

IN THE SUPREME COURT OF FLORIDA

ANTHONY BRADEN BRYAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC00-335

ON APPEAL FROM THE CIRCUIT COURT  
OF THE FIRST JUDICIAL CIRCUIT,  
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

### **A. PROCEDURAL HISTORY**

Anthony Bryan was charged by indictment with one count of first-degree murder, in regard to the August 1983 murder of George Wilson, as well as with one count of kidnapping and one of robbery. After an initial mistrial in Santa Rosa County, venue was changed to Walton County, and, on April 3, 1986, following a trial by jury, Bryan was found guilty as charged on all three counts. The evidence presented against Bryan included the eyewitness testimony of Sharon Cooper, testimony that Bryan was in possession of the murder weapon (a sawed-off shotgun which he had used during a prior bank robbery), testimony that Bryan admitted committing this crime to a fellow federal prisoner, Mark Hart, and testimony that Bryan attempted to solicit a false alibi from Hart; the false alibi was contained in a document, introduced at trial, in Bryan's handwriting, which additionally bore his fingerprints. At the trial, Bryan took the stand and denied murdering Wilson. The penalty proceeding was then held the next day. The sentencing jury subsequently returned an advisory sentence of death, and, on May 16, 1986, Judge Wells formally imposed such sentence.

Bryan appealed his conviction and sentence of death to the Supreme Court of Florida, raising six (6) primary points on appeal:

- (1) alleged error in the admission of collateral crime evidence;
- (2) the trial court's alleged failure to conduct a Richardson

hearing; (3) alleged errors in the court's imposition of the death sentence; (4) alleged error in the denial of Bryan's motion to suppress evidence; (5) alleged prosecutorial misconduct, and (6) alleged error in the denial of Bryan's motion for new trial, involving a number of evidentiary issues. In the point on appeal in regard to the death sentence, Bryan suggested that the trial court had improperly computed the number of aggravating circumstances, and specifically attacked the sentencer's finding of a number of them, as well as the sentencer's failure to find certain mitigation. In its opinion, Bryan v. State, 533 So.2d 744 (Fla. 1988), the Florida Supreme Court affirmed Bryan's convictions and sentence of death in all respects. The court expressly noted that strength of the evidence against Bryan. Id. at 745. The court concluded that the attacks upon Bryan's convictions were meritless, and, as to the sentence of death, held:

On his third issue, appellant argues that the trial court erred in imposing the death sentence by finding aggravating circumstances which were not present and by failing to find mitigating circumstances which were present. We disagree. It is obvious from the order and the record on which it is based that the judge relied on six aggravating circumstances from section 921.141(5), Florida Statutes (1983): (b) previous conviction of felony involving the use or threat of violence to the person; (d) capital felony committed while engaged in commission of kidnapping and robbery; (e) capital felony committed to avoid lawful arrest; (f) capital felony committed for pecuniary gain; (h) capital felony was especially heinous, atrocious, or cruel; and (i) capital felony was committed in cold,

calculated, and premeditated manner without any pretense of moral or legal justification. Circumstance (b) is supported by appellant's concurrent convictions for both kidnapping and robbery. Circumstance (f) is supported by the conviction for robbery in taking the victim's wallet and car and does not duplicate circumstance (d) because that circumstance was also based on kidnapping. Appellant's argument that the car was of little value and was soon discarded merits no comment. Circumstances (e) and (i) are supported by the evidence that after the victim was robbed of his wallet and car keys, he was nevertheless kidnapped and taken to a distant and isolated area for the murder. The only conclusion that can be drawn from this evidence is that appellant, who was a wanted bank robber, did not want the victim to raise an alarm after the robbery and coldly calculated that the must be murdered and his body disposed of so as to avoid detection. In this connection, we note that the body was not discovered until approximately a month later after Cooper went to the police and assisted in the search for the body. Circumstance (h) is supported by the evidence that the victim was kidnapped, held for hours under physical duress and fear for his life, transported to an isolated area, marched at gunpoint to a creek bank, after asking that he not be crippled, struck and felled by a blow to the back of the head, and killed at short range by a sawed-off shotgun blast to the face. In mitigation, the court found that appellant had a good work record prior to robbing the bank and that he had been gainfully employed and law abiding for over a year in Arizona, after he escaped from the Santa Rosa jail. Appellant argues that other mitigating circumstances should have been found, e.g., appellant was under substantial domination of Cooper who only received one year jail time and probation; appellant was under extreme mental or emotional disturbance and was unable to appreciate criminality of conduct or to conform behavior to requirements of law. We disagree.



Bryan, 533 So.2d at 748-49.

Bryan sought review by the Supreme Court of the United States and his petition for writ of certiorari was denied on April 17, 1989. Bryan v. Florida, 490 U.S. 1028 (1989).

On August 28, 1990, Governor Martinez signed a death warrant in this case, such death warrant active between noon, October 29, and noon, November 3, 1990, with execution scheduled for 7:00 a.m., October 30, 1990. On October 2, 1990, following the granting of an extension of time by the Supreme Court of Florida, Bryan filed a motion for postconviction relief, pursuant to Fla.R.Crim.P. 3.850, in the state circuit court. In such pleading, Bryan raised fifteen (15) primary claims for relief: (1) a contention that trial counsel rendered ineffective assistance at the sentencing phase; (2) a contention that Bryan was deprived of a constitutionally adequate mental health evaluation at the penalty phase; (3) a contention that trial counsel rendered ineffective assistance at the trial phase<sup>1</sup>; (4) a contention that the State's use of an informant violated Bryan's rights and that the State was guilty of a discovery violation; (5) a contention that the sentencer refused

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<sup>1</sup> In this claim, collateral counsel alleged that trial counsel failed to investigate and prepare, failed to adequately impeach state witnesses, failed to determine if there was evidence to support a defense that "the victim was involved with illegal drugs," failed to adequately investigate the existence of tape-recordings between Bryan and Sharon Cooper, and failed to present a defense involving the effects of alcohol and cocaine on the ability to form specific intent.

to find mitigating circumstances clearly set out in the record; (6) a contention that the prosecutor's closing argument at the guilt and penalty phases was improper; (7) a contention that the aggravating circumstance regarding the homicide having been committed for purposes of avoiding arrest, pursuant to §921.141(5)(e), had been erroneously found; (8) a contention that the prosecutor violated Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), by making improper argument involving victim impact, as well as a claim of ineffective assistance of trial counsel for failing to preserve this claim; (9) a contention that the judge and prosecutor violated Caldwell v. Mississippi, 472 U.S. 320 (1985), by diluting the jury's sense of responsibility in sentencing, as well as a claim that trial counsel was ineffective for failing to preserve this claim; (10) a contention that the jury instructions at the sentencing phase shifted the burden of proof onto the defense to prove mitigation; (11) a contention that the aggravating circumstance relating to the homicide having been committed in a cold, calculated and premeditated manner, pursuant to §921.141(5)(i), had been erroneously found; (12) a contention that the instructions given the jury at the penalty phase as to the definition of the aggravating circumstances were unconstitutionally vague; (13) a contention that Bryan's double jeopardy rights were violated, as well as a claim that trial counsel was ineffective for failing to

preserve this claim; (14) a contention that non-statutory aggravation was presented at Bryan's sentencing proceedings; and (15) a contention that the application of Fla.R.Crim.P. 3.851 to Bryan's case violated his constitutional rights.

