**IN THE SUPREME COURT OF FLORIDA**

**NO. _____**

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**ANTHONY BRADEN BRYAN,**

**Petitioner,**

**v.**

**MICHAEL MOORE, Secretary,**
**Department of Corrections, State of Florida,**

**Respondent.**

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**IN THE SUPREME COURT OF FLORIDA**

**NO. _____**

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**ANTHONY BRADEN BRYAN,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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# APPELLANT'S BRIEF, APPLICATION FOR STAY OF EXECUTION AND PETITION FOR EXTRAORDINARY RELIEF

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## INTRODUCTORY STATEMENT

In 1991, an evidentiary hearing was ordered on Mr. Bryan's claim that he received ineffective assistance of counsel at the penalty phase of his capital trial. In preparation for that hearing, collateral counsel interviewed Ted Stokes and specifically asked him if he had had a substance abuse problem at the time of Mr. Bryan's case. Ted Stokes denied any substance abuse problem. Mr. Stokes deliberately misled collateral counsel and withheld information specifically requested. As a result, the evidentiary hearing did not include evidence of Mr. Stokes' alcohol abuse at the time of his representation of Mr. Bryan.

The significance of the omission can only be understood by examining the record that was made in 1991.[1] At issue in the 1991 hearing was Mr. Stokes' actions outside the courtroom which caused him to not present available mitigating evidence. Evidence that Mr. Stokes was abusing alcohol provides a pretty good explanation for why witnesses failed to receive phone calls advising them when to show up to court to testify. Such evidence could have explained why mental health experts had the sense that

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[1] Of course, the hearing was limited to the penalty phase. No hearing was conducted on guilt phase ineffective assistance, and collateral counsel was unable to plead Mr. Stokes' alcohol abuse in order to strengthen the claim pled because Mr. Stokes did not disclose the requested information. Had proper disclosure occurred, Mr. Bryan would have been able to argue that he was entitled to a full and fair evidentiary hearing, just like the one Mr. Kelly received in Kelly v. United States, 820 F.2d 1173 (11th Cir. 1987).

Mr. Stokes had not read their reports. Or why the same experts did not get the sense that Mr. Stokes understood what they were trying to say. The evidence of alcohol abuse could have been used to call into question Mr. Stokes' memory, particularly given the divergence between his memory and the memory of numerous other witnesses as to the sequence of events.

Mr. Stokes' deception of collateral counsel about his alcohol problem itself would have provided important impeachment of Mr. Stokes. Yet, the presiding judge relied specifically upon his testimony of tactical reasons for the failure to present mitigating evidence. Mr. Stokes' withholding of evidence of his alcohol abuse problems demonstrates his willingness to deceive in order to protect his reputation. This impeachment significantly undermines his credibility and establishes not just a motive to manufacture a tactical reason to protect his reputation, but a history of deception in order to protect and shield his reputation.

When evidence of a Brady violation is not turned over and fails to surface despite collateral counsel's best efforts to locate it, this Court has not hesitated to order proceedings reopened in order to put the capital defendant back in the position he would have been had the disclosure occurred when requested. See Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Provenzano v. State, 616 So. 2d 428, 430-31 (Fla. 1993). Ted

Stokes was state-paid counsel. His obligation to disclose evidence or information to collateral counsel should be on no different footing than the prosecutor's obligation to disclose. See Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993). And the remedy for a refusal to disclose requested information should be no different.

Mr. Stokes did not disclose his alcohol abuse problem to Mr. Bryan's collateral counsel until October 21, 1999. And on October 24, 1999, he executed an affidavit regarding it. At the time, Mr. Bryan was precluded from filing a 3.850 motion based upon the revelation because the circuit court lacked jurisdiction during the pendency of an appeal in this Court. This Court was advised of the affidavit in the habeas petition pending at the time regarding Mr. Stokes' effectiveness in the direct appeal. This Court did address the habeas petition and its reference to the Stokes affidavit. This Court described the affidavit as "equivocal." In the context of trial ineffectiveness, the claim was not presented because by the time jurisdiction returned to the circuit court so that a 3.850 could be filed, Mr. Bryan's then pending execution was stayed by the United States Supreme Court.

Mr. Bryan has continued to investigate in order to present a 3.850 seeking a full and fair evidentiary hearing on the effectiveness of Mr. Stokes' representation. To that end, Mr.

Bryan sought in camera inspection of Mr. Stokes' medical treatment records. To that end, collateral counsel spoke to Mr. Stokes' secretary at the time of Mr. Bryan's trial and obtained an affidavit from her. Collateral counsel was preparing a 3.850 motion to file once the circuit court ruled on his request for access to the medical records. However, the circuit court then ruled that any 3.850 motion based upon Mr. Stokes alcohol abuse would be procedurally barred.

Thus, Mr. Bryan is now before this Court to seek redress. He was represented at trial by a state-paid lawyer who was abusing alcohol. The state-paid lawyer deliberately deceived collateral counsel in 1991, and by doing so, precluded his alcohol abuse from being made part of the 1991 hearing regarding trial counsel's arguably deficient performance at trial. The question that remains now for this Court to answer is whether that deception by the state-paid trial attorney forfeits Mr. Bryan's right to a full and fair evidentiary hearing on the issue of the state-paid trial attorney's effectiveness.

## STATEMENT OF THE CASE

Mr. Bryan's convictions and death sentence originate from Santa Rosa County, Florida, and are based upon a jury verdict of guilt for the kidnapping, robbery, and murder of George Wilson. The jury recommended death by the narrowest margin legally permissible: 7-5. Mr. Bryan's judgments and sentence were

affirmed by this Court on direct appeal. Bryan v. State, 533 So.2d 744 (Fla. 1988), cert. denied, 490 U.S. 1028 (1989).

In late 1990 under extreme circumstances brought on by numerous death warrants being litigated at the same time, including Mr. Bryan's first death warrant, collateral counsel for Mr. Bryan filed a stay application and motion for postconviction relief. A stay was granted and an evidentiary hearing was scheduled for 1991.

In anticipation of the evidentiary hearing, collateral counsel for Mr. Bryan interviewed Mr. Bryan's trial attorney, Ted Stokes, at his office in Milton, Florida. Collateral counsel specifically asked Mr. Stokes whether he had had problems with alcohol at the time of Mr. Bryan's trial:

> In preparation for the 1991 evidentiary hearing, lead counsel, Martin McClain, and I interviewed Mr. Bryan's trial attorney, Ted Alan Stokes. Knowing that Mr. Bryan had several viable claims regarding trial counsel's performance, we specifically asked Mr. Stokes whether he suffered from substance abuse during his representation of Mr. Bryan. Mr. Stokes denied any substance abuse.

Affidavit of Gail Anderson. Mr. Stokes assured collateral counsel that at the time of the trial there had been no problems with alcohol.[2] Based upon Mr. Stokes' factual representations,

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[2] Ted Stokes acknowledged in his 10/24/99 affidavit that Mr. Bryan's collateral counsel had asked about this in 1991:

> The information concerning my alcoholism

collateral counsel had no reason to further pursue the matter.[3]

The circuit court held the evidentiary hearing on Mr. Bryan's ineffective assistance of penalty-phase counsel on June 12, 1991. Conflicting evidence was presented. Mr. Stokes testified and his testimony conflicted in significant ways with the testimony of Dr. Larson and Dr. Gentner and with the introduced affidavits of Mr. Bryan's family members. In denying this claim, the lower court specifically relied upon the truthfulness of the testimony of Ted Stokes and found based upon his testimony tactical decisions for his actions which were at issue:

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> contained in this affidavit has never been disclosed to any attorney representing Mr. Bryan in postconviction proceedings. I vaguely recall a conversation with Mr. Bryan's attorneys in 1991 prior to the 3.850 hearing when they raised the issue of an alcohol problem and I either denied it or avoided the question. I was then early in sobriety and not comfortable with discussing the matter.

Affidavit of Ted Stokes.

[3] Collateral counsel had no means of obtaining such evidence. Mr. Stokes' secretary who has now provided an affidavit describing Mr. Stokes' alcohol abuse has stated:

> But for Mr. Stokes' own recent revelations regarding his alcoholism, and his original request that I cooperate with Anthony Bryan's attorneys, I would not have discussed these matters with attorneys representing Mr. Bryan.

Affidavit of Sharon Price.

The thrust of the evidentiary hearing in this case was that defense counsel, Ted A. Stokes, did err for failing to present the mental health defense through live testimony, rather that submitting their reports prepared for a considered but rejected insanity defense. Furthermore, it is alleged that Mr. Stokes did not properly prepare the Defendant's family members for their testimony relating to non-statutory mitigating circumstances and that he failed to obtain the testimony of other family members who might give such evidence. It is further argued that Mr. Stokes' deficient performance in this area is not the result of a strategic decision but rather a failure to meet a reasonably competent standard of performance.

At the penalty phase, Mr. Stokes called several family members as well as a former employer for non-statutory mitigating circumstances. In addition, he admitted into evidence the mental health evaluations of the Defendant prepared by Dr. Barbara Medzarian (two separate evaluations), Dr. Ellen Gentner, Dr. Jose C. Montes, and Dr. Philip B. Phillips. Further admitted were a psychiatric examination from Arizona State Hospital dated 8/6/70, and records from Camelback Psychiatric Hospital 10/10/73, both relating to Jean Hanley, an aunt of the Defendant. Records from Phoenix Baptist Hospital and Medical Center on Keith Hanley, a relative, were also introduced. Copies of these documents are attached to this Order.

Mr. Stokes did not call every member of the Defendant's family as there was at that time some alienation within the family, and some family members were not helpful. The additional testimony from other family members would only have been cumulative. Mr. Stokes talked with several family members on many occasions, even sending an investigator to Arizona to talk with Mr. Bryan's aunt, Jean Hanley, and other persons he had worked for while in Arizona. Mr. Stokes testified at the evidentiary hearing that he understood his duty in the penalty phase was to humanize

the Defendant for the jury. He made a tactical decision not to call Dr. James Larson as a witness as Dr. Larson told him, only moments before he would have testified, that his testimony would not be helpful.

Although live testimony from the other mental health experts might have been helpful to the jury and judge, Mr. Stokes did introduce their written reports. The defense has not been able to present evidence or an argument to support their position that live testimony would have been more persuasive to a jury than the written documents. Further, the decision not to submit the Springfield, Missouri, records was also the result of a tactical decision by Mr. Stokes. None of the mental health experts testified at the evidentiary hearing that their conclusions as to the Defendant's mental state would have been changed through the receipt of the additional information submitted in preparation for this post-conviction relief proceeding.

* * *

Although in hindsight Mr. Stokes might have presented his case differently to the sentencing jury, this Court does not find that his performance was below the "broad range of reasonably competent performance under prevailing professional standard." *Maxwell* at 932. Furthermore, this Court finds that there is no reasonable probability of a different sentencing result had the proffered family background testimony and the live testimony of the mental health experts, both presented at the evidentiary hearing, been offered during the 1986 penalty phase. This conclusion is made also in light of the six aggravating circumstances supported by the record and the Florida Supreme Court upon direct appeal.

(Final Order on Defendant's Emergency Motion To Vacate Judgment of Conviction and Sentence)[4](the emphasis added is to highlight conclusions based entirely upon the testimony of Ted Stokes).[5]

This Court considered Mr. Bryan's appeal from the denial of his Rule 3.850 motion in Bryan v. Dugger, 641 So.2d 61 (Fla. 1994). The Court ruled that the "only issues that merit discussion are issues one and two in which Bryan asserts that his trial counsel's penalty-phase performance was deficient." Bryan v. State, 641 So. 2d at 63. On the issue of ineffective assistance of counsel, this Court deferred to the circuit court and reviewed only to determine whether competent substantial evidence supported the findings:

> Our review of the record and the trial judge's findings of fact indicate that the judge's findings are **supported by the record**.

Bryan v. State, at 63 (emphasis added). After reciting the trial court's order denying Mr. Bryan's post conviction relief, this Court stated:

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[4] It also should be noted that the analysis that prejudice was not shown because this Court found six aggravators on direct appeal is an erroneous legal conclusion. Mr. Bryan asserted on appeal that at best only three aggravators were established and the Attorney General conceded this both in their Answer Brief and during oral argument.

[5] The State has also previously conceded that the 1991 Evidentiary hearing depended upon Mr. Stokes' testimony. (See State's Answer Brief filed in the Appeal of the denial of Mr. Bryan's 3.850 at p. 25)("**The prime witness was Ted Stokes, Bryan's former trial counsel**.")(emphasis added).

> The record reflects that the judge's findings are based on **competent substantial evidence**.

Bryan v. State, at 64 (emphasis added). This Court also ruled:

> 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 v. State, at 65 (emphasis added).

On October 21, 1999, Ted Stokes first revealed that he had not been truthful with collateral counsel in 1991 when he denied that he had a problem with alcohol at the time of Mr. Bryan's trial. On October 24, 1999, he signed the following affidavit:

> 1. My name is Ted Alan Stokes and I have been a member of the Florida Bar since 1971.
>
> 2. I was appointed by the Court to represent Anthony Braden Bryan in 1983 and that representation continued until 1989 when his direct appeal was final. My representation included two trials, the first resulting in a mistrial and a change of venue, filing Mr. Bryan's direct appeal, which consisted of an Initial Brief and a Supplemental Brief, and petitioning the United States Supreme Court for certiorari review.
>
> 3. The information concerning my alcoholism contained in this affidavit has never been disclosed to any attorney representing Mr. Bryan in postconviction proceedings. I vaguely recall a conversation with Mr. Bryan's attorneys in 1991 prior to the 3.850 hearing when they raised the issue of an alcohol problem and I either denied it or avoided the question. I was then early in sobriety and not comfortable with discussing the matter. I called Andrew Thomas, Mr. Bryan's current collateral counsel on

Thursday, October 21, 1999 and learned Judge Kenneth Bell had denied the present 3.850 motion. It was during that conversation and several subsequent conversations that I, for the first time, revealed the contents of the affidavit concerning alcohol.

4. I recognize now that at the time of the Bryan trial, I was an active alcoholic, drinking daily. It was not until several years later that I came to understand that my alcohol dependence was having a negative impact in fulfilling my professional responsibilities, on my health, and in my interpersonal relationships.

5. I believe it was the spring of 1990 when I first sought professional, residential treatment for my alcoholism. I checked into the Friary, a private addictions treatment center in Gulf Breeze, Florida and resided there for 28 days. Unfortunately, that first attempt at abstinence was not successful, so I sought additional treatment in 1991 in what was then called First Step program at Baptist Hospital in Pensacola. I completed the program and with the help of God and Alcoholics Anonymous have not had a drink of alcohol since.

6. I specifically remember the night before Tony Bryan testified during the second jury trial held in DeFuniak Springs, Florida. I was staying at the Best Western Motel in DeFuniak Springs and had a number of drinks before I went to counsel with him. I was anxious and nervous about my participation in my first capital trial. I cannot specifically recall how much I drank or how intoxicated I may have been when I met with Tony, but I was under the influence of alcohol. As I have testified before and stated during Mr. Bryan's trial, I advised Tony Bryan that the State did not have any recorded conversations of him and Sharon Cooper. I decided to call Tony Bryan to the stand as a witness. I feel that decision was influenced by my lack of experience and

possibly by my being under the influence of alcohol at the time of the jail conference.

When I spoke with Tony at the jail, he was still having problems with his memory and asked me what he should say in Court if he did not remember the answer to the prosecutor's question. I told him to "Just say you don't remember." Regrettably, I did not anticipate that he would use that phrase ten or more times during his testimony which severely impacted the believability of it. In retrospect, I should have taken the time to go through the possible questions of the prosecutor with him to prepare him as well for cross-examination as I had for his direct testimony.

7. I have now had the experience of going to trial in thirteen separate murder cases, five of which were capital cases. Given that experience and years of sobriety, I would now have advised Anthony Bryan not to testify at his trial. I was very recently faced with a similar situation in the Capital murder trial of Teddy Shawn Stokes, who despite the name similarity, is not related to me. Like Tony Bryan, that client had very limited recall of the events surrounding the murder and with a memory of only bits and pieces, could not have survived the cross-examination of the good prosecutor in the case. He suffered from epilepsy and even though the experts found him sane at the time of the incident and competent to stand trial, he obviously had some amnesia.

I made the decision to advise him not to testify in either guilt or penalty phase, based primarily on the concern that if he were unable to sufficiently recall details to answer the questions in cross-examination, the jury would believe him to be untruthful and consider that in their deliberations in the penalty phase. Consequently, although Teddy Shawn Stokes was convicted of First Degree Murder, the jury recommended life and the Court imposed that sentence.

8. I was totally shocked during cross-examination of Tony Bryan when Assistant State Attorney Michael Patterson pulled out an audiotape of a telephone conversation between my client and Sharon Cooper while he was at the Federal Correctional Institution in Tallahassee. I objected vehemently, believing there to be a discovery violation. Unfortunately, my memory did not allow me to rebut Mr. Patterson's assertions that the tape had been available at an earlier time and offered to me. I never reviewed a transcript or listened to the audiotape prior to trial.

9. I have now had an opportunity to listen to that tape and am convinced the State and the Santa Rosa County Sheriff's Department with the cooperation of Sharon Cooper violated Mr. Bryan's 5th and 6th Amendment constitutional rights by taping that conversation and failing to make it available to defense counsel.

10. Had I listened to the tape prior to trial, I would have sought to suppress the [sic] it. I may also have utilized the tape, along with records indicating Tony Bryan was in the process of committing suicide just prior to the phone call, by supplying it to confidential mental health experts for review. It could also been utilized to impeach the testimony of Sharon Cooper.

11. I have had the opportunity to review Dr. James Larson's affidavit filed in the recent 3.850 proceeding. Based upon its contents, I am convinced that I should have pursued what Sharon Cooper and others knew about Tony Bryan's state of mind at the time of the homicide. I have always been convinced that Tony Bryan was incompetent when I first met him and most likely at the time of the homicide. I now conclude that in my present state and knowing what is now known, I would not have advised Mr. Bryan to testify. I would have called Dr. Larson as a penalty phase witness to attack proposed

aggravating factors and support my argument regarding statutory mental health mitigating factors.

12. I have been made aware of collateral counsel's claim that Sharon Cooper did not actually lead police to the body of George Wilson. That is based upon a map dated September 1, 1983 indicating the locations of the body and the shotgun shell. The map is dated two days prior to the date witnesses testified that Sharon Cooper led them to the body. I did not note this discrepancy in the discovery materials and do not recall whether such a map was provided to me in discovery. I feel this is strong impeachment evidence which the state should have provided me or I should have discovered.

