IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-658

BYRON BRYANT,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

LEOR VELEANU
Assistant CCRC-S
Florida Bar No. 0139191

ANNA-LIISA NIXON
Staff Attorney
Florida Bar No. 26283

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Bryant's successive motion for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

"R."— record on direct appeal to this Court;

"PC-R."— record on 3.851 appeal to this Court following the initial rule 3.851 motion;

"Supp. PC-R."— supplemental record on 3.851 appeal to this Court following the initial rule 3.851 motion;

"PC-R2."— record on 3.851 appeal to this Court following the circuit court's denial of Mr. Bryant's successive rule 3.851 motion;

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Bryant requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar 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 and the stakes at issue.

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STATEMENT OF CASE AND FACTS

On March 15, 1993, Mr. Bryant was convicted of murder and armed robbery. He was sentenced to death on April 21, 1993. On direct appeal, this Court reversed Mr. Bryant's conviction because the trial judge was absent during a recitation of testimony without a valid waiver. *Bryant v. State*, 656 So. 2d 426, 429 (Fla. 1995).

Mr. Bryant was retried and again found guilty by a jury on February 13, 1998. Mr. Bryant waived his penalty phase jury and on February 5, 1999, he was sentenced to death by Judge Mounts, the same judge who presided at Mr. Bryant's first trial. The trial court found the following three aggravating factors: (1) Mr. Bryant previously had been convicted of a felony involving the use or threat of violence to a person; (2) the capital felony was committed while the defendant was engaged in the commission of or in an attempt to commit the crime of robbery; and (3) the crime was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody. *Bryant v. State*, 785 So. 2d 422, 436-37 (Fla. 2001). The court did not find any statutory mitigating factors but did find the single nonstatutory mitigator of remorse. *Id.* On direct appeal, Mr. Bryant raised seven issues.[1] This Court affirmed the conviction on all issues. The mandate was

[1] Mr. Bryant claimed that the trial court erred in (1) determining that Mr. Bryant was competent to stand trial; (2) requiring Mr. Bryant to be held in visible restraints before the jury; (3) failing to properly evaluate the nonstatutory

issued on June 11, 2001. CCRC-South was appointed to represent Mr. Bryant the same day. Thereafter, CCRC-South filed a motion to withdraw, which was granted.[2] The United States Supreme Court denied certiorari on November 13, 2001. *Bryant v. Florida*, 534 U.S. 1025 (2001).

On January 29, 2002, the trial court appointed Jo Ann Kotzen (hereinafter "registry counsel") as registry counsel to represent Mr. Bryant in his capital postconviction litigation pursuant to section 27.711, Florida Statutes.[3] (PC-R2. 2). When registry counsel notified Mr. Bryant of her appointment in February, 2002, Mr. Bryant immediately requested a face to face meeting as soon as possible in order to talk about his case. (PC-R2. 2). Over the next several months, Mr. Bryant repeatedly requested a telephone call or meeting with his counsel. *Id*. In a letter dated May 24, 2002, Mr. Bryant asked registry counsel to relay to him what work she had done on his case and stated that he had all his notes, et cetera, in order and

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mitigating circumstance of Mr. Bryant's lack of education; (4) failing to evaluate the nonstatutory mitigator that Mr. Bryant lacked a positive role model; (5) failing to exercise its discretion in evaluating the nonstatutory mitigating factor of Mr. Bryant's neurological impairment; (6) finding the death sentence proportionate in this case; and (7) ruling that electrocution is not cruel and unusual punishment.

[2] Although these orders and pleading should have been included in the record on appeal following the denial of Mr. Bryant's initial rule 3.851 motion, they were not.

[3] In December 2001, Judge Mounts initially appointed Gordon Richstone to represent Mr. Bryant, but he withdrew shortly thereafter. (Supp. PC-R. 6-18).

was ready to assist her with whatever she needed. *Id*. On July 23, 2002, almost six months after being appointed to the case and less than four months before his rule 3.851 motion was due, registry counsel met with Mr. Bryant for the first and only time before filing his motion. *Id*. She allotted three hours for their meeting. *Id*.

A regularly scheduled status hearing was held before Judge Mounts on November 4, 2002. (Supp. PC-R. 34-50). Registry counsel notified the court that Mr. Bryant had requested that she withdraw from his case and had refused to sign his rule 3.851 motion, which was due in seven days. (Supp. PC-R. 36).[4] Counsel also indicated that the State had agreed not to oppose a request for a 30-day extension for filing the motion. *Id*.

On November 5, 2002, a hearing was held on registry counsel's motion to withdraw. (Supp. PC-R. 51-81). Mr. Bryant, who was present via telephone, informed the court that he had not received a copy of the rule 3.851 motion that his counsel had drafted, nor had he received the boxes of public records and legal materials that he needed to review before reviewing the rule 3.851 motion. (Supp. PC-R. 64). Registry counsel stated that she had sent the boxes of public records,

[4] Registry counsel also revealed that several months earlier, Mr. Bryant had requested that she withdraw based on a conflict involving an investigation into a complaint against a judge where Judge Mounts was listed as a witness for that judge and registry counsel was listed as a witness against the judge. Registry counsel indicated that she did not move to withdraw at that point because after speaking to Mr. Bryant about the situation, "he was fine with it." (Supp. PC-R. 44).

along with other legal materials and the draft of the rule 3.851 motion to Mr. Bryant two weeks earlier. (Supp. PC-R. 66). She told the court that there had been a problem with delivery of the boxes to Mr. Bryant, and although she had not confirmed it, she thought the problem had been resolved. *Id*. Judge Mounts asked the prison to help expedite the delivery of the materials to Mr. Bryant. (Supp. PC-R. 68).

Registry counsel notified Mr. Bryant and the court that she had filed a motion for a 30-day extension with this Court so that Mr. Bryant would have time to go through the materials she had sent him and review the rule 3.851 motion and feel comfortable swearing to it. *Id*. The State had no objection to the extension which, if granted, would make Mr. Bryant's rule 3.851 motion due more than one year after his conviction became final.

Mr. Bryant sought to have Judge Mounts and/or his registry counsel explain to him the consequences of not filing his rule 3.851 motion on November 12, 2002, the day it was due: [5]

[5] Section 27.711(12), Florida Statutes, imposes upon the Florida state courts a duty to monitor collateral counsel's performance and ensure that "quality representation" is provided:

> The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Comptroller, the Department of Legal Affairs, the executive director, or any interested person may

THE COURT: Okay, Mr. Bryant, anything else from you, sir?

THE DEFENDANT: Yes. I am just—with my position right now, I mean, it's, the 3.850 is not filed, if it is not met by the deadline, then I think pretty much that I will be procedurally barred from raising anything that was drafted or any issue that I have had, that I do have regarding that in the future once another counsel, once other counsel is appointed.

THE COURT: Ms. Campbell, do you have a response to that, do you care to—

MS. CAMPBELL: I don't think I need to respond to that, Your Honor. If he wishes to discuss that with his counsel—

THE DEFENDANT: Because I am confused, I have no knowledge of it, is what I was asking, Judge, sir.

THE COURT: Okay. I don't know if he is procedurally barred. That's his question, I think.

MS. CAMPBELL: I am not prepared to answer that question at this time.

THE COURT: I don't know Mr. Bryant myself and I am sorry that I don't but, I mean, you have made, you have raised the question and at least you have put that on the record and that's, that's a wise thing to do. Ms. Kotzen, any response from you?

MS. KOTZEN: No, Your Honor.

