 288 (1998), for the proposition that Mr. Muhammad should have raised a due process claim before the clemency hearing was even scheduled to take place (Answer at 60-61). However, as Mr. Muhammad's counsel explained during the case management conference, the proceedings in Woodard involved a § 1983 action and not Rule 3.851:

> . . . Woodard was a 1983 action. That means it was filed in federal court, and it was - - 1983 action, a lot of times, you're not saying, "I've been denied the right." "I'm being denied the right." It's an effort to get the right that you're being denied.
>
> Under 3.851, we can't do that. That's not part of 3.851. That's what 1983 is about. It's an action in federal court to try to get the right given to you that you're saying you're being denied. Here, 3.851 doesn't authorize us to come in and file something every time we think that we're being denied a right. We have to meet the 3.851 requirements.

(T. 106).

Likewise, the State's reliance on this Court's decision in Ferguson v. State, 101 So. 3d 362, 366 (Fla. 2012), (AB at 59-60), is misplaced. In Ferguson, this Court rejected the argument that Ferguson's clemency claim was not ripe until his death warrant was signed Id. at 365-66. As Mr. Muhammad's counsel explained during the case management conference, Ferguson's

complaint concerned a clemency proceeding from the 1980's, not one that had just recently been concluded:

> Now, the state on page 16 of the response argues that this is untimely and cites Ferguson v. State. And what's important to note about Ferguson, in Ferguson, the clemency hearing had been scheduled, I believe it was in 1987, and the governor's office, I think as I recall, postponed it because there was a question about Ferguson's competency, competency to be executed. When that was resolved, then there was no request by Mr. Ferguson to move forward with clemency. And so because the events that were being challenged in Ferguson in 2012 as to the clemency problem were from 1987, the Florida Supreme Court said they were untimely.
>
> Here that's not the situation. We're not talking about something from 1987. We're talking about events in the past two years, and we're talking about the clemency process that has occurred now as opposed to the clemency process that occurred in 1987. So that's not what Ferguson stands for.

(T. 99-100). Mr. Muhammad received a letter from the Office of Executive Clemency on October 21, 2013, notifying him that his clemency had been denied. Mr. Muhammad filed his postconviction motion on October 29, 2013. His clemency claim is timely.

Regarding the merits, the State asserts that Mr. Muhammad's claim is particularly frivolous (AB at 61). According to the State, "While Defendant acts as if there was no basis to seek his counsel's removal as clemency counsel, Defendant's counsel had previously been appointed as Defendant's post conviction counsel", thereby precluding her from also serving as clemency counsel (AB at 61). The State's argument, however, omits the following relevant facts: First, Ms. McDermott was approached by the Florida Parole Commission to represent Mr. Muhammad as clemency counsel. Second, Ms. McDermott served as Mr. Muhammad's clemency counsel for 76 days before the Florida Parole Commission

sought her removal, presumably at the behest of the State. Third, the circuit court denied the Florida Parole Commission's motion to appoint new counsel, finding that any objection was waived as it was the Florida Parole Commission who had requested that Ms. McDermott be appointed in the first place. Thus, given that it was the Florida Parole Commission who sought Ms. McDermott's appointment in the first place, there was in fact no basis to seek her removal.

Additionally, the State asserts that Mr. Muhammad's other complaints about clemency were properly rejected (AB at 62). According to the State, after it was determined that Mr. Muhammad was medically able to participate in a clemency interview, he simply refused to be interviewed (AB at 62-63). This is not the case. As Mr. Muhammad's counsel explained during the case management conference:

> Here, Mr. Muhammad had surgery on his vocal cords and was trying to recover from that. When the clemency interview was scheduled, he had been instructed - - his understanding of the medical advice was that he shouldn't be talking, and so he didn't want to talk and wanted to have the hearing continued. It was not continued, and, as a result, he wasn't interviewed. So he was denied access.

(T. 105). Mr. Muhammad did not simply refuse to be interviewed. He sought to participate in the clemency process once his medical condition had improved.

Finally, the State argues that Mr. Muhammad was given full access to clemency proceedings before his initial motion for postconviction relief was filed (AB at 63). However, as Mr. Muahammad's counsel explained at the case management conference,

the proceedings referenced by the State do not concern the instant case:

> MR. MCCLAIN: Your Honor, first, with the most recent statement, on this death sentence, he's never had clemency denied before this past couple weeks. There was not - - the clemency proceeding that Ms. Jaggard is referring to is in a different case, a different capital case. As to this death sentence, there was no clemency proceeding conducted previously that was completed and a death warrant was signed, didn't happen until now, and the reason that they were investigating now is because it's a different case.

(T. 104).

Mr. Muhammad submits that under the circumstances of his case, relief is 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.