13. In representing Mr. Bryan on appeal, I drafted an Initial Brief containing but three issues: (a) error for admitting evidence of collateral crimes; (b) a Richardson violation regarding the audiotape; and (c) an attack on the trial court's findings regarding aggravating and mitigating circumstances. After filing the Brief, Tony Bryan complained that it was incomplete. I asked the Florida Supreme Court to allow me to withdraw or supplement the brief. I thereafter filed a Supplemental Initial Brief with three additional claims of error: (a) denial of Motion to Suppress; (b) prosecutorial misconduct; and (c) denial of Motion for New Trial. In reviewing the prosecutorial misconduct issue I raised on appeal, I see that I emphasized Mr. Patterson's highlighting of collateral crimes evidence, the defense's failure to introduce evidence, and comment on the defendant's right to remain silent. While I argued a pattern of prosecutorial misconduct and overzealousness, I did not focus on the improper arguments made by the prosecutor in the guilt and penalty phase arguments regarding Mr. Bryan being worthy of death because he fooled people, was a scary liar, sent shivers up and down the prosecutor's

spine, had no conscience, was vicious and dangerous, and was not like the rest of humanity. I failed to raise the issue that the prosecutor argued nonstatutory aggravation during penalty phase. I also realize that had I listened to the audiotape, questioned Sharon Cooper thoroughly about Tony's state of mind, and discovered the map, the issues on appeal would have been different.

14. The information contained in this affidavit dealing with alcoholism is difficult to disclose. The whole basis of Alcoholics Anonymous is anonymity and I have sought to preserve that in my practice. I was not asked about my drinking during the evidentiary hearing and did not volunteer the information. However, my longstanding abstinence from alcohol, the emphasis on honesty in my twelve step programs and my conscience dictate that I come forward before Tony Bryan is executed and tell the complete truth regarding my representation of him.

15. I have reviewed my testimony from the evidentiary hearing conducted June 12, 1991. I did not recall many of the specific actions and communications with mental health experts at the time of Mr. Bryan's trial and I so testified. I recall problems with having little time to talk with Dr. Larson and having Dr. Gentner available to testify in the penalty phase. I also recall testifying that I was unaware that Dr. Medzarian had appeared at the Courthouse during the penalty phase and that had I known she was there, would have called her as a witness. I recall testifying that I had no testimony from an eyewitness that Tony Bryan had committed the homicide while in a rage or impulsively or without planning. I was asked if Sharon Cooper ever said anything like that. I have reviewed the depositions of Sharon Cooper and I did not effectively and thoroughly explore my client's state of mind with her. I have reviewed the affidavits concerning Sharon Cooper's recent statements

> about Tony's state of mind at the time of the homicide. I should have asked those questions and provided the answers to mental health experts.

(Affidavit of Ted Stokes)(emphasis added). At the time this affidavit was obtained, Mr. Bryan's second 3.850 motion was pending on appeal in this Court. The circuit court ruled it was without jurisdiction to entertain another 3.850 relying on the newly revealed information. This Court was advised of the affidavit in Mr. Bryan's petition for a writ of habeas corpus described. In denying that petition, this Court stated with regard to the claim of ineffective assistance of direct appeal counsel presented in the habeas petition:

> 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*.") **Furthermore, this Court affirmed the trial court's previous determination that counsel was effective at both the guilt and sentencing phases. *See Bryan*, 641 So.2d at 63, 64-65 (this Court affirmed that the allegations as to guilt phase ineffectiveness were insufficient to establish a violation of *Strickland*, and this Court affirmed the trial court's denial of relief as to alleged sentencing-phase ineffectiveness after it held an evidentiary hearing on the issue). Accordingly, regardless of counsel's condition, he rendered effective assistance.**

Bryan, 1999 WL 971125, *4 (Fla.)(emphasis added).[6]

Undersigned counsel has since been able to secure corroboration of Mr. Stokes' alcohol abuse during his representation of Mr. Bryan. This corroboration comes in the form of an affidavit of Mr. Stokes' secretary at the time of Mr. Bryan's trial, Sharon Price. In her affidavit, Ms. Price stated:

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[6] This Court's opinion was entered on October 26, 1999, merely two days after Ted Stokes signed the affidavit. Mr. Bryan had no time to investigate, marshall his resources and fully plead the ramifications of Ted Stokes' startling disclosure. The circuit court had refused to allow the filing of a 3.850 while an appeal was pending in this Court.

Under these circumstances, it is not surprising that this Court did not understand Mr. Bryan's claim. It was not some sort of special "I had a drunk attorney at trial" claim, which this Court apparently assumed when it stated "that he may have been under the influence outside of trial does not warrant relief." Mr. Stokes deliberately deceived collateral counsel in 1991, and through his actions caused relevant evidence to not be presented at the 1991 evidentiary hearing.

At issue at the 1991 hearing was Mr. Stokes' actions outside the courtroom which caused him not to present mitigating evidence on Mr. Bryan's behalf. Evidence that Mr. Stokes was abusing alcohol at the time may explain why witnesses did not receive phone calls telling them when to show up to testify. It may explain why mental health experts had the sense that Mr. Stokes had not read their reports and did not understand what they were trying to say.

Mr. Stokes' deception with reference to his problems with alcohol certainly indicates a willingness to deceive in order to protect his reputation. Given that the hearing concerned whether Mr. Stokes had rendered ineffective assistance, his deception suggests that he may have similarly deceived in court in order to protect his reputation. He may have made up tactical reasons for failures that were a result of alcohol abuse.

Alternatively, the alcohol abuse may simply have resulted in memory problems--an important possibility given the numerous conflicts between Mr. Stokes' recall and the recall of other witnesses as to events surrounding Mr. Bryan's trial.

1. My name is Sharon Price and I am currently employed as a legal secretary in Pensacola, Florida.

2. In 1983, when I was twenty-one (21) years old, I went to work for attorney Ted Alan Stokes in Milton, Florida. I did not go to school to become a legal secretary, but learned as I became Mr. Stokes' secretary and sole employee. I left my employment with Mr. Stokes in May 1989.

3. I am still fond of Mr. Stokes, and feel he is responsible for my career as a legal secretary. The contents of this affidavit are very difficult for me to reveal. But for Mr. Stokes' own recent revelations regarding his alcoholism, and his original request that I cooperate with Anthony Bryan's attorneys, I would not have discussed these matters with attorneys representing Mr. Bryan.

4. During my employment with Mr. stokes, he represented Mr. Bryan regarding his capital murder case. He represented him through two trials and on appeal, so Mr. Bryan's case was ongoing during most, if not all, of the time I was employed with Mr. Stokes.

5. Upon my employment, Mr. Stokes had a pattern of regular consumption of alcohol. His consumption of alcohol progressively worsened during the period of my employment, and had an increasingly negative impact on his practice.

6. In approximately 1984 or 1985, shortly after I began working for Mr. Stokes, we moved the law office from a rental office to Mr. Stokes' home in Bagdad.

7. At some point late in my employment, during weekdays, I observed Mr. Stokes drink more frequently. At times he would miss afternoon appointments that he knew I had

scheduled because he would be drinking somewhere and not return to the office.

8. I recall a trial which occurred before Mr. Stokes sought alcohol addiction treatment in 1988. He had obviously been drinking during lunch and I was embarrassed by his demeanor in the courtroom. He badgered the alleged victim of a rape and asked the same question multiple times. The jury returned a guilty verdict against the defendant.

9. I specifically remember when Mr. Stokes began getting excited about a defense theory that was developing about a drug deal that went bad. He came to the office after a discussion with Bebe Morrell, a now-deceased bail bondsman, who was a "spinner of yarns." Mr. Stokes announced that Mr. Morrell had provided "inside information" about a drug operation connecting Pascagoula, Mississippi, Munson, Florida, and the Anthony Bryan case. He said he was concerned that it was too dangerous to get into.

10. Mr Bryan took the stand in his own defense, was unable to answer the prosecutor's questions, and repeatedly stated that he could not remember. The State also impeached Mr. Bryan with a tape-recorded telephone conversation between him and Sharon Cooper that had not previously been disclosed, and Mr. Bryan's credibility was shattered.

11. I recall that we wanted to show some home movies made by the Bryan family. These movies were on Super 8 mm film and showed Mr. Bryan before his fall on the boat. They showed him with his children and sailing. We went through two projectors and ultimately could not get the projector to work in front of the jury. The jury never saw the films and we looked foolish in the process.

> 12. I recall the logistics of Mr. Bryan's capital trial in Walton County were very difficult. My daily travel back and forth from the Milton/Bagdad area to DeFuniak Springs was difficult, and we had problems making long distance telephone calls to coordinate witnesses.
>
> 13. I left my employment with Mr. Stokes in May 1989. I left because of work conditions. These included pay, lack of benefits, and Mr. Stokes' continued alcohol addiction.

(Sharon Price Affidavit, See Motion for Rehearing Attachment).

At the time of Mr. Bryan's 1991 evidentiary hearing, Mr. Bryan's trial/direct appeal attorney, Ted A. Stokes, affirmatively denied substance abuse:

> I, Gail Anderson, having been duly sworn or affirmed, do hereby depose and say:
>
> 1. My name is Gail Anderson. I am an attorney licensed in the State of Florida. During my employment at the Office of the Capital Collateral Representative (CCR), I represented Anthony Braden Bryan during his postconviction process.
>
> 2. My representation of Mr. Bryan included reviewing the case, and preparing for Mr. Bryan's evidentiary hearing held in his case on June 12, 1991 ordered by the circuit court. I was present at the 1991 evidentiary hearing and developed evidence for the court's consideration of Mr. Bryan's Rule 3.850 motion.
>
> 3. **In preparation for the 1991 evidentiary hearing, lead counsel, Martin McClain, and I interviewed Mr. Bryan's trial attorney, Ted Alan Stokes. Knowing that Mr. Bryan had several viable claims regarding trial counsel's performance, we specifically asked Mr. Stokes whether he suffered from**

**substance abuse during his representation of Mr. Bryan. Mr. Stokes denied any substance abuse.**

4. At the evidentiary hearing, issues surrounding Mr. Stokes' failure to present critical evidence were presented and hinged upon Mr. Stokes' decision making process. In the order denying Mr. Bryan's Rule 3.850 motion, the lower court relied heavily upon Mr. Stokes' decision to present written mental health reports rather than testimony of mental health experts, his decision not to call Dr. James Larson as a witness after only a brief conversation, and his decision not to obtain Mr. Bryan's mental health records from Springfield, Missouri.

5. Had Mr. Stokes revealed his substance abuse problems during his representation of Mr. Bryan when we asked him in 1991 in preparation for the evidentiary hearing, we certainly would have used this information and presented it to the court at the evidentiary hearing. Such information is exactly the type of evidence used to prove ineffective assistance of counsel.

6. Some of the ways we would have used Mr. Stokes' substance abuse would have been to refute the reasons Mr. Stokes gave for presenting the case in the manner he did. We would have argued to the court that the reasonableness of Mr. Stokes' trial actions had to be viewed in light of his substance abuse impairment.

7. Additionally, Mr. Stokes' impairment and the information I have been told about a defense created by Mr. Stokes and BeBe Morrell would have led us to raise a claim regarding Mr. Stokes' decision to present the testimony of Mr. Bryan at the guilt phase. Throughout the post-conviction litigation in Mr. Bryan's case, courts have relied upon his guilt phase testimony as refuting evidence of his mental health impairments, although new information

> indicates the story Mr. Bryan related at the guilt phase was based on the theory created by Mr. Stokes and Mr. Morrell.

(Gail Anderson Affidavit, See Motion for Rehearing Attachment)(emphasis added).

The first indication that Mr. Stokes in fact had a problem during the time he represented Mr. Bryan was in a phone conversation on October 21, 1999, three days before he executed his affidavit on October 24 ,1999. (See Stokes affidavit). In his affidavit, Mr. Stokes only admitted to being an "active alcoholic". However, on January 4, 2000, Mr. Stokes testified under oath in a deposition in State v. Bonifay regarding his representation of Mr. Bonifay, another former client currently on death row. In the deposition, Mr. Stokes also admitted a history of cocaine abuse. He also corrected some of the dates contained in the October 24th affidavit:

> Q. I gather that you did provide the attorney for Mr. Bryan with a signed copy of this affidavit?
>
> A. Yes.
>
> Q. Who is the attorney; Andrew Thomas?
>
> A. Right.
>
> Q. Is he out of Tallahassee?
>
> A. Yeah, he's with CCR
>
> Q. Based upon this affidavit you have indicated that you acknowledge that you're an alcoholic?

A. Right, recovering.

Q. Paragraph five indicates that you sought additional treatment in 1991.

A. **Yeah. Those dates aren't right I had to correct that.** I think it was after I talked with Buck I had my wife go back and locate some documents, and that last treatment was 4-27-90 at Baptist there.

MR. SPENCER: I didn't catch the date.

MR. FARRAR: 4-27-90.

THE WITNESS: **The first one was in '88 also**.

BY MR. FARRAR:

Q. So, your first treatment occurred --

A. Yeah, the Friary was the first one. **It was 3-18-88.**

Q. So, your first treatment was on 3-18-88 --

A. Right.

Q. -- at the Friary?

A. Right.

Q. And your last treatment was on April 27th, 1990?

A. Right.

* * *

Q. Have you had other --

A. **I've been in treatment for cocaine.** This was in --

Q. When were you treated?

A. Let's see. About three to four years ago.

(Excerpt from Deposition of Ted A. Stokes, January 4, 2000, State of Florida v. James Patrick Bonifay, Escambia County Case No. 910606, See Motion for Rehearing Attachment)(emphasis added).

Mr. Stokes had recently agreed to release his treatment records, but then revoked the release four days later after conferring with Sharon Price and learning what she told Mr. Bryan's current counsel. He authorized Mr. Bryan's collateral counsel to file the records with the circuit court under seal. Mr. Stokes revealed to Mr. Bryan's collateral counsel in early February that the prosecuting attorney currently handling Mr. Bryan's case had filed a Florida Bar grievance against him as a result of his admissions contained in the October 24th affidavit.

Undersigned counsel dutifully submitted Mr. Stokes' treatment records in a sealed fashion to the lower court for an *in camera* inspection. Mr. Bryan sought a determination whether the records provided corroboration of Mr. Stokes' alcohol usage at the time of Mr. Bryan's case. Undersigned counsel thought it was clear that the question was akin to an *in camera* inspection for Brady material--to determine whether the records corroborate that alcohol usage was occurring, the duration of Mr. Stokes' alcohol addiction, the amount of daily alcohol consumption, sleep patterns, eating patterns, medical conditions suggestive of chronic consumption, the resulting mental impairment, if any,

during the relevant time period, and whether the records impeach the testimony of Mr. Stokes at the 1991 evidentiary hearing which the circuit court had relied upon to deny Mr. Bryan relief.

The lower court initially refused to conduct the required inspection and seemed ignorant of the records' existence in the court file. However after an issue was made of the refusal in a Motion for Rehearing, the lower court personally contacted Mr. Stokes on an *ex parte* basis, discussed the situation outside of court, with no notice to Mr. Bryan, no opportunity to be heard, without a court reporter present, and obtained permission from Mr. Stokes to view the treatment records. The extent of the conversation between Judge Bell and Ted Stokes is unknown, as there exists no record. It should be noted that Stokes regularly appears before Judge Bell in both criminal and civil cases.

Of course, since Mr. Stokes denied his disease to postconviction counsel, the lower court adjudicating Mr. Bryan's postconviction motion and presiding over his evidentiary hearing in 1991 never had any of this information. Accordingly, the disposition of Mr. Bryan's postconviction motion and evidentiary hearing, **upon which this Court and the federal courts have relied is unreliable**.

Review of the treatment records is essential in order to objectively establish the actual time frames and circumstances of Mr. Stokes' disease. We now know from the ***Bonifay*** deposition

that Mr. Stokes' representations in his affidavit that he first sought treatment in 1990 and again 1991, were incorrect and that he only recently stated that he first sought alcohol treatment on March 18, 1988 and that his last alcohol treatment was April 27, 1990 (Bonifay deposition at p. 28). Mr. Bryan's trial took place March 31 - April 3, 1986. His direct appeal was filed March 17, 1987, (filed one day late)[7] and Supplemental Brief filed November 23, 1987. Oral argument occurred February 2, 1988--only 44 days before Stokes' alcoholism reached the level requiring in-patient-residential addictions treatment.

Mr. Stokes testified at the 1991 evidentiary hearing that

> My memory based on the transcripts and conversations with counsel and talking with my secretary at the time is that--that in the transcript there is an indication that we planned to call her [Gentner] because I had stated to the judge during the penalty phase with them looking for Dr. Gentner, "She's not here so I'm going to recall Karen Bryan." So based on that I feel that I would have called her had she been there.

(1991 Evidentiary Hearing Transcript at p. 38).

* * *

> Well, I apparently planned to call Dr. Larson and Dr. Gentner based on what I told Judge Wells.

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[7] Billing records filed with Santa Rosa County indicate that Mr. Stokes devoted but ten hours to the preparation of Tony Bryan's Initial Brief. He devoted but ten additional hours to the Supplemental Brief. He raised a total of six issues on appeal from a capital trial where death was imposed.

(1991 Evidentiary Hearing Transcript at p. 57).

* * *

> Q. Did you have any reason for not presenting Dr. Gentner's or Dr. Medzarian's live testimony identifying the mitigation and sufferings?
>
> A. Only that Dr. Gentner apparently wasn't there and if Dr. Medzarian was there I didn't know she was.
>
> Q. In terms of Dr. Gentner, you did have her under subpoena so to the extent that she was under subpoena you could make her be there?
>
> A. The transcript indicates that she was on-call and it also indicates that we tried to find her and she was not there.
>
> Q. And if you had found her is there any doubt in your mind that you would have put her on the stand?
>
> A. Based on what I've told the judge in the transcript I think that I would have used her.

(1991 Evidentiary Hearing Transcript at p. 96).

However, Dr. Gentner testified at the evidentiary hearing :

> What I was told was they wanted me--I had to go out of town a couple of days thereafter and I, it was my understanding that if they needed me that they would have called and I was never--**I was never called** so I went ahead and went out of town.
>
> Q. In terms of the trip out of town would you have canceled that trip if you were asked to stay?
>
> A. Yes.

(1991 Evidentiary Hearing Transcript at 155)[8].