THE COURT: Okay, anything else, Mr. Bryant?

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advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.

THE DEFENDANT: Yes, well, Judge, I was sort of expecting for Ms. Kotzen to respond because she was the one that told me not only yesterday but I think when I spoke with her Friday that if, if she does not file the 3.850 or if it is not filed at all by anyone by November the 12th that I would not be able to file one at any other date in the future. That is what Ms. Kotzen informed me of.

THE COURT: Well, I understand her to say earlier, and I will allow her to correct her position if she chooses, that, that she believed it was her understanding of the law that she had to file it with or without your consent; she preferred to have it with your endorsement, with your consent, with your signature; is that what you said, Ms. Kotzen?

MS. KOTZEN: Judge, as we stand here before you today on November 5th, the pleadings are due on November 12th, in one week. If the Florida Supreme Court grants me an extension of time then, then they are not due on November 12th, the pleadings are due whenever the Supreme Court tells me they are due… I want to preserve Mr. Bryant's rights. I know that Mr. Bryant is concerned about being procedurally barred and I feel I have an obligation as his attorney to file something.

THE COURT: I think you have answered the question in the affirmative, and that's a yes, Ms. Kotzen. Mr. Bryant, do you understand that's what will happen, if, if that's necessary, that's what she says will happen; you understand that, Mr. Bryant?

THE DEFENDANT: I am sorry, sir, no. I didn't understand it clearly. What I would like to know and I am not trying to be rude or disrespectful, I am just trying to get a clear understanding, if my 3.850 is not filed by November the 12th, then from my understanding from Ms. Kotzen that I would not be able to file a 3.850 at any date in the future.

> THE COURT: Well, I don't really know, but she has indicated that she is going to file it, if that's the situation on the 12th and she doesn't have a continuation, so I can't bind the Supreme Court but I would think that, that you are not barred from further, at least, you could at least ask them if you can enlarge upon the motion that she has filed …

(Supp. PC-R. 75-79).

On November 12, 2002, the day Mr. Bryant's rule 3.851 motion was due, the circuit court held another hearing. (Supp. PC-R. 82-96). Mr. Bryant was again present via telephone. At the time of the hearing, this Court had not yet ruled on registry counsel's motion for a 30-day extension. (Supp. PC-R. 84). For the first time, the State informed the court that if Mr. Bryant did not file a rule 3.851 motion that day, "he's probably going to be precluded from filing any post conviction matters in state court and that may also follow him into federal court." (Supp. PC-R. 90-91). The State also pointed out that if the rule 3.851 motion were filed without Mr. Bryant's signature, it would be subject to being stricken under Fla. R. Crim. P. 3.851, and that also "may preclude Mr. Bryant from filing a post conviction [motion] in state court and later on in federal court." (Supp. PC-R. 91).

Mr. Bryant stated that he received the rule 3.851 motion from registry counsel on Friday, November 8, 2002 and was waiting for a notary public so that he could sign the affidavit.[6] Registry counsel told the court that she would file the

[6] Monday, November 11, 2002 was Veterans Day, a legal holiday, and therefore there was no mail service.

motion that day and amend it with the signed paperwork when she received it from Mr. Bryant. (Supp. PC-R. 93).

Later that day, this Court granted a 30-day extension to file Mr. Bryant's rule 3.851 motion. Registry counsel filed a rule 3.851 motion on behalf of Mr. Bryant on November 20, 2002.[7] (PC-R. 1-69). Attached to it was an affidavit dated November 12, 2002, in which Mr. Bryant swore to the allegations in the motion. (PC-R. 70).

The State moved to strike the original motion, arguing that Mr. Bryant failed

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[7] The rule 3.851 motion that registry counsel drafted for Mr. Bryant raised a claim of ineffective assistance of trial counsel (specifically, that trial counsel was ineffective in (1) preventing the shackling of defendant during trial and/or obtaining an evidentiary hearing as to this issue; (2) failing to suppress defendant's statements; (3) waiving defendant's right to a jury trial in the penalty phase; (4) failing to present numerous other mitigating factors; (5) failing to dispute two of the listed three aggravating factors; (6) failing to move for a continuance of the trial or a mistrial upon discovery that the ski mask found at the scene of the crime had not been tested for a match for hair, saliva, etc., with defendant or any other suspect; (7) failing to preserve as an appellate issue the trial court's erroneous order denying defense's motion to suppress the defendant's statements as involuntary; and in (8) allowing the trial to proceed without the presence of petitioner and participation of the petitioner in jury selection), a claim that the conviction obtained was due to the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant, a claim that the conviction was obtained by a violation of the privilege against self-incrimination, a claim that the conviction was obtained due to the use of evidence pursuant to an unlawful arrest, a claim that the conviction was obtained by use of a coerced confession, and a claim that Mr. Bryant's death sentence was unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Additionally, in an attached memorandum of law, registry counsel argued that the death penalty was disproportionate.

(1) to attach a copy of the judgment and sentence, (2) to plead his claims separately, detailing facts, and (3) to justify raising issues in a collateral pleading which either were or could have been raised on direct appeal. (PC-R. 71-79). The circuit court struck the motion (PC-R. 83), and then allowed Mr. Bryant to file an "amended" motion on March 4, 2003. (PC-R. 109-170).

On August 11, 2003, however, the circuit court decided that it lacked subject matter jurisdiction to hear Bryant's claims because the "amended" motion was actually a new motion since the original motion had been stricken. Alternatively, the circuit court made summary findings on the merits of the motion without holding an evidentiary hearing. (PC-R. 785-851).

On appeal, this Court found that the circuit court did have subject matter jurisdiction over the amended motion, as the original motion should have been stricken with leave to amend. *Bryant v. State*, 901 So. 2d 810 (Fla. 2005). This Court, however, affirmed the circuit court's denial of relief on the merits. *Id*.

On September 11, 2007, Mr. Bryant filed a successive rule 3.851 motion, raising two claims: first, that he was denied his constitutional right to meaningful access to the judicial process in his initial postconviction proceedings due to the ineffective assistance of his registry counsel, in violation of Florida law; and second, that the State of Florida's method of lethal injection is unconstitutional as it will subject Mr. Bryant to cruel and unusual punishment. (PC-R2. 1-46). The

State filed a response on October 1, 2007. (PC-R2. 48-114).

On November 16, 2007, Mr. Bryant filed demands for additional public records pursuant to Fla. R. Crim. P. 3.852(i) from the Department of Corrections, the Office of the Attorney General, and the Office of the Governor. Each agency filed objections. (PC-R2. 119-132).

On January 31, 2008, the circuit court held a case management conference on Mr. Bryant's successive rule 3.851 motion. The circuit court orally denied Mr. Bryant's motion after hearing argument. The court was scheduled to hold a hearing on Mr. Bryant's public records demands on that date, as well, but instead denied the demands as moot after denying Mr. Bryant's successive rule 3.851 motion. The circuit court entered a written order denying Mr. Bryant's motion and public records demands on February 26, 2008. (PC-R2. 268).

Mr. Bryant timely filed a motion for rehearing on March 5, 2008 (PC-R2. 272), which the circuit court denied on March 11, 2008 (PC-R2. 276). Mr. Bryant timely filed a notice of appeal on March 24, 2008. (PC-R2. 277). This appeal follows.

