

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC08-1841**

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**DENNIS SOCHOR,  
Appellant,**

**v.**

**STATE OF FLORIDA,  
Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT  
OF THE SEVENTEENTH JUDICIAL CIRCUIT,  
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA**

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**REPLY BRIEF OF APPELLANT**

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## REPLY

### REPLY TO STATE'S ANSWER TO ARGUMENTS I AND II

**THE LOWER COURT ERRED IN DENYING MR. SOCHOR'S SUCCESSIVE RULE 3.851 MOTION WITHOUT HOLDING A CASE MANAGEMENT CONFERENCE, IN VIOLATION OF *HUFF V. STATE*, THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND THE LOWER COURT ERRED IN DENYING MR. SOCHOR'S SUCCESSIVE RULE 3.851 MOTION PURSUANT TO THE STATE'S RESPONSE TO HIS MOTION, IN VIOLATION OF MR. SOCHOR'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

In its Answer Brief, the State argues that Mr. Sochor's claims regarding the lower court's failure to hold a case management conference and its adoption of the State's response as its order denying relief are procedurally barred because Mr. Sochor did not raise the issues in a motion for rehearing.<sup>1</sup> While as a general rule, courts will not consider an unpreserved issue that is raised for the first time on appeal, courts will consider issues involving fundamental error. *See Goodwin v. State*, 751 So. 2d 537, 544 (Fla. 1999). This Court has held that an error is "fundamental" only when it is one that "goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process." *J.B. v.*

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<sup>1</sup> It is telling that rather than responding to Mr. Sochor's arguments involving the denial of due process separately, as Mr. Sochor presented them, the State conflates these issues with the lethal injection argument.

*State*, 705 So. 2d 1376, 1378 (Fla.1998) (citing *State v. Johnson*, 616 So. 2d 1, 3 (Fla.1993)). In other words, for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process. *D'Oleo-Valdez v. State*, 531 So. 2d 1347 (Fla. 1988). “‘Fundamental’ error, in this sense, refers to error that goes to the very heart of the judicial process, not to mistakes as to which arguably correct law or rule to apply, or as to the application of such a rule of law to the facts in the case.” *Fleischer v. Fleischer*, 586 So. 2d 1253, 1254 (Fla. 4th DCA 1991).

The failure to hold a case management conference is fundamental error that goes to the very heart of the judicial process and amounts to a denial of due process. In *Huff v. State*, this Court reiterated that “[t]he essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered.” 622 So. 2d 982, 983 (Fla. 1993) (quoting *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990)). This Court concluded that Huff was denied due process of law because the circuit court did not give him a reasonable opportunity to be heard.

Likewise, the circuit court’s adoption of the State’s response to Mr. Sochor’s rule 3.851 motion—without notice to Mr. Sochor or affording Mr. Sochor any

opportunity to respond to the State’s arguments<sup>2</sup>—is fundamental error because it constitutes a denial of due process under this Court’s precedent. Again, the touchstone of due process is notice and reasonable opportunity to be heard. “[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause.” *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment). The circuit court’s adoption of the State’s response to Mr. Sochor’s 3.851, without notice to Mr. Sochor, and without affording Mr. Sochor an opportunity to object to the contents of the order constitutes a denial of due process. *See Rose v. State*, 601 So. 2d 1181 (Fla. 1992).

### **REPLY TO STATE’S ANSWER TO ARGUMENT III**

#### **THE LOWER COURT ERRED IN SUMMARILY DENYING WITHOUT AN EVIDENTIARY HEARING MR. SOCHOR’S CLAIMS REGARDING THE CONSTITUTIONALITY OF FLORIDA’S LETHAL INJECTION PROCEDURES**

Mr. Sochor pled facts in his successive rule 3.851 motion regarding his challenge to Florida’s lethal injection procedures that, when accepted as true as they must be, are not conclusively refuted by the files and records in the case. This Court has long held that a postconviction defendant is “entitled to an evidentiary hearing unless ‘the motion and the files and records in the case conclusively show

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<sup>2</sup> The State’s argument that Mr. Sochor waived this issue because he failed to notify the circuit court that it had yet to rule on a pending motion is misplaced. Mr. Sochor’s request for an opportunity to reply to the State’s response was included in his rule 3.851 motion, which the circuit court denied in its entirety. There were pending motions that were not ruled upon.

that the prisoner is entitled to no relief.”” *Lemon v. State*, 498 So. 2d 923 (Fla. 1986) (quoting Fla. R. Crim. P. 3.850). “Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief.” *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999).

Mr. Sochor was prepared to present different evidence than that presented at the circuit court level in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), the only case in which there has been any evidentiary development concerning Florida’s lethal injection procedures since 2000. Moreover, the majority of evidentiary hearing held in *Lightbourne* was focused on the botched execution on Angel Diaz. The evidence heard regarding the Department of Corrections’ latest protocol, promulgated on August 1, 2007 was severely limited. It is significant that this Court decided there was substantial and competent evidence to uphold the *Lightbourne* circuit court’s factual findings regarding the constitutionality of Florida’s latest procedures, yet Mr. Sochor still does not know what licensure the so called “medically qualified” execution team members possess; does not know if they have been credentialed in a healthcare institution to provide medical care; does not know if they have ever had had their license revoked; and does not know if they have background problems, pending criminal investigations, convictions and/ or arrests or other things that would make them inappropriate for the positions

they fill on the execution team. Mr. Sochor does not know if they have experience starting IVs that will be used for inducing anesthesia, or whether those responsible for starting a central IV line, with or without a cut-down, do so routinely in their daily practice. Incredibly, Mr. Sochor does not even know whether the medically-trained execution team members who participated in the botched Angel Diaz execution will participate in future executions.