At the evidentiary hearing, Mr. Stokes testified about Dr. Medzarian:

> Q. Now, in terms of Dr. Medzarian do you recall considering--do you recall talking to her at all in reference to the penalty phase.
>
> A. No.
>
> Q. Do you recall considering her and having her testify live?
>
> A. I'll tell you what I think happened based upon my--refreshing my recollection is that Dr. Gentner was not available and Dr. Medzarian apparently appeared for her. And I don't recall seeing her there but that's the information that I am getting. And apparently I did not know that Dr. Medzarian was there. Had I known that she was there I most likely would have called her.

(1991 Evidentiary Hearing Transcript at 42-43).

However, Dr. Medzarian testified at the evidentiary hearing:

> Q. Do you recall testifying at the competency hearing?
>
> A. Yes. And that would be late December of 1985?
>
> A. Yes.

---

[8] Note that the State in its Answer Brief from the denial of the 1991 3.850 motion, relies upon the credibility dispute between Stokes and Dr. Gentner (States Answer Brief at p.29-30)(internal cites omitted)("Doctor Gentner testified that she had been 'on-call' to testify at the penalty phase, but that she had gone on to Atlanta as planned, **inasmuch as she claimed that she was never called.**")(emphasis added).

> Q. And following that do you recall if you had any contact with Mr. Stokes?
>
> A. Following that?
>
> Q. Yes. Leading to the trial?
>
> A. I know that I was subpoenaed to Walton County to the trial and I don't know whether, I don't know if I had personal contact with him or his office.
>
> Q. And do you recall actually being there while the penalty phase was going on?
>
> A. I was outside of the courtroom. And I honestly don't know what was going on inside. I was outside for the better part of a day and then excused.

(1991 Evidentiary Hearing Transcript at 250-251).

Contrary to his 1991 testimony, Mr. Stokes now, in 2000, refers to a "decision not to call Dr. Medzarian" (Stokes Response at unnumbered p. 3).

Additionally, Mr. Stokes testified at the 1991 evidentiary hearing:

> Q. In terms of Dr. Larson, you indicated earlier that he did show up at the courthouse?
>
> A.Yes.
>
> Q. And do you recall, I think you said that was on Friday, what time on Friday would that have been?
>
> A. Prior to court that day.
>
> Q. Do you recall where the conversation actually took place?

A. I recall going to the back of the courtroom in the Walton County Courthouse and talking to him in a jury room or ante-room behind the courthouse or courtroom there.

Q. And when you were talking to him I assume that were you talking to him about what his testimony would be?

A. Yes.

Q. Tell us what happened?

A. Dr. Larson indicated that he would hurt us if he testified. That--that he wanted to help Tony but he felt that his testimony would be detrimental. And I made a decision not to use him based on that.

Q. Did he tell you why it would be detrimental?

A. From reviewing this report I think that I know why, but I can't specifically remember his words, but I think that I know why from reviewing the report.

Q. Did you talk to him in terms of what you- Did you continue to talk to him in order to find out if there was so much good that he had to say that it offset any bad?

A. Yes. I know that I tried to get, every way to get something good out of him.

Q. And what happened? What is your recollection of the discussion?

A. I can just remember being really disappointed because I was going to rely on him and Dr. Gentner as the psychologists. And as you would in trying to rehabilitate any witness--trying--kind of cross examining him and see if I could rehabilitate his testimony. But he convinced me that he would not be helpful.

(1991 Evidentiary Hearing at 39-41)

> Q. How much time basically did you have in order to--you said that you were trying to rehabilitate him--in order to try to rehabilitate him and make a decision as to whether or not you were going to call him?
>
> A. Probably ten or fifteen minutes.

(1991 Evidentiary Hearing at p 100).

However, Dr. Larson testified at the evidentiary hearing:

> I don't recall specifically thinking at that time as I made the journey--I believe that it was in DeFuniak Springs--and in talking to him that I wasn't really certain that he had read the report. And I guess that was based on--you know the kinds of questions--I remember in making the trip that I had anxiety that we had not talked about the case sufficiently or at least I did not think, and I did not really know just what he would ask in terms of testimony and so forth and so on. And I know that I had a sense of hoping that I could catch him before I testified as normally I do meet with the attorney before I testify.

(1991 Evidentiary Hearing at 181).

> I remember having a sense that I didn't think he fully understood what I was talking about and I had that clear recollection. I don't remember just what we talked about. But I remember that he signaled to me clearly, "I don't think that I want to use you" and he said something about "just go back and we'll make sure that you get paid." I remember things like that. I don't remember how much of the report I might have explained to him or I don't remember what I would have said about mitigation. I don't know that he asked any questions about that even. And I know that it was a very brief conversation. And I think that it was in a courtroom like this during a recess off in a corner. And may be it was like a two or three or four minute conversation.

(1991 Evidentiary Hearing at 205).

> Q. If Mr. Stokes testified that you in fact told him that you would not be a helpful witness and that he should not call you, would you recall that event?
>
> A. It is hard for me to imagine that I would ever tell an attorney to use me or not use me. And I think that falls outside of the--how I would see my role. It is his case and he is managing that case. And I would try to make the attorney aware of how I would testify, but I would certainly not try to confuse my role with his or suggest that I would probably say here's how I would testify. And I may say these would be problems with my testimony and try to educate the attorney about what I would testify about. But it is hard for me to imagine that I would ever tell an attorney don't use me. It is just not my role.

(1991 Evidentiary Hearing at p. 220).

Regarding his failure to call family members, Mr. Stokes testified at the evidentiary hearing:

> I think there was some alienation between the family kind of split up and some lived with the mother and some with the father. And that is my memory that--that some of the family was not as helpful as other portions of it.

(1991 Evidentiary Hearing at 34).

However Mr. Bryan's family members affidavits were introduced at the evidentiary hearing stating:

> Tony's attorney never asked me about our family or what I know about Tony's life growing up. He did ask me to be a character witness for Tony at the trial but he had no idea what I would say because he never asked me anything about what I knew. Just as I was

> leaving to go to the trial, his secretary called and cancelled. I would have testified for Tony at his trial if I had been given the chance.

(Affidavit of Carol Freeman, at PCR, Defense Exhibit 15).

> I went to Tony's trial every day, but his attorney never talked to me about testifying. I didn't know that I could have helped Tony by telling the judge and jury about how things were when we were growing up. Tony's attorney never asked me about Tony or told me I could help.

(Affidavit of Cynthia Johns, at PCR, Defense Exhibit 16).

> When Tony had his trial in Florida, I was never contacted by his attorney. I was in touch with my family and they knew how to reach me. If I knew that testifying for Tony and explaining his life history to the court would have been helpful, I would have done so. No one ever called me or asked me any questions about what I knew. I love Tony very much and it breaks my heart that the judge and jury never got to hear the whole story.

(Affidavit of Deborah Lynn Manasala, PCR, Defense Exhibit 17).

Without permitting Mr. Bryan to actually file his 3.850, the circuit court ruled that any claim based upon Ted Stokes' revelation that he was abusing alcohol at the time he represented Mr. Bryan was barred. Every court since, and the current circuit court relied upon Mr. Stokes' representations at the 1991 evidentiary hearing in denying Mr. Bryan's claims.

Additionally, the circuit court relied upon new filings by Mr. Stokes. These filings have occurred since the prosecutor filed a bar grievance against Mr. Stokes. The circuit court's

reliance upon Mr. Stokes' filings to refute any potential 3.850 motion that Mr. Bryan could file constitutes going outside what is normally meant by "the record." Specifically, the circuit court stated:

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

(See Order on Motion for Rehearing at p. 2 fn. 1). Contrary to the court's treatment of Stokes' Response, and as demonstrated below, nothing is clarified or settled except the fact that all courts have relied upon Stokes' deception regarding his substance abuse in denying Mr. Bryan relief which is clearly unreliable. Accordingly, the lower court has deprived Mr. Bryan of the opportunity to have Mr. Stokes examined under oath and subject to cross examination. Consequently, Mr. Bryan has been denied due process.

Had previous postconviction counsel not been deceived by Mr. Stokes in 1991, postconviction counsel would have been able to plead a rule 3.850 motion with sufficient allegations of ineffective assistance of counsel and an actual conflict of interest. Instead, prior postconviction counsel was deprived of critical information regarding Mr. Bryan's trial/direct appeal lawyer, hamstringing their ability to fully raise issues of significant constitutional magnitude. As a result, Mr. Bryan has

**never** been given a full and fair evidentiary hearing on his claims.

## ARGUMENT I

**THE PREVIOUS RESOLUTIONS OF THE EFFECTIVENESS OF COUNSEL AT MR. BRYAN'S TRIAL ARE INVALID BECAUSE TRIAL COUNSEL INTENTIONALLY WITHHELD CRITICAL EVIDENCE WHICH MUST NOW BE HEARD AND CONSIDERED AND BECAUSE THIS COURT DID NOT ENGAGE IN THE DE NOVO REVIEW REQUIRED ON APPELLATE REVIEW.**

### A. INTRODUCTION

Prior to the 1991 evidentiary hearing, Mr. Bryan's collateral counsel asked Ted Stokes whether he had any substance abuse problems at the time of Mr. Bryan's trial. "[W]e specifically asked Mr. Stokes whether he suffered from substance abuse during his representation of Mr. Bryan." Affidavit of Gail Anderson. Mr. Stokes denied that he had such a problem at the time of Mr. Bryan's trial. See Affidavit of Gail Anderson; Affidavit of Ted Stokes. As a result, Mr. Bryan's collateral counsel did not receive disclosure of crucial information which would have been presented at the evidentiary hearing and which would have provided the factfinder with "a significantly different impression of [Ted Stokes'] credibility."[9] Olden v. Kentucky, 488 U.S. 227, 232 (1988).

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[9] At the evidentiary hearing, Ted Stokes' credibility was a critical factor. For example, he offered a tactical reason for why he did not call Dr. Larson to testify which was directly contradicted by Dr. Larson.

This Court has not hesitated to order previously presented claims reheard where new evidence surfaces which had been wrongfully withheld from collateral counsel at the time of the prior hearing. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999)(previously decided Brady claim had to be reconsidered in light of newly available evidence supporting old claim); Scott v. State, 657 So. 2d 1129 (Fla. 1995)(new evidence of Brady violation warranted evidentiary hearing on successive motion); Walton v. Dugger, 634 So. 2d 1059, 1061 (Fla. 1993)(State's failure to disclose Chapter 119 warranted abeyance of appeal until after full disclosure in circuit court and an opportunity to amend and further present claims for relief); Muehleman v. Dugger, 623 So. 2d 480, 481 (Fla. 1993)(same as Walton). As in these cases, the evidence which was first revealed to Mr. Bryan's collateral counsel on October 21, 1999, requires another evidentiary hearing at which the factfinder hears all of the relevant evidence. Mr. Bryan's collateral counsel sought to obtain this evidence in 1991, but was denied access to the evidence when Mr. Stokes intentionally deceived them.[10]

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[10] In Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995), the Eleventh Circuit found that new evidence of a previously denied judge bias claim defeated any procedural bar arising from the prior adjudication. This was because the new evidence was qualitatively different from the evidence previously offered and because there had been no unreasonable failure to investigate by collateral counsel. Subsequently, this Court found the claim meritorious and warranted post-conviction relief. Porter v. State, 723 So. 2d 191 (Fla. 1998).

The evidence was wrongfully withheld by the actions of state-paid counsel, Ted Stokes. Mr. Stokes had been provided as Mr. Bryan's trial counsel by the State of Florida. His refusal to disclose pertinent evidence when asked by collateral counsel deprived Mr. Bryan of relevant and necessary evidence at the 1991 hearing on ineffective assistance of trial counsel.[11]

In refusing to allow Mr. Bryan to present a claim of ineffective assistance of counsel now, the circuit court relied upon this Court's prior determination that Mr. Bryan was effective. Of course, the prior determination was made without benefit of the evidence which Mr. Stokes hid. In addition, when this Court heard Mr. Bryan's appeal of the denial of 3.850 relief, it failed to conduct the required *de novo* review. Instead, it simply reviewed the circuit court's order to determine whether competent evidence existed in the record to support the circuit court's conclusions. This violated Sixth Amendment jurisprudence, as this Court recently explained in Stephens v. State, 1999WL 1073001, 24 Fla. L. Weekly S554 (Nov. 24 1999) reh. denied Jan 27, 2000.

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[11] There can be no serious argument that, if a prosecutor intentionally deceives collateral counsel and refuses to disclose evidence which would have supported a capital defendant's claim that a Brady violation occurred, the capital defendant is entitled to a cumulative review of the Brady claim when the truth is finally disclosed. See Kyles v. Whitley, 115 S.Ct. 1555 (1995).

Thus, the prior adjudication of Mr. Bryan's ineffective assistance of counsel claim on which the State and the circuit court have relied as procedurally barring presentation of a successor motion to vacate raising ineffective assistance of counsel is defective and ineffectual.

**B. TED STOKES INTENTIONALLY WITHHELD CRUCIAL EVIDENCE.**

The situation here is analogous to that faced by this Court countless times when a State agency has failed to disclose properly requested Chapter 119 materials in the capital post-conviction process. In those circumstances, this Court has stated:

> Our remand after Provenzano's initial 3.850 motion was designed to put Provenzano in the same position he would have been in if the files had been disclosed when first requested. Provenzano [v. Dugger], 561 So. 2d [541,] 549 [(Fla. 1990)]. Given that Provenzano's ineffectiveness claims have arisen as a direct result of the disclosure of the file, we find that they are timely raised.

Provenzano v. State, 616 So. 2d 428, 430-31 (Fla. 1993).

Similarly, this Court in Walton v. Dugger was presented with a case where an evidentiary hearing had been held in circuit court on a number of Mr. Walton's claims. On appeal, Mr. Walton challenged the circuit court's resolution of those claims heard at the evidentiary hearing. This Court determined that public records had wrongfully been withheld from Mr. Walton's collateral

counsel.[12] It then concluded "Because resolution of the public records issue could possibly affect other issues raised by Walton, we find that we should reserve ruling on those issues until the trial court makes a determination regarding the public records request." 634 So. 2d at 1062.

Here, Ted Stokes was the attorney that the State of Florida provided to Mr. Bryan. Mr. Stokes was paid by the State of Florida to represent Mr. Bryan. The State of Florida was constitutionally liable for the representation provided by Mr. Stokes. If Mr. Stokes' representation fell below the constitutionally mandated limits, then the conviction and/or sentence of death that the State had obtained against Mr. Bryan has to be reversed. State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995).

The State bears similar constitutional liability for the prosecution's performance. Where the prosecution fails to disclose exculpatory evidence which is material at either the guilt or penalty phases of a capital trial, post-conviction

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[12] The situation here is only different to the extent that collateral counsel had no basis for knowing that Ted Stokes had deceived them, no recourse for obtaining disclosure, and had to wait until years after the appeal of the denial of 3.850 relief had been denied. Yet in Walton, this Court recognized that non-disclosure of relevant evidence may render a previously conducted evidentiary hearing in need of a do-over.

relief will be required. Young v. State, 739 So. 2d 553 (Fla. 1999).[13]

To give meaning to the constitutional guarantees, Florida capital defendants are entitled to the assistance of collateral counsel who conduct the necessary investigation to determine whether the prosecution disclosed the required evidence and whether trial counsel rendered constitutionally adequate representation. To that end, collateral counsel obtains from the prosecutor's office public records in order to determine whether the constitutional obligation was met and all exculpatory evidence was properly disclosed. This Court has recognized that collateral counsel cannot properly investigate a failure to disclose exculpatory evidence until all of the public records have been turned over. Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). The disclosure obligation extends beyond public records. "[T]he State must still disclose any exculpatory document within its possession or to which it has access, even if

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[13] State-provided counsel's obligation to provide effective representation and the prosecutor's obligation to disclose exculpatory evidence arise from the same source--the Sixth Amendment guarantee of an adequate adversarial testing which will result in a constitutionally acceptable reliable result. The fact that both guarantees arise from the same source must mean that claims of deprivation of these guarantees be treated the same. Since under this Court's case law the prosecutor's failure to disclose requested records and information authorizes representation of a Brady claim when the disclosure occurs, the same treatment of an ineffectiveness claim must occur when trial counsel wrongfully hides relevant evidence from collateral counsel.

such document is not subject to the public records law." Walton, 634 So. 2d at 1062. The failure to disclose all of the public records will result in allowing an amendment to the motion to vacate in order to put the capital defendant in the posture he would have been in had the public records been fully disclosed when first requested. Provenzano v. State, 616 So. 2d at 430-31; Walton; Muehleman.

Just as the prosecutor's office is under an obligation to disclose requested public records to collateral counsel, so too the capital defendant's state-provided trial attorney is under an obligation to disclose.[14] Section 27.51 (5)(a), Fla. Stat. 1999, provides that an attorney who represented a capital defendant has the obligation to "forward all original files on the matter to the capital collateral representative."

Here, Ted Stokes has admitted under oath that "I vaguely recall a conversation with Mr. Bryan's attorneys in 1991 prior to the 3.850 hearing when they raised the issue of an alcohol problem and I either denied it or avoided the question." Gail Anderson, Mr. Bryan's collateral counsel in 1991, has stated under oath that "In preparation for the 1991 evidentiary hearing,

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[14] The analogy between the prosecution's non-disclosure and trial counsel's non-disclosure is strengthened by consideration of the fact that the standard for reviewing Brady error was lifted from the standard from determining whether counsel rendered effective representation. See United States v. Bagley, 473 U.S. 667 (1985).

lead counsel, Martin McClain, and I interviewed Mr. Bryan's trial attorney, Ted Alan Stokes. Knowing that Mr. Bryan had several viable claims regarding trial counsel's performance, we specifically asked Mr. Stokes whether he suffered from substance abuse during his representation of Mr. Bryan. Mr. Stokes denied any substance abuse." As a result of Ted Stokes' specific denial, the issue of substance abuse was not pursued at the evidentiary hearing.[15]

To understand the impact of Mr. Stokes' intentional withholding of his alcohol abuse while he was representing Mr. Bryan, there must be an examination of what occurred at the evidentiary hearing without this significant evidence. Ted Stokes did in fact testify, and his testimony conflicted with the testimony of Dr. James Larson, Dr. Ellen Gentner, and Dr. Barbara Medzarian. Mr. Bryan's collateral counsel were contending that Mr. Stokes was ineffective in his preparation of the penalty phase.

As to Dr. Larson, the allegation was that Mr. Stokes failed to contact Dr. Larson in advance of his appearance at court on the day he was to testify at the penalty phase and learn what mitigation he could provide. Dr. Larson testified that Mr. Stokes did not talk to him to discuss Mr. Bryan and to determine

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[15] In fact, one can only imagine the State's howling had collateral counsel attempted to accuse Mr. Stokes of substance abuse without any evidence to support such an allegation.

what Dr. Larson could say which would be useful prior to Dr. Larson's arrival at the courthouse the day he was to testify.