SUMMARY OF THE ARGUMENTS

I. The circuit court erroneously denied Mr. Bryant's claim alleging that he was denied meaningful access to the judicial process. Mr. Bryant is entitled to relief under the laws and Constitution of Florida as well as the Due Process Clause

of the Fourteenth Amendment to the United States Constitution. Because the motion, files, and records do not conclusively demonstrate that Mr. Bryant is not entitled to relief; and because there exists a factual dispute regarding whether Mr. Bryant received meaningful access to the judicial process, the circuit court improperly denied the claim without an evidentiary hearing.

II. The circuit court erroneously denied Mr. Bryant's claim that Florida's method of lethal injection is unconstitutional as it will subject Mr. Bryant to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The circuit court erred in denying Mr. Bryant an evidentiary hearing on this claim since the motion and the files and records in the case do not conclusively show that Mr. Bryant is entitled to no relief.

III. The circuit court erroneously denied Mr. Bryant's demands for additional public records pursuant to Fla. R. Crim. P. 3.852(i). Rule 3.852(i) requires a circuit court to order an agency to produce public records upon a showing that the requirements of the rule have been met, and Mr. Bryant had made that showing. The rationale relied upon by the lower court was not a proper legal basis for denying Mr. Bryant's record requests.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual

conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. *See Ornelas v. U.S.*, 517 U.S. 690 (1996); *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). Since no evidentiary development was permitted, Mr. Bryant's factual allegations must be accepted as true. *Borland v. State*, 848 So. 2d 1288, 1290 (Fla. 2003); *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

ARGUMENT I

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. BRYANT'S CLAIM THAT HE HAS BEEN DEPRIVED OF HIS STATUTORY RIGHT TO MEANINGFUL POSTCONVICTION REVIEW OF HIS CONVICTION AND DEATH SENTENCE DUE TO THE INEFFECTIVE ASSISTANCE OF REGISTRY COUNSEL, IN VIOLATION OF SECTION 27.702, FLORIDA STATUTES, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

In his successive rule 3.851 motion, Mr. Bryant pled with specificity that he had been deprived of his statutory right to meaningful postconviction review of his conviction and death sentence and of his right to meaningful access to the judicial process in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and corresponding provision of the Florida Constitution. Mr. Bryant alleged that this deprivation of his rights was due to the grossly

ineffective assistance of his registry counsel. The circuit court summarily rejected the claim without an evidentiary hearing, reasoning that:

> 2. …The Defendant relied heavily on *Peede v. State*, 748 So. 2d 253 (Fla. 1999) and *Fotopoulos v. State*, 741 So. 2d 1135 (Fla. 1999), in urging this Court to recognize a cognizable ineffective assistance of counsel claim in this context.
>
> 3. The State, however, correctly argued that the Florida Supreme Court, in *Kokal v. State*, 901 So. 2d 766, 777-778 (Fla. 2005), rejected the Defendant's reliance on *Peede* and *Fotopoulos* for this proposition. In *Kokal*, the Florida Supreme Court specifically found no constitutional right for defendants to have representation in post conviction relief proceedings, finding that capital defendants, like non-capital defendants, are entitled only to "meaningful access to the judicial process" quoting from *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404 at 408.
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> 4. This Court finds that the Florida Supreme Court's holding in *Kokal* (*supra*), is dispositive. The Defendant's Claim One is not cognizable as a successive post conviction claim.

(PC-R2. 269). The circuit court's denial of this claim without an evidentiary hearing was in error on several grounds.

A. Mr. Bryant's claim is cognizable under the statutes and Constitution of Florida and this Court's precedent, as well as under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and United States Supreme Court precedent.

The circuit court erred in denying Mr. Bryant's claim on the basis that it is not cognizable as a successive post conviction claim. The circuit court held that

"[t]he Defendant relied heavily on *Peede v. State*, 748 So. 2d 253 (Fla. 1999) and *Fotopoulos v. State*, 741 So. 2d 1135 (Fla. 1999), in urging this Court to recognize a cognizable ineffective assistance of counsel claim in this context." (PC-R2. 269). Mr. Bryant did not, however, ask the court to grant relief on a claim of ineffective assistance of postconviction counsel; in fact, he made a point of conceding that this Court has repeatedly ruled that ineffective assistance of postconviction counsel is not a cognizable claim. (PC-R2. 218-19). Instead, Mr. Bryant urged the court to recognize that he was in fact denied meaningful access to the judicial process due to the ineffectiveness of registry counsel and a complete breakdown of the system that was supposed to ensure that he was afforded his statutory right to effective collateral representation. Whether Mr. Bryant received effective assistance of postconviction counsel in a traditional *Strickland* sense is not the issue before this Court. The salient issue is a factual question regarding whether Mr. Bryant had meaningful access to the judicial process.

That Mr. Bryant has a right to the effective assistance of counsel in his postconviction proceedings is undisputed. Under Section 27.702, Florida Statutes, each defendant under a sentence of death is entitled, as a statutory right, to legal representation in all collateral relief proceedings. *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988). This Court has recognized that "[t]he appointment of counsel in any setting would be meaningless without some assurance that counsel give

effective representation." *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990). This Court has held the right to effective assistance of counsel in postconviction proceedings is not a constitutional one; rather, this Court has held that what is required is that defendants in postconviction relief proceedings—both capital and non-capital—have meaningful access to the judicial process. *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 407-08 (Fla. 1998). Additionally, the United States Supreme Court has long held that prisoners have a constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S. 817 (1977); *Ex parte Hull*, 312 U.S. 546 (1941). The right requires a prisoner's access to the courts to be adequate, effective, and meaningful. *See, e.g., Douglas v. California*, 372 U.S. 353, 358 (1963); *Burns v. Ohio*, 360 U.S. 252, 257 (1959); *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). This Court has "consistently refused to permit an execution to be carried out absent a record demonstrating that a death-sentenced defendant has received the assistance of counsel in a meaningful postconviction proceeding." *Arbalaez v. Butterworth*, 738 So. 2d 326, 330 (Fla. 1999) (Anstead, J., concurring).

Mr. Bryant acknowledges that this Court's precedent clearly maintains that ineffective assistance of postconviction counsel is not a cognizable claim. *See, e.g., Lambrix v. State*, 698 So. 2d 247 (Fla. 1996). However, what this Court's precedent makes equally clear is that where a defendant has been denied meaningful access to the postconviction judicial process as a result of counsel's

ineffectiveness, justice demands some remedy. In *Steele v. Kehoe*, a non-capital defendant's postconviction attorney undertook to file a rule 3.850 motion on his behalf, but then failed to do so in a timely manner. 747 So. 2d 931 (Fla. 1999). This Court held that the defendant should not be precluded from seeking some form of relief and held that if he could show that the attorney had undertaken to file a rule 3.850 motion and then negligently failed to do so within the statutory time limit, the defendant was entitled to belatedly file a motion. *Id*. at 934 (agreeing "that due process entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner" and holding that "if the prisoner prevails at the hearing, he or she is authorized to belatedly file a rule 3.850 motion challenging his or her conviction or sentence."). In *Medrano v. State*, this Court held that a defendant in the same position as Mr. Steele was entitled to a hearing on his claim that he missed the deadline to file his initial rule 3.850 motion based on the ineffectiveness of his postconviction counsel, and that if the hearing was successful, he was entitled to raise all the issues he alleged entitled him to relief in a belated rule 3.850 motion. 748 So. 2d 986, 988 (Fla. 1999).

