IN THE SUPREME COURT OF FLORIDA

TERRY MELVIN SIMS,

Appellee,
v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 96,731
Seminole Co. 78-363-CFA
Death warrant Signed
Execution Set for
October 26, 1999 at 7:00 am

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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This brief is typed in Courier New 12 point.

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STATEMENT OF THE CASE AND FACTS

On September 23, 1999, a warrant was signed for the execution of Sims' sentence of death. Execution is scheduled for October 26, 1999. This Court entered an order directing that any Circuit Court proceedings be expedited and scheduling oral argument for October 19, 1999.

On or about September 29, 1999, Sims filed 23 public records requests which were directed to numerous agencies and individuals. The vast majority of those requests were for information on 51 individuals, many of whom were identified only by race and gender.[1] Some of those requests contained as many as 61 separate demands.

On October 5, 1999, a status conference was held by Seminole County Circuit Judge O. H. Eaton. At the conclusion of the conference, Judge Eaton directed that Sims file any successive *Florida Rule of Criminal Procedure* 3.850 motion by 5:00 PM on October 11. The Judge further ordered that any hearing or hearings would be conducted on October 15, and, if

[1] The records requested also included requests for information relating to the "Dixie Mafia" and the "Drugstore Cowboys", for a total of 53 separate requests. Some individuals were identified only by name.

necessary, on October 16, 1999[2]. On October 8, 1999, the Circuit Court held a hearing to deal with the objections to production of public records filed by two of the affected agencies.

On October 11, 1999, Sims filed a motion to compel production of public records and a motion to modify the scheduling order. On October 12, 1999, Judge Eaton entered an order finding, *inter alia*, that "the demand for public records is nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry." *Order*, at 2.[3] The Court also found that the case was investigated by the defense before trial, was investigated again during the previous Rule 3.850 proceedings[4], and further found that there has been no action in the circuit court since October 20, 1992. *Id.* The Circuit Court went on to find that, even if it is true that changes to *Florida Rule of Criminal Procedure* 3.852 prevented him from seeking public records after October 1, 1998,

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[2] These time limits were contained in an order issued on October 6, 1999.

[3] This statement in the order refers to the October 8, 1999, hearing. During that hearing, Sims' counsel made numerous statements that referred to the "investigation" of Sims' case that is allegedly "ongoing" at this time.

[4] Sims made **one** request for public records during the previous Rule 3.850 litigation. That request, which was directed to the Seminole County State Attorney's Office, is dated April 24, 1990, and is attached hereto as appendix A.

that does not explain why there were no public records requests made prior to that date. *Id.,* at 3. The Circuit Court denied Sims' motion to compel, and extended the time for filing a successive collateral attack motion until 5:00 PM on October 13, 1999. *Id.,* at 4. On October 13, 1999, Sims gave notice of appeal of the orders entered on October 6 and October 12, 1999.[5] On October 13, 1999, the State filed a motion to dismiss that appeal as being an unauthorized interlocutory appeal of a non-final order. Sims filed a "Response in Opposition"[6] to the motion to dismiss that was received by counsel for the State well after the close of business on October 14, 1999, and after this Court had established a schedule for briefing and oral argument on the matters at issue.[7]

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[5] The notice of appeal asserts that the orders appealed from "foreclose Mr. Sims' rights to post-conviction public records discovery, and to file post-conviction habeas corpus pleadings."

[6] The "Response" asserts that the Circuit Court's orders "forbid" him from filing a rule 3.850 motion after 5:00 PM on October 13, 1999. Such language (or its equivalent) appears nowhere in any order entered by that Court. Likewise, that pleading indicates that Sims has "**filed all the motions he could file**" in the Circuit Court. Motion, at 2 [emphasis added]. The obvious meaning of that statement is that he **lacks a good faith basis for a Rule 3.850 motion, and is engaging in nothing more than an unauthorized fishing expedition** in the hope of gaining a stay by playing chicken with the Court. *See, Bell v. Lynaugh,* 858 F.2d 978, 985-86 (5th Cir. 1988).

[7] The certificate of service on that response certifies that the pleading was served on October 11, 1999. That cannot be correct because the order appealed from was not entered until October 12,

SUMMARY OF THE ARGUMENT

The Circuit Court properly denied Sims' motion to compel production of public records. That ruling is correct under controlling law. Likewise, the Circuit Court did not abuse its discretion in denying Sims motion for further extension of the scheduling order. The orders of the Circuit Court should be affirmed in all respects.