Likewise, on or about October 2, 1990, Bryan filed a consolidated Petition for Extraordinary Relief, Etc., or Petition for Writ of Habeas Corpus, in the Supreme Court of Florida, presenting eleven (11) primary claims for relief: (1) a contention that the sentencing order failed to demonstrate a reasoned judgment and reliable weighing of the aggravating and mitigating circumstances, and an accompanying claim of ineffective assistance of appellate counsel; (2) a contention concerning the prosecutor's closing argument at the guilt and penalty phases; (3) a contention that the Eighth Amendment was violated by the sentencer's refusal to find mitigating circumstances "clearly set out in the record"; (4) a renewed attack upon the sentencer's finding that the homicide was committed to avoid arrest, pursuant to §921.141(5)(e); (5) a contention that certain of the prosecutor's comments violated Booth v. Maryland and South Carolina v. Gathers, and an accompanying claim of ineffective assistance of appellate counsel; (6) a contention that the sentencing jury was misled as to its role in sentencing, in violation of Caldwell v. Mississippi, and an accompanying claim of ineffective assistance of appellate counsel; (7) a contention that the jury instructions at the penalty phase

impermissibly shifted the burden of proof onto the defense to prove mitigation, and an accompanying claim of ineffective assistance of appellate counsel; (8) a renewed attack upon the sentencer's finding that the homicide was committed in a cold, calculated and premeditated manner, pursuant to §921.141(5)(i), as well as the jury instruction upon such subject; (9) a contention that the jury instructions as to the aggravating circumstances were insufficient and/or vague, and an accompanying claim of ineffective assistance of appellate counsel; (10) a contention that Bryan's double jeopardy rights were violated when, at the second trial, collateral crime evidence was admitted, such evidence allegedly excluded at the first trial, and an accompanying claim of ineffective assistance of appellate counsel; and (11) a contention that nonstatutory aggravation was considered, and an accompanying claim of ineffective assistance of appellate counsel.

On October 25, 1990, the circuit court granted a stay of execution, and entered a preliminary order on the postconviction motion. The court held that an evidentiary hearing would be granted as to Bryan's claim of ineffective assistance of counsel at the penalty phase, and that Bryan would have further leave to amend the claim of ineffective assistance of counsel at the guilt phase. The court further found no merit to Bryan's claim regarding Rule 3.851, and found all other claims to be procedurally barred. Following Bryan's amendment of the claim of ineffective assistance

of counsel at the guilt phase, the circuit court concluded that such claim was either facially insufficient or procedurally barred. The evidentiary hearing in the cause was held on June 21, 1991, and, on August 30, 1991, the circuit judge rendered a final order denying the motion in all respects, and, as to the claim of ineffective assistance of counsel, specifically finding that neither deficient performance of counsel nor prejudice had been established under Strickland v. Washington, 466 U.S. 668 (1984).

Bryan appealed this ruling to the Supreme Court of Florida, which considered the matter together with the petition for writ of habeas corpus; in his appeal to the Florida Supreme Court, Bryan abandoned a number of claims, including those relating to Booth or Gathers, as well as that involving Rule 3.851. In its opinion, Bryan v. State, 641 So.2d 61 (Fla. 1984), the Florida Supreme Court affirmed the circuit court's denial of all relief as the 3.850 motion, and further denied Bryan's petition for writ of habeas corpus. In such opinion, the Florida Supreme Court made express findings of procedural bar as to the vast majority of the claims raised. Thus, the court found, as to the 3.850 appeal, that the following claims were procedurally barred: (1) the jury instructions on aggravating circumstances were constitutionally invalid; (2) the trial court failed to find all mitigating circumstances; (3) the introduction of nonstatutory aggravating circumstances resulted in an arbitrary and capricious imposition of

the death penalty; (4) improper prosecutorial comment throughout the trial and sentencing; (5) alleged argument and instructions which misled the jury and diluted its sense of responsibility; (6) alleged shifting of the burden in the jury sentencing instruction; (7) alleged unconstitutional use of a co-defendant/informant to obtain statements from Bryan and failure to disclose such; and (8) alleged denial of protection against double jeopardy and collateral estoppel. Bryan, 641 So.2d at 62-63.

Similarly, as to the claims presented in the petition for writ of habeas corpus, the state supreme court found the following claims procedurally barred: (1) the written sentencing order failed to demonstrate a reasoned judgment and violated Bryan's right to a reliable weighing by the sentencer; (2) the prosecutor's comments at the guilt and penalty phases rendered Bryan's conviction and sentence fundamentally unfair and unreliable; (3) the sentencing court refused to find mitigating circumstances that were clearly set out in the record; (4) the "avoid arrest" aggravating factor was improperly applied; (5) evidence of victim impact violated Booth v. Maryland; (6) prosecutorial and judicial comments and instructions diminished the jury's sense of responsibility; (7) the trial court's jury instruction improperly shifted the burden of proving the inappropriateness of the death penalty to Bryan and the trial judge employed this improper standard when he imposed the death sentence; (8) the trial court erroneously and

unconstitutionally applied the cold, calculated and premeditated aggravating factor; (9) the jury was improperly instructed on aggravating circumstances in violation of Maynard v. Cartwright, 486 U.S. 356 (1988); and (10) the trial court erred in admitting collateral crime evidence when the admission of such evidence was cause for mistrial on a previous trial. Bryan, 641 So.2d at 65. As should be apparent, there was substantial overlap in the claims presented on habeas corpus and on 3.850.

The Florida Supreme Court only addressed one of the habeas corpus claims on the merits, i.e., Bryan's claim that appellate counsel had been ineffective for failing to assert on appeal a claim that nonstatutory aggravating factors tainted his sentence of death. The court found that neither deficient performance nor prejudice had been demonstrated. Id. As to the 3.850 claims, the state supreme court only addressed on the merits Bryan's claim of ineffective assistance of counsel at the penalty phase and the related claim that counsel's ineffectiveness resulted in the denial of Bryan's right to effective adequate mental health assistance. The state appellate court agreed with the circuit court that Bryan's claim of ineffective assistance at the guilt phase was insufficient. Bryan, 641 So.2d at 63. The Florida Supreme Court found that the circuit court's findings, to the effect that neither deficient performance of counsel nor prejudice had been

demonstrated under Strickland, were supported by the record. Bryan, 641 So.2d at 63-64.

The state supreme court also made findings of its own, stating:

[T]his is not a case which defense counsel failed to prepare. Counsel had Bryan examined by seven mental health experts. He did not call Dr. Larson as a witness after the doctor told him that his testimony would not be helpful and that it suggested the possibility of malingering. He had Dr. Gentner under subpoena, but she was out of the state during the trial. Apparently, Dr. Medzerian came to testify in her place but counsel was not aware of her presence.

To introduce the medical reports of certain experts instead of having these experts testify in person was clearly a tactical decision. Several of the doctors indicated that Bryan had no memory of the circumstances surrounding the murder. Bryan, during the guilt phase of the trial and in contravention of the doctors' testimonies, testified in detail about the circumstances surrounding the murder. There was a clear danger that if the doctors were put on the witness stand they would discredit his veracity. Furthermore, of the three doctors who testified at the post-conviction hearing, Dr. Gentner did not believe Bryan met the criteria for either of the statutory mitigators and the other two doctors felt that only one mitigator existed. Each of the medical reports clearly indicated the existence of mental abnormalities, so Stokes was able to persuasively argue both statutory mental mitigators from these reports. The fact that the language of the reports was not couched in the exact terms of statutory mental mitigators does not mean that they were not used effectively.

As for nonmedical evidence, Stokes introduced the testimony of Bryan's mother, grandmother,



and aunt as well as his ex-wife, a former employer, and a friend. The evidence supports the trial judge's conclusion that because of alienation between them, not all of the family would present favorable testimony. As noted in Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla.), cert. denied, 479 U.S. 972, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986):

The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorough job being done than was actually done.

In spite of the existence of six statutory aggravating circumstances and a gruesome murder preceded by a kidnapping, defense counsel was able to persuade five jurors to recommend life imprisonment. Now, several years after the fact, Bryan argues that if his lawyer had employed different tactics there is the possibility that he would have received a life sentence. After a full evidentiary hearing, the trial judge denied relief and the record supports his ruling. Accordingly, we affirm the order denying post-conviction relief.

Bryan, 641 So.2d at 63-65.