In *Peede v. State*, 748 So. 2d 253 (Fla. 1999), this Court remanded a case back for a new rule 3.851 motion to be filed because of concerns about the quality of postconviction counsel's representation. Of the initial brief on appeal filed in

that case, this Court wrote:

> We are also constrained to comment on the representation afforded Peede in these proceedings. Peede's brief on appeal raised nine issues, but was only 24 pages in length. While we are cognizant that quantity does not reflect quality, the majority of the issues raised were conclusory in nature and made it very difficult and burdensome for this Court to conduct a meaningful review… [W]e remind counsel of the ethical obligation to provide coherent and competent representation, especially in death penalty cases, and we urge the trial court, upon remand, to be certain that Peede receives effective representation.

Id. at 256. Similarly, in *Fotopoulos v. State*, this Court, faced with an initial brief in a 3.851 appeal that raised several grounds not raised in the original rule 3.851 motion, remanded the case to the trial court for the claims to be properly asserted and heard so that the interests of justice would be honored. 741 So. 2d 1135 (Fla. 1999). In *Williams v. State*, 777 So. 2d 947 (Fla. 2000), after the circuit court denied relief on Williams's timely filed rule 3.850 motion, Williams's postconviction counsel failed to timely file a notice of appeal with the circuit court. Relying on the proposition that "postconviction remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States," *State v. Weeks*, 166 So. 2d 892, 896 (Fla. 1964), this Court held that Williams was allowed to file a petition for habeas corpus seeking permission to file a belated 3.850 appeal. *Williams*, 777 So. 2d at 950. Likewise, in *DeMaria v. State*, 777 So. 2d 975 (Fla. 2001), this Court held that *Lambrix*,

when considered in light of *Steele*, does not foreclose the provision of a belated appeal from the denial of a postconviction motion when the notice of appeal was not timely due to ineffectiveness of counsel in the postconviction proceeding. 777 So. 2d 975 (Fla. 2001). Thus, while it is clear that this Court has repeatedly held that ineffective assistance of postconviction counsel is not a cognizable claim, this Court has held in various circumstances that justice requires a remand when meaningful access to the judicial system has been thwarted.

Additionally, although there may be no federal constitutional right to collateral counsel, the federal constitution provides that if a state chooses to provide a right that is has no obligation to provide, it must comport with due process. As the United States Supreme Court explained, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (although there is no constitutional right to an appeal of a state criminal conviction, a State that provides for an appeal as of right must comport with due process before infringing that right). If the right is designed to protect either the fairness and reliability of the criminal trial or the individual rights of criminal defendants, then due process requires that the right be meaningful. In general, a meaningful right is one that is designed to achieve its purpose. It is "adequate and effective"

rather than a "meaningless ritual" or a "futile gesture." *Griffin v. Illinois*, 351 U.S. 12, 20 (1956); *Draper v. Washington*, 372 U.S. 487, 358 (1963); *Evitts v. Lucey*, 469 U.S. at 397. Florida Supreme Court's precedent "leave[s] no doubt that where a [state] statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (O'Connor, J., concurring in part and dissenting in part) (quoting *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)).

B. The circuit court erred in denying this claim without an evidentiary hearing because the records of Mr. Bryant's first postconviction action do not conclusively demonstrate that he was not denied meaningful access to the judicial process.

The circuit court erred in not granting an evidentiary hearing on the claim, as required by Fla. R. Crim. P. 3.851(5)(B). 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 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). Factual

allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

The same standard applies to successive motions to vacate. *Lightbourne v. State*, 742 So. 2d 238, 249 (Fla. 1999). This Court, like the lower court, must accept that Mr. Bryant's allegations are true at this point in the proceedings. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). Mr. Bryant pled facts regarding the merits of his claim not refuted by the record which must be accepted as true. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively rebut Mr. Bryant's claim and that an evidentiary hearing is required. Mr. Bryant alleged that he was denied meaningful access to the judicial process during his postconviction proceedings due to the ineffective assistance of registry counsel. His successive rule 3.851 motion contained myriad examples of counsel's deficient performance. The deficiencies of registry counsel were not minor, insignificant transgressions. Rather, registry counsel was grossly incompetent in terms of investigating and pleading potential claims. Registry counsel's deficiencies amounted to a divestment of Mr. Bryant's statutory right to the effective assistance of counsel. *See Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990) (recognizing that "[t]he appointment of counsel in any setting would be

meaningless without some assurance that counsel give effective representation."). In great detail despite the stringent page limitations of rule 3.851(e)(2), Mr. Bryant's successive rule 3.851 motion made clear to the lower court the numerous ways in which registry counsel failed to provide meaningful and effective assistance. (PC-R2. 10-15).

1. Failure to obtain trial attorney files.

The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter "ABA Guidelines") state that all persons who are or have been members of the defense team have a continuing duty to safeguard the interest of the client and this duty includes "maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation" and "providing the client's files, as well as information regarding all aspects of the representation, to successor counsel." Guideline 10.13, 2003 ABA Guidelines. Mr. Bryant's registry counsel never obtained trial counsel's files.

On April 3, 2003, a hearing was held on the State's motion compel postconviction counsel to provide a copy of trial counsel's files. At that hearing, registry counsel stated:

> MS. KOTZEN: I never received the trial counsel's files here. The trial counsel was Mike Dubiner. … I went over to Mr. Dubiner's office. I did receive some transcripts and some records, the thing that I received

> from Tallahassee. But they never provided me with their trial file. I had called and followed up on it. And because Mr. Dubiner is no longer practicing, I think that was part of the glitch. And so, because there was a time when I went ahead and filed a motion, and because I don't have the file, I can't turn it over.
>
> … Because I didn't need [the file] for my motion, I would submit that the state doesn't need it for its response.

(PC-R. T. 131-132).

Obtaining and reviewing trial counsel's files is absolutely necessary to effective representation of a capital postconviction client[8]. It is so important that Rule 3.851 contains a subsection describing trial counsel's responsibilities with respect to the trial attorney file. *See* Fla. R. Crim. P. 3.851(c)(4). The trial attorney file, including videos, photographs, notes, e-mails, and all "information pertaining to the defendant's capital case which was obtained during the representation of the defendant" is crucial for postconviction counsel's ethical responsibility to, *inter alia*, investigate ineffective assistance of counsel claims, compare with other agency files to search for possible *Brady*[9] claims, as well as investigate whether any newly discovered evidence exists which requires knowing what trial counsel knew at the time of trial. Simply put, possession of the complete

[8] After being appointed to Mr. Bryant's case, undersigned counsel obtained 9 original boxes of files from the separate offices of trial counsel Michael Dubiner and Gregg Lerman.

[9] *Brady v. Maryland*, 373 U.S. 83 (1963).

trial attorney file is absolutely necessary for postconviction counsel to provide meaningful representation.

If registry counsel had obtained and thoroughly reviewed trial counsel's files, she would have discovered that Gregg Lerman, Mr. Bryant's penalty phase counsel, had previously represented Cheryl Evans, who gave a statement to the police implicating Mr. Bryant and was listed as a witness for the State.[10] A review of trial counsel's files would also have revealed that Mark Wilensky, one of Mr. Bryant's direct appeal attorneys, had previously represented Bettie Bouie, who also gave the police a statement implicating Mr. Bryant. Both of Mr. Bryant's attorneys represented Mr. Bryant under conflicting interests because they previously represented witnesses against Mr. Bryant.

"An actual conflict of interest that adversely affects counsel's performance violates the Sixth Amendment of the United States Constitution." *Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984). A defendant's fundamental right to conflict-free counsel, however, can be waived. *United States v. Rodriguez*, 982 F.2d 474 (11th Cir. 1993), cert. denied, 510 U.S. 901 (1993). For a waiver to be valid, the record must show that the defendant was aware of the conflict of interest, that the defendant realized the conflict could affect the defense, and that the defendant knew of the right to obtain other counsel. *Larzelere v. State*, 676 So. 2d

[10] Ms. Evans, who was incarcerated at the time of Mr. Bryant's trial, was transported to the courthouse, but did ultimately testify.