ARGUMENT[8]

The issue in this appeal is whether the Circuit Court's scheduling order and the denial of Sims' motion to compel public records production establish a basis for delay in the execution of Sims' sentence of death. For the reasons set out below, the Circuit Court should be affirmed in all respects.

This Court affirmed Sims' conviction and sentence in 1983. *Sims v. State,* 444 So.2d 922 (Fla. 1983). The United States Supreme Court denied Sims' petition for writ of certiorari, and Sims' conviction and sentence became final for all purposes in 1984. *Sims v. Florida,* 467 U.S. 1246 (1984). This Court affirmed

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1999, and the notice of appeal was not filed until October 13, 1999.

[8] The State does not waive the procedural defenses asserted in the motion to dismiss this appeal. This appeal is not authorized by any *Rule of Appellate Procedure*. *See, Fla. R.App.P.* 9.300, 9.140(b), 9.130(a)(3). The proper vehicle for review of the complained-of orders is an appeal from a final order denying rule 3.850 relief. *See, e.g., Davis v. State* 24 FLW S345 (Fla., July 1, 1999).

the denial of relief under *Florida Rule of Criminal Procedure* 3.850 in 1992. *Sims v. State,* 602 So.2d 1253 (Fla. 1992). Sims' petition for writ of certiorari was denied in 1993. *Sims v. Florida,* 503 U.S. 1065 (1993). Sims' federal habeas corpus proceeding concluded in 1998, when the Eleventh Circuit Court of Appeals reversed the order of the District Court granting penalty phase relief, and affirmed the conviction and sentence in all respects. *Sims v. Singletary,* 155 F.3d 1297 (11th Cir. 1998). The United States Supreme Court denied certiorari on June 21, 1999. *Sims v. Moore,* No. 98-9020 (June 21, 1999).

As the foregoing procedural history of the case demonstrates, Sims' conviction and sentence has been in litigation for well in excess of 15 years.[9] The public records act has been available to Sims at all times relevant, and, in fact, Sims filed **one** demand for public records in connection with the 1990 Rule 3.850 motion. *See,* Appendix A. One of Sims' present attorneys, Steven Malone, represented Sims at that time. Sims cannot now claim that he was unaware of Chapter 119, and, because that is so, further litigation is time-barred as he has failed to exercise due diligence.

In *Buenoano,* this Court resolved the identical issue:

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[9] Of course, the conviction and sentence have been subject to a presumption of validity since this court issued its direct appeal opinion in 1983.

> we are presented with Buenoano's third motion for postconviction relief, clearly filed outside the time limitation of rule 3.850(b). As explained above, before Buenoano could be entitled to relief based on any claim she might raise as a result of her public records requests, in this otherwise procedurally barred motion, she must establish that the facts on which the claim is based were unknown to her or her attorney and could not have been ascertained by the use of due diligence. *See* Fla. R. Crim. Pro. 3.850(b)(1); *Mills*.
>
> The Public Records Act has been available to Buenoano since her conviction; but most of the records she alleges were not disclosed prior to the filing of her latest rule 3.850 motion were not requested until January 1998, or later. Some of the records were requested in January 1997, but Buenoano did not seek to compel compliance with those requests until February 1998. Buenoano has not alleged that through the exercise of due diligence she could not have made these requests within the time limits of rule 3.850. Accordingly, she is precluded from asserting that the trial court should have addressed her public records requests prior to denying her third rule 3.850 motion. *Cf. Zeigler v. State,* 632 So.2d 48 (Fla. 1993) (finding that rule 3.850 bars as untimely a motion based on information obtained as a result of a chapter 119 public records request made after the cut-off date for postconviction relief), *cert. denied*, 513 U.S. 830, 115 S.Ct. 104, 130 L.Ed.2d 52 (1994); *Agan v. State*, 560 So.2d 222 (Fla. 1990) (same); *Demps v. State*, 515 So.2d 196 (Fla. 1987) (same).

Buenoano v. State, 708 So.2d 941, 952-53 (Fla. 1998).

Sims has not alleged that he could not have made his public records requests within the time limitations of Rule 3.850, and cannot do so in good faith because he did, in fact, seek public records at the time of his initial Rule 3.850 motion. Sims has had his opportunity to seek public records, and, under settled law, may not now institute a wide-spread public records

"investigation". The motion to compel was properly denied.