In its Answer Brief, the State sets forth a number of arguments in support of the denial of this claim. First, the State asserts that the circuit court properly denied Mr. Muhammad's claim as untimely (AB at 64). In doing so, the State fails to provide any record citation as to where the circuit court made this finding in its order. Indeed, a review of the circuit court's order establishes that there was no such finding. Rather, the circuit court denied relief on the basis that Mr. Muhammad's claim was without merit (PC-R4. 542).

The State also asserts that "[g]iven Defendant's responsibility for the delays in this matter, the lower court properly found this claim meritless." (AB at 67). Again, the

State has misrepresented the basis of the circuit court' order. The circuit court found Mr. Muhammad's claim to be without merit, not because he was responsible for any delay, but because this Court has repeatedly rejected Lackey claims (PC-R4. 541-42).

With regard to the delay in this case, the State fails to dispute Mr. Muhammad's contention that it was largely attributable to various deficiencies in Florida's death penalty system and errors committed by the State. Ignoring these assertions, the State proclaims that it was Mr. Muhammad who contributed substantially to the delay (AB at 65). The basis for the State's contention is that Mr. Muhammad filed motions and pleadings in accordance with the law. The State, for instance, faults Mr. Muhammad for taking two years to file his postconviction pleading, despite the fact that Rule 3.850 at the time allotted two years to file such a motion; for filing public record requests, despite the fact that Mr. Muhammad was permitted by law to do so and it was the State who delayed turning over records; and for waiting a year before filing his federal habeas petition, despite the fact that under the AEDPA, Mr. Muhammad was afforded one year in which to file his federal habeas petition (AB at 66-67). In taking these actions, Mr. Muhammad wasn't delaying his case; he was exercising the rights given to him to advance his claims. Mr. Muhammad didn't urge the trial court, as the State did, to erroneously summarily deny his postconviction motion filed in 1989, thereby causing an eleven year delay in his case. Mr. Muhammad didn't cause the delay, as the State did, in turning over public records; and Mr. Muhammad didn't urge the

trial court in his Dade case, as the State did, to unconstitutionally restrict consideration of nonstatutory mitigating evidence, thereby causing a 21 year delay in that case.

As further purported evidence of delay, the State claims that Mr. Muhammad's counsel insisted upon representing him during the clemency proceeding, thus "the issue of her ability to represent Defendant had to be litigated, which delayed consideration of clemency in this matter." (AB at 67). The State's assertion, however, is patently false. Mr. Muhammad's clemency counsel never sought, much less insisted, on representing him. Rather, it was the Florida Parole Commission who asked Ms. McDermott to represent Mr. Muhammad in his clemency proceedings.[20] After Ms. McDermott agreed, she was appointed by the circuit court on October 24, 2011. Approximately two and a half months later, on January 9, 2012, after the clemency process had commenced, the Florida Parole Commission filed a motion requesting that the circuit court appoint Mr. Muhammad new clemency counsel. This motion was filed despite the fact that 76 days had passed since Ms. McDermott's appointment; that the Florida Parole Commission had sought out Ms. McDermott for the appointment; that Mr. Muhammad's clemency hearing was scheduled for January 31, 2012; and that Ms. McDermott had spent considerable hours and effort on Mr. Muhammad's behalf. The

[20]The Commission sought out Ms. McDermott even after the Office of the Public Defender had been appointed to represent Mr. Muhammad.

circuit court denied the Florida Parole Commission's motion to appoint new counsel, finding that any objection was waived as it was the Florida Parole Commission who had requested that she be appointed in the first place. Thus, given that it was the Florida Parole Commission who sought Ms. McDermott's appointment in the first place, there was no basis to seek her removal. By filing an untimely and frivolous motion, it was the State who unnecessarily caused delay in Mr. Muhammad's clemency proceeding.

Finally, the State claims that "Defendant sought to delay the clemency process further by refusing to allow Defendant to participate in a clemency interview." (AB at 67). The State's argument here is misleading and erroneous. Mr. Muhammad did not participate in the clemency interview as a result of medical concerns. His non-participation in the interview caused no delay in the case. If anything, it likely caused the proceedings to be more expedient as there was less information for the Florida Parole Commission to consider.

Mr. Muhammad submits that under the circumstances of his case, 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.