394, 403 (Fla. 1996); *see also Lee v. State*, 690 So. 2d 664, 667 (Fla. 1st DCA 1997) (where defense counsel made a pretrial disclosure of a possible conflict of interest with the defendant, it was reversible error for the trial court to accept the defendant's waiver of the possible conflict when it was not clear from the record that the defendant understood he had the right to obtain other counsel). Registry counsel's failure to discover that Mr. Bryant's trial attorneys had previously represented two of the witnesses who implicated Mr. Bryant in the crime and who were listed as possible State witnesses at trial prejudiced Mr. Bryant because he is now barred from making a claim of ineffective assistance of counsel based on these facts.

2. Failure to investigate/ hire an investigator.

Under the ABA Guidelines, attorneys representing capital clients in postconviction proceedings should "continue an aggressive investigation of all aspects of the case." 2003 ABA Guidelines at Guideline 10.15.1. The trial record alone in any given case is unlikely to provide a complete or accurate picture of the facts and issues in a case, which

> may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1086 (2003).

Although Mr. Bryant has maintained since the beginning of his case that he is factually innocent and that his confession—the only inculpatory evidence introduced against him at trial—was the product of police misconduct, registry counsel filed Mr. Bryant's rule 3.851 motion without any investigation into the qualifications of the law enforcement officers who took the statement. Registry counsel also failed to contact witnesses who gave statements to the police implicating Mr. Bryant but who never testified at trial. One important witness died after registry counsel should have begun an investigation and another died shortly after the initial rule 3.851 motion was filed.[11] Registry counsel's failure to conduct any investigation denied Mr. Bryant meaningful postconviction review during his initial process.

3. Failure to make supplemental public records requests.

Postconviction counsel must obtain all public records in existence which may bear on the issues in this case or risk issues being procedurally barred. *Porter v. State*, 653 So. 2d 374 (Fla. 1995). Florida Rule of Criminal Procedure 3.852 governs capital postconviction public records production. Under this rule, the Florida Supreme Court's issuance of a mandate affirming a sentence of death triggers the beginning of public records production by the state attorney who

[11] Cheryl Evans died April 18, 2002. Menold Joseph died January 6, 2003.

prosecuted the case, the Department of Corrections, and law enforcement agencies involved in the investigation of the capital offense. Fla. R. Crim. P. 3.852(d) and (e). The public records are sent to the Records Repository. Postconviction counsel must contact the Records Repository in order to obtain copies of public records that were sent there by agencies.

Mr. Bryant's registry counsel did not contact the Repository to request public records until July 19, 2002, almost 6 months after she was appointed to the case. On July 31, 2002, registry counsel received public records from the Delray Beach Police Department, the Department of Corrections, and the State Attorney's Office. Based on these records, registry counsel should have made supplemental records requests under rule 3.852(g), which allows postconviction counsel 240 days after appointment to demand supplemental public records from persons or agencies submitting public records or identified as having information pertinent to the case under rule 3.852(d). Registry counsel should also have made public records requests under rule 3.852(i), which allows postconviction counsel to request records from agencies to which requests have not previously been made.

Under rule 3.852(g), in relation to the false/ coerced confession claim, registry counsel should have requested personnel files and internal affairs records pertaining to Sergeant Robert Brand and Lieutenant Craig Hartmann, the officers who took Mr. Bryant's statement, and should have requested an audio tape copy of

the unedited version of Mr. Bryant's confession, which the Delray Beach Police Department did not send to the Records Repository. Registry counsel should also have requested all information in the possession of the Delray Beach Police Department pertaining to the victim of the murder, Leonard Andre, and pertaining to Tara Bouie, Betty Bouie, Mary Williams, and Cheryl Evans, who claimed that Mr. Bryant had confessed to the crime. Registry counsel should also have made supplemental requests to the state attorney's office, including any information that would indicate bias on the part the members of the jury that found Mr. Bryant guilty, or information that would show that any jurors were not truthful during voir dire.

Additionally, under rule 3.852(i), registry counsel should have requested records from the Boynton Beach Police Department relating to Mr. Bryant's arrest for aggravated assault with intent to commit a felony and aggravated battery on a pregnant woman. The alleged assault that was the basis of those charges occurred less than an hour before Tara Bouie, Betty Bouie, and Mary Williams came forward to give Detective Hartmann the first information implicating Mr. Bryant in the murder of Leonard Andre.[12] Registry counsel should also have requested public records from the Medical Examiner's Office, the Palm Beach County Sheriff's Office, and the Florida Department of Law Enforcement.

[12] These charges were nolle prossed on April 22, 1993 in the interest of judicial economy after Mr. Bryant received the instant death sentence.

As rule 3.852 does not provide a means by which to request these records now, undersigned counsel is unable to allege with specificity what information registry counsel would have found in these records. Finally, not only did registry counsel fail to obtain important public records, but her inaction will also prejudice Mr. Bryant in making additional requests if and when a death warrant is signed. *See* Fla. R. Crim. P. 3.852(h)(3). Because registry counsel failed to request supplemental records, Mr. Bryant will be prejudiced, if and when a death warrant is signed, because rule 3.852(h)(3) may prohibit requesting records from agencies that were not previously the subject of a supplemental request.

4. Deficient pleading of false confession issue.

This Court found that the claim in Mr. Bryant's initial rule 3.851 motion regarding trial counsel's ineffectiveness for failing to call a false confession expert was legally insufficient because the motion failed to allege what testimony trial counsel could have elicited from such an expert and how trial counsel's failure to call such an expert prejudiced the case. *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004) (to state a claim of ineffective assistance of trial counsel, defendant is required to allege what testimony defense counsel could have elicited from witnesses and how counsel's failure to call, interview, or present the witnesses who would have so testified prejudiced the case). At oral argument before this Court, registry counsel explained that she had failed to even hire a false confession expert

to review the confession and thus was unable to allege what testimony trial counsel could have elicited from such a witness and how trial counsel's failure to call, interview, or present the witness prejudiced the case. *See* Julie Kay, *Ineffective counsel?; Poor showing by private lawyers has justices, lawmakers rethinking phase-out of capital collateral offices*, Broward Daily Business Review, February 1, 2005. (PC-R2. 42-46).

Undersigned counsel pled with great specificity in Mr. Bryant's successive 3.851 motion that he retained a false confession expert to review Mr. Bryant's alleged confession and is prepared to testify at an evidentiary hearing. (PC-R2. 15). After listening to an audio tape of Mr. Bryant's confession, as well as reviewing transcripts of the confessions and the suppression hearing testimony, this expert was able to point to five factors that relate to the veracity of confessions generally, and which clearly exist in this case. The five factors include (1) the use of false evidence (the detectives told Mr. Bryant that the victim's wife had identified him, that they had fingerprints, and that they had DNA from the ski mask); (2) the leading nature of the interrogation (the detectives admitted that they provided some details of the crime to Mr. Bryant before going on tape, but could not recall what exactly they told him prior to turning the tape on); (3) overt/ physical coerciveness (Mr. Bryant maintains that Sergeant Brand pointed a gun at him, yelled at him, threw him across the room, and smashed his head against the table); (4) mental

state (Mr. Bryant's IQ and history of brain damage contributed to his suggestibility and inability to deal with interrogation); and (5) the statement itself (the confession did not demonstrate any unique knowledge on Mr. Bryant's part and did not reveal any novel evidence).