Dr. Larson testified at the evidentiary hearing:

> I don't recall specifically thinking at that time as I made the journey--I believe that it was in DeFuniak Springs--and in talking to him that I wasn't really certain that he had read the report. And I guess that was based on--you know the kinds of questions--I remember in making the trip that I had anxiety that we had not talked about the case sufficiently or at least I did not think, and I did not really know just what he would ask in terms of testimony and so forth and so on. And I know that I had a sense of hoping that I could catch him before I testified as normally I do meet with the attorney before I testify.

(1991 Evidentiary Hearing Transcript at 181).

> I remember having a sense that I didn't think he fully understood what I was talking about and I had that clear recollection. I don't remember just what we talked about. But I remember that he signaled to me clearly, "I don't think that I want to use you" and he said something about "just go back and we'll make sure that you get paid." I remember things like that. I don't remember how much of the report I might have explained to him or I don't remember what I would have said about mitigation. I don't know that he asked any questions about that even. And I know that it was a very brief conversation. And I think that it was in a courtroom like this during a recess off in a corner. And may be it was like a two or three or four minute conversation.

(1991 Evidentiary Hearing Transcript at 205).

> Q. If Mr. Stokes testified that you in fact told him that you would not be a helpful

> witness and that he should not call you, would you recall that event?
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> A. It is hard for me to imagine that I would ever tell an attorney to use me or not use me. And I think that falls outside of the-- how I would see my role. It is his case and he is managing that case. And I would try to make the attorney aware of how I would testify, but I would certainly not try to confuse my role with his or suggest that I would probably say here's how I would testify. And I may say these would be problems with my testimony and try to educate the attorney about what I would testify about. But it is hard for me to imagine that I would ever tell an attorney don't use me. It is just not my role.

(1991 Evidentiary Hearing Transcript at p. 220)

Mr. Stokes, on the other hand, testified that he had a conversation with Dr. Larson in which Dr. Larson said that he had nothing to say that would be useful to Mr. Bryan:

> A. Dr. Larson indicated that he would hurt us if he testified. That--that he wanted to help Tony but he felt that his testimony would be detrimental. And I made a decision not to use him based on that.
>
> Q. Did he tell you why it would be detrimental?
>
> A. From reviewing this report I think that I know why, but I can't specifically remember his words, but I think that I know why from reviewing the report.
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> Q. Did you talk to him in terms of what you- Did you continue to talk to him in order to find out if there was so much good that he had to say that it offset any bad?
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> A. Yes. I know that I tried to get, every way to get something good out of him.

> Q. And what happened? What is your recollection of the discussion?
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> A. I can just remember being really disappointed because I was going to rely on him and Dr. Gentner as the psychologists. And as you would in trying to rehabilitate any witness--trying--kind of cross examining him and see if I could rehabilitate his testimony. But he convinced me that he would not be helpful.

(1991 Evidentiary Hearing Transcript at 39-41).

> Q. How much time basically did you have in order to--you said that you were trying to rehabilitate him--in order to try to rehabilitate him and make a decision as to whether or not you were going to call him?
>
> A. Probably ten or fifteen minutes.

(1991 Evidentiary Hearing Transcript at 100).

Thus, there was a direct conflict in the testimony of these two witnesses on a critical issue necessary to the resolution of whether Mr. Stokes had rendered effective assistance of counsel. The circuit court order denying relief specifically resolved the conflict in favor of Mr. Stokes: "[Mr. Stokes] made a tactical decision not to call Dr. James Larson as a witness as Dr. Larson told him, only moments before he would have testified, that his testimony would not be helpful."

A similar conflict in testimony occurred between Dr. Gentner and Mr. Stokes. Mr. Stokes testified at the 1991 evidentiary hearing that:

> My memory based on the transcripts and conversations with counsel and talking with

my secretary at the time is that--that in the transcript there is an indication that we planned to call her [Gentner] because I had stated to the judge during the penalty phase with them looking for Dr. Gentner, "She's not here so I'm going to recall Karen Bryan." So based on that I feel that I would have called her had she been there.

(1991 Evidentiary Hearing Transcript p.38)

* * *

We'll, I apparently planned to call Dr. Larson and Dr. Gentner based on what I told Judge Wells.

(1991 Evidentiary Hearing Transrcipt at p. 57).

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Q. Did you have any reason for not presenting Dr. Gentner's or Dr. Medzarian's live testimony identifying the mitigation and suffers?

A. Only that Dr. Gentner apparently wasn't there and if Dr. Medzarian was there I didn't know she was.[16]

Q. In terms of Dr. Gentner, you did have her under subpoena so to the extent that she was under subpoena you could make her be there?

A. The transcript indicates that she was on-call and it also indicates that we tried to find her and she was not there.

Q. And if you had found her is there any doubt in your mind that you would have put her on the stand?

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[16] With Sharon Price's assistance, counsel has identified a note in Stokes' trial file which seems to rebut this. In handwriting believed to be Sharon's, the note reads: "Barbara Medzerian is here to testify for the State."

> A. Based on what I've told the judge in the transcript I think that I would have used her.

(1991 Evidentiary Hearing Transcript at p. 96).

However, Dr. Gentner testified at the evidentiary hearing :

> What I was told was they wanted me--I had to go out of town a couple of days thereafter and I, it was my understanding that if they needed me that they would have called and I was never--**I was never called** so I went ahead and went out of town.
>
> Q. In terms of the trip out of town would you have canceled that trip if you were asked to stay?
>
> A. Yes.

(1991 Evidentiary Hearing Transcript at 155). Thus according to Dr. Gentner, Mr. Stokes never made the phone calls to her he claimed to have made in his testimony. Mr. Stokes' memory and testimony in this regard is also suspect in light of the fact Dr. Gentner testified as a proffered, but excluded, guilt-phase witness earlier in the trial (R. 455-57). Since she appeared at that time, one would logically conclude she would have appeared two days later if notified to do so.

At the evidentiary hearing, Mr. Stokes testified about Dr. Medzarian:

> Q. Now, in terms of Dr. Medzarian do you recall considering--do you recall talking to her at all in reference to the penalty phase.
>
> A. No.

> Q. Do you recall considering her and having her testify live?
>
> A. I'll tell you what I think happened based upon my--refreshing my recollection is that Dr. Gentner was not available and Dr. Medzarian apparently appeared for her. And I don't recall seeing her there but that's the information that I am getting. And apparently I did not know that Dr. Medzarian was there. Had I known that she was there[17] I most likely would have called her.

(1991 Evidentiary Hearing Transcript at 42-43).

Dr. Medzarian did not directly contradict Mr. Stokes' testimony. She testified at the evidentiary hearing:

> Q. The fact, you see the facts that make up mitigating factors and this is just part of the evaluation. And nobody told you that it was relevant?
>
> A. Correct.
>
> Q. And no one asked you testify about them?
>
> A. Correct.

(1991 Evidentiary Hearing Transcript at 274-275).

Mr. Stokes' testimony also conflicted with family affidavits which were admitted into evidence. Regarding his failure to call family members, Mr. Stokes testified at the evidentiary hearing:

> I think there was some alienation between the family kind of split up and some lived with the mother and some with the father. And that is my memory that--that some of the family was not as helpful as other portions of it.

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[17] See n. 16, supra.

(1991 Evidentiary Hearing Transcript at 34).

However, Mr. Bryan's family members affidavits were introduced at the evidentiary hearing stating:

> Tony's attorney never asked me about our family or what I know about Tony's life growing up. He did ask me to be a character witness for Tony at the trial but he had no idea what I would say because he never asked me anything about what I knew. Just as I was leaving to go to the trial, his secretary called and cancelled. I would have testified for Tony at his trial if I had been given the chance.

(Affidavit of Carol Freeman, at PCR, Defense Exhibit 15).

> I went to Tony's trial every day, but his attorney never talked to me about testifying. I didn't know that I could have helped Tony by telling the judge and jury about how things were when we were growing up. Tony's attorney never asked me about Tony or told me I could help.

(Affidavit of Cynthia Johns, at PCR, Defense Exhibit 16).

> When Tony had his trial in Florida, I was never contacted by his attorney. I was in touch with my family and they knew how to reach me. If I knew that testifying for Tony and explaining his life history to the court would have been helpful, I would have done so. No one ever called me or asked me any questions about what I knew. I love Tony very much and it breaks my heart that the judge and jury never got to hear the whole story.

(Affidavit of Deborah Lynn Manasala, at PCR, Defense Exhibit 17).

Mr. Stokes' intentional withholding of his alcohol abuse is evidence that bears upon the resolution of the conflict in evidence in several ways. First, alcohol abuse, itself, is known

to impair memory. Thus, Mr. Stokes' alcohol abuse[18] calls into question his memory of the events which conflicts with Dr. Larson's memory of events and with Dr. Gentner's memory.

Second, Mr. Stokes' alcohol abuse is also consistent with dysfunctional behavior. Again, this is consistent with Dr. Larson's memory of events--Mr. Stokes failed to discuss with him the potential benefit of his testimony for Mr. Bryan. It is also consistent Dr. Gentner's memory--Mr. Stokes failed to call her and tell her that she would be needed as a witness. It is also consistent with Dr. Medzarian's testimony that Mr. Stokes never talked to her about the penalty phase.

Third, Mr. Stokes' intentional withholding of the information, i.e., his alcohol abuse, demonstrates a desire to cast himself in a better light through deception. This is particularly significant behavior, given that the issue at the evidentiary hearing was whether he was ineffective. His willingness not to tell the truth and/or hide facts is certainly evidence which argues against his credibility vis-a-vis Dr. Larson and Dr. Gentner. See Kyles v. Whitley, 115 S.Ct. 1555

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[18] Mr. Stokes' cocaine abuse, as disclosed in the recent Patrick Bonifay deposition, is impossible to assess without access to the treatment records. Stokes acknowledges entering residential treatment some years ago, but only the records can objectively prove his duration and period of cocaine abuse. It is doubtful Stokes will tell more unless compelled to do so given the State's action in filing a Florida Bar grievance against him. Nevertheless, Stokes is clearly a polysubstance abuser and this results in mental deterioration beyond monosubstance abuse.

(1995)(discusses the many uses of undisclosed impeachment evidence and how it undermines confidence in the reliability of the outcome of a proceeding where the impeachment evidence was not disclosed); Olden v. Kentucky, 488 U.S. at 232 (discussing the fact that relevant evidence withheld from trier of fact could significantly alter impression of witness' credibility).

This Court in Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999) held that a new cumulative analysis of Mr. Lightbourne's previously presented Brady claim was required where new evidence supporting the claim was subsequently discovered and where collateral counsel had unsuccessfully sought the new evidence previously. Mr. Lightbourne had first presented his Brady claim years before. See Lightbourne v. Dugger, 549 So. 2d 1364, 1367 (Fla. 1989). In fact in Lightbourne, the Brady claim presented in 1989 was "based on the State's failure to disclose that the police had engaged in a scheme with Chavers and Carson to elicit incriminating statements from Lightbourne." 742 So. 2d at 242. The Brady claim presented in 1994 was supported by evidence not previously available ("the State committed a Brady violation in withholding evidence that Chavers' and Carson's testimony was false and elicited in violation of Henry." 742 So. 2d at 247). This Court's decision in Lightbourne is a repudiation of the circuit court's ruling here. Where new relevant evidence of a previously presented claim surfaces and

where collateral counsel had previously tried to locate the evidence but was thwarted by improper non-disclosure, the claim must be heard anew.

**C. NO DE NOVO REVIEW ON APPEAL.**

This Court in Bryan v State, 641 So. 2d 61 (Fla. 1994) reviewed Mr. Bryan's ineffective assistance of counsel claims in an unconstitutional manner on appeal from the denial of post-conviction relief. See Stephens v. State, 24 Fla. L. Weekly S554, (Nov. 24, 1999), 1999WL 1073001.

This Court acknowledged in Stephens, that deferential review of claims under Strickland v. Washington, 466 U.S. 668 (1984), is not "the appropriate standard of appellate review for issues of constitutional magnitude." Stephens v. State, Case No. SC92639, at 8 (Fla. Jan. 27, 2000)(slip op.). In Mr. Bryan's case, this Court affirmed the trial court's determination that Mr. Bryan's trial counsel was not ineffective based on the judge's findings being "supported by the record" and "competent substantial evidence." In doing so, this Court failed to review *de novo* the mixed questions of law and fact upon which the trial court's conclusion should have been based. See Stephens, slip op. at 10 ("under *Strickland*, both the performance and prejudice prongs are mixed questions of law and fact with deference given only to the lower court's factual findings").

This Court considered Mr. Bryan's appeal from the denial of his Rule 3.850 motion and his Writ of Habeas Corpus in Bryan v. Dugger, 641 So.2d 61 (Fla. 1994). Mr. Bryan raised 12 issues in his appeal from the denial of his Rule 3.850 motion. The Court ruled that the "only issues that merit discussion are issues one and two in which Bryan asserts that his trial counsel's penalty-phase performance was deficient." Bryan v. State, 641 So. 2d at 63. On the issue of ineffective assistance of counsel, the Court stated:

> Our review of the record and the trial judge's findings of fact indicate that the judge's findings are **supported by the record**.

Bryan v. State, at 63 (emphasis added). After reciting the trial court's order denying Mr. Bryan's post conviction relief, this Court stated:

> The record reflects that the judge's findings are based on **competent substantial evidence**.

Bryan v. State, at 64 (emphasis added). This Court also ruled:

> 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 v. State, at 65 (emphasis added).

The Court's review of the denial of Mr. Bryan's 1990 postconviction motion failed to provide Mr. Bryan the constitutionally adequate review to which he is entitled.[19]

This Court recently held that the proper standard of appellate review for ineffective assistance of counsel claims, consistent with the precedent of the United States Supreme Court and other federal courts on the standard of review for Sixth Amendment claims is *de novo*. Stephens v. State, 1999WL 1073001, 24 Fla. L. Weekly S554 (Nov. 24, 1999) reh. den. Jan. 27 2000. This Court specifically stated:

> The State takes the position, and we agree, that the "competent substantial evidence" standard announced in *Grossman* applies to the trial court's factual findings. However, as the State argues, an "appellate court is not required to accord particular deference to a legal conclusion of constitutional deficiency or prejudice under the Strickland test for evaluating the effectiveness of counsel." (Respondent's Brief at 28). Instead, based on *Rose*, the alleged ineffective assistance of counsel claim is a mixed question of law and fact, subject to plenary review based on *Strickland*. *See Rose*, 675 So.2d at 571 (citing *Baxter v. Thomas*, 45 F.3d 1501, 1512-13 (11th Cir. 1995)). In *Rose*, we independently reviewed the trial court's

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[19] The Nebraska Supreme Court was faced with a similar situation recently. In State v. Reeves, 2000 WL 10208, --- N.W.2d --- (Neb. 2000), the Nebraska Supreme Court found that its prior opinion resentencing Reeves to death "was clearly erroneous" and thus a violation of due process. "Because of the life interest and due process rights at stake, it would do more harm than good to adhere to this court's clearly erroneous decision in Reeves III." 2000 WL 10208 at 12. This Court should be guided by the Nebraska Supreme Court's action in Reeves.

> legal conclusions as to the alleged ineffectiveness of the defendant's counsel. See Id. at 572-73. Indeed, we recently applied this independent standard of review in accordance with United States Supreme Court precedent in *Quince v. State*, 732 So.2d 1059, 1064 (Fla. 1999), in the context of a conflict of interest claim. In addition, there is further precedent in this Court for applying an independent standard of review to mixed questions of law and fact involved in Sixth Amendment claims. See e.g. *Rivera v. State*, 717 So.2d 477, 482 (Fla. 1988); *Van Poyck v. State*, 694 So.2d 686, 689-98 (Fla. 1997),cert. denied, ___U.S. ___, 118 S.Ct. 559, 139 S.Ed.2d 400 (Fla. 1997); *Breedlove v. State*, 692 So.2d 874, 877-78 (Fla. 1997); *Clark v. State*, 690 So. 2d 1280, 1282 (Fla. 1997).

Stephens at *3 (internal footnotes omitted).

This Court also recognized that:

> The less deferential standard of review inescapably follows from *Strickland*, the seminal ineffective assistance of counsel case, as well as other decisions of the United States Supreme Court on the appropriate standard of appellate review for issues of constitutional magnitude.

Stephens at *4 (footnotes omitted).

> Because the ineffective assistance of counsel claim is based on the Sixth Amendment, we are not at liberty to disregard the United States Supreme Court's decision in *Strickland*, nor do we find that it is appropriate to abdicate the responsibility of the appellate courts to ensure the correct and uniform application of the law.

Stephens at *4.

> Despite this deference to a trial court's findings of fact, the appellate court's obligation to independently review mixed

> questions of fact and law of constitutional magnitude is also an extremely important appellate principle. This obligation stems from the appellate court's responsibilities to ensure that the law is applied uniformly in decisions based on similar facts and that the defendant's representation is within constitutionally acceptable parameters. This is especially critical because the Sixth Amendment right to assistance of counsel is predicated on the assumption that counsel "plays the role necessary to ensure the trial is fair." *Strickland*, 466 U.S. at 685. "The Sixth Amendment . . . envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." Id. (emphasis supplied).

Stephens at *6.

In affirming the lower court's denial of Mr. Bryan's ineffective assistance of counsel-penalty phase, this Court applied the wrong standard of review:

> Our review of the record and the trial judge's findings of fact indicate that the judge's findings are **supported by the record**.

Bryan v. State, at 63 (emphasis added).

* * *

> The record reflects that the judge's findings are based on **competent substantial evidence**.

Bryan v. State, at 64 (emphasis added).

* * *

> 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 v. State, at 65 (emphasis added).

The language used by the Court regarding the lower court's rulings: "supported by the record", "competent substantial evidence", and "the record supports his ruling" is clearly the same incorrect standard of review that was employed by the lower court in *Stephens* and rejected by this Court. In Mr. Bryan's case, the Court clearly did not accord the required plenary review of Mr. Bryan's ineffective assistance of counsel claims.