On or about October 19, 1994, Bryan, represented by collateral counsel, filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254 in the United States District Court for the Northern District of Florida in Pensacola, presenting twenty (20) claims for relief: (1) a claim of ineffective assistance of counsel at the penalty phase; (2) a claim that Bryan was denied his right to adequate mental health assistance; (3) a claim that Bryan's death sentence was tainted by constitutionally invalid jury instructions

and improper application of statutory aggravating circumstances; (4) a claim that Florida's death penalty statute was overbroadly applied to Bryan; (5) a claim that the sentencing court refused to find mitigating circumstances clearly established by the record; (6) a claim that the trial court's written sentencing order failed to demonstrate a reasoned judgment and that the Florida Supreme Court's review was inadequate; (7) a claim that Bryan's death sentence was tainted by nonstatutory aggravating circumstances; (8) a claim that the prosecutor made improper comments throughout trial and sentencing; (9) a claim that Bryan's jury was misled by comments and instructions which diluted its sense of responsibility; (10) a claim that the jury instructions shifted the burden of proof; (11) a claim that Bryan was denied his protection against double jeopardy and/or collateral estoppel; (12) a claim that the State's use of a confidential informant to obtain tape-recorded statements from Bryan violated his rights; (13) a claim of ineffective assistance of counsel at the guilt phase; (14) a claim of ineffective assistance of appellate counsel; (15) a claim that Bryan was deprived of his due process rights because collateral counsel was deprived of adequate time or funds; (16) a claim that the State of Florida and other entities have concealed exculpatory evidence; (17) a claim of cumulative error; (18) a claim that Florida's rule prohibiting interviews with jurors violates Bryan's rights; (19) a claim that the application of the aggravating

circumstances in this case violated the Eighth and Fourteenth Amendments; and (20) a claim that the testimony concerning collateral crimes violated Bryan's rights.

Following response by the State on May 8, 1995, Federal District Judge Collier summarily denied relief on July 9, 1996. Judge Collier addressed each claim in some detail; given the fact that the petition was filed in 1994, the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) were not applied. As to Bryan's primary claim (claim 1), that of ineffective assistance of counsel at the penalty phase, the district court found that neither deficient performance of counsel nor prejudice had been established under Strickland v. Washington; the court likewise rejected Bryan's related claim under Ake v. Oklahoma, 470 U.S. 68 (1985) (claim 2), as lacking merit. The district court similarly found claims 6 (sentencing order failed to demonstrate reasoned judgement); 13 (ineffective assistance of counsel at the guilt phase); 14 (ineffective assistance of appellate counsel); 15 (inadequate time for preparation of collateral appeal); 16 (alleged claim under Brady v. Maryland, 373 U.S. 83 (1963), in regard to clemency records); 17 (alleged cumulative effect of errors); and 20 (admission at trial of collateral crime evidence) to be properly presented, but meriting no relief. Judge Collier found portions of claim 8 (prosecutorial argument) to be properly presented, but meritless, and other

portions to be procedurally barred. Judge Collier also made express findings of procedural bar in regard to claims 3 (constitutionally defective jury instruction on aggravators); 4 (overbroad application of aggravating factors); 5 (sentencer's failure to find mitigation established in the record); 7 (prosecutor's arguments constituting nonstatutory aggravation); 8 (prosecutorial comment); 9 (Caldwell error); 10 (burden shifting jury instructions); 11 (double jeopardy); 12 (improper use of informant); and 19 (improper application of aggravating factors). In all instances, the court fully examined each claim for cause and prejudice, finding that Bryan had failed to establish such. Additionally, the judge found that claim 3, raising error under Espinosa v. Florida, 505 U.S. 112 (1992), was barred under Teague v. Lane, 489 U.S. 288 (1989). Finally, Judge Collier found claim 18 (attack upon Florida Bar Rule precluding juror interviews) to be unexhausted. Bryan's motion to alter and amend was denied on August 19, 1996.

Bryan appealed the district court's order to the United States Court of Appeals for the Eleventh Circuit, and raised six (6) primary claims on appeal -- (1) a claim of ineffective assistance of counsel at the penalty proceeding; (2) a related claim relating to mental health assistance under Ake v. Oklahoma; (3) a multi-faceted attack upon Florida's capital sentencing statute, as well as upon the jury instructions on the aggravating circumstances; (4)

a claim that the sentencing order did not reflect reasoned judgment; (5) claimed violation of Caldwell v. Mississippi; and (6) a discussion of the Prison Litigation Reform Act. On May 11, 1998, the Court of Appeals rendered its decision, Bryan v. Singletary, 140 F.3d 1354 (11th Cir. 1998), affirming the district court's order in all respects. The Court only addressed in detail Bryan's claim of ineffective assistance of counsel at the penalty phase, setting forth in a footnote its disposition of the other matters. At such time the court expressly found the attack upon the adequacy of the sentencing order to be without merit, and the attack upon the capital sentencing statute and jury instruction to be procedurally barred. The Court likewise found the alleged Caldwell error claim to be procedurally barred, and noted that the application of the PLRA had been decided in other cases. Bryan, 140 F.3d at 1355, n.1. Given its disposition of the ineffectiveness claim, the Court found that it did not need to make a separate disposition of the interrelated Ake claim, id. at 1361, n.13, and expressly found that no prejudice had been demonstrated under Strickland in regard to any deficiency on the part of Bryan's counsel at the penalty proceeding. The Court's conclusions included the following:

As we have previously recognized, the assistance of even the best lawyering in some situations may not be enough to convince a jury to overlook the details of a horrible murder, or a less brutal murder with substantial evidence of guilt. *Clisby v.*

*State of Alabama*, 26 F.3d 1054, 1057 (11th Cir. 1994). In the face of strong aggravating circumstances, the failure to present psychiatric testimony may not be prejudicial to the defendant, especially so in this case where the substance of Bryan's health problems was in fact before the jury, and where the conclusions of experts which Bryan now proffers are inconsistent with Bryan's actions in implementing a complicated murder scheme and his elaborate attempts to cover his tracks.

In the instant case, the Florida Supreme Court found six aggravating circumstances: Bryan had a prior conviction for a crime of violence, Fla. Stat. §921.141(5)(b); the capital felony was committed while Bryan was engaged in the commission of another felony, Fla. Stat. §921.141(5)(d) (robbery, kidnapping); the murder was committed in order to avoid arrest, Fla. Stat. §921.141(5)(e); the capital felony was committed for pecuniary gain, Fla. Stat. §921.141(5)(f); the capital murder was especially heinous, atrocious, or cruel, Fla. Stat. §921.141(5)(h); and the capital felony was a homicide that was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, Fla. Stat. §921.141(5)(i).

The details of this crime are also especially heinous. Bryan kidnapped an elderly man at gunpoint, tied him up, stuck him in the back of his own car, and drove him across county lines. After spending the night at a motel, Bryan took Wilson out to a remote, wooded area. Bryan parked the car and led Wilson, still tied-up, into the woods. Bryan took Wilson beside a stream. While Wilson begged for his life, the defendant knocked him over the head with the butt of a shotgun. Bryan then shot Wilson in the face as his body fell into the water.

In light of the aggravating and mitigating factors, and in light of the

limited value of the proffered expert testimony, Bryan's argument does not undermine our confidence in the determination of the state trial court. Bryan did not show that he was prejudiced by the performance of his counsel; we cannot find that he received ineffective assistance of counsel.

(Footnotes omitted).

Bryan, 140 F.3d at 1360-1.

The Court also discussed, in some detail, why under the facts and circumstances of this case, the presentation of any "mental health defense" was doomed to failure:

The facts of this case suggest that the murder was anything but 'impulsive.' While on the run from police for a bank robbery, Bryan used a cabin cruiser to travel from Florida to Mississippi. The boat's motor became damaged near Pascagoula, Mississippi and Bryan stopped to make repairs. When he was unsuccessful in making these repairs, he robbed Wilson of his keys and tied him up. Bryan then robbed Wilson's place of employment. Returning to Wilson's trailer, Bryan put Wilson in the victim's own car and drove him to another county for an evening in a motel. That next morning, Bryan drove Wilson around the countryside looking for a secluded spot. Bryan parked the car, marched the bound man into the woods, and shot him at close range. Looking at the facts of this case, it does not appear Bryan acted in an impulsive manner.

