

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**

REPLY BRIEF OF APPELLANT

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REPLY TO ARGUMENT I

In his Initial Brief, Mr. Bryant emphasized that the salient issue before this Court is a factual question regarding whether Mr. Bryant was afforded meaningful access to the judicial process. The State, in its Answer, focuses almost exclusively on the argument that claims of ineffective assistance of postconviction counsel are not cognizable. The State would have this Court's analysis end there, dismissing the distinction between claims based on meaningful access and claims based on the ineffective assistance of postconviction counsel as "a distinction without a difference." (Answer at 11). Yet in *Kokal v. State*, this Court highlighted this very distinction, reiterating that "claims of ineffective assistance of postconviction counsel are not cognizable" but that what "is required in postconviction relief proceedings, whether capital or non-capital, is that the defendant have meaningful access to the judicial process." 901 So. 2d 766, 777 (Fla. 2005).

Furthermore, in *Kokal*, this Court did not end its analysis by refusing to recognize the claim of ineffective assistance of postconviction counsel claim; instead, it went on to scrutinize what occurred in Kokal's initial postconviction proceedings to determine whether Kokal was in fact afforded meaningful access to the judicial process:

In February 1997, an evidentiary hearing was held on Kokal's amended postconviction motion. At that hearing, Morrow presented six witnesses, including two mental health experts; Kokal's mother and father; an assistant

public defender; and Dale Westling, Kokal's trial attorney. The transcript of the evidentiary hearing reveals that Morrow questioned the witnesses at length and entered numerous objections--some sustained, some overruled--to questions posed on cross-examination by the State. Further, Morrow filed a lengthy post-evidentiary hearing written closing argument. After the trial court denied Kokal's postconviction motion, Morrow filed a timely notice of appeal to this Court and continued to represent Kokal through that appeal. Morrow's brief to this Court was over fifty pages in length and presented four claims. Additionally, Morrow moved to supplement the record on appeal to ensure that this Court had Kokal's medical records to support one of the claims on appeal.

Id. at 778. This Court concluded that “the record of Kokal’s first postconviction action [] conclusively demonstrates that Kokal was provided meaningful access to the judicial process.” *Id.* at 777.

Likewise, a proper analysis of Mr. Bryant’s claim requires an examination of what occurred during his initial postconviction proceedings in order to determine whether he was afforded meaningful access to the judicial process. While the State asserts that “both [Mr. Bryant] and Kokal had full postconviction reviews and as such, had meaningful access to the courts in contrast to a defendant whose counsel failed to file a postconviction motion to [sic] an appeal from the denial of same” (Answer at 16), this Court has held in no uncertain terms that defendants are entitled to **meaningful** access to the judicial process in their postconviction proceedings. *Cf. Bounds v. Smith*, 430 U.S. 817 (1977). This is a factual question that requires evidentiary development. It also bears noting that Kokal was granted

a full evidentiary hearing on his initial rule 3.851 motion, while Mr. Bryant's initial motion was summarily denied without a hearing.

Additionally, whether Mr. Bryant's registry counsel ever obtained trial counsel's file during Mr. Bryant's initial postconviction proceedings is relevant to the question of whether Mr. Bryant was afforded meaningful access to the judicial process and this fact is in dispute. (*See* Initial Brief at 35; Answer Brief at 11, 14).¹ Reviewing trial counsel's file is a fundamental part of the postconviction process. The only way to discover and plead with specificity claims of newly discovered evidence and *Brady* violations is to compare the information in trial counsel's files to information gleaned from re-investigation and to information and evidence in the possession of the State.

The circuit court's summary denial of Mr. Bryant's claim was based wholly on the proposition that the ineffective assistance of postconviction counsel is not a cognizable claim. It bears repeating that Mr. Bryant is not alleging that it is a cognizable claim. It should not go unnoticed that the State refrained from addressing the factual basis of Mr. Bryant's claim and instead continued to make

¹ In its Answer Brief, the State asserts that the record rebuts Mr. Bryant's claim that registry counsel "did not investigate his case, did not review trial counsel's files, and did not meet, correspond, and discuss the case with Bryant." (Answer Brief at 14, FN 7). Mr. Bryant does not concede that the record rebuts any of these claims and would note that this was not one of the grounds on which the circuit court denied the claim. This factual dispute further demonstrates the need for an evidentiary hearing.

this case about the cognizability of a claim of ineffective assistance of postconviction counsel.