The false confession expert also stated that there was a great deal of research in the area of false confessions available at the time of Mr. Bryant's trial in 1998.[13] While false confession expert testimony is usually general in nature, the retained expert indicated that he or a similar expert would have been able to tie the specific factors outlined above to Mr. Bryant's case.

Had Mr. Bryant's trial counsel presented a false confession expert at trial, Mr. Bryant's jury would have understood that there is a recognized phenomenon of innocent people confessing to crimes that they did not commit. Next to the striking dearth of evidence against him, Mr. Bryant's unwavering defense that he was coerced into confessing to a crime he did not commit would have had greater force if it had been presented along with false confession expert testimony. Had registry counsel properly raised this claim of ineffective assistance of trial counsel in Mr. Bryant's first 3.851 motion, the outcome would have been different.

[13] *See, e.g.*, Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1996); Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (1992); Richard J. Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 Cultic Stud. J. 1 (1989).

5. Failure to preserve Mr. Bryant's right to federal habeas review.

The federal Antiterrorism and Effective Death Penalty Act ("AEDPA") provides a one-year limitations period for the filing of a federal petition for a Writ of Habeas Corpus. 28 U.S.C. § 2244(d). The one year time limit starts on the date the conviction becomes final and is tolled while a properly-filed application for state postconviction relief is pending. *Id*. at § 2244(d)(2).

Under the ABA Guidelines, postconviction counsel has a duty to be aware of the applicable deadlines under federal law to ensure that the client's right to federal habeas review is preserved.[14] Mr. Bryant's registry counsel sought and received a 30 day extension to the one year time limit to file Mr. Bryant's initial rule 3.851 motion without advising him of the detrimental effect such an extension might have on his ability to seek relief in federal court. Thus, not only did registry counsel utterly fail to effectively represent Mr. Bryant in his initial postconviction proceeding as argued above, but by failing to file his rule 3.851 motion in a timely fashion, registry counsel may have effectively eviscerated any opportunity for the

[14] *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1085 (2003) ("As state and federal collateral proceedings become ever-more intertwined, counsel representing a capital client in state collateral proceedings must become intimately familiar with federal habeas corpus procedures. …[F]or example, although the AEDPA deals strictly with cases being litigated in federal court, its statute of limitations provision creates a de facto statute of limitations for filing a collateral review petition in state court.").

federal courts to review Mr. Bryant's conviction and death sentence. It is not an exaggeration to submit that registry counsel's deficiencies have gravely jeopardized Mr. Bryant's constitutional guarantee to petition the federal courts for a writ of habeas corpus.

C. An evidentiary hearing is necessary because a factual dispute exists as to whether Mr. Bryant received meaningful access to the judicial process.

Mr. Bryant's initial postconviction proceedings do not conclusively demonstrate that he was provided meaningful access to the judicial process. To the contrary, the facts alleged by Mr. Bryant demonstrate that what he received was an illusion of due process, an illusion of effective representation, and an illusion of meaningful access to the judicial process. In fact, the quality of representation in his initial postconviction proceedings was highlighted in an extraordinary article published in the Broward Daily Business Review shortly after Mr. Bryant's oral argument was held before this Court. Julie Kay, *Ineffective counsel?; Poor showing by private lawyers has justices, lawmakers rethinking phase-out of capital collateral offices*, Broward Daily Business Review, February 1, 2005. (PC-R2. 42-46). Within the milieu of the death penalty litigation community, Mr. Bryant's case was a shot across the bow arousing the attention of judges, legislators, and the legal community in general. The article reported that this Court asked lawmakers to draft legislation to increase minimum experience standards of registry counsel in

capital postconviction cases, and cited sources who speculated that Mr. Bryant's case may have prompted comments by a Justice that some of the worst lawyering he has seen has been from registry counsel. *Id*. Yet Mr. Bryant's denial of meaningful access to the judicial process was due not only to substandard representation. It was caused by a complete breakdown of the postconviction system which led to a gross miscarriage of justice.

Under section 27.711(12), Florida Statutes, it is the responsibility of the State of Florida to ensure that the collateral representation provided is quality, effective representation. The State of Florida failed to ensure that registry counsel adequately represented Mr. Bryant and protected Mr. Bryant's rights under Florida law. The monitoring system failed in Mr. Bryant's case and he was deprived of the substantive right that state law promised him. As demonstrated in the status hearings prior to the filing of Mr. Bryant's initial stricken rule 3.851 motion, the lower court judge and the assistant attorney general had strong reason to suspect something was amiss in the postconviction process. To be sure, Mr. Bryant, an individual with no legal training and demonstrable brain damage alerted the lower court of his grave concerns regarding his counsel. (Supp. PC-R. 75-79). The duty imposed on the lower court, as mandated in Section 27.711(12), Florida Statutes, to ensure that Mr. Bryant receive quality representation was violated, as was Mr. Bryant's statutory right to effective, meaningful assistance of counsel.

In denying Mr. Bryant relief, the lower court relied on this Court's holding in *Kokal v. State*, 901 So.2d 766 (Fla. 2005). The lower court specifically held that "[I]n *Kokal*, the Florida Supreme Court specifically found no constitutional right for defendants to have representation in postconviction relief proceedings, finding that capital defendants, like non-capital defendants, are entitled only to 'meaningful access to the judicial process' quoting from *State ex rel. Butterworth v. Kenny,* 714 So.2d 404 at 408." (PC-R2. 269). What the lower court gets wrong is that in *Kokal*, this Court did look to the factual question of whether Mr. Kokal received "meaningful access to the judicial process."

> The trial court did not err in refusing to grant Kokal an evidentiary hearing on his claim of ineffective assistance of postconviction counsel. As we have repeatedly held: "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." *Lawrence v. State, 831 So. 2d 121, 132 (2002) (quoting Floyd v. State, 808 So. 2d 175, 182 (Fla. 2002)).* Based upon our precedent regarding claims of ineffective assistance of postconviction counsel, **and the record of Kokal's first postconviction action which conclusively demonstrates that Kokal was provided meaningful access to the judicial process,** it is unquestionable that Kokal was not entitled to relief on this claim and, therefore, it was not error for the trial court to deny him an evidentiary hearing.

Kokal v. State, 901 So.2d 766 (Fla. 2005)(emphasis added). While it is true that this Court denied Mr. Kokal relief, and while it is true that this Court held again that claims of ineffective assistance of postconviction counsel are not cognizable, it

is equally true that this Court examined the factual question as to whether a defendant has had meaningful access to the judicial process. Clearly in *Kokal*, this Court looked at the record from his first postconviction proceeding:

> Based upon our precedent regarding claims of ineffective assistance of postconviction counsel, and the record of Kokal's first postconviction action which conclusively demonstrates that Kokal was provided meaningful access to the judicial process.

Id. Mr. Bryant has demonstrated that in his first postconviction action, unlike *Kokal*, he was not provided meaningful access to the judicial process. At the very least, the glaring deficiencies of registry counsel must be fully fleshed out at an evidentiary hearing. Without such a hearing, the factual dispute as to whether Mr. Bryant had access to the judicial process cannot be resolved.