The facts of this case also do not indicate that Bryan suffered from a diminished capacity to plan his activities. The murder of George Wilson was an orchestrated attempt to continue Bryan's flight from the law because Bryan needed to further cover his tracks. As opposed to his victims at the bank robbery (where Bryan wore a mask), George Wilson would have been able to directly identify Bryan to the police. Further, the

murder of Wilson was not an instantaneous decision but a plot developed over the course of an entire evening that involved transporting the victim a considerable distance and staying overnight in a motel.

Evidence also suggests that Bryan planned his activities following the crime, attempting to create an alibi for himself and Sharon Cooper. Following the murder, he drove around looking for a place to hide the car, and he finally dumped it in a river. He mailed the murder weapon, a sawed-off shotgun, and some clothing to Biloxi, Mississippi. Later, Bryan attempted to have a fellow inmate at the Springfield Medical Center assist him in concocting an alibi for the crime. These are not the actions of an impulsive person, a person unable to plan, or a person suffering from a substantially impaired ability to "appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Instead, they are the actions of a person calculating the disposal of incriminating evidence and reconstructing the events of a murder.

Id. at 1360.

Bryan unsuccessfully petitioned the Court of Appeals for rehearing, which was denied on September 1, 1998. Bryan's Petition for Writ of Certiorari to the Supreme Court of the United States, in which he presented a claim in regard to his allegation of Strickland error, was denied on February 8, 1999. Bryan v. Singletary, 119 S.Ct. 1067 (1999).

Following the signing of Bryan's second death warrant, Bryan filed his second motion for postconviction relief on October 15, 1999, raising the following claims: (1) a claim that Bryan's right to public records was denied by virtue of the death warrant; (2) a



renewed claim of ineffective assistance of counsel at the guilt phase for failing to obtain testimony or evidence from Sharon Cooper relating to Bryan's mental state at the time of the murder; (3) a renewed claim of ineffective assistance of counsel at the penalty phase stemming from the same omission; (4) a renewed claim of ineffective assistance of counsel and/or of mental health experts for not considering the above information; (5) a renewed claim that Sharon Cooper acted as a state agent when she tape-recorded a conversation with Anthony Bryan in September of 1983, and that various constitutional rights were violated thereby; (6) a claim that Bryan has been deprived of his access to the clemency process; and (7) a claim of cumulative error. On October 18, 1999, Bryan filed a supplement to his prior motion to vacate, adding claim (8), in which he contended that the State had allegedly suppressed evidence relating to the circumstances under which the victim's body was discovered; this claim was allegedly premised upon unnamed public records disclosures.

On October 21, 1999, Circuit Judge Kenneth Bell rendered a comprehensive order denying all relief, and expressly finding claims (2) - (8) procedurally barred. The judge alternatively found that, even if some of the matters could be considered "newly discovered evidence," such were insufficient to undermine confidence in the result, noting the fatal inconsistency between the "new" theory of defense (that Bryan had committed the murder

while intoxicated) and the theory of defense offered by Bryan himself at trial (denial of participation in the murder). Judge Bell likewise noted that any defense premised upon Bryan's mental state at the time of the offense would have been prejudicial itself, given that additional details concerning the "myriad collateral crimes" committed by Bryan would have been disclosed. As to Bryan's public records claim, the court found that the defense had failed to show why the current records requests had not been made earlier, and that, likewise, no necessity had been demonstrated for any records requested. Although Bryan immediately appealed this ruling, he also, on October 25, 1999, filed yet a third postconviction motion in the trial court, raising a renewed claim of ineffective assistance of counsel at trial and penalty phase, due to defense counsel's alleged alcoholism. An affidavit from defense counsel, executed October 24, 1999, was attached. In light of the pending appeal, the circuit court dismissed this motion for lack of jurisdiction.<sup>2</sup>

In addition to appealing the denial of postconviction relief, Bryan also filed a successive petition for habeas corpus relief in the Florida Supreme Court, which was in many respects verbatim to the third postconviction motion, premised upon the alleged alcoholism of Bryan's trial and appellate counsel, and asserting

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<sup>2</sup> By order dated October 26, 1999, the Florida Supreme Court affirmed this ruling.

ineffective assistance of counsel. On October 26, 1999, the Florida Supreme Court rendered its opinion, Bryan v. State, 24 Fla.L.Weekly S516 (Fla. October 26, 1999), denying all relief. The court found that Judge Bell had not abused his discretion in the disposition of the public records claim, and likewise agreed with the circuit court's findings of procedural bar as to the other issues. Alternatively, the court noted that counsel would have had no basis to believe that Sharon Cooper would have offered information helpful to a mental health defense, as she had offered much testimony to the contrary, and could have provided "additional damaging information about Bryan's ability to plan and carry out criminal offenses." Id. at S517 The court observed that the contents of the tape-recording would not have further illuminated Bryan's mental state at the time of the crime, "since it was made three weeks later," id., and noted that Bryan's mental state had been thoroughly examined prior to trial and that he had taken the stand and denied committing the offense. As to the claim concerning the discovery of the victim's body, the court found: "An anonymous piece of paper does not undermine a conviction based on eyewitness testimony; a confession; a false alibi written in Bryan's handwriting and with his fingerprints on the paper; and clear evidence that the murder weapon was Bryan's." Id. at S518.

As to Bryan's habeas corpus petition, the Florida Supreme Court noted that Bryan had previously attacked the competency of

appellate counsel, but that his current claim had "a new twist: Bryan's trial and appellate counsel, Ted Alan Stokes, has sworn in an attached affidavit that he was an alcoholic when he represented Bryan at trial and on appeal." Id. The court then quoted from Stokes' affidavit that portion in which counsel discussed his decision to call Bryan to testify in his own behalf. Id. Citing to Kelly v. United States, 820 F.2d 1173 (11th Cir. 1987), the court found that Stokes' "equivocal recollection that he may have been under the influence outside of trial" did not warrant relief. Id. The state supreme court noted that it had previously affirmed determinations that counsel had been effective at both trial and sentencing phases, and concluded that, "regardless of counsel's condition, he rendered effective assistance." Id.

Bryan had, in the interim, filed an all-writs petition in the Florida Supreme Court attacking the constitutionality of electrocution in Florida's electric chair, which the court had denied on October 20, 1999. On October 26, 1999, the Supreme Court of the United States granted Bryan's petition for writ of certiorari in order to review this ruling, and stayed his execution. Bryan v. Moore, 120 S.Ct. 394 (1999). Following Florida's adoption of lethal injection as its method of execution, the Court dismissed Bryan's petition as improvidently granted, on January 24, 2000. Bryan v. Moore, 66 Crim.L.Rptr 2145 (January 24, 2000).

On January 26, 2000, Governor Bush rescheduled Bryan's execution for 7 a.m. on Thursday, February 24, 2000, with the warrant period formally commencing at 7 a.m. on Tuesday, February 22, 2000, and concluding at 7 a.m. on Tuesday, February 29, 2000. On January 31, 2000, Bryan filed an application for stay of execution in the circuit court, in which he contended, inter alia, that he could not meaningfully "elect" his method of execution, as now permitted under Section 922.105, Fla. Stat.(2000), in that the Department of Corrections had failed to disclose sufficient information concerning the lethal injection method which would be utilized. Bryan also stated that he did not believe that the new statute applied to him, in any event, due to the "Savings Clause" of the Florida Constitution. Bryan's counsel further maintained that he faced an ethical dilemma in light of the Death Penalty Reform Act of 2000, which could render him subject to sanctions if he filed further postconviction challenges on Bryan's behalf. On February 7, 2000, Bryan filed a motion to compel the production of Department of Corrections records relating to lethal injection and requested an evidentiary hearing thereon. Bryan likewise attacked the constitutionality of certain statutes setting forth exemptions in this regard. Finally, on February 8, 2000, Bryan filed an emergency application for release of records, requesting that the court conduct an in camera review of the treatment records of Attorney Stokes, allegedly pertaining to his treatment for

substance abuse in 1988, and that the court subsequently order release of the records.