In its Answer Brief, the State contends that "the lower court properly summarily denied this claim as it was not cognizable in a motion for post conviction relief and was meritless" (AB at 67). The circuit court's order, however, does

not rely on this as a basis for denial. Rather, the circuit court denied relief on the basis that, "[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 State's argument regarding the cognizability of Mr. Muhammad's claim is based on the notion that since the Timely Justice Act does not amount to a challenge of Mr. Muhammad's conviction and sentence, as Fla. R. Crim. P. 3.850 requires, this claim is not proper in a postconviction motion (Answer at 67-68). In making this argument, the State ignores the fact that numerous issues not specifically challenging the conviction and sentence are routinely considered in postconviction proceedings. These include public records claims, challenges to the method of execution, clemency claims and competency claims. Indeed, warrant selection claims have likewise been previously considered during postconviction proceedings. See e.g., Gore v. State, 91 So. 3d 769 (Fla. 2012); Ferguson v. State, 101 So. 3d 362 (Fla. 2012); Carroll v. State, 114, So. 3d 883 (Fla. 2013). This Court has made it clear that the authority to review the merits of various postconviction claims is not limited by its procedural rules. Rather, as this Court has regularly noted, "Rule 3.850 is a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus." State v. Bolyea, 520 So. 2d 562, 563 (Fla. 1988). Contrary to the State's assertion, Mr.

Muhammad submits that this claim was properly raised in his postconviction motion.

The State also asserts that even if the claim was cognizable, the lower court would still have properly denied it as it was without merit as a matter of law (Answer at 68). According to the State, the determination of when to sign a death warrant remains in the complete discretion of the Governor because he controls clemency and the Timely Justice Act only requires the Governor to sign a death warrant if the clemency process has concluded (AB at 68-69). Thus, the State surmises that Mr. Muhammad's claim that the Timely Justice Act is unconstitutional because it compels the signing of a death warrant automatically is meritless (AB at 69).

The State's argument is essentially that nothing has changed. Yet the sponsors of the Timely Justice Act have proclaimed that "exactly what this legislation was designed to put a stop to" is "legal filings" which "delay the inevitable," Dara Kam, *New Florida law to hasten executions faces lawsuit challenge*, The Palm Beach Post, June 26, 2013, http://www.palmbeachpost.com/news /news/crime-law/new-florida-law-to-hasten-executions-faces-lawsuit/nYXDg/ (quoting sponsor), that the Act is intended to ". . . improve Florida's death penalty system by limiting frivolous appeals and ensuring that we have . . . appropriate and timely justice," (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of sponsor beginning 00:13)), and that the Act is intended to "fix the death penalty" because "[i]t's a blight on

our whole justice system that we have folks hanging around for decades when there is no dispute about guilt or innocence," so the Act will accelerate the executions of "those where guilt or innocence is not in question" out of a desire to "put these monsters to death." (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of sponsor beginning 46:20)). The lawmakers that pushed for and won approval for this Act did so on the basis that it will fix capital postconviction litigation by speeding it up. That is the purpose of the Act.

Further, while citing to the Governor's complete discretion with regard to clemency, the State relies on current practice from the Governor's Office regarding the timing and method of clemency, but that practice could change at any time, removing the precondition of clemency. A governor could decide that clemency should occur earlier, or that defendants who had clemency under the former method, after their direct appeal, do not need an additional, present-day clemency determination. In short, a governor could change the clemency process and, in so doing, make the automatic-warrant provision unconditional and immediately operable in every case.

The State also contends that the Timely Justice Act in no way abrogates this Court's authority (Answer at 69) ("Nothing in the act abrogates any existing rule or compels the adoption or amendment of a rule."). Mr. Muhammad disagrees with this contention. For instance, this Court has adopted a rule of capital postconviction procedure that permits one year after the

discovery of new evidence or the establishment of a new constitutional right for a defendant to file a successive claim on those bases. Fla. R. Crim. Pro. 3.852(e)(2); Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008)(successive motions must be "filed within one year of the date upon which the claim became discoverable through due diligence."). New evidence may come to light and new rights may be established up to and on the day initial proceedings conclude. Under this Court's rules, a defendant would have one year to file a claim. Under the Timely Justice Act, however, that defendant would be executed long before the one-year filing deadline.

Additionally, the State also submits that the Timely Justice Act "does not address postconviction litigation in any respect or bring any changes to the death penalty cases pending in this Court or throughout the trial courts of this State" (AB at 70). This will no doubt come as a surprise to the Legislature that drafted and passed the Act, because the Legislative Intent codified in Florida Statutes § 924.057, explicitly states that the Act is intended to support efforts "to improve the overall efficiency of the capital postconviction process," CS/CS/HB 7083 lns. 852-53, and during floor debates, proponents of the Act explained that it was intended to "change the structure, . . . to expedite the process." (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 14:23)). In fact, applause broke out in response to statements that "we have judges in this state who have refused to issue orders in these key matters for up to six

years" and "we have lawyers who for money have pretended and filed documents that in defending those accused that they have done so incompetently." (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 5:16)). Contrary to the State's assertion, it is clear that the Timely Justice Act was based on the notion that judges and litigants are accountable for delays, and, because the judicial system has failed to do so, the Legislature must repair and accelerate capital postconviction litigation in the State of Florida.

Mr. Muhammad submits that under the circumstances of his case, 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 brief has been furnished by electronic transmission to all counsel of record on November 15, 2013.

CERTIFICATE OF FONT

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

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