Because the motion and the files and records in this case do not conclusively demonstrate that Mr. Bryant is not entitled to relief, the circuit court erred in summarily denying the claim. Furthermore, to the extent that the State's statement of facts as set out in its procedural history section of the rule 3.851 Response (PC-R2. 48-55) created a factual dispute with regard to registry counsel's performance, an evidentiary hearing is required.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. BRYANT'S CLAIM THAT FLORIDA'S LETHAL INJECTION STATUTE AND THE EXISTING LETHAL INJECTION PROCEDURES VIOLATE

THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 17 AND ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION AS THEY CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

In his successive rule 3.851 motion, Mr. Bryant argued that newly discovered evidence demonstrates that Florida's lethal injection procedures violate the Eighth Amendment to the United States Constitution and corresponding provisions of the Florida Constitution. Specifically, Mr. Bryant alleged that the Department of Corrections' August 1, 2007 lethal injection procedures create a constitutionally unacceptable risk of pain. The circuit court rejected Mr. Bryant's claim without an evidentiary hearing:

> 6. Defendant specifically challenges the August, 2007, protocols developed after the 13-day evidentiary hearing in *State v. Lightbourne*, Case Number 1981-170CF; *State v. Lightbourne*, SC 06-2391. This Court finds that the Florida Supreme Court has decided these issues contrary to Defendant's position. *See Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007); *Schwab v. State*, 969 So. 2d 318 (Fla. 2207) [sic].
>
> 7. The Florida Supreme Court has considered the constitutionality of these issues after full evidentiary hearings and has definitively found against the Defendant's position, and found lethal injection and the procedures and protocols and the "three drug cocktail" to be constitutional.

(PC-R2. 207).

Mr. Bryant acknowledges that this Court has recently upheld the constitutionality of Florida's lethal injection procedures in *Schwab v. State*, 2008

Fla. LEXIS 55 (Fla. Jan. 24, 2008), *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), and *Schwab v. State*, 969 So. 2d 318 (Fla. 2007). Mr. Bryant submits, however, that the circuit court erred in denying his claim without evidentiary hearing. 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 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). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). The same standard applies to successive motions to vacate. *Lightbourne v. State*, 742 So. 2d 238, 249 (Fla. 1999). This Court, like the lower court, must accept that Mr. Bryant's allegations are true at this point in the proceedings. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). Mr. Bryant's rule 3.851 motion pled facts regarding the merits of his claim and his diligence which must be accepted as true. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively rebut Mr. Bryant's claim and that an evidentiary hearing is required. As

demonstrated herein, Mr. Bryant is entitled to an evidentiary hearing and thereafter relief on his claim.

Mr. Bryant also acknowledges that the United States Supreme Court issued an opinion in a case involving a challenge to Kentucky's lethal injection protocols. On April 16, 2008, the Court upheld the constitutionality of Kentucky's lethal injection protocol and laid out the legal standard that governs Eighth Amendment challenges to methods of execution. *Baze v. Rees*, 2008 U.S. LEXIS 3476 (U.S. Apr. 16, 2008). That standard requires plaintiffs to first establish a "substantial risk of harm." *Id*. at *27. If an alternative is proffered, *Baze* requires the plaintiff to show that the alternative procedure is "feasible, readily implemented, and in fact significantly reduce[s] 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 *32.

The *Baze* decision turned wholly on Kentucky's written protocol. It left open the important question of whether a protocol that is constitutional on its face may violate the Eighth Amendment when it is not carried out as written. The United States Supreme Court upheld the constitutionality of Kentucky's lethal injection procedures on the basis that, in light of the safeguards included in the

written protocol, the risks identified by the petitioners were not so substantial or imminent as to amount to an Eighth Amendment violation. *Baze v. Rees*, 2008 U.S. LEXIS 3476 at *38. Among the safeguards lauded by the Court were the written protocol's requirement that "members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman"; that "IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year"; that "[t]hese sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers"; and that "the protocol calls for the IV team to establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences." *Id*. at *36-37. The Court concluded that "[t]hese redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected." *Id*.

Florida's unique history of deviating from written execution protocols reveals the gravity of the question of whether a protocol that is constitutional on its face may violate the Eighth Amendment when it is not carried out as written. *See, e.g., Davis v. Florida*, 742 So. 2d 233 (Fla. 1999) (relying on the presumption but expressing concern with respect to the electric chair that "once again" . . . "there is

an indication that [the Florida Department of Corrections] has not followed the protocol established for the appropriate functioning of the electric chair and carrying out of the death penalty."); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999)(detailing the subsequent bloody execution of Allen Lee Davis, only a week after his challenge was denied, which eventually led to the decision to adopt lethal injection as a method of execution in Florida). Mr. Bryant's claim was based in large part on the 2006 botched execution of Angel Diaz. What the Diaz execution demonstrates is that although a state may have a written protocol in place that contains myriad safeguards, if the people carrying out the execution choose not to follow the protocol, its existence does little to mitigate the risk of harm.

Florida's August 16, 2006 written lethal injection protocol, under which Diaz was executed, contained some safeguards similar to those contained in the Kentucky written protocol. Yet despite the written requirement for training, and despite the written sequence for injecting drugs, and despite the written contingency plan for what to do if venous access became compromised, this Court concluded that "it is undisputed that in the execution of Angel Diaz, the intravenous lines were not functioning properly because the catheters passed through his veins in both arms and thus delivered the lethal chemicals into soft tissue, rather than into his veins." *Lightbourne v. McCollum*, 969 So. 2d 326, 343 (Fla. 2007).

In *Baze*, the United States Supreme Court reiterated that "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Baze v. Rees*, 2008 U.S. LEXIS 3476 at *29, *citing Farmer v. Brennan*, 511 U.S. 825, 842 (1994). The facts of the Diaz execution make clear that the botch cannot be written off simply as an "isolated mishap." Despite the written protocol's requirement that the execution team be qualified and trained to carry out their duties, the evidence presented in the Lightbourne litigation showed that the execution team observed Diaz moving, talking, and struggling long after the first administration of sodium thiopental, and then went ahead and injected pancuronium bromide and potassium chloride into him while he was still conscious. *State v. Lightbourne*, Case Number 1981-170CF. The Diaz execution demonstrates that the mere existence of a written protocol is not enough to safeguard against even the most predictable problems and therefore, that any evaluation of an Eighth Amendment challenge to a method of execution must go beyond the written document.

Discovery into the background, training, and qualifications of execution team members is necessary to a complete inquiry into whether a protocol that appears constitutional on its face violates the Eighth Amendment when it is not carried out as written. Discovery in other states has revealed some disquieting

facts. In lethal injection litigation in Missouri, for example, it was learned through discovery that the medical doctor responsible for mixing and administering the drugs suffered from dyslexia. *Taylor v. Crawford*, 2006 U.S. Dist. LEXIS 42949, *15 (W.D. Mo. 2006). The Eighth Circuit upheld Missouri's lethal injection procedures after consideration of, *inter alia*, the State's promise that the dyslexic doctor would no longer take part in executions. *Taylor v. Crawford*, 487 F. 3d 1072 (8th Cir. 2007). In the California lethal injection litigation, a district court judge concluded that the evidence presented showed that California's protocol and the defendants' implementation of it suffered from a number of critical deficiencies, including inconsistent and unreliable screening of execution team members:

> For example, one former execution team leader, who was responsible for the custody of sodium thiopental (which in smaller doses is a pleasurable and addictive controlled substance), was disciplined for smuggling illegal drugs into San Quentin; another prison guard led the execution team despite the fact that he was diagnosed with and disabled by post-traumatic stress disorder as a result of his experiences in the prison system and he found working on the execution team to be the most stressful responsibility a prison employee ever could have.

Morales v. Tilton, 465 F.Supp.2d 972, 979 (N.D.Cal. 2006).