On February 8, 2000, the circuit court held a hearing on these matters, and, on February 11, 2000, ordered that an evidentiary hearing would be held the next day on "the Department of Corrections' methodology for execution by lethal injection," and any claim of public records exemption relating to such. At such hearing, Bryan called five witnesses, including the Secretary of Corrections and the warden of Florida State Prison. Later that day, Judge Bell rendered orders denying the application for stay and the motion to compel. The court had denied the motion for release of records the day before, finding that disclosure of Stokes' treatment records would not lead to information which would further a viable postconviction claim.

In the order denying the application for stay, the court specifically rejected any contention that the lethal injection statute did not apply to Bryan due to the Savings Clause of Florida's Constitution and further held that Bryan possessed sufficient information to make a knowing election of execution method. The court also found Bryan's challenge to the Death Penalty Reform Act to be moot, in light of the Florida Supreme Court's order of February 7, 2000, reinstating the former rules of procedure on an interim basis. Judge Bell noted that Bryan's counsel had chosen not to file a motion for postconviction relief,

but observed, as to any lethal injection challenge, "given the unique position of this case, the Court believes it is appropriate to rule on his freestanding stay application as a colorable claim for postconviction relief." Finally, in the order on the motion to compel, the court specifically upheld the Department of Corrections' asserted exemptions and further upheld the constitutionality of the statutes authorizing such exemptions.

Bryan filed a rehearing motion as to all three orders on Tuesday, February 15, 2000, and the circuit court denied relief on February 18, 2000. In the rehearing order, Judge Bell clarified that, as to the request for release of Stokes' treatment records, he had conducted an in camera review, and had concluded that these records contained no records "to objectively document Bryan's claim that Mr. Stokes was ineffective during the times at issue," as such contained no "specific evidence of substance abuse or dependency that impaired Mr. Stokes' 'actual conduct at trial.'"

**B. STATEMENT OF THE FACTS**

The most accurate recitation of the facts in the instant case is that set forth by the Florida Supreme Court in Bryan's direct appeal:

Appellant was arrested in Madison County, Florida, driving a stolen car in late August 1983. A sawed-off shotgun was found in the car. His companion, Sharon Cooper, was released soon thereafter and voluntarily went to the FBI with a report that appellant had robbed, kidnapped, and murdered the victim

here, George Wilson, in early August 1983. Appellant was also wanted by the FBI for a 27 May 1983 bank robbery in Grand Bay, Alabama. After his return to Santa Rosa County for trial, appellant escaped in June 1984 and was recaptured in Colorado in October 1985. Appellant was convicted of bank robbery in federal court in April 1986 prior to the convictions here.

The chief witness for the state, Cooper, testified as follows. She met appellant in June 1983 in Jacksonville and the two hitchhiked to Mississippi where appellant obtained a truck. They then drove back to Florida, stopping en route for appellant to retrieve the hidden sawed-off shotgun which he had used in the bank robbery. At Gulf Breeze, Florida, appellant obtained a cabin cruiser outboard motor boat. Abandoning the truck, the two traveled by water to Mississippi. En route, the motor was damaged and they put in at Pascagoula, Mississippi, near a seafood wholesaler for whom the elderly victim worked as a night watchman. Appellant, who is an experienced commercial fisherman and former captain of a large shrimp boat, borrowed tools from the victim and others and unsuccessfully attempted to repair the cabin cruiser. Abandoning the boat, and using the shotgun, appellant robbed the victim of his wallet and keys and tied him up. After entering the seafood wholesaler, which was closed for the night, appellant returned and placed the bound victim in the back seat of the victim's car. The three then drove to Santa Rosa County for a short stay in a motel. Later in the morning, the victim was driven to an isolated area where, with his hands tied, he was marched at gunpoint to a creek. The victim, fearing for his life, asked that he not be crippled. Appellant struck the victim in the back of the head with the shotgun and, when he fell in to the creek, killed him with a single blast to the face. Appellant then concealed the victim's car in a river and resumed his travels with Cooper until arrested in Madison County. Other evidence against Appellant



included: (1) his fingerprints taken from the abandoned cabin cruiser and testimony of witnesses who saw him in the vicinity of the wholesaler prior to the crimes; (2) identification of the sawed-off shotgun as the murder weapon by weapon experts and prints of appellant taken from the internal working of the weapon; (3) the testimony of a federal prisoner that appellant confessed the crimes to him in Missouri and asked for his assistance in concocting an alibi, which testimony was corroborated by a written outline of the alibi in appellant's handwriting on paper which contained appellant's prints; (4) photographs of appellant robbing the bank with a sawed-off shotgun similar to the murder weapon and testimony from investigators and witnesses to the bank robbery showing that appellant had pawned and redeemed the unmodified shotgun prior to the bank robbery and that the sawed-off portion of the barrel and the stock were seized in appellant's home on the day of the bank robbery.

Bryan, 533 So.2d at 745.

### SUMMARY OF ARGUMENT/INTRODUCTION

This case comes before the court on appeal from the circuit court's denial of three motions or applications - that requesting the release of confidential health records, that relating to compelling the production of Department of Corrections public records relating to lethal injection methodology and that requesting a stay of execution. Assuming that jurisdiction does in fact lie, no basis for relief has been demonstrated. The death sentence in this case was imposed in 1986, and Bryan has already fully litigated every cognizable constitutional challenge to his convictions and sentence. As best as can be determined, any postconviction claim which might result from the disposition of these motions would be procedurally barred or insufficient to merit relief, and it should be noted that Bryan has nowhere contended that he is actually innocent of the underlying offense.

As to any claim relating to the release of trial counsel's confidential health records in regard to his treatment for substance abuse years after Bryan's trial, Bryan has failed to demonstrate any abuse of discretion in the circuit court's disposition of such matter. Bryan has already filed three postconviction motions attacking the competency of counsel, and this Court specifically concluded, in its October 26, 1999 opinion, that regardless of Attorney Stokes' alleged alcoholism, he rendered effective assistance. Judge Bell concluded, following in camera

inspection, that the records in question would not give rise to a viable postconviction claim, and competent substantial evidence in the record supports this conclusion. Bryan may not now secure a stay of execution to endlessly litigate the same issue.

As to any claim relating to the circuit court's disposition of Bryan's public records claims, it must be noted that Bryan's acquisition of public records would seem to be for a limited purpose - to acquire sufficient knowledge concerning Florida's methodology for execution by lethal injection in order to allow a knowing "election" of such a method by Bryan, as well as, if warranted, a constitutional challenge thereto. As Judge Bell correctly found, Bryan possesses more than sufficient information regarding lethal injection, and his failure to file a constitutional challenge is attributable to no action or inaction by the Department of Corrections. Bryan has failed to demonstrate that the further acquisition of public records would allow him to present a claim which would, in turn, entitle him to relief, and Judge Bell was eminently correct in stating that there was no need to stay Bryan's execution "to fight a public records battle." In any event, Bryan's inchoate concerns would seem to have been mooted by this Court's decisions in Sims v. State, 25 Fla.L.Weekly S128 (Fla. Feb. 16, 2000).

Finally, as to the circuit court's denial of Bryan's application for stay, reversible error or an abuse of discretion

has likewise not been demonstrated. In light of the exigency involved, Judge Bell construed Bryan's application for stay as containing facts sufficient to state a colorable claim for postconviction relief; to the extent that the circuit court may have erred in such determination, a dismissal of this appeal for lack of jurisdiction is mandated. Any contention by opposing counsel that the court below, in conjunction with circumstances beyond his control, somehow deprived him of the ability to litigate on Bryan's behalf is squarely contradicted by the record. The simple truth is that, after over a decade of collateral litigation, Bryan has simply run out of claims to raise, and the instant death sentence should now at last be carried out.