**This Court's Most Recent Review**[20]

In denying Mr. Bryan's Consolidated Petition for Extraordinary Relief, Writ of Habeas Corpus, and Leave to Reopen Direct Appeal, this Court stated with regard to the claim of ineffective assistance of direct appeal counsel:

> 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*.") **Furthermore, this Court affirmed the trial court's previous determination that counsel was effective at both the guilt and sentencing phases. *See Bryan*, 641 So.2d at 63, 64-65 (this Court affirmed that the**

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[20] In Bryan v. State & Bryan v. Moore, 1999WL 971125 (Fla.), 24 Fla. L. Weekly S517 (Oct. 26, 1999), this Court considered the trial court's summary denial of Mr. Bryan's rule 3.850 motion filed on October 15, 1999, as supplemented October 18, 1999, and Mr. Bryan's Consolidated Petition for Extraordinary Relief, Writ of Habeas Corpus, and Leave to Reopen Direct appeal and Request for Stay of Execution filed on October 25, 1999.

> **allegations as to guilt phase ineffectiveness were insufficient to establish a violation of *Strickland*, and this Court affirmed the trial court's denial of relief as to alleged sentencing-phase ineffectiveness after it held an evidentiary hearing on the issue). Accordingly, regardless of counsel's condition, he rendered effective assistance.**

Bryan, 1999 WL 971125, *4 (Fla.)(emphasis added).

This Court's reliance on Kelly v. United States, 820 F.2d at 1174, was clearly misplaced. There, relief was denied only after a full and fair evidentiary hearing had been held at which trial counsel's drug usage before, during and after Mr. Kelly's trial was fully developed. Only after hearing all of the evidence did the trier of fact determine that trial counsel's drug usage did not affect his performance during trial. The hearing afforded Mr. Kelly has not been afforded Mr. Bryan.

As demonstrated by the highlighted excerpt above, this Court in its most recent review of Mr. Bryan's case relied upon the Court's previous review of Mr. Bryan's case which did not perform a constitutionally adequate *de novo* review as required by Stephens. Accordingly, the Court has not to date performed the constitutionally mandated review in Mr. Bryan's case and should do so here.

## ARGUMENT II

**THE TRIAL COURT ERRED IN DENYING MR. BRYAN DUE PROCESS OF LAW, CONTRARY TO THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS**

**OF THE FLORIDA CONSTITUTION, ACCESS TO HIS TRIAL ATTORNEY'S RELEVANT SUBSTANCE ABUSE TREATMENT RECORDS, BY DENYING HIM A FULL AND FAIR HEARING ON THE MATTER, BY TREATING HIS DISCOVERY REQUEST AS A FULLY PLED POSTCONVICTION CLAIM AND SUMMARILY DENYING IT, BY ENGAGING IN EX PARTE COMMUNICATIONS WITH THE TRIAL ATTORNEY AS PART OF THE EVENTUAL IN CAMERA REVIEW, EVEN WHILE DENYING MR. BRYAN NOTICE AND AN OPPORTUNITY TO BE HEARD.**

**Introduction**

> I concur in the majority's remand in order for the appellant to be provided with a reasonable opportunity to present evidence, including expert opinion evidence, of his competency to be executed. Unfortunately, it appears that these proceedings were driven by the perceived need to be certain that there would be no delay in the date of execution set for the defendant.

Provenzano v. State, 24 Fla. Law Weekly S434, S436 (Fla. September 23, 1999)(Anstead, J., specially concurring)(emphasis supplied).

> I concur in the majority opinion and write only because we once again encounter imposition of the ultimate penalty without the full measure of the deliberative process. The issue of competency for execution, by its very nature, can only be confronted in close proximity to an execution. That does not mean, however, that the process to resolve the issue deserves less consideration than other steps in the judicial proceeding of this type of case.
>
> ***
>
> The constitutional right involved in this consideration would be rendered a hollow shell, and indeed meaningless, without proper interpretation and application of the procedures for enforcement. This right,

> unfortunately, is not self-executing, and the right is of no value if procedures such as those utilized here are the standard by which the right is protected. Cf. Ramirez v. State, FLa. L. Weekly, S353, S355-56 (Fla. July 8, 1999). Procedures are not simply "technical" niceties which serve no purpose other than to complicate or delay judicial proceedings. Procedures give life to due process rights afforded all citizens, whether those citizens are challenging a speeding ticket or, as here, presenting evidence during an evidentiary hearing to determine sanity to be executed. Procedures count.

Provenzano, supra, at S436 (Lewis, J., specially concurring) (emphasis supplied).

**(A) Mr. Bryan Has Been Denied Due Process of Law By the Actions of the Lower Court, the Assistant State Attorney & the Assistant Attorney General.**

Postconviction remedies are subject to the more flexible standards of due process announced in the Fifth Amendment of the United States Constitution. State v. Weeks, 166 So. 2d 892, 896 (Fla. 1964). Even where a case has an extensive procedural history involving successive petitions for relief, an unrebutted showing of newly discovered evidence of constitutional error requires an evidentiary hearing. Scott v. State, 657 So. 2d 1129 (Fla. 1995). A narrow vote of 7-5 by a jury recommending death is a valid consideration in granting evidentiary hearings on successive petitions for relief. Scott, supra, at 1132. Striking a motion for postconviction relief signed by a licensed attorney not yet admitted to the Florida Bar without considering a motion to appear pro hac vice violates due process of law.

Huff v. State, 569 So. 2d 1247, 1248 (Fla. 1990). "Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. In this respect, the term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals." Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990)(citations omitted). "The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." Id. "When a procedural error reaches the level of a due process violation, it becomes a matter of substance." Huff v. State, 622 So. 2d 982, 983 (Fla. 1993)(error to deny Motion for Rehearing objecting to flawed procedure in postconviction proceeding).

The "impartiality of the tribunal" is compromised when improper ex parte communications take place with one party to a proceeding. Smith v. State, 708 So. 2d 253, 255 (Fla. 1998). In Rose v. State this Court explained that

> [n]othing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks

> about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments... ... The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

601 So. 2d 1181, 1183 (Fla. 1992).

A trial court errs and denies due process when it denies a claim without conducting a proper review and inquiry into the claim asserted. See Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996). Even where a right is "fragile", "the government violates the fundamental fairness which is the essence of due process when it creates a right to petition and then makes the exercise of that right utterly impossible." Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038-39 (5th Cir. 1982). Inmates under sentence of death maintain a residual life interest requiring a measure of due process even in executive clemency proceedings. Ohio Adult Parole Authority v. Woodard, 118 S.Ct. 1244, 523 U.S. 272 (1998). Mr. Bryan's right to due process of law in capital postconviction actions is much superior to an illegal immigrant's right not to be deported or to his right to fair clemency review.

Mr. Bryan's lower court proceedings have simply been a rush to judgment and denial of fundamental due process rights. Taking cues from the Attorney General, the trial court predetermined

that Mr. Bryan could not have any cognizable postconviction claims. Frustrated by Mr. Bryan's insistence on due process and claims that State action was precluding his ability to fully plead his postconviction claims, the trial court responded by summarily denying anticipated claims. It did so without considering the record, by engaging in ex parte communications with Mr. Stokes (who has been chilled by the Assistant State Attorney's Florida Bar complaint), and by erroneously treating discovery demands as postconviction claims. The court's summary disposition of the Emergency Application to Release Records and to Hold Proceedings in Abeyance is an egregious example of the lower court's predisposition toward denying unfiled claims and depriving Mr. Bryan of due process of law.

Ted Stokes served as Mr. Bryan's attorney both at trial and on direct appeal. Based upon subsequent investigation, it is now certain that Mr. Stokes' affidavit of October 24, 1999, was but a first tentative step towards disclosure of the painful truth regarding his history of substance abuse and the detrimental impact this had on his representation of Tony Bryan[21]. For that

[21] Stokes conceded in his October 24, 1999 affidavit that "alcoholism is difficult to disclose" and he sought to preserve anonymity in his practice. It is well recognized that an accurate and reliable memory is one of the first casualties of alcohol and narcotic abuse. Dorland's Illustrated Medical Dictionary, 26th Edition, defines chronic alcoholism as "long-continued, excessive intake of ethyl alcohol characterized by various conditions, including anorexia, diarrhea, weight loss, **mental deterioration**, personality changes, peripheral neuropathy,

reason, counsel for Mr. Bryan have sought objective and reliable sources of information regarding Mr. Stokes' addictions, their duration, his consumption patterns, sleep patterns, eating patterns, and such other relevant evidence which is routinely contained in substance abuse treatment records.

In denying Mr. Bryan's petition for writ of habeas corpus (alleging ineffective assistance of direct appeal counsel based upon the October, 1999 affidavit), the majority of this Court concluded Stokes cited but "one instance where he may have provided ineffective assistance because of his possible state at that time" and referred to Stokes' "equivocal recollection that he may have been under the influence outside of trial". Bryan v. State, 24 Fla. Law Weekly S516, S518 (Fla. October 26, 1999). While it is both difficult to determine why this finding was relevant to a state habeas action and to square with Stokes' own admission of "daily drinking" as a chronic alcoholic, efforts have been on-going to bring the truth out of the darkness of addiction and denial and into the light of judicial scrutiny. These efforts have been impeded by the Assistant State Attorney (filing Florida Bar grievance against Stokes in transparent effort to quiet him; apparently successful), the Assistant Attorney General (see arguments below), and most egregiously, by the lower court's rulings.

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and fatty deterioration of the liver. (p. 45)(emphasis supplied).

While the legal profession protects its own and prefers to discuss substance-addicted and ineffective lawyers in whispers and sighs, Mr. Bryan should not be executed merely to avoid embarrassment to the profession. The lower court--upon cue from Mr. Stokes and the State--has kept the truth in darkness, apparently choosing to protect a fellow member of the Florida Bar at the expense of Tony Bryan's life.[22]

On February 8, 2000, during hearing upon appellant's application for stay and motion for an evidentiary hearing regarding the Department of Corrections' withholding of public records regarding lethal injection, counsel for Mr. Bryan put the court on notice that an Emergency Application for Release of Records and to Hold Proceedings in Abeyance had been prepared and served by facsimile transmission (Tr. of February 8, 2000 hearing, at 3, 7, 34, 37). The Emergency Application was in fact filed with the clerk on February 9, 2000. Even before the court had reviewed the Emergency Application, received the sealed records, or reviewed any response by Stokes, the State was making

[22] Of course, Stokes also represented current death row inmates Michael Coleman and Patrick Bonifay. They are not faced with the exigencies of a pending death warrant and will presumably be able to discover the facts regarding Stokes' drug and alcohol impairments and fully litigate whether these impairments warrant relief in their cases. The critical question before this Court is whether Stokes' withholding of this relevant information until 1999 means Tony Bryan has somehow forfeited his right to fully investigate and litigate his claims.

every effort to deprive Mr. Bryan of relevant evidence and the ability to file a fully pled postconviction claim on this basis:

> **MR. MARTELL:** ...If you would like to take up the motion about Mr. Stokes' records the state can --
>
> **MR. THOMAS:** Impossible, Judge, until we get Mr. Stokes' notice and an opportunity to file written response or to appear in person for the court to conduct an in camera inspection of the records which we are Federal Express-ing to you today.
>
> **MR. MARTELL:** Well, the state did file a Notice of Filing which I'm assuming all parties have in which we took the position that in its last opinion the Florida Supreme Court decided all issues about Mr. Stokes' representation and made a finding of lack of prejudice.
>
> That was based on the same affidavit that was presented to this court in the third 3850 which was presented to the Florida Supreme Court in the second habeas.
>
> So basically if we simply have more information about Mr. Stokes' condition he can't impeach the holding of the Florida Supreme Court that there was no prejudice.
>
> And basically <u>given the time frames we would suggest that it is not the best use of judicial or counsels' labors at this point</u>.
>
> **MR. THOMAS:** That's not before the court. Notice of Filing is not a pleading requested [sic]--More properly a response to whatever motion we filed [sic], and then in the event the court wants argument I can certainly comply.
>
> **THE COURT:** Go ahead.
>
> **MR. THOMAS:** Your honor, this court dismissed our motion without prejudice to

> refile when you had jurisdiction. You now have jurisdiction.
>
> The Florida Supreme Court affirmed your order dismissing without prejudice. The claim has never been adjudicated. The only thing that the Florida Supreme Court has [sic] jurisdiction to adjudicate, and did, was the state's [sic] habeas alleging ineffective assistance of appellate counsel.
>
> And has, as justices, pointed out in dissent Mr. Bryan has never had an evidentiary hearing regarding ineffective assistance of guilt stage [sic] counsel whatsoever.
>
> **THE COURT:** Never had a hearing, but he has raised the issue in multiple post-conviction proceedings though, correct?
>
> **MR. THOMAS:** Raised it, and it was summarily denied as being conclusory and so it was not revealed until October 24 of 1999, a position [sic] while he was representing Mr. Bryan. And that was filed October 25, 1999. Newly discovered evidence of his ineffectiveness.
>
> And we can now plead with specificity and be granted a hearing.

(Tr. of February 8, 2000 hearing, at 36-39).

It is obvious the lower court, of one mind with the Assistant Attorney General, was more concerned with rushing matters through the courts to guarantee an execution on February 24th than with affording Mr. Bryan due process of law and adjudicating matters in a reasoned, legal, and orderly manner. Counsel advised the court of this:

> **THE COURT:** Okay. I guess my question is timing. Because we have the Supreme Court directive that everything be filed by this

> Friday in the Supreme Court--as far as I know those deadlines are still impinging on this court.
>
> **MR. THOMAS:** If I may respectfully submit those deadlines do not deprive Mr. Bryan of due process of law.
>
> And as Mr. Martell stated I believe at the last hearing that I did not attend, those dates as in the last round are suggested dates. The Florida Supreme Court is not going to deny Mr. Bryan review if we take a few extra days when we have almost three weeks remaining on the warrant, and do this in some type of methodical, rational way to where we can present fully pledged [sic] claims to the court after full disclosure of everything necessary.

(Tr. of February 8, 2000 hearing, at 34-35).

Thus, the lower court had a copy of Mr. Bryan's emergency request for treatment records on February 8th and was advised on that same date that said records were critical to Mr. Bryan's ability to fully plead his postconviction ineffective assistance of counsel claims. Mr. Stokes had already filed a Revocation of Consent on February 7, 2000, stating he had "executed a document on February 3, 2000, giving conditional consent for release of records from treatments at the Friary on or about March 18, 1988 [this was but 44 days after Mr. Stokes argued Mr. Bryan's direct appeal before the Florida Supreme Court] and the Baptist Hospital First Step Program on or about April 27, 1990", but he revoked "that consent with the understanding that the records will be placed unopened, under seal, in the Court File pending a ruling

by Judge Kenneth Bell as to the admissibility thereof." Thus, Mr. Bryan's attorneys must have been "getting warm".

Mr. Bryan's application for the records specifically stated that the Friary records were closer in time to Mr. Bryan's trial than originally revealed by Mr. Stokes and that "Mr. Bryan cannot fully plead his claim that Mr. Stokes' alcoholism denied him constitutionally effective assistance of counsel without the release of the treatment records". Mr. Bryan cited case law regarding the lack of harm to Stokes and the procedures to be followed in evaluating Stokes' qualified privilege versus Mr. Bryan's life interest regarding release of the records. Such records are routinely released in litigation involving less serious matters. Burton v. Becker, 516 So. 2d 283 (Fla. 2d DCA 1987)(records created during physician's treatment for drug addiction relevant to malpractice action against him; release would not harm him in manner not within contemplation of privilege statutes); Russell v. Stardust Cruisers, Inc., 690 So. 2d 743 (Fla. 5th DCA 1997)(decedent's alleged alcoholism was relevant in wrongful death action and mental health records subject to release); Saenz v. Alexander, 584 So. 2d 1061 (Fla 1st DCA 1991)(sexual battery defendant's mental health records discoverable when part of deferred prosecution agreement); Florida Board of Bar Examiners, Re: Applicant, 443 So. 2d 71 (Fla. 1984)(privacy guaranteed under Florida Constitution does

not protect from all governmental intrusion; applicant to Florida Bar required to disclose mental health treatment and release records of same as condition precedent to admission).

The lower court did not rule upon Mr. Bryan's Emergency Application until the afternoon of Friday, February 11, 2000. The brief Order stated that "further claims related to this issue [Stokes' alcoholism] are procedurally barred" and "[a]s a result, any records obtained in reference to this matter are not reasonably calculated to lead to information that will further a viable postconviction claim". Order at 2. Thus, the lower court summarily denied a claim that was not before it and denied Mr. Bryan a hearing and proper in camera inspection of the records.

Mr. Bryan sought rehearing of all orders entered by the trial court, sending the motion to the court by facsimile transmission on February 14, 2000. In between, counsel had engaged in a public records hearing regarding lethal injection on February 12, 2000. The Motion for Rehearing was straight-forward. It contained additional affidavits from Stokes' former legal secretary corroborating his drinking habits and from Bryan's former postconviction counsel corroborating that Stokes' denied an alcohol problem when asked before Mr. Bryan's initial postconviction proceedings. It also contained an excerpt from a court-ordered deposition in the Patrick Bonifay case wherein Stokes admitted to cocaine use, abuse, and residential

treatment[23]. This likely explains why counsel obtained **three** sealed envelopes of treatment records. It is also corroborated by Sharon Price's revelations to Bryan's counsel that Stokes began using cocaine and, in fact, taking cocaine for fees during the period of his representation of Tony Bryan. None of these matters have been pled before the lower court in a detailed postconviction motion **because the lower court has pre-empted the claim and deemed it procedurally barred before it could be filed.** The Motion for Rehearing sought remedial measures: for the court to vacate its prior Order and conduct a full and fair hearing, pursuant to statute and case law, and with notice and an opportunity to be heard by all parties.

The lower court's Order on Motion for Rehearing is a remarkable reversal of the court's prior ruling on the records issue. The court does **not** retreat form its former position that

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[23] The Bonifay deposition contains the following:

> Q: You haven't had any alcohol or drug-related instance occur this entire decade of the 1990's?
>
> A: **Not alcohol**.
>
> Q: Have you had other --
>
> A: **I've been in treatment for cocaine**.

(Bonifay deposition, at 28-29).

Mr. Bryan is procedurally barred from raising any claim--unquestionably never adjudicated by the trial court[24]- but nevertheless **engaged in an ex parte communication with Stokes**, reviewed a portion of the records and concluded "these records do not contain any records to objectively document Bryan's claim that Mr. Stokes was ineffective during the times at issue." Apparently, the trial court has concluded that unless the medical records contain some admission by Mr. Stokes that he was impaired during Mr. Bryan's trial, they are irrelevant.