The circuit court erred in denying Mr. Bryant an evidentiary hearing on this claim since the motion and the files and records in the case do not conclusively

show that Mr. Bryant is entitled to no relief. This Court should reverse the circuit court's order and remand the case for an evidentiary hearing.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. BRYANT'S REQUESTS FOR PUBLIC RECORDS PURSUANT TO FLA. R. CRIM. P. 3.852, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9 AND 17 OF THE FLORIDA CONSTITUTION.

On November 16, 2007, Mr. Bryant filed demands for additional public records pursuant to Fla. R. Crim. P. 3.852(i) from the Department of Corrections, the Office of the Attorney General, and the Office of the Governor. Mr. Bryant sought public records related to the State's lethal injection procedures. Each agency filed written objections. The circuit court scheduled a hearing on the public records demands at the same time as the case management conference on January 31, 2008. After conducting the case management conference and orally denying Mr. Bryant's successive rule 3.851 motion, however, the circuit court denied Mr. Bryant's public records demands as moot without a hearing.

Mr. Bryant's public records requests were made pursuant to Fla. R. Crim. P. 3.852(i), which governs public records production. The rule state that:

> (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.

Fla. R. Crim. P. 3.852(i). Undersigned counsel filed the required affidavit along with the records requests. The agencies each objected to producing records on the grounds that: a "substantial number" of the records sought are currently in the possession of CCRC-South (DOC); "many, if not all" of the records sought were introduced or otherwise provided to CCRC-South counsel during the *State v. Lightbourne* lethal injection litigation (Office of the Governor and Office of the Attorney General); the records sought are not relevant to a colorable claim for postconviction relief (Office of the Governor and Office of the Attorney General); and some of the records sought included work product exempt from public records disclosure (Office of the Governor and Office of the Attorney General).

On February 26, 2008, the circuit court entered a written order denying Mr. Bryant's successive rule 3.851 motion and his public records demands:

> 6. Defendant specifically challenges the August, 2007, protocols developed after the 13-day

> evidentiary hearing in *State v. Lightbourne*, Case Number 1981-170CF; *State v. Lightbourne*, SC 06-2391. This Court finds that the Florida Supreme Court has decided these issues contrary to Defendant's position. *See Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007); *Schwab v. State*, 969 So. 2d 318 (Fla. 2207) [sic].
>
> 7. The Florida Supreme Court has considered the constitutionality of these issues after full evidentiary hearings and has definitively found against the Defendant's position, and found lethal injection and the procedures and protocols and the "three drug cocktail" to be constitutional.
>
> 8. Based upon the above findings, the Court finds the Defendant's public records requests are moot.

(PC-R2. 270). The circuit court gave no further reasons for denying the requests.

This Court applies the "abuse of discretion" standard when reviewing appeals from denials of requests for public records. *Hill v. State*, 921 So. 2d 579 (Fla. 2006). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *Parker v. State*, 904 So. 2d 370, 379 (Fla. 2005).

The circuit court abused its discretion in denying Mr. Bryant's records requests because the grounds on which it relied are not proper grounds on which to deny public records requests. The rule is very clear that the court shall order an agency to produce additional public records upon a finding that certain requirements have been met. Yet rather than consider whether those requirements

were met, the circuit court simply denied the requests because it denied Mr. Bryant's rule 3.851 motion. As argued *supra*, it is Mr. Bryant's position that the circuit court erred in denying his claim challenging Florida's lethal injection procedures.

Additionally, the circuit court abused its discretion by not finding that Mr. Bryant met the requirements of Fla. R. Crim. P. 3.852(i)(2)(A) through (D). In the public records requests, undersigned counsel attested that the requirements were met. (PC-R2. 119-132). The written objections filed by each agency contained numerous assertions regarding the records sought which were either misleading or patently false. The circuit court's failure to conduct a hearing, as ordered, on the requests prevented Mr. Bryant from challenging the agencies' assertions. For example, the Office of the Attorney General asserted that "many, if not all" of the records sought were introduced or otherwise provided to CCRC-South counsel during the *State v. Lightbourne* lethal injection litigation. The agency also argued that the records had been provided to the Records Repository. Contrary to that assertion, however, none of the records sought by Mr. Bryant are available at the Records Repository—either in Lightbourne's file or in Mr. Bryant's. Just as in Mr. Bryant's case, the Office of the Attorney General objected to producing most of the public records sought by Mr. Lightbourne. Mr. Bryant has not requested the few public records that were turned over as a result of a public records request in

State v. Lightbourne. While some of the records sought may have been introduced during the Lightbourne litigation, they were not turned over pursuant to any order on public records requests and the agency did not send the records to the Records Repository. Likewise, while the DOC objected to producing the records sought on the ground that "a substantial number" of the records sought are in the possession of CCRC-South, this is simply false. Had the circuit court held a hearing on the public records requests, as ordered, Mr. Bryant could have demonstrated that the requirements of Fla. R. Crim. P. 3.852(i)(2)(A) and (B) were met.

Furthermore, both the Office of the Attorney General and the Office of the Governor misleadingly objected to producing the public records sought by Mr. Bryant on the grounds that they constitute attorney work product. First, Fla. R. Crim. P. 3.852(f)(1) describes the procedure for producing public records which an agency contends are exempt from disclosure. They are to be delivered to the Records Repository under seal and the circuit court must inspect the records to determine whether the claimed exemption in fact applies. Second, as this Court explained in *Lightbourne v. McCollum*, the work product exemption to public records production is found in section 119.071(1)(d)1, Florida Statutes and "only extends to those records that contain the attorney's mental impressions, litigation strategy, or legal theory *and* are prepared exclusively for litigation or in anticipation of imminent litigation." 969 So. 2d 326, 332 (Fla. 2007) (emphasis in

original). Mr. Bryant specifically sought records created during the development of the August 2007 lethal injection procedures. If the records were created during the development of the procedures, they were not prepared exclusively for litigation or in anticipation of imminent litigation. Again, the circuit court's denial of Mr. Bryant's public records requests without a hearing was an abuse of discretion, especially considering the false and misleading assertions made by the agencies in their written objections that Mr. Bryant had no opportunity to challenge.

The circuit court abused its discretion in denying Mr. Bryant's public records requests. This Court should remand the case to the circuit court for full public records disclosure and to permit amendment of his rule 3.851 motion based on future records received.

CONCLUSION AND RELIEF SOUGHT

The safeguards that should have protected Mr. Bryant's due process right to meaningful access to the judicial process failed. The monitoring system envisioned under Section 27.711(12) of Florida Statutes meant to ensure that the capital defendant receives quality representation utterly broke down. Mr. Bryant's initial postconviction process was rendered utterly meaningless by the breakdown of the system. In light of the foregoing arguments, Mr. Bryant 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. Bryant is entitled to a new trial and/or sentencing proceeding. Finally, Mr. Bryant submits that he should not be executed in a manner that constitutes cruel and unusual punishment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that counsel has furnished true and correct copies of the foregoing via U.S. Mail, first class postage prepaid, to: Leslie Campbell, Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL and Daniel Galo, Assistant State Attorney, 401 N. Dixie Hwy, West Palm Beach, FL 33401; this ___ day of June, 2008.

LEOR VELEANU
Assistant CCRC-S
Florida Bar No. 0139191

ANNA-LIISA NIXON
Staff Attorney
Florida Bar No. 26283

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR APPELLANT

CERTIFICATE OF FONT

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

LEOR VELEANU
Florida Bar No. 0139191