Despite noting that capital defendants are entitled to meaningful access to the judicial process, the circuit court failed entirely to consider whether Mr. Bryant actually was afforded meaningful access. There is no doubt that the facts alleged by Mr. Bryant in his successive rule 3.851 motion—which must be accepted as true for the purposes of this appeal—demonstrate that due to the substandard representation by his registry counsel and a complete breakdown of the postconviction system, Mr. Bryant did not receive the **meaningful** access to the judicial process that Florida law promises to all capital postconviction defendants. What is at stake here is not just Mr. Bryant’s life, but the integrity of the entire judicial process. The system cannot and should not countenance the provision of grossly substandard representation to a death-sentenced inmate—to his great prejudice—by a registry attorney with no remedy whatsoever. 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 this claim.

REPLY TO ARGUMENT II

In its Answer, the State argues that the circuit court did not err in summarily denying Mr. Bryant’s claim regarding the constitutionality of Florida’s lethal

injection procedures because this Court's recent decisions in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), *Schwab v. State*, 969 So. 2d 318 (Fla. 2007) (hereinafter "*Schwab I*") and *Schwab v. State*, 2008 Fla. LEXIS 1113 (Fla. June 27, 2008) (hereinafter "*Schwab II*"), and the United States Supreme Court decision in *Baze v. Rees*, 128 S. Ct. 1520 (2008) control this case. (Answer at 20-299). Mr. Bryant acknowledged all these decisions in his Initial Brief, but the fact remains that "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. 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.

Furthermore, in *Schwab I*, this Court held that the circuit court erred in failing to take judicial notice of the record in *Lightbourne*, reasoning that "Since Schwab's allegations were sufficiently pled, the postconviction court should have either granted Schwab an evidentiary hearing, or if Schwab was relying upon the evidence already presented in *Lightbourne*, the court should have taken judicial notice of that evidence." 969 So. 2d at 323. Mr. Bryant is entitled to no less. Since

his allegations were also sufficiently pled, the circuit court should have granted Mr. Bryant evidentiary hearing on his claim.

The State points out that in *Schwab II*, this Court adopted a circuit court order finding that Florida's lethal injection procedures are "substantially similar" to the Kentucky procedures considered by the United States Supreme Court in *Baze*. It bears noting that this comparison was made strictly based on the written protocols because Schwab was denied an evidentiary hearing. The question of whether Florida's protocol is substantially similar to Kentucky's, however, is a question of fact that goes beyond which drugs are used; it is a question that can only be answered after considering how Florida's written protocol will actually be carried out. For example, the United States Supreme Court called significant the Kentucky "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." *Baze*, 128 S. Ct. at 1533. The Court also noted that "Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population." *Id.*

Florida's latest written protocol, on the other hand, lists the minimum statutory qualifications for the medically trained participants, but Mr. Bryant still does not know what licensure the technical 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. Bryant 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. Bryant does not even know whether the technical team members who participated in the botched Diaz execution will participate in future executions. Thus, any assertion that Florida's protocol is substantially similar to Kentucky's is mere speculation. Without factfinding regarding the actual qualifications, background, training, and experience of the people who will carry out the critical aspects of Florida's lethal injection protocol, any comparison to Kentucky's protocol is meaningless. This Court should reverse the circuit court's order and remand the case for an evidentiary hearing.

REPLY TO ARGUMENT III

The State argues that because this Court rejected constitutional challenges to Florida's lethal injection procedures in previous cases, Mr. Bryant therefore is not entitled to any public records concerning lethal injection. (Answer at 33, citing *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007); *Schwab v. State (Schwab I)*,

969 So. 2d 318 (Fla. 2007); *Schwab v. State (Schwab II)*, 2008 Fla. LEXIS 1113 (Fla. June 27, 2008); *Griffin v. State*, SC06-1055 (Fla. June 2, 2008) (unpublished opinion)). Only one of those challenges, however, was rejected after an evidentiary hearing. *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007). Importantly, neither the circuit court nor this Court on appeal had an opportunity to consider the information contained in the public records sought by Mr. Bryant below, because they were not disclosed in that case, either. (See Initial Brief at 46-47). Additionally, when this Court rejected Schwab's most recent challenge to Florida's lethal injection procedures, it affirmed the circuit court's finding that Florida's procedures are "substantially similar" to the Kentucky procedures found constitutional by the U.S. Supreme Court in *Baze v. Rees*, 128 S. Ct. 1520 (2008)—a finding made without much of the information about Florida that the U.S. Supreme Court found significant to its evaluation of Kentucky's procedures. (See Reply to Argument II, *supra*).

Mr. Bryant's public records demands met the requirements of rule 3.852(i). The circuit court abused its discretion in denying them on the grounds that they were moot because this Court had rejected lethal injection challenges in other cases. This Court should reverse the circuit court's order and remand the case to the circuit court for full public records disclosure and to permit amendment of Mr. Bryant's rule 3.851 motion based on records received.

CONCLUSION

In light of the foregoing arguments, and the arguments presented in Mr. Bryant's Initial Brief, 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. Mr. Bryant also 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 September, 2008.

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

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