The ruling is improper for at least three reasons: (1) If relevancy was a proper issue--as Mr. Bryan has asserted from the beginning--then the procedural bar ruling is erroneous and Mr. Bryan has been unconstitutionally denied the right to a full and fair hearing on the records release issue, complete with adequate notice and opportunity to be heard, and he has been unconstitutionally deprived of the right file a claim. (2) The trial court engaged in an ex parte communication with Stokes--who has become an adverse party in interest due his own nondisclosures and due to the State's repressive actions. Stokes is an actual party requiring notice and an opportunity to be heard in the records process. **Mr. Bryan is also a party to the**

[24] In the court's original Order denying access to the sealed records, it acknowledged "this Court did not address Bryan's ineffective assistance of counsel claim in regards to Stoke's alcoholism on the merits" during the last warrant litigation.

**records release action and was entitled to notice and an opportunity to be heard**. (3) The trial court applied an incorrect standard of review and clearly erred in limiting its review of the records to whether or not they contain "specific evidence of substance abuse or dependency that impaired Mr. Stokes' 'actual conduct at trial'". Order at n. 2. A broader inquiry was required to assess relevancy. The trial court did **not** determine whether the records contained impeachment evidence relating to Stokes' postconviction hearing testimony, impeachment evidence relating to his 1999 affidavit, or impeachment evidence of his recent Response to Mr. Bryan's application for release of records. Nor did the trial court inspect the records to determine if they corroborated the affidavits of Gail Anderson and/or Susan Price or the contents of the Bonifay deposition.

Further, Mr. Bryan specifically asked that the records be released for review by his medical experts. All addictions treatment centers take detailed histories from their patients. These histories include duration of alcoholism or other addictions, consumption patterns, eating patterns, sleeping patterns, and other highly relevant information from which reasonable conclusions regarding impairment at a given time may be reached. Stokes has admitted he was an active alcoholic, drinking daily at the time of Mr. Bryan's trial (and apparently at the time of appeal). The trial record is replete with errors

and perplexing turns of events that are explained by impairment. For example, if Mr. Stokes drank a quart of vodka every day for three years, including the period of time he was representing Mr. Bryan, ate little, slept little, and was under a high degree of stress, an expert could take this information and make a scientific estimate of Stokes' blood alcohol level **while in court representing Mr. Bryan in this capital case**. This information does not rely upon the tainted memory of a longterm polysubstance abuser with a State-imposed motive to protect himself from additional disciplinary proceedings and the possible loss of his law license. It is objective evidence of his condition while representing Tony Bryan. The trial court failed to review the medical records for the purposes Mr. Bryan sought them. Had Mr. Bryan been granted a hearing, with the ability to fully state his position regarding the records, the trial court would have been asked to perform a meaningful in camera inspection of the records.

**(B) This Court Must Remedy the Violations of Mr. Bryan's Due Process Rights. This Court Must Properly Review the Treatment Records, Order The Records Released to Mr. Bryan's Counsel, and Grant a Stay of Execution to Allow for Evidentiary Hearing.**

Despite the extensive procedural history of this capital case, Mr. Bryan's unrebutted showing of newly discovered evidence of constitutional error requires an evidentiary hearing. Scott

v. State, supra. This Court's view of the 7-5 jury recommendation of a death sentence must be transformed from that of the 1994 Court. Bryan v. State, 641 So. 2d 61, 64 (Fla. 1994) ("defense counsel was able to persuade five jurors to recommend life imprisonment"). Rather than subtle proof of effectiveness, in combination with the recent disclosures regarding Stokes' impairments, the vote demonstrates that the mitigating circumstances surrounding Anthony Braden Bryan's life and offenses were so strong that even in the absence of sober and effective counsel for the defense five jurors voted to spare his life. Scott v. State, supra, at 1132.

The fact that the lower court felt compelled to both rely on Stokes' bald assertions of effectiveness as contained in his Response to the application for release of records and to engage in an ex parte communication with Stokes concerning the treatment records demonstrates that the State cannot rebut Mr. Bryan's assertions of constitutionally defective counsel without resort to matters outside the traditional record. The lower court's impartiality has been compromised. Smith v. State, supra. Mr. Bryan's claims, premised upon Stokes' October 24, 1999 affidavit and subsequent investigation, have **not** been judged "only after proper consideration of issues advanced by adversarial parties." Scull v. State, supra, at 1252. The lower court has refused to hear from Mr. Bryan. The lower court has refused to allow Mr.

Bryan to file claims of constitutional error. The lower court has refused to permit Mr. Bryan discovery of relevant evidence in support of his claims. The procedural errors below reach "the level of a due process violation" and have become matters of "substance." Huff v. State, 622 So. 2d 982, 983 (Fla. 1993). The flawed procedures utilized by the lower court--in conjunction with the mechanistic adoption of all arguments asserted by the State of Florida--has deprived Mr. Bryan of the right to seek redress of wrongs committed against him by State-paid and provided defense counsel. The lower court was preoccupied with "the time frames" and "deadlines...impinging on [the] court" which made affording Mr. Bryan due process of law utterly impossible. (Tr. of February 8, 2000 hearing, at 34-39).

This Court is the final arbiter of fundamental fairness. This Court has the authority to stay Mr. Bryan's execution for a reasonable period of time to allow for a full and fair judicial inquiry into Stokes' actual, rather than presumed, effectiveness during Mr. Bryan's capital trial and direct appeal. This Court has the power to decide that prior determinations were unreliable and to order a reliable record from which to decide Mr. Bryan's fate. Since Mr. Bryan cannot be secure by virtue of the lower court's *ex parte* communications or in the lower court's *in camera* review based thereon, this Court must review the treatment records to protect Mr. Bryan's rights and thereafter release them

to Bryan's counsel for review by experts and further investigation. Only then can this Court--or any citizen of the State of Florida--be assured that Anthony Bryan is constitutionally deserving of a death sentence and not just the victim of arbitrary and capricious imposition of the ultimate penalty because his lawyer couldn't overcome his addictions and impairments long enough to establish Mr. Bryan's right to life.

As the Chief Justice has recently stated:

> Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights were specifically provided for within the body of the Constitution. Today these rights include the **right to have effective assistance of counsel in criminal matters**, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocent until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt. These rights are available to all citizens, regardless of race, creed, or social status. **History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible**.

Nixon v. Singletary, 2000 WL 63415, 25 Fla. Law Weekly S59 (Fla. January 27, 2000)(Harding, C.J., concurring). Mr. Bryan deserves no less.

**(C) Mr. Bryan Has Suffered a Complete Denial of Due Process During the Postconviction Procedures Held Below in that the Lower Court Has Failed to Provide Him with a Full, Fair and Adequate Opportunity to Vindicate His Rights, in Violation of His Fifth and Fourteenth Amendment Rights as Guaranteed by the Federal Constitution, as well as the Corresponding Provisions of the Florida Constitution.**

Mr. Bryan has been denied due process in his pursuit of postconviction relief by the lower court. The lower court summarily denied postconviction claims for relief despite the fact that no such claims were before it. The lower court erroneously denied access to treatment records of Mr. Bryan's trial attorney without a proper hearing, thereby preventing any possibility of Mr. Bryan being able to sufficiently investigate, plead and establish a claim of gross ineffectiveness of trial counsel. The lower court improperly sustained asserted public records exemptions without requiring proof of said exemptions. The lower court erroneously found full compliance with public records demands by the Department of Corrections despite substantial evidence to the contrary. Lastly, the lower court abjudicated the constitutionality of statutes despite the fact that no challenge to said statutes was before it.

Postconviction litigation is governed by principles of due process, and Mr. Bryan is entitled to a full, fair and adequate opportunity to vindicate his constitutional rights. Art. V, sec. 3(b)(9), Fla. Const.; Fla. R. Crim. P. 3.850; Holland v. State, 503 So.2d 1250 (Fla. 1987). The lower court denied Mr. Bryan

this opportunity, denying him even a modicum of due process. Furthermore, contrary to existing law, the lower court's actions have rendered postconviction counsel ineffective. See, Ch. 97-313, § 1, Laws of Fla. (amending § 27.702, Fla. Stat. (1996 Supp.)); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); Spaziano v. State, 660 So.2d 1363, 1370 (Fla. 1995); Peede v. State, Florida Supreme Court Case No. 90,002, footnote #5 (August 19, 1999).

**(i) Claims Not Before the Lower Court**

On February 9, 2000, Mr. Bryan filed an Emergency Application to Release Records and To Hold Proceedings in Abeyance requesting that the lower court conduct a hearing in chambers to consider the release of substance abuse treatment records regarding Ted Alan Stokes, Mr. Bryan's trial and appeal attorney. Mr. Bryan urged the lower court to notice Mr. Stokes, conduct an in camera review of the records, conduct the hearing in chambers, decide the relevancy of the records, and thereafter to release said records to Mr. Bryan's postconviction counsel for review by an expert and as evidence.

The lower court refused to grant any of Mr. Bryan's requests. Instead, the lower court summarily denied a claim of ineffective assistance of counsel that was not even before it. The lower court found that this Court had decided the issue when

it denied Mr. Bryan relief on his second petition for writ of habeas corpus (filed with this Court on October 25, 1999), and that "any records obtained in reference to this matter are not reasonably calculated to lead to information that will further a viable postconviction claim." See, Order on Emergency Application to Release Records and to Hold Proceedings in Abeyance, dated February 11, 2000[25].

In response to Mr. Bryan's Motion for Rehearing (filed February 14, 2000), the lower court went one step further. The lower court ruled that in order for Mr. Bryan to **raise** a new ineffectiveness claim, Mr. Bryan had the burden of presenting proof that Mr. Stokes's substance abuse problems impaired his performance to the extent that it fell below an objective standard of reasonableness, at the same time ruling that Mr. Bryan had failed to demonstrate the treatment records were necessary for filing a claim "previously determined on the merits". These determinations were made despite the fact the Mr. Bryan's counsel, as well as the experts working for him, have never been allowed to review the records.

On page 3 of the February 18, 2000, Order on Motion for Rehearing, the lower court also appears to preemptively rule on a constitutional challenge to the Department of Correction's lethal

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[25] It should be noted that the lower court made this determination without reviewing the treatment records. See, transcript of February 12, 2000, hearing, at 139.

injection procedures, despite the fact that Mr. Bryan has yet to be given the opportunity to file such a challenge. The lower court appears to rely on this Court's findings in Sims v. State, Nos. SC00-295, SC00-297, slip op. at 24 (Fla. February 16, 2000). However, at Mr. Bryan's February 12, 2000, hearing, contradictory testimony was elicited from the DOC witnesses. This demonstrates that the lower court's reliance on DOC testimony from the Sims hearing was erroneous[26]. At the very least, based upon these contradictions, as well as different evidence Mr. Bryan's counsel has obtained independent of the Sims hearing, Mr. Bryan should be allowed the opportunity to present (and be heard on) a claim regarding the constitutionality of the procedures DOC will use during lethal injection executions. Due Process requires no less.

**(ii) Improper Denial of Access to Treatment Records and the Improper Procedures Which Led to the Denial**

On February 9, 2000[27], Mr. Bryan filed an Emergency Application requesting, among other things, that the lower court release relevant substance abuse treatment records regarding Mr. Bryan's trial and appellate counsel. On February 11, 2000, the lower court denied Mr. Bryan's application, finding that any

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[26] This issue is more thoroughly presented in Argument IV, infra.

[27] The Emergency Application was actually prepared and served on all parties on February 8th, by facsimile.

claim regarding trial counsel's alcohol abuse during Mr. Bryan's trial procedurally barred, and finding that "any records obtained in reference to this matter are not reasonably calculated to lead to information that will further a viable postconviction claim." February 11, 2000, Order at 2.

As presented above, the lower court's order works to summarily deny a claim of ineffective assistance of trial counsel that has not yet been presented to **any** court. Compounding this error, the lower court's order also denies Mr. Bryan a properly requested hearing and *in camera* inspection of the relevant records. Apparently, as a result of Mr. Bryan's February 14th Motion for Rehearing, the lower court engaged in improper *ex parte* communications with Mr. Bryan's trial counsel regarding the records and conducted an improper review of said records.[28]

In doing so, the lower court has deprived Mr. Bryan of even minimal due process regarding this matter. The Emergency Application, although making trial counsel an actual party in interest, logically makes Mr. Bryan a party of interest to the records release action. After all, Mr. Bryan is the party that filed the action. The lower court, however, excluded Mr. Bryan from any consideration on the issue by not providing him notice or an opportunity to be heard, and denied Mr. Bryan the

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[28] From this, the lower court made a determination that the records did not "objectively document" trial counsel's ineffectiveness.

opportunity to investigate the contents of said records or provide them to experts who could give informed opinions regarding their contents. This is anything but due process.

### (iii) Improperly Sustained Records Exemptions and An Erroneous Finding of Full Compliance[29]

The lower court erroneously accepted the public records exemptions claimed by the Department of Corrections (DOC) despite substantial evidence and law which required a different result. On January 26, 2000, Mr. Bryan sent to DOC a detailed public records request. For his effort, Mr. Bryan received several purchase orders, as well as a heavily redacted document listing, at best, generalized execution-day procedures. It was clear to Mr. Bryan's counsel that DOC had not come close to the compliance required by Florida's public records law, as well as the Florida Constitution.

On February 7, 2000, Mr. Bryan filed a Motion to Compel Production of Public Records, to Declare Statutes Unconstitutional, and for an Evidentiary Hearing on Claimed Public Records Exemptions. The lower court heard legal arguments on the motion on February 8, 2000. The lower court also held an evidentiary hearing on February 12, 2000, to determine if public records were being improperly withheld by DOC.

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[29] The facts and analysis of this particular subclaim are more thoroughly plead in Argument IV, infra.

Within hours of the February 12, 2000, hearing, the lower court hastily ruled that DOC's claimed exemptions were valid, despite ample evidence and testimony to the contrary. The lower court accepted DOC's claimed exemptions without requiring them to meet the burden of proving their right to said exemptions, as the law requires. The lower court did so without a transcript of the hearing, and failed to cite the record, statutes or case law in ruling the way it did. As pled in Argument IV, infra, the lower court also ruled that Mr. Bryan must demonstrate that the unprovided documents "would likely entitle him to any ultimate relief", a standard much higher than required by Fla. R. Crim. P. 3.852(l).

Also in its February 12, 2000, order, the lower court erroneously ruled that DOC had met its burden of proving claimed exemptions to Mr. Bryan's public records demands, finding that Mr. Bryan had not presented any substantial challenge to the validity of DOC's claimed exemptions at the February 12th hearing. However, the transcript of the February 12th hearing shows that this is clearly not the case. More importantly, the fact that the order fails to cite any statutes, caselaw or the record itself provides even greater support to Mr. Bryan's claim that the lower court's finding of full compliance by DOC is blatantly erroneous.

Worse still, in its February 18, 2000, Order on Mr. Bryan's Motion for Rehearing, the lower court went one step further in ruling that Mr. Bryan had not "demonstrated that the documents he seeks would likely entitle him to any ultimate relief."[30] Basically, the lower court has decided that records Mr. Bryan and the lower court have not seen will not support claims Mr. Bryan has yet to present.

At no point did the lower court require that DOC meet the burden of **proving** their right to any claimed exemption at the February 12th hearing. Thus, its order was based on nothing more than legal and factual assumptions, completely lacking in testimonial or evidentiary support.

Mr. Bryan was clearly denied the due process he is entitled to in postconviction. Whether the lower court's rulings were, at best, the product of a mistaken belief that these proceedings must be completed as soon as possible or, at worst, the result of ignorance of the relevant law and testimony, the simple fact remains that Mr. Bryan has not been provided the due process to which he is entitled.

**(iv) The Necessity of Due Process**

Mr. Bryan's case presently sits before this Court in a condition which illustrates why the founding fathers included the

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[30] Again, the lower court has subjected Mr. Bryan to a standard much higher than required by Fla. R. Crim. P. 3.852 (l).

Due Process Clause in our federal constitution. Due Process contemplates fair process and procedures, and the state cannot deprive Mr. Bryan of life without first giving him the opportunity to be heard. Yet, this is exactly what the lower court has allowed to occur in Mr. Bryan's case.

This Court said it best when it stated the following:

> Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. In this respect, the term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals.

Scull v. State, 569 So.2d 1251, 1252 (Fla. 1990) (citations omitted). Denying Mr. Bryan the right to present claims by preemptively ruling on claims he has yet to present condemns Mr. Bryan before providing him his right to be heard. Denying Mr. Bryan the means (records) to fully investigate and present claims for relief denies him his right to advance issues to a competent court, ultimately denying him his right to be heard. "The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." Id. See also, Roberts v. State, 678 So.2d 1232, 1235 (Fla. 1996) (a court denies due process by not conducting a proper review and inquiry into an asserted claim). Mr. Bryan did not receive fair notice, an opportunity to

be heard, or a proper review and inquiry in the court below. Instead, the lower court summarily denied a claim of ineffective assistance of counsel that was not even before it. This was anything but due process.

Furthermore, by ruling against Mr. Bryan on matters without requiring proof from the state, or accepting unsupported representations from the state despite substantial evidence to the contrary, the lower court is assisting the state in denying Mr. Bryan his right to life without due process of law. This is contrary to the role of the lower courts contemplated by this Court in Scull, where a court would act as an arbitrator "of issues advanced by adversarial parties", instead of assisting one adversary to the detriment of the other.

Counsel is useless to Mr. Bryan if he is not afforded the opportunity to present claims before the lower court rules on them. Counsel is useless if the lower court does not assist him in obtaining the means to investigate and plead claims of constitutional error. Lastly, counsel is useless if he must be placed in an adversarial posture not only with the state but with the lower court itself.

Mr. Bryan has been denied due process. In fact, the number of procedural errors from below are so great, they have become substantive in nature. This Court must return Mr. Bryan's case to the lower court in order to correct the numerous errors

outlined above, and to ensure Mr. Bryan is provided the due process to which he is entitled.

## ARGUMENT III

**MR. BRYAN IS ABOUT TO BE EXECUTED DESPITE THE FACT THAT HIS TRIAL/DIRECT APPEAL ATTORNEY HAD AN ACTUAL CONFLICT OF INTEREST AND HE HAS BEEN DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHICH HAS GONE UNCORRECTED IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.**

Mr. Bryan's trial/direct appeal counsel had an actual conflict of interest and did not perform the critical role as he was required to do in the adversarial process. Due to Ted Stokes' refusal to disclose crucial information, Mr. Bryan has been prevented from presenting this claim at an earlier time.