Further, because any Rule 3.850 motion will be a **successive** collateral attack on a presumptively valid conviction and sentence, it makes no sense to argue, as Sims does, that he is entitled to some sort of relief based upon the denial of his motion to compel production of public records, especially when, as in this case, Sims has not even **alleged** that the public records at issue will result in "newly discovered evidence." In *Buenoano*, this Court stated, in the same context:

> Buenoano's eleventh-hour public records requests and resulting litigation are insufficient to justify a stay of execution, **particularly where she has not alleged that the requests will produce newly discovered evidence**. Moreover, we will deny relief sought in further appeals regarding public records requests unless Buenoano establishes that she could not have timely sought production of the documents or that the documents were previously requested but unlawfully withheld.

Buenoano v. State, 708 So.2d at 953 [emphasis added].

Sims' case is no different, and, in fact, throughout his filings, Sims refers to public records requests as being a part of the **investigation** of his case. *See, e.g.,* Notice of Inability to Meet Filing Date, at 2.[10] This case has already been investigated at least twice, and to seek to initiate expansive

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[10] Sims' Notice of Appeal filed in this Court refers to the public records as part of the "discovery" in this case. At no time has Sims ever alleged that his "requests" will produce newly discovered evidence. During the hearing on October 8, 1999, Sims' counsel made numerous references to the "investigation" of the case.

public records discovery only after a death warrant has been issued is, as the trial court found, a deliberate attempt to delay execution. *Order*, at 2.[11] This Court should affirm the denial of the motion to compel.

Moreover, to the extent that Sims may argue that *Florida Rule of Criminal Procedure* 3.852(h)(3) precluded him from making a request for public records until his death warrant was signed, the true facts are that that provision of Rule 3.852 did not take effect until October 1, 1998[12]. *Amendments to Florida Rules of Criminal Procedure -- Rule 3.852 (Capital Postconviction Public Records Production) and Rule 3.993 (Related Forms)*, 723 So.2d 163 (Fla. 1998). It is disingenuous to suggest that, because of Rule 3.852, Sims could not have sought public records until his death warrant was signed. The record demonstrates that Sims was aware of the availability of public records "discovery" in 1990, and that he took advantage of Chapter 119 at that time. No provision of Florida law limited or foreclosed any opportunity to Sims, and he should not be heard to complain. Whatever the effect of Rule 3.852(h)(3) was, it did not prevent

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[11] Of course, Chapter 119 expressly provides that public records litigation is not to be used as a basis for delay. *Fla. Stat.,* § 119.07(8).

[12] The related statutory provision, § 119.19, also took effect on October 1, 1998. Nothing prevented Sims from seeking public records in the years preceeding that date.

Sims from seeking public records in a timely fashion.[13]

In the July 1, 1999, Opinion of this Court which adopted Rule 3.852, this Court expressly stated that the rule was amended in light of the enactment of Section 119.19 during the 1998 legislative session. That statutory provision provides as follows with respect to public records demands after a death warrant is issued:

> (e) If, on the date that this statute becomes effective, the defendant has had a Rule 3.850 motion denied and no Rule 3.850 motion is pending, no additional requests shall be made by capital collateral regional counsel or contracted private counsel until a death warrant is signed by the Governor and an execution is scheduled. Within 10 days of the signing of the death warrant, capital collateral regional counsel or contracted private counsel **may request of a person or agency that the defendant has previously requested** to produce records any records previously requested to which no objection was raised or sustained, but which the agency has received or produced since the previous request or which for any reason the agency has in its possession and did not produce within 10 days of the receipt of the previous notice or such shorter time period ordered by the court to comply with the time for the scheduled execution. The person or agency shall produce the record or shall file in the trial court an affidavit stating that it does not have the requested record or that the record has been produced previously.

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[13] The trial court pointed out that even if changes to the rules did prevent Sims from seeking public records from October 1, 1998 until July 1, 1999, that did not explain why such requests were not made before October 1, 1998. *Order,* at 3. As the court likewise found, no explaination is offered for Sims' failure to request relief from the procedural rule if it in fact prevented him from seeking production of relevant records. *Id.*

§ 119.19(8)(e), *Fla. Stat.* (1998) [emphasis added].