ARGUMENT

ASSUMING THAT JURISDICTION LIES, THE CIRCUIT COURT'S ORDERS SHOULD BE AFFIRMED IN ALL RESPECTS.

Before proceeding to the merits of Bryan's claims, the State would initially contend that the trial court's resolution of his motions relating to release of trial counsel's confidential records, as well as its disposition of all public records matters relating to the Department of Corrections (DOC), do not represent orders appealable of right, pursuant to §924.06, Fla. Stat. (1999) or applicable provisions of the Rules of Appellate Procedure. These rulings can only properly be presented in an appeal following the denial of a formal motion for postconviction relief, a motion which Bryan's counsel has shown every disinclination to file. While the trial court's denial of Bryan's application for stay of execution is subject to this Court's review, to the extent that, pursuant to State ex rel Russell v. Schaeffer, 467 So.2d 698 (Fla. 1985), such application had sufficient facts to state a colorable claim for relief, it must be noted that Bryan's position is that he, in fact, presented no colorable claims therein. Acceptance of Bryan's position dictates that the instant appeal be dismissed in its entirety.

A. THE CIRCUIT COURT PROPERLY RULED UPON, AND DENIED, BRYAN'S APPLICATION FOR STAY OF EXECUTION.

Bryan filed an application for stay of execution with the circuit court, dated January 27, 2000. That application complained that, even though Bryan did not believe that the new lethal injection provision applied to him due to Florida's "Savings Clause", he did not possess sufficient knowledge about lethal injection "to make an intelligent and knowing election" between lethal injection and electrocution as the method of his execution. (R I 2-3, quotation at 3). In the application for stay, collateral counsel also stated that he had been "placed in the position of either being able to fulfill his ethical obligations to Mr. Bryan . . . or be subject to sanctions imposed by this court" (R I 3), by virtue of the Death Penalty Reform Act of 2000. Finally, the stay application stated that Bryan would suffer irreparable harm if he is "executed by lethal injection without ever being afforded a forum to challenge this new method of execution." (R I 4).

The circuit court denied the application for stay of execution on February 12, 2000. In its order the court considered the Savings Clause complaint in light of Washington v. Dowling, 92 Fla. 601, 109 So. 588 (1926), Ex parte Browne, 93 Fla. 332, 111 So. 518 (1927), and Provenzano v. Moore, 744 So.2d 413 (Fla. 1999), and held that the new lethal injection statute was applicable to Bryan. (R VI 1074-75). The court also stated: "Bryan appears to attack

the constitutional validity of the DPRA and its effect on his attorney's representation." (R VI 1074). After quoting the new statute that Bryan "appears to attack," the court recognized Bryan's right to counsel, but correctly stated that Bryan "does not have the right to representation that abuses the process." (R VI 1075-6). Instead, the court held that "Bryan's attorneys continue to have a duty to zealously advocate his position" and that the new statute "does not materially affect that duty." (R VI 1076, footnote omitted). Finally, the court held that Bryan had sufficient information about the procedures and methodology of lethal injection to make a knowing election of the method of his execution. (R VI 1076-77).

Bryan filed a motion for rehearing on February 14, 2000. In that motion Bryan complained that the circuit court erroneously ruled on his complaint about the Savings Clause: "Contrary to this court's assertion that Mr. Bryan raised the issue of the Savings Clause." (Motion for Rehearing at 22). Instead of asking for a ruling as to the Savings Clause's applicability, Bryan contended that he had filed the application for stay only to inform the court that he could not knowingly choose a method of execution because he had not been provided information on the methodology and procedures involved in lethal injection. (Motion for Rehearing at 22-23). Thus, according to Bryan, the circuit court "ruled upon an issue that was not before it" and compounded that error by overruling

Washington v. Dowling, which it had "no authority" to do. (Motion for Rehearing at 23).

Bryan also claimed that the circuit court erroneously read more into his application for stay when it considered the validity of the new death penalty statute. (Motion for Rehearing at 24). Thus, he stated that his concern about his counsel's ability to represent him "was nothing more than an expression of concern, and was not a request for relief or request to have any provision of the [new statute] subjected to constitutional scrutiny" by the circuit court. (Motion for Rehearing at 24). Bryan finished this part of his complaint by stating that the circuit court had "no authority" to rule on the statute, "especially on its own volition." (Motion for Rehearing at 24).

As his final complaint about the ruling on his stay application, Bryan claimed that the court erroneously held that he had failed to state the relief he was entitled to and grounds for that relief. (Motion for Rehearing at 25). Instead, he claimed that the stay application "clearly asserted that he was unable to make a knowing and intelligent election of the method of his execution" because the Department of Correction (DOC) failed to give him sufficient information about lethal injection. (Motion for Rehearing at 25). Therefore, according to Bryan, he meant for his stay application to ask only for an evidentiary hearing on DOC's compliance, after which the court would order DOC to turn



over all the requested information, and a stay of execution until DOC did so. (Motion for Rehearing at 25). Bryan then accused the circuit court of "rush[ing] the judgment" by holding that he had gained sufficient information about the lethal injection process from the evidentiary hearing given to Terry Sims because neither he nor the circuit court had had time to review the Sims material. (Motion for Rehearing at 25-26, quotation at 26).

The circuit court denied the motion for rehearing on February 18, 2000. In doing so, the court stated the following regarding the application for stay of execution:

Lastly, within his application for stay, Bryan raised sufficient facts on the face of the motion to state a colorable claim for relief under rule 3.850. See *State ex rel. Russell*, 467 So.2d 698 (Fla. 1985). Specifically, Bryan stated that he was unable make a knowing election of the method of execution due to the DOC's withholding of information. Noting the time constraints that are present, the Court addressed this concern as well as other claims that he appeared to raise (e.g. the Saving Clause issue and attorney sanctions issue). The Court's intent in the challenged order was to provide Bryan's counsel with sufficient information in which to narrow the focus of their efforts on his behalf to viable claims. There was never an attempt to deprive Mr. Bryan of due process. This Court was simply performing appropriate judicial winnowing to separate the wheat from the chaff so due consideration could be given any duly raised issues.

Bryan implicitly raised the Saving Clause issue in his application when he stated "[t]hrough Mr. Bryan does not believe that F.S. §922.105 applies to him due to the Savings Clause of the Florida Constitution. . ."

Application for Stay of Execution, ¶6. Bryan contends that the Court's decision regarding section 922.105 overruled *Washington v. Dowling*, 92 Fla. 601, 109 So. 588 (Fla. 1926). In *Dowling*, the defendant was sentenced to death when the established method of execution was hanging. The legislature subsequently abolished hanging and changed the method of execution to electrocution. Thus, when the governor signed the defendant's warrant, the warrant called for death by electrocution. The trial court held that the warrant was void because it conflicted with the judgment of the court. The Florida Supreme Court affirmed the trial court's decision holding that a retroactive change in the method of execution violated the Savings Clause. See *Dowling*, 109 So. at 592-93.

This claim is now moot in light of the Florida Supreme Court's recent holding that section 922.105 does not violate the Savings Clause. See *Sims*, Nos. SC00-295, SC00-297, slip op. at 18. Unlike the statute in *Dowling*, section 922.105 preserves the method of execution for those prisoners sentenced under the former law and also provides prisoners the option of electing a method of execution. See *id.* Therefore, the holding in *Dowling* is no longer applicable and Bryan is subject to section 922.105. See *id.*

Bryan's next claim that the Court on its own volition reviewed the constitutionality of the Death Penalty Reform Act ("DPRA") is without merit. Bryan's application for stay initially challenged the DPRA and stated that his counsel was fearful of sanctions. Although the Florida Supreme Court's order regarding the rules governing capital postconviction actions had rendered Bryan's challenge of the DPRA partially moot, the Supreme Court's order did not address the DPRA provision that urges the courts to impose sanctions for abusive and dilatory procedures in a capital postconviction proceeding. Therefore, this Court wanted to inform Bryan's counsel that section 924.395 did not affect

counsel's duty to zealously advocate their client's position. Nowhere in this Court's order does the Court affirm the constitutionality of this provision. Further, this Court specifically stated that this claim was not ripe for review.