**United States v. Cronic**

The inescapable question is whether the Fifth, Sixth and Fourteenth Amendments tolerate an individual charged with a capital crime to be represented by an attorney who was an active alcoholic and who suffered from polysubstance abuse. The problem however does not end there. Here, Mr. Bryan, a brain damaged person, relied upon the advice of his attorney--advice that was critically flawed--Mr. Bryan's lawyer simply did not know (or could not remember) what the State's case against his client was and consequently misinformed Mr. Bryan. This resulted in Mr. Bryan making decisions based upon critical information that was

flat wrong. This information affected many of the critical decisions Mr. Bryan had to make regarding his case. For example, the decision of whether to plead guilty or not guilty, the decision whether to testify or invoke his right to remain silent.

Without the correct information regarding his case (in fact with **affirmatively incorrect information regarding the State's case**), Mr. Bryan, a brain damged individual, on trial for his life, was clearly denied the protections of the Sixth Amendment right to counsel under Cronic. The affect was akin to the "sacrifce of unarmed prisoners to gladiators" Cronic, 466 U.S. at 657. Mr. Bryan's attorney failed to inform him of critical evidence possessed by the state. As a result, Mr. Bryan was unarmed and sacrificed.

It can hardly be said that Mr. Bryan's lawyer played that critical role necessary in the adversaial process. A client, especially a client charged with a capital crime, should be able to rely upon his or her attorney to at least know what the case is against him or her. A client should also be able to confidently rely upon their attorney's advice. Moreover, Mr. Bryan, unlike clients who may be able to detect problems with their attorney, is a brain damaged individual. Does the Sixth Amendment allow for these results?

The performance of Mr. Bryan's counsel is so inadequate that no assistance was provided and thus Mr. Bryan's Sixth Amendment

right to counsel has been denied. The scenario present in Mr. Bryan's case amounts to the denial of counsel at trial. Cronic.

**Actual Conflict of Interest**

Furthermore, Mr. Stokes created a conflict of interest to the detriment of Mr. Bryan when he handled Mr. Bryan's direct appeal.

On direct appeal, Mr. Stokes raised a Richardson violation regarding the tape recording that was referenced by the state in rebuttal to attack Mr. Bryan's testimony. This is the same tape that Mr. Stokes told Mr. Bryan did not exist. Of course, Mr. Stokes lost the Richardson violation claim on direct appeal, because Mr. Stokes memory would not allow him to rebut the argument that he knew about the tape. In fact, during the direct appeal oral argument, Mr. Stokes could only say that whether the state had actually disclosed the tape "was not his memory." The conflict of interest manifests itself in the fact that Mr. Stokes would have had to raise an issue of fundamental error of ineffective assistance of himself in the direct appeal in order to demonstrate that Mr. Bryan was denied access to a critical piece of evidence--the reason Mr. Bryan was denied the evidence was because Mr. Stokes told him it did not exist. Accordingly, Mr. Stokes' loyalties to himself and to Mr. Bryan were pitted against each other. These circumstances establish an actual conflict of interest. As shown, this conflict of interest

impaired Mr. Bryan's defense and thus he is entitled to relief. Since Mr. Bryan has shown that an actual conflict existed and that it affected his defense, prejudice is presumed.

As the United States Supreme Court stated in Cuyler v. Sullivan:

> Once the Court conluded that *Glasser's* lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributalbe to the conflict. The conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel." *315 U.S. at 76, 62 S.Ct. at 467*. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. *See Holloway, supra, 435, U.S. at 487-491, 98 S.Ct., at 1180-1182*. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *See Glasser, supra, 315 U.S. at 72-75, 62 S.Ct. at 465-467*.

Cuyler v. Sullivan, 446 U.S. 335, 349-350, 100 S.Ct. 1708, 1719 (1980).(internal footnote ommitted). See also Buenoano v. Singletary, 963 F.2d 1433, 1437 (11th Cir. 1992).

Here, Mr. Bryan has clearly shown the conflict of interest in the form of Mr. Stokes' divided loyalites. The United States Supreme Court has stated:

> **Representation of a criminal defendant entails certain basic duites. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.** See Cuyler v. Sullivan, supra, 446 U.S. at 346, 90 S.Ct. at 1717. From

> counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions **and to keep the defendant informed of important developments in the course of the prosecution.**

Strickland v. Washington, 466 U.S. 668, 688,104 S.Ct. 2052, 2056 (1984)(emphasis added). The Strickland Court also recognized that in instances of an actual conflict of interest, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties". Strickland 466 U.S. at 692. That is exactly what happened in Mr. Bryan's case. Furthermore, in Mr. Bryan's case the actual conflict of interest regarding divided loyalties is magnified exponentially compared to conflicts presented by virtue of multiple representations because here, the competing loyalty was the overriding loyalty Mr. Stokes had to himself and his own self preservation.[31]

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[31] Several rules regulating a lawyer's professional conduct are implicated by the circumstances presented here.

In failing to inform Mr. Bryan of critical evidence in the possession of the state, Mr. Stokes violated Florida Rule of Professional Conduct, 4-1.4 (b) **Duty to Explain Matters to Client**. "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Consequently Mr. Bryan was forced to make uninformed decisions.

Florida Rule of Professional Conduct 4-1.7(b) **Conflict of Interest; general rule; Duty to Avoid Limitation on Independent Professional Judgment**. "A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the

## ARGUMENT IV

**THE LOWER COURT'S FAILURE TO PROPERLY ADJUDICATE MR. BRYAN'S PUBLIC RECORDS CLAIMS AND ITS DECISION BASED THEREON TO FORCLOSE MR. BRYAN'S VALID CHALLENGE TO A FLAWED LEGISLATIVE ACT VIOLATED HIS RIGHTS UNDER THE 5TH AND 14TH AMENDMENTS OF THE FEDERAL CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND FLORIDA RULES OF CRIMINAL PROCEDURE 3.850 AND 3.851 AS WELL AS ARTICLE I, SECTION 24 OF THE FLORIDA CONSTITUTION AND CHAPTER 119 OF THE FLORIDA STATUTES.**

**Statement of the Facts Underlying Argument IV.**

On January 26, 2000, Mr. Bryan sent a request for public records to the Department of Corrections ("DOC") asking for, *inter alia*:

> any and all records, in the possession of [DOC] and <u>wherever situated</u> (including, but

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lawyer's responisbilities to another client or to a third person or by the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation". See also Comment to Florida Rule of Professional Conduct 4-1.7 "**Loyalty to a client,** Loyalty is an essential element in the lawyer's relationship to a client. Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.

Florida Rule of Professional Conduct 4-1.16 **Declining or terminating representation** (a) When Lawyer Must decline or terminate Representation. Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the represntation of a client if "(1) the representation will result in violation of the Rules of Professional Conduct or law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.

> not limited to [DOC's] administrative offices and prisons), including but not limited to all reports (both internal and generated by third parties for use by [DOC]), memoranda, emails, phone records, purchase orders, invoices, etc., dealing in any way with [DOC's] research of, plans for implementing, ordering/purchase of equipment for, determination of what combination of drugs is to be administered for (and/or identifying who will decide--or has decided--what combination of drugs is to be administered), testing of, or anything, connected in any way with lethal injection.

(emphasis in original).

On Friday, February 4, 2000, Mr. Bryan sent via Federal Express next-business-day delivery for filing with the lower court the records received from DOC in response to the above-outlined request. These records consisted of nothing more than a stack of puchase orders and a single, largely redacted document listing generalized execution day procedures. See Transcript of February 12, 2000, Hearing at 53-54 (wherein Susan Schwartz, Assistant General Counsel for DOC, agrees with the aforementioned description of the extent of DOC's public records compliance).

As is apparent from the disclosed documents, DOC's response fell woefully short of compliance with Fla. Const. Art. I, § 24 and Fla. Stat. Ch. 119.[32]

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[32] Beyond the mandates of Art. I, § 24 and Chapter 119, this Court in a recent opinion regarding the electric chair and in response to a "history" of problematic executions by DOC, directed DOC to maintain an "open file policy" by which "the results of any and all tests and any other records" regarding execution be "promptly submitted" to counsel for capital

Conspicuously absent or redacted from the initial records provided by DOC were, *inter alia*, the names of people to be involved in execution by lethal injection; the chemcial(s) to be used; the quantity of chemicals to be used; whether the injection will be done by hand or by machine; whether, if more than one chemical is to be administered, a saline wash will be used between each administration; whether the heart monitoring will include recording; travel records for trips to view other states' lethal injection procedures; directives from within or without DOC to Florida State Prison instructing them to set-up, test, employ, etc., lethal injection equipment; testing procedures for lethal injection; any departmental studies of lethal injection; any materials on lethal injection from outside sources that were

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postconviction defendants. Provenzano v. State, 739 So.2d 1150, 1154 (Fla. 1999); see also Davis v. State, 742 So.2d 233 (Fla. 1999). Furthermore, this Court in Provenzano directed DOC to maintain execution and testing procedures and to certify compliance therewith to counsel for capital postconviction defendants prior to any and all future executions. Id. Given the history of execution problems, the absence of any DOC track record regarding lethal injection (and, based upon DOC's partial public records disclosure, an apparent intention not to perform testing on lethal injection equipment), and DOC's failure still to disclose, *inter alia*, the precise quantities of chemicals they intend to use to kill Mr. Bryan, the documents garnered from other states upon which DOC's procedures are based, and notes from meetings of the DOC committee that formulated the lethal injection procedures, the lower court **should** have insisted upon strict complaince with the Florida Constitution, Chapter 119, and the opinions of this Court. However, the lower court came nowhere near proper enforcement of the law, completely ignoring it, and denying Mr. Bryan his constitutional rights to due process and public records.

utilized by DOC; minutes and/or notes from meetings of DOC's Bioethics Committee; or phone records.[33]

On February 7, 2000, undersigned faxed to the lower court a Motion to Compel Production of Public Records, to Declare Statutes Unconstitutional, and for an Evidentiary Hearing on Claimed Public Records Exemptions.

On February 8, 2000, the lower court heard legal argument regarding, *inter alia*, the extent of DOC's complaince with public records law and the legality of DOC's claimed exemptions. As was clear from testimony of DOC Deputy General Counsel, Susan Maher[34], the person in charge of collecting and disseminating public records regarding lethal injection for DOC, public records had been illegally withheld.[35]

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[33] While it has now been proven that DOC has illegally husbanded certain public records, it should also be noted that Mr. Bryan has been left speculating as to what other records continue to be withheld by DOC, as only DOC can know for certain what records they possess.

[34] It should be noted that the lower court accepted this testimony over the objection of Mr. Bryan and without placing Ms. Maher under oath, commencing the lower court's pattern of taking the state at it's word without a scintilla of proof being offered or required. See also generally Transcript of February 12, 2000, hearing; February 12, 2000, Order on Motion to Compel Production of Public Records, to Declare Statutes Unconstitutional, and for an Evidentiary Hearing on Claimed Public Records Exemptions.

[35] In light of the fact that trial courts have never imposed the statutory sanctions for agency violations of public records law in a capital postconviction case, rendering what is intended to be a puissant deterrent to future transgressions of constitutional rights toothless in the capital postconviction context, it is of special import that this Court remand and order

On February 12, 2000, an evidentiary hearing was held at which counsel for Mr. Bryan were allowed to question DOC employees in an effort to discover improperly withheld public records dealing with lethal injection.

Approximately three (3) hours after the three-and-a-half hour hearing, at which the lower court displayed an extreme lack of familiarity with the already voluminous record (including at least two pleadings)[36], the lower court entered an Order erroneously denying Mr. Bryan relief on any of his public records claims--inexplicably including the one asking for the hearing that had just been held.

On Monday February 14, undersigned faxed to the lower court a Motion for Rehearing, outlining in detail the spate of errors committed by the lower court in it's over-hasty Order.

On February 15, the Attorney General filed a sparse Response to the Motion for Rehearing.

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DOC to comply and satisfy Mr. Bryan's constitutional right to public records access.

[36] See, e.g., Transcript of February 12, 2000, Hearing at 34-35 (wherein the court asks if the redacted DOC protocol, which had been filed with the court by Mr. Bryan on February 8, had been turned over to counsel for Mr. Bryan); see also Transcript of February 12, 2000, Hearing at 139 (wherein the lower court reveals that it is unaware that **three** envelopes of the substance-abuse treatment records of Mr. Bryan's trial attorney were sealed and in the court file, notwithstanding the fact that pleadings filed by undersigned **and** the trial attorney were copied to the lower court).

On February 18, undersigned filed with this Court a Petition for Writ of Mandamus asking this Court to order the lower court to rule on Mr. Bryan's Motion for Rehearing,[37] simultaneously faxing the Petition to the lower court.

Approximately 30 minutes after receiving the Petition, the lower court faxed his error-fraught Order on the Motion for Rehearing to undersigned, who immediately filed a Notice of Appeal with this Court.

**A. The lower court's February 12, 2000 Order on Motion to Compel Production of Public Records, to Declare Statutes Unconstitutional, and for an Evidentiary Hearing on Claimed Public Records Exemptions was fraught with error and denied Mr. Bryan due process of law under the 5th and 14th Amendments to the Federal Constitution and the corresponding provisions of the Florida Constitution.**

**I. The lower court erred in its failure to order disclosure of the records to which Mr. Bryan is entitled and which are necessary for Mr. Bryan to plead the claims which the law entitles him to plead.**

In a portion of the February 12, 2000, Order correctly stating the law, the lower court wrote:

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[37] Though Mr. Bryan had previously condemned the lower court's rash rulings, the lower court's delay in ruling on Mr. Bryan's Motion for Rehearing was by that time infringing upon Mr. Bryan's appellate rights, so the Petition was necessary. Further, it seemed to counsel for Mr. Bryan that the lower court--particularly if it had given the constitutionally-required thought before entering the challenged Order--could easily have ruled upon a Motion for Rehearing in fewer than three-and-a-half days.

> The public records law expressly states that "[i]t is the policy of this state that all state, county, and municipal records shall be open for inspection by any person." City of St. Petersburg v. Romine ex. rel. Dillinger, 719 So.2d 19, 21 (Fla. 2d DCA 1998)(quoting § 119.01, Florida Statutes (1999)) [sic]. Accordingly, the public records law "is to be construed liberally **in favor of openness**, and **all exemptions** from disclosure **are to be construed narrowly** and limited to their designated purpose." Id. (quoting City of Riviera Beach v. Barfield, 642 So/2d 1135, 1136 (Fla. 4th DCA 1994)). In addition, the governmental agency that claims an exemption has the burden of **proving** the right to that exemption. See Florida Freedom Newspapers, Inc. v. Dempsey, 478 So.2d 1128, 1130 (Fla. 1st DCA 1985).

February 12, 2000, Order at 2 (emphasis added). However, the lower court, after properly stating the law, failed to apply it.

In the second full paragraph of the February 12, 2000, Order's second page, the lower court stated, "There was no substantial challenge at the evidentiary hearing to the validity of [DOC's] claimed exemptions relative to the 'Execution team.'" However, if one reads the transcript (which was unavailable to anyone--including the court--until nearly 24 hours after the Order was entered), it is apparent that this is patently incorrect. See Transcript of February 12, 2000, Hearing at 10-11, 14-18, 27-30, 32-34, 37-38, 40-41, 44-47 (making a total of **22** pages wherein Mr. Chester more-than-substantially challenges the validity of DOC's claimed exemptions relative to the "Execution Team"--the overbreadth of which are discussed *infra*).

Apparently, in the lower court's haste to get an Order out within three hours after a three-and-a-half-hour hearing, it must have overlooked this testimony.

The lower court went on to say, "The Department met its burden of proving the exemption as to the 'Execution Team' and the travel records associated with the team members." Unfathomably, the lower court made this statement notwithstanding the facts that: 1) DOC had unconstitutionally broadened the definitions of §§ 922.106 and 922.10 (unconstitutionally exempting only the executioner and the person[s] "prescribing, preparing, compounding, dispensing, or administering the lethal injection") to include anyone remotely connected with the execution in any way, 2) DOC voluntarily revealed the identity of one of the team members (William Matthews), 3) DOC could cite **no** out-of-state law that made team members' notes exempt, and 4) counsel for DOC agreed with counsel for Mr. Bryan that any agreement to keep such notes confidential "needs to be in a written contract in order to honor representations that this information would be kept confidential," but no such agreements were ever produced. See Fla. Const. Art. I, § 24; Fla Stat. §§ 922.10 and 922.106; Transcript of February 12, 2000, Hearing at 18. Furthermore, the lower court cited to nothing in making this determination--neither the record, statutes, nor case law--because there was nothing to which the lower court could have

cited to support this clearly erroneous conclusion. The only proper course for the lower court was to require disclosure and to conduct an *in camera* inspection. See, e.g., Walton v. Dugger, 634 So.2d 1059, 1061 (Fla. 1993) ("When...statutory exemptions are claimed by the party against whom public records requests have been filed..., the proper procedure is to furnish the document to the trial judge for an in camera inspection."); Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993) (holding that an *in camera* inspection was required even where a state attorney had "no doubt" that the records it concealed were work product)

During the period of Mr. Bryan's last warrant, on October 21, 1999, the lower court, even though he had already denied Mr. Bryan's Motion for Postconvition Relief and Mr. Bryan was scheduled to be killed by the State of Florida in six days, "Ordered and adjudged that those agencies listed on the [pending] Motion to Compel shall disclose their records pursuant to Chapter 119 and relevant case law." Since then, apparently, the lower court has had a change of heart regarding the meanings of Fla. Const. Art. I, § 24, Fla. Stat. Ch. 119, and this Court's opinions.

Notwithstanding the fact that, at present, Mr. Bryan is still engaged in the public records discovery process necessary to formulate his claims for postconviction relief, the lower court, in its February 18, 2000, Order on Mr. Bryan's Motion for

Rehearing, concluded that, "[i]rrespective of the correctness of this Court's reasons for upholding the DOC's claimed public records exemptions, Bryan has not demonstrated that the documents he seeks would likely entitle him to any ultimate relief."

The change in the lower court's position is curious: in October of 1999, after it had already ruled that **the claims that had been before it** warranted no relief, it still followed the law and ordered public records production; now, while Mr. Bryan is in the process of gathering the information necessary to properly plead his valid claims for relief **which were not yet before the lower court** (due to the lower court's countenancing the State's and Mr. Bryan's trial attorney's efforts to conceal relevant information) and no motion for relief has even been filed, the lower court has determined that the records he has not seen will not support the claims he has not seen--and that this "fact" renders Florida's public records law meaningless. This illogical reversal of position--from following the law though no prospect of relief was apparent to ignoring the law where following it was necessary to protect Mr. Bryan's right to due process--cannot be endorsed by this Court.