Although no court in Florida has been willing to address the question of whether Florida's lethal injection procedures are constitutional in light of the standard enunciated in *Baze v. Rees*, 128 S. Ct. 1520 (2008), other states recognize that the analysis necessarily involves a factual determination and have allowed the evidentiary development that is the only means of resolving the issue. For example, in a section 1983 challenge to Ohio's lethal injection procedures, a federal district court judge in Ohio recently conducted a 5 day evidentiary hearing at which members of Ohio's execution team testified anonymously. *Cooey v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio April 21, 2009) (order vacating stay of execution for intervening plaintiff Kenneth Biros). The court ultimately concluded that the death row inmate failed to demonstrate a strong or substantial likelihood of success on the merits of his section 1983 claims, but noted that *Baze* teaches that challenges to a state's lethal injection protocol need not be confined merely to challenging the drugs and dosages employed, pointing out that "[t]he *Baze*

plurality went well beyond a mere discussion of the three drugs, delving deeply into the details of the drugs and equipment used, and the training of the executioners.” *Id.* at 124-25.

This case should be remanded to the circuit court for an evidentiary hearing.

#### **REPLY TO STATE’S ANSWER TO ARGUMENT IV**

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

In its Answer Brief, the State first urges this Court to affirm the circuit court’s summary denial of Mr. Sochor’s claim on the ground that Mr. Sochor is seeking to re-litigate an issue that was raised in his initial rule 3.851 motion. Mr. Sochor has already pointed out in his Initial Brief that he previously raised a claim of ineffective assistance of counsel, a sub-issue of which involved his trial counsel’s failure to investigate and present evidence regarding substantial and compelling mitigation, including his severe mental illness. Mr. Sochor’s instant claim is grounded in the Eighth Amendment’s prohibition against cruel and unusual punishment and premised on the argument that defendants who suffer from severe mental illness fall 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.

The instant claim is based on ABA Resolution 122A,<sup>3</sup> which urges states to exempt from the death penalty those defendants with severe mental illness at the time of their crimes as described in the resolution, and provides evidence of an evolution in standards of decency which must be considered in a proper Eighth Amendment analysis. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958) (noting that “[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.). Additionally, since the U.S. Supreme Court held in *Atkins* that the death penalty is unconstitutional for mentally retarded defendants, a number of courts and commentators have found that its rationale should apply with equal force to those individuals who suffer from a severe mental illness. In a concurring opinion in *State v. Ketterer*, 855 N.E. 2d 48 (Ohio 2006), Justice Stratton recently 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

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<sup>3</sup> The State argues that this Court has held that a report issued by the ABA in September 2006 is not newly discovered evidence, citing to this Court’s opinion in *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006) in which this Court agreed with a circuit court that a September 17, 2006 American Bar Association Report on Florida’s death penalty is not newly discovered evidence. Mr. Sochor has not made any claim based on that report; rather, his claim was based on ABA Resolution 122A, which was approved on August 8, 2006.

same characteristics.” *Id.* at ¶ 245. *See also People v. Danks*, 82 P.3d 1249, 1285 (Cal. 2004) (Kennard, J. concurring and dissenting) (“The same mental capacities are impaired in a person suffering from paranoid schizophrenia, and the impairment may be equally grave.”); *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003) (Henry, J., concurring and dissenting) (stating that the imposition of the death penalty on mentally ill defendant contributes nothing to the stated goals of capital punishment, retribution and deterrence.); *State v. Nelson*, 803 A.2d 1, 41 (N.J. 2002) (Zazzali, J., concurring) (“The State's legitimate penological interests that purportedly are served by the death penalty are unconstitutionally diminished if the State executes such a mentally ill and psychologically disturbed person.”); *Corcoran v. State*, 774 N.E. 2d 495, 502 (Ind. 2002) (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.”).

Mr. Sochor’s severe mental illness and neurological impairments render him ineligible for the death penalty under the Eighth Amendment and the U.S. Supreme Court’s reasoning in *Atkins* and *Roper*. The ABA Resolution must be considered under a proper Eighth Amendment evaluation of Mr. Sochor’s claim. The circuit court’s order should be reversed.

### **CONCLUSION AND RELIEF SOUGHT**

In light of the foregoing arguments, Mr. Sochor submits that he is entitled to have the lower court’s order reversed and his case remanded to the circuit court for an evidentiary hearing on his claims. Based on his claims for relief, Mr. Sochor is entitled to a new trial and/or sentencing proceeding. Finally, Mr. Sochor submits that he should not be executed in a manner that constitutes cruel and unusual punishment.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401, this \_\_\_\_\_ day of May, 2009.

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**CERTIFICATE OF FONT**

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

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