This Court also properly determined that Bryan had sufficient information in which to make a knowing election between lethal injection and electrocution, a method he earlier had challenged as cruel and unusual. In Judge Eaton's order denying Terry Melvin Sims's request for stay of execution, he stated the following:

The second part of the argument, the defendant lacks sufficient information to choose the method of execution, is specious. All that is required is a general knowledge of the method of execution. A person cannot be said to be uninformed if hanging is the method of execution because he does not know the diameter of the rope or the length of the drop. Nor is a person uninformed about electrocution because he is ignorant of the voltage used. Lethal injection as a means of execution has been around for sufficient time for it to be generally known.

State v. Sims, Order Denying Emergency Motion to Vacate Judgments of Conviction and Sentence With Request For Leave to Amend, and Request Stay of Execution, p. 13 (Fla. 18th Cir. Ct. February 12, 2000) (Attachment 2). This Court agrees with Judge Eaton's position regarding the level of knowledge that is required to make a knowing election. Therefore, Bryan had sufficient information in which to make a knowing election and any pending record requests will not alter this ruling.

(Order denying rehearing at 5-7, footnotes omitted).

In State ex rel. Russell v. Schaeffer, 467 So.2d 698 (Fla. 1985), this Court held that a circuit court has no jurisdiction to consider an application for stay of execution unless the stay application is accompanied by a motion for postconviction relief or it contains sufficient facts for the court to consider it as a motion for postconviction relief. The circuit court relied on Russell in both its original order and the order on rehearing because "given the unique position of this case, this Court believes it is appropriate to rule on his freestanding stay application as a colorable claim for postconviction relief." (VI 1076). As Bryan points out in all of his pleadings, time is of the essence because his execution is scheduled for February 24, 2000. The court was well aware of this. Bryan's failure to file a motion for postconviction relief, therefore, left the court with a dilemma -- dismiss the application for stay and leave Bryan's case in limbo or rule on the stay application.

Bryan obviously hoped that the circuit court would grant the freestanding application for stay. When it did not, however, he began complaining that the court should not have ruled on it. However, when one files a pleading with a court, a ruling is expected to follow. Given the time constraints involved in this case, it was reasonable for the court to treat the stay application as a colorable motion for postconviction relief. Assuming that Bryan filed that pleading expecting it to be dismissed for lack of

jurisdiction would have been unreasonable in this case. Therefore, the circuit court was justified in choosing the course of action that would advance the case. As the court stated, this was not an attempt to deprive Bryan of due process, but, rather, was "appropriate judicial winnowing to separate the wheat from the chaff so due consideration could be given to any duly raised issues." (Order on Motion for Rehearing at 5).

As stated earlier, Bryan did not file a motion for postconviction relief in conjunction with the stay application. He knew, however, that such could be done because he was aware that Terry Sims had done so in his case.<sup>3</sup> When the court issued its rulings after the evidentiary hearing on February 12, 2000, Bryan criticized it for ruling so quickly. (E.g., Motion for Rehearing at 9, 13, 18, 25-26). At that point Bryan knew what the court's ruling was. Instead of filing a postconviction motion or appealing the court's orders, Bryan filed a motion for rehearing. Then, when the circuit court did not rule on that motion quickly enough, he filed a petition for writ of mandamus asking this Court to direct the circuit court to rule.

From Bryan's course of nonlitigation, it is obvious that no substantive claims for relief exist. Bryan has shown no error in the circuit court's consideration of his application for stay. As

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<sup>3</sup> Sims' postconviction motion is in this case's record at R I 49 et seq.

the court pointed out in the order on rehearing, this Court recently found no merit to the claim that lethal injection could not be applied to him. Sims v. Moore, 25 Fla.L.Weekly S128 (Fla. Feb. 16, 2000). In Sims this Court found that Washington v. Dowling was inapplicable to Sims, and, thereby, to Bryan because they are in an identical posture, because the Dowling court "was not presented with the type of legislative changes at issue in the instant case." 25 Fla.L.Weekly at S131.

Furthermore, as the circuit court pointed out, it did not rule on the constitutionality of the new death penalty statute. Instead, it merely recognized collateral counsel's duty to represent Bryan. (Order denying Rehearing at 6-7). Bryan has demonstrated no error.

Finally, the court properly held that Bryan had sufficient information to allow him to make a knowing election between lethal injection and electrocution. The court made this decision only after an evidentiary hearing at which DOC personnel testified extensively about the procedures that will be used in a lethal-injection execution. Bryan has the DOC protocols and also has the record from Terry Sims' evidentiary hearing on the same subject. As both Judge Bell in this case and Judge Eaton in Sims' case held, the level of knowledge needed to elect between lethal injection and electrocution is not overly high. (Order denying Rehearing at 7). See Sims, 25 Fla.L.Weekly at S131. Bryan has shown no error in the

circuit court's holding that he had sufficient information to make a knowing election.

Bryan has had ample opportunity to file a motion for postconviction relief, but has chosen not to do so. He has demonstrated no error in the circuit court's ruling on his application for stay of execution. The court's order, therefore, should be affirmed.

B. THE CIRCUIT COURT'S RESOLUTION OF BRYAN'S PUBLIC RECORDS CLAIMS WAS NOT ERROR.

It is anticipated that Bryan will present a lengthy assault upon the constitutionality of those statutes relied upon by the Department of Corrections to exempt certain matters pertaining to lethal injection from disclosure, and that Bryan will highlight for this Court what he perceives to be conflicts in testimony between the public records witnesses at the evidentiary hearing of February 12, 2000. Appellee would contend, however, that given the procedural posture of this case, Bryan has not stated any basis for relief. At this juncture, after so many years of collateral litigation, Bryan's convictions and sentence of death are entitled to the presumption of correctness, see Sims v. State, 25 Fla.L.Weekly S117, 118 (Fla. Feb. 8, 2000), and Bryan has made no showing that any additional records would contain newly discovered evidence likely to entitle him to relief. See, Buenoano v. State,

708 So.2d 941, 947 (Fla. 1998); Bryan v. State, 24 Fla.L.Weekly at S517.

As best as can be determined, Bryan's latest quest for public records relating to Florida's methodology for conducting executions by lethal injection was undertaken to secure sufficient information for him to make a "meaningful election" as to such method of execution, as well as to provide the basis for any constitutional challenge thereto; of course, should Bryan elect lethal injection, or electrocution for that matter, he would waive any constitutional challenge to the method of execution so chosen. See, Stewart v. LaGrand, 526 U.S. 115 (1999). In any event, the court below was correct in concluding that no stay of execution was required, so as to allow Bryan to "fight a public records battle." (R VI 1080). The record in this case indicates that the Department of Corrections has made five disclosures of public records to Bryan, including a disclosure of its execution day procedures involving lethal injection, and the documents so disclosed literally number in the hundreds (R VI 1177-8; II 224-III 413; III 512-517; V 824-VI 1072). At the evidentiary hearing on February 12, 2000, Bryan's counsel presented the testimony of five witnesses, including Warden Crosby, who detailed the manner in which lethal injection would be carried out in Florida (R VII 1210-1265), and Secretary Moore, who testified as to the specific chemicals involved and the minimum dosages (R VII 1287-1291). During the course of this hearing,



Bryan's counsel indicated familiarity with the events at the Sims evidentiary hearing, a transcript of which the State had previously filed (R IV 518-V 823; R VI 1133, 1138, 1153, 1167, 1198; R VII 1210, 1215, 1217, 1227). Clearly, Bryan's counsel has long possessed the ability to advance any legal position desired relating to lethal injection, and counsel's inaction in this regard stands in stark contrast to the actions of counsel for Terry Melvin Sims, who filed a fully pled postconviction motion attacking lethal injection on February 7, 2000, and proceeded to evidentiary hearing thereupon several days later (R I 49-100; IV 523; V 823). Bryan's failure to formally litigate this matter represents a strategic choice of counsel, and not a "dilemma" caused by any action or inaction relating to public records by the Department of Corrections.