As the emphasized portion of the statute expressly states, a defendant may not initiate first-time record requests after a death warrant is issued. Instead, such "under warrant" requests are expressly limited to agencies from which the inmate has **previously** requested public records.

Rule 3.852(a)(2) expressly provides that "this rule shall not be a basis for renewing requests that have been initiated previously ...."[14] Sims has previously sought public records from the State Attorney in Seminole County, and, under the rule, is not allowed to renew a request to that agency. Further, to the extent that further discussion of the "warrant provision" is necessary, Rule 3.852(h)(3) (as amended July 1, 1999) also precludes first-time public records discovery after a death warrant is signed. That rule reads, in pertinent part, as follows:

> Within 10 days of the signing of a defendant's death warrant, collateral counsel may request in writing the production of public records from a person or agency **from which collateral counsel requested public records.** A person or agency shall copy, index, and deliver to the repository any public record:
>
> (A) that was not **previously** the subject of an objection;
>
> (B) that was received or produced since the **previous**

[14] Under Rule 3.852(h)(3), Sims is allowed to seek the documents specified therein from the Seminole County State Attorney's Office.

request; or

(C) that was, for any reason, not produced **previously**.

. . . If none of these circumstances exist, the person or agency shall file with the trial court and the parties an affidavit stating that no other records exist and that all public records have been **produced previously**.

[emphasis added].

Rule 3.852 is premised, by its plain language, on the existence of a **prior** request for public records, as the statute requires. *See,* § 119.19, *Fla. Stat.*[15] No other reading of the introductory portion of this rule is consistent with the statute itself, with Rule 3.852 in general, or with the sub-parts of Rule 3.852(h)(3). The portion of the rule emphasized above leaves no doubt that public records discovery after the issuance of a death warrant is limited to agencies from which counsel has **previously** requested records. The phrase "from which collateral counsel **requested** records" can have no other meaning, both by its plain language, and from its context in the Rules.[16]

The sub-parts of Rule 3.852(h)(3) are likewise premised on a prior request. Obviously, a record cannot have "previously" been the subject of an objection unless there was a prior

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[15] Of course, the purpose of Rule 3.852 is to effectuate the legislative enactment.

[16] The use of the past tense "requested" is appropriate only if an earlier request for records was made.

request for it (sub-part A), nor can a record have been "received or produced since the previous request" unless there was such a prior request (sub-part B). Likewise, sub-part C requires a prior request, because it refers to records that were "not produced previously". That condition precedent cannot be satisfied unless there was a previous request for records.[17]

Finally, the concluding portion of Rule 3.852(h)(3) contains the following language: "[i]f none of these circumstances exist, the person or agency shall file with the trial court and the parties an affidavit stating that no other records exist and that all public records have been **produced previously**." [emphasis added]. The "produced previously" language would not be appropriate unless a prior request for public records was required. When Rule 3.852(h)(3) is read fairly, and *in pari materia* with the statute, it clearly limits under-warrant public records discovery to agencies that have previously been the recipients of such demands. It does not allow a capital defendant to file **initial** public records requests after a death warrant has been signed and seek public

[17] To the extent that Sims may argue that this provision allows him to make first-time requests under Rule 3.852(h), that would require sub-part C to be interpreted to include, as a part of the "for any reason" component, the absence of a prior request. Such an interpretation of sub-part C would, quite literally, allow that exception to swallow the entire rule, and make the purpose of Rule 3.852, which is to bring order to the public records process in capital cases, wholly meaningless.

records from sources which have not been the object of prior requests.

Finally, a substantial number of documents are statutorily exempt from disclosure because they were received before January 25, 1979. § 119.07(3)(h), *Fla. Stat.* (1998). The crime for which Sims was convicted and sentenced to death took place in 1977, and his trial began in January of 1979. Obviously, the investigation into this murder took place well before the January 25, 1979 cut-off date for public records.

CONCLUSION

As this Court is aware, simultaneous briefs are being filed by the parties to this appeal. Neither the denial of the motion to compel, nor the denial of the request for an extension of time was an abuse of discretion. Both rulings should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Timothy P. Schardl, Law Offices of Mark E. Olive, P.A., 320 West Jefferson Street, Tallahassee, Florida 32301; and Steven H. Malone, Assistant Public Defender, 15th Judicial Circuit, 421 Third Street, West Palm Beach, Florida 33401, on this _____ day of October, 1999.

_____
Of Counsel