Bryan's strategic refusal to litigate any claim relating to public records is, of course, understandable, in light of the fact that this Court conclusively rejected all constitutional challenges to that method of execution in its most recent opinion in Sims. 25 Fla.L.Weekly S130-2. In that opinion, this Court rejected claims that the Department of Corrections' execution day protocol fails to provide sufficient details and procedures for administering lethal injection; claims that the new law violates the separation of powers clause in the Florida Constitution as an improper delegation of legislative power to an administrative agency; and broad-based

claims that lethal injection can be cruel and unusual punishment. In order to now merit any relief from this Court, including any stay of execution, Bryan must demonstrate that he would likely be entitled to relief, if additional documents were ordered disclosed. He has clearly failed to sustain this burden of proof, and Judge Bell did not abuse his discretion in his resolution of these matters.

C. THE CIRCUIT COURT RULED CORRECTLY ON BRYAN'S MOTION TO RELEASE RECORDS.

While Bryan's last motion for postconviction relief was on appeal to this Court, he filed a successive motion based on an affidavit executed by his trial counsel, Ted A. Stokes, averring that Stokes was an active alcoholic at the time of Bryan's trial. The circuit court dismissed the motion for lack of jurisdiction, and Bryan filed a petition for writ of habeas corpus with this Court, alleging that Stokes rendered ineffective assistance. This Court denied the petition, stating: "Stokes' equivocal recollection that he may have been under the influence outside of [Bryan's] trial does not warrant relief." Bryan v. State, 24 Fla.L.Weekly S516, S518 (Fla. Oct. 26, 1999). The Court also stated that it had affirmed the trial court's finding of Stokes' effectiveness during the previous round of postconviction proceedings and held: "Accordingly, regardless of counsel's condition, he rendered effective assistance." Id.

After the reactivation of his death warrant, Bryan filed a motion seeking the release of Stokes' treatment records, over Stokes' objection. (III 423-28). In that motion Bryan stated that Stokes rescinded his conditional release of his records and that the sealed records were being transmitted to the circuit court. (R III 425). The circuit court denied the motion because this Court's October 1999 holding that Stokes rendered effective assistance regardless of his condition made further claims on the issue procedurally barred. (R III 435-36).

Bryan argued against that ruling in his motion for rehearing and chided the circuit court for "essentially summarily [denying] a claim that was not even pending before it." (Motion for Rehearing at 1-9, quotation at 5). In its order denying rehearing, the court stated:

First, Bryan asserts that by denying his access to Stokes' substances abuse records the Court has denied him due process and has deprived him of the ability to fully develop his ineffective assistance of counsel claim. Mr. Stokes' trial performance in relation to his alcoholism was presented before the Florida Supreme Court in his most recent writ of habeas and that Court determined that Stokes rendered effective assistance. See *Bryan v. State*, 1999 WL 971125, p.5 (Fla. 1999) *corrected* (Jan. 31, 2000). The Supreme Court stated the following:

Stokes' equivocal recollection that he may have been under the influence outside of trial does not warrant relief. See *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987) ("There being no specific evidence

that Kermish's drug use or dependency impaired his actual conduct at trial, Kelly has not met his initial burden of showing that Kermish's representation fell below an objective standard of reasonableness. See *Strickland*.").<sup>1</sup>

*Id.* Additionally, the new claims within Bryan's motion for rehearing and the new affidavits attached thereto do not refute or otherwise undermine the previous judicial reviews of counsel's performance.

In order to raise a new ineffective assistance of counsel claim, Bryan has the burden of presenting new evidence that demonstrates that Stokes' substance abuse problems impaired his actual conduct at trial to such an extent that his performance fell below an objective standard of reasonableness. He has failed to satisfy this burden. There is no evidence Mr. Stokes was under the influence of or otherwise impaired by alcohol or any other substances at the trial of Mr. Bryan. There is no evidence from his secretary or anyone else present during the trial to support a claim of substance abuse impairment at trial.<sup>2</sup> Bryan also failed to demonstrate that Mr. Stokes' treatment records for 1988 and 1990 are a necessary and relevant predicate to filing a claim previously determined on the merits. Mr. Bryan has not been denied due process or the ability to fully develop an ineffectiveness claim under applicable legal standards and in light of the status of this claim.

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1. Mr. Stokes has clarified this "equivocal recollection" in his February 14, 2000 Response to Bryan's emergency application. (Attachment 1). This clarification supports the Supreme Court's finding and holding.

2. As suggested by defense counsel in the Motion for Rehearing, the Court conducted an in camera review of Mr. Stokes' substance abuse treatment records for 1988 and 1990. This

review was made after Mr. Stokes filed his revocation of consent regarding these files, but after he gave consent for this Court to review the records with the understanding the records would be re-sealed and not re-opened without his prior notice and opportunity to be heard. This limited consent by Mr. Stokes was made to give this Court the opportunity to assure the records contained no objective support for the Defendant's assertions. In fact, these records do not contain any records to objectively document Bryan's claim that Mr. Stokes was ineffective during the times at issue. Neither these documents nor the affidavits of record contain any specific evidence of substance abuse or dependency that impaired Mr. Stokes' "actual conduct at trial." See *Bryan v. State*, *supra* quoting *Kelly v. United States*.

(Order on Rehearing at 2-3). Bryan can demonstrate no error regarding the circuit court's ruling.

As the court pointed out, Stokes responded to motion for release of records<sup>4</sup> and clarified his "equivocal recollection" of his performance at Bryan's trial. Moreover, the court accepted Bryan's suggestion in his motion for rehearing and reviewed the treatment records in camera. The court found that those records contained nothing "to objectively document Bryan's claim that Mr. Stokes was ineffective during the times at issue."

The circuit court's ruling demonstrates the correctness of this Court's holding in October 1999 that Stokes rendered effective assistance both at trial and on appeal. 24 Fla.L.Weekly at S518. Bryan complained to the circuit court that this Court should not have so ruled, however, because it was "without jurisdiction, exceeded it's [sic] powers, and denied Mr. Bryan due process of law

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<sup>4</sup> The circuit court attached Stokes' response to its order denying rehearing.

without the ability to seek rehearing of the ruling." (Motion for Rehearing at 8). Contrary to this contention, this Court may rule on any claim presented to it, and Bryan presented this Court with allegations concerning Stokes' trial representation, not just his performance on appeal.

This Court will not second guess a circuit court's ruling after in camera review where there is competent substantial evidence to support that ruling. Bryan v. Butterworth, 692 So.2d 878, 881 (Fla. 1997). The circuit court reviewed Stokes' treatment records and held that they showed conclusively that Stokes' alleged impairment did not play any part in his representation of Bryan. Any claim of ineffectiveness based on Stokes' treatment records, besides having no merit, would be procedurally barred, as found by both the circuit court and this Court. As this Court has stated: "Endless repetition of claims is not permitted." Atkins v. State, 663 So.2d 624, 627 (Fla. 1995). The circuit court correctly denied the motion to release Stokes' records, and this Court should affirm that order. See also Buenoano, 708 So.2d at 950, 951 n.7, n.9.

CONCLUSION

WHEREFORE, for the aforementioned reasons, assuming jurisdiction lies, the orders on appeal should be affirmed in all respects, and no stay of execution granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Andrew Thomas, Assistant Capital Collateral Regional Counsel, Office of the Capital Collateral Regional Counsel, Northern Region, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 21st day of February 2000.

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Richard B. Martell  
Chief, Capital Appeals