Furthermore, in stating "Bryan has not demonstrated that the documents he seeks would likely entitle him to any ultimate relief," the lower court utilized a standard much higher than that required by Fla. R. Crim. P. 3.852(l) (requiring that public

records sought by a capital postconviction defendant "are either relevant to the the subject matter of the proceeding under rule 3.850 or 3.851 **or are reasonably calculated to lead to the discovery of admissible evidence**"); see also Ventura v. State, 673 So.2d 479, 481 (Fla. 1996) ("a defendant should be allowed to amend a previously filed rule 3.850 motion after reuqested public records are finally furnished).

Due process requires meaningful access to public records. Teffeteller v. Dugger, 676 So.2d 369 (Fla. 1996); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994); Holland v. State, 503 So.2d 1354 (Fla. 1987); Huff v. State, 622 So.2d 982 (Fla. 1993).

When a state agency claims the benefit of a public records exemption, the agency bears the burden of having to **prove** the right to an exemption. See, e.g., Barfield v. City of Ft. Lauderdale, 639 So.2d 1012, 1015 (Fla. 4th DCA), rev. denied, 649 So.2d 869 (Fla. 1994). Hence, agents of DOC should have been made to prove at the February 12, 2000, hearing that they had a right to the exemptions they claimed. They were never made to do so, yet the lower court--on, at best, unsubstantiated representations of counsel and, at worst, nothing at all--upheld each and every one of the exemptions DOC claimed.[38]

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[38] The error of the lower court is apparent when comparing its Order with the transcript of the February 12, 2000, hearing:

> The Department does have lethal injection protocols or manuals from several other

## II. The lower court erred in relying on this Court's findings in the Sims case because the facts revealed at the February 12, 2000, hearing in Mr. Bryan's case were in direct conflict with those revealed in Sims.

In its February 18, 2000, Order on Mr. Bryan's Motion for Rehearing, the lower court wrote, "the Florida Supreme Court recently addressed the DOC's lethal injection procedures in a related case and stated:

> From our review of the [Sims] record, we find that DOC has established procedures to be followed in administering the lethal injection and **we rely on the accuracy of the testimony by the DOC personnel** who explained

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> states that the Defendant has requested, but these documents are either privileged work product of the Department's legal counsel or exempt by express agreement as confidential under the laws of the sending state.

February 12, 2000, Order.

The problem with the aforementioned statement is multifold: 1) counsel for DOC cited **no** out-of-state law under which these items would be confidential, thus, they failed to carry **any** burden of proof; 2) the court cited no out-of-state law to support its conclusion; 3) the court refers to an "express agreement" between DOC and other states, however, counsel for DOC equivocally testified about whether any agreements even existed and admitted that she had no idea whether there even was an agreement between Florida and Arizona or Ohio (Transcript of February 12, 2000, hearing at 170-171); 4) counsel for DOC admitted that a written agreement was required to prove that a confidentiality agreement existed, yet produced none (Transcript of February 12, 2000 hearing at 18); and 5) counsel for DOC admitted that she had no idea whether Arizona or Ohio had any laws that would make their manuals confidential (Transcript of Febraury 12, 2000, hearing at 170-171).

In short, a comparison of the Order and Transcript demonstrates that lower court's clearly erroneous ruling was based upon supposition with no supporting evidence and must be reversed.

> such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection **as attested** do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Sims v. State, Nos. SC00-295, SC00-297, slip op. at 24 (Fla. Fab. 16, 2000)."

Though DOC may have provided uncontroverted testimony in the Sims case, at the February 12, 2000, hearing in Mr. Bryan's case, the glaring contradictions in testimony **on topics testified to at the Sims hearing** by DOC personnel along with the admission that DOC legal staff instructed departmental employees to leave no paper trail in order to avoid any legal challenges to lethal injection procedures combine to illustrate one of two inescapable conclusions: either DOC is so confused about the procedure due to an intentional lack of written guidelines that each member of the department has a different (and, hence, unreliable) understanding of how the procedure is to be effectuated, or DOC made intentional misrepresentations to the lower court. In either event and unlike the evidence gathered in the Sims case, what follows demonstrates why the "accuracy" of DOC personnel's testimony is no longer to be relied upon.[39]

The lower court, in its February 12, 2000, Order stated:

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[39] It should be noted that the lower court **in no way ruled upon the credibility of DOC witnesses** and, hence, the standard of review for this Court to follow is a ***de novo*** inspection of the February 8 and 12, 2000, transcripts.

> The Defendant is obviously frustrated by the absence of a significant paper trail leading up to the Department's adoption of its "Execution Day Procedures" to be used for lethal injection.... The Department has had meetings, established a protocol and is continuing to test its procedures, but it has also minimized the production of a document trail of written directives, testing methodology, studies of lethal injection or minutes or notes from meetings.

February 12, 2000, Order at 2-3. What the lower court neglected to mention is that, not only is Mr. Bryan frustrated by the lack of public records, but so is the spirit of Fla. Const. Art. I, § 24 and Fla. Stat. Ch. 119. Cf. Provenzano v. State, 739 So.2d 1150 (Fla. 1999); Davis v. State, 742 So.2d 233 (Fla. 1999); Wisner v. City of Tampa Police Department, 601 So.2d 296 (Fla. 2d DCA 1992); Tober v. Sanchez, 417 So.2d 1053 (Fla. 3d DCA 1982).

Assuming *arguendo*, that DOC is not concealing any notes or records, and that they, in fact, conducted the business of implementing lethal injection without taking any notes, the reasons for this are twofold: 1) DOC legal staff instructed those involved in the planning and implementation of lethal injection not to write anything down so that legal challenges could be avoided and 2) DOC placed a lawyer on the committee charged with adopting and implementing lethal injection procedures, put all documents in her hands, then claimed an as-yet-unproven work-product exemption. See Transcript of February 12, 2000, hearing at 67 and 128-130 (wherein Warden **Crosby testifies that counsel**

**for DOC urged him not to put anything in writing** in order to avoid discovery) and compare with Transcript of February 12, 2000, hearing at 26 (wherein Ms. **Maher, DOC deputy general counsel testifies that no one in the meetings** (attended by both her and Warden Crosby) **told anyone not to take notes**); compare, e.g., also Transcript of February 12, 2000, hearing at 29-38 (wherein Ms. **Maher states that she served on the committee promulgating the lethal injection procedures as a sort of "secretary," then claims that since she is a lawyer, all documents describing lethal injection procured from sources from outside DOC are in her files, were for her own personal use, and are non-discoverable work product (which the court has refused to review *in camera*,** ignoring all law regarding attorney work-product)) with Transcript of February 12, 2000, hearing at 162 (wherein Secretary **Moore states that the members of the DOC legal staff who served on the committee** promulgating lethal injection procedures were not there only to offer legal advice, but they **were also "part of the meeting and ideas**"); cf. Transcript at 161 (wherein Secretary **Moore states that "It would be unusual" for no one to have taken notes at the meetings held to plan lethal injection**).

Beyond creating a conspiracy of silence designed to contravene public records law, the inconsistency in the testimony

of DOC employees can give rise to nothing but the conclusion that, even if they are not attempting to conceal public records 1) DOC testimony is unreliable and 2) full disclosure of the records that Mr. Bryan needs and to which he is constitutionally entitled have been withheld. See generally Transcript of February 12, 2000, hearing; e.g., compare Transcript of February 9, 2000, hearing in State v. Sims at 81 (wherein **Warden Crosby states that he is unsure** whether six or eight syringes are to be used ) with Transcript of February 12, 2000, hearing at 141 (wherein **Crosby testifies that he doesn't know** how many syringes are to be used) with Transcript of February 10, 2000, Transcript in Sims (wherein Secretary of DOC **Moore testifies that Crosby is the one person entrusted to know everything** about the lethal injection process); compare Transcript of February 12, 2000, hearing at 51 (wherein Susan **Schwartz states** that **she asked no one other than Susan Maher** for public records) with Transcript of February 12, 2000, hearing at 10 (wherein Ms. **Maher states that Ms. Schwartz sought public records from DOC employees** studying lethal injection in Virginia) and Transcript of February 12, 2000, hearing at 8 (wherein Ms. **Maher states that she sought public records from** everyone on the lethal injection **committee on which Stan Czerniak served**) and Transcript of February 12, 2000, hearing at 24 (wherein Ms. **Maher states that she never contacted**

**Mr. Czerniak but Ms. Schwartz may have**); compare Transcript of February 9, 2000, hearing at 21 (wherein Ms. **Maher states** "We have no minutes or notes from any meetings of a bio-ethics committee. To my knowledge **no bio-ethics committee has sat**.") with Transcript of February 12, 2000, hearing at 144 (C.J. **Drake's testimony that** late **last year he forwarded a request for records from the Bioethics Committee to Susan Maher's office**) and Transcript of February 12, 2000, hearing at 19 (wherein Ms. **Maher states that no records from the Bioethics Committee are missing**) and Transcript of February 12, 2000, hearing at 51 (wherein Ms. **Schwartz, who works for Ms. Maher, acknowledges that Bioethics Committee minutes had been destroyed** by acknowledging that she has not yet finished determining which Bioethics Committee records were inadvertently destroyed); compare Transcript of February 12, 2000, hearing at 44 (wherein Ms. **Maher testifies that she has identified physically or through testimony all records regarding lethal injection in the possession of DOC**) with Transcript of February 12, 2000, hearing at 146 (wherein C.J. **Drake reveals that DOC possesses lethal injection manuals from two states--Arizona and Ohio--that Ms. Maher failed to disclose** when asked **under oath** to do so) and Transcript of February 12, 2000, hearing at 153 (wherein Mr. Drake testifies that no one from Legal asked him to send them lethal injection records) and

Transcript of February 12, 2000, hearing at 169 (wherein Ms. **Maher (upon being recalled) admits that she was aware of** and may possess **the Ohio manual** which she failed to disclose under oath); compare Transcript of February 12, 2000, hearing at 160 (wherein Secretary **Moore testifies that he doesn't take notes while on the phone**, that he stores the information "in [his] mind") with Transcript of February 12, 2000, hearing at 167 (wherein Secretary **Moore admits to testifying from notes that he took while on the phone**).

### III. The lower court erred in finding Fla. Stat. §§ 945.10(1)(e), 922.10, and 922.106 to be constitutional.

Section 945.10(1)(e) states:

> Confidential information.--Except as otherwise provided in this section, the following records and information of the Department of Corrections are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution:.... (e)Information which if released would jeopardize a person's safety.

Article II, section 3 of the Florida Constitution provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

"The prohibition contained in the second sentence of Article II, section 3 of the Florida Constitution could not be plainer, as [the Florida Supreme Court's] cases clearly have held. [The

Florida Supreme Court] has stated repeatedly and without exception that Florida's Constitution absolutely requires a `strict' separation of powers." B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994). This "strict separation" means "the legislature is not free to redelegate to an administrative agency so much of its lawmaking power as it may deem expedient." Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978).

Article I, § 24 of the Florida Constitution states in relevant part:

> Section 24. Access to public records and meetings
>
> (a) Every person **has the right** to inspect or copy **any** public record made or received in connection with the official business of **any** public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.
>
> * * *
>
> (c) This section shall be self-executing. **The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a)** and the exemption of meetings from the requirements of subsection (b), **provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish**

> **the stated purpose of the law**. . . . Laws enacted pursuant to this section shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

In § 945.10(1)(e), the legislature has granted DOC the authority to create public records exemptions with a single, nebulous "guideline": that the release of records would jeopardize a person's safety. The breadth of discretion afforded DOC is virtually standardless[40], and certainly beyond the "no broader than necessary" mandate of the Florida Constitution.[41] Hence, the Legislature has unlawfully delegated the authority vested in them by the Florida Constitution to an administrative agency and, as such is the case, the statute must fall.[42] See,

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[40] The legislature has provided one small clue for interpreting § 945.10(1)(e): their passage of § 922.10 (exempting the identity of the executioner). And while DOC is given virtually unfettered discretion under § 945.10(1)(e), one thing is clear: at the very least, a reading of § 922.10 *in pari materia* with § 945.10(1)(e) shows that the Legislature did not intend for DOC to have the authority to exempt anyone or anything involved in an execution **other than the executioner**. If the Legislature had intended otherwise, § 922.10 would have specified "the execution team" or "the execution procedures." Whereas no such language is included in § 922.10, DOC is obviously precluded from exempting such information.

[41] While no purpose for the exemption is stated in the statute, as is constitutionally required, the breadth of this exemption is beyond that necessary for any potentially intended purpose.

[42] The impropriety of the overbroad delegation of legislative authority in § 945.10(1)(e) is even more apparent when compared with the properly specific exemptions created in other subsections of § 945.10(1). Cf. § 945.10(1)(a) ("Mental

e.g., Clark v. State, 395 So.2d 525 (Fla. 1981) (finding a statute a reasonable delegation of authority because the only discretion the legislature left to DOC in a statute forbidding contraband to brought into a prison was the designation of points of ingress and egress, while the legislature defined--and listed--contraband; cf. Solimena v. DBPR, 402 So.2d 1240 (Fla. 3d DCA 1981) (stating as the basis for upholding a more detailed statute than those attacked here the "recognized exception to the requirement that the legislature expressly enunciate guidelines and standards occurs in licensing and in hte determination of the fitness of license applicants");

Furthermore, **nowhere** in § 945.10 did the Legislature "**state with specificity the public necessity justifying the exemption**." Where the Legislature enacts a public records exemption without following the express provisions of Art. I, § 24, the statute must be found unconstitutional. Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So.2d 373, 380 (Fla. 1999) (Wells, J., writing for a majority of six) ("[W]e believe that **an exemption** from public records access **is available only after the legislature has followed the express procedure provided in**

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health, medical, or substance abuse records of an inmate or offender."); § 945.10(1)(b) ("Preplea, pretrial investigation, and presentence or postsentence investigative records...."); § 945.10(1)(c) ("Information regarding a person in the federal witness protection program."); § 945.10(1)(f) ("Information regarding a victim's statement and identity.").

**article I, section 24(c) of the Florida Constitution**.") (emphasis added) (footnote citing to Fla. Const. Art. I, § 24 omitted).

In passing § 922.10, the Legislature, as with § 945.10(1), failed to "**state with specificity the public necessity justifying the exemption**." See § 922.10 (2000). Worse still, the legislature stated **no** public purpose whatsoever--much less the specific articulation of public necessity required by the Florida Constitution.[43] Therefore, this Court must follow the mandates of the Florida Supreme Court and the Florida Constitution and find § 922.10 unconstitutional. Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., supra; Fla. Const. Art. I, § 24.

### B. The lower court erred in foreclosing Mr. Bryan's Eighth Amendment challenge to DOC's lethal injection procedures.

In its Order on Mr. Bryan's Motion for Rehearing, the lower court wrote "...the Florida Supreme Court recently addressed the DOC's lethal injection procedures in [Sims] and stated:

> [...] **we rely on the accuracy of the testimony by the DOC personnel** who explained

[43] The Legislature neglected to specifically state the public necessity for this exemption because there is no such public necessity. In fact, when one considers a patient's right to know whether his or her medical practitioner is participating in the taking of a life, or whether their doctor or nurse has botched the procedure of lethal injection (as has often happened across the U.S.), or the fact that our state has established boards and agencies (e.g., the Department of Health and the Agency for Health Care Administration) charged with protecting public safety by montioring the practices of medical professionals, one finds the opposite to be true: the public necessity is in disclosing, not hiding, the identity the Legislature has sought to conceal.

> such procedures at the hearing below. **Thus, we conclude that the procedures** for administering the lethal injection **as attested do not violate the Eighth Amendment**'s prohibition against cruel and unusual punishment."

(citations omitted) (emphasis added).

As was discussed, *supra*, in section A(II) of this Claim, the accuracy of DOC personnel's testimony can no longer be considered reliable. Hence, the foundation beneath this Court's ruling in Sims has been razed, and the conclusion which stood thereon--that lethal injection does not violate the Eighth Amendment--now lies in ruin.

Furthermore, even if this Court disagrees with the conclusion that DOC's testimony is patently unreliable, Mr. Bryan should have been allowed by the lower court to attack the fatally flawed legislative Act adopting lethal injection because, though, in Sims, this Court passed judgment on Mr. Sims' arguments regarding lethal injection, several valid and compelling arguments which demonstrate the unconstitutionality of the Act were never before this Court.

### C. The Legislature's Act adopting lethal injection is fatally flawed and, of necessity, must be struck down as unconstitutional under controlling case law and the Florida Constitution.[44]

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[44] It should be noted that the Act adopting lethal injection, unlike its counterpart the Death Penalty Reform Act of 2000 ("DPRA"), contains **no** severability clause. Therefore, as it is clear that the Legislature knew of their ability to include a

## I. The Legislature erased the line between the legislative and Judicial Branches in gross violation of Article II, § 3[45] of the Florida Constitution.

"The prohibition contained in the second sentence of Article II, section 3 of the Florida Constitution could not be plainer, as [the Florida Supreme Court's] cases clearly have held. [The Florida Supreme Court] has stated repeatedly and without exception that Florida's Constitution absolutely requires a `strict' separation of powers." B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994).

Sections 922.105(3), (4), and (5) **all** exceed the Legislature's power in violation of Fla. Const. Art. II, § 3, in that the Legislature is performing constitutional interpretation which is the exclusive domain of the judiciary. Marbury v. Madison, 5 U.S. 137 (1803); Commission on Ethics v. Sullivan, 489 So.2d 10 (Fla. 1986) ("The judicial power is defined by the declaration of policy as follows: The judicial branch has the

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severability clause, but chose not to do so, that they did not intend to protect any portion of the lethal injection Act if another portion thereof was found to be unconstitutional. Therefore, and in light of the arguments to follow, this Court should strike down the Act in its entirety.

[45] Article II, § 3 states:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

purpose of...adjudicating any conflicts arising from the interpretation or application of the laws. In perhaps the most famous characterization of the judicial power, Chief Justice John Marshall said: 'It is emphatically the province and duty of the judicial department to say what the law is.'") (internal citations omitted) (citing Marbury); Mikolsky v. Unemployment Appeals Commission, 721 So.2d 738 n. 2 (Fla. 5th DCA 1998) ("The fact that interpreting the law is a uniquely judicial function has been firmly established since at least 1803....") (citing Marbury); State v. Shaktman, 389 So.2d 1045 (Fla. 3d DCA 1980) ("The statutory law, both federal and state, appears to authorize the subject electronic eavesdropping. These statutes, however, do not and cannot resolve the constitutional issue posed by this case as it is settled that constitutional issues are solely for the courts to determine.... Thus, the constitutional issue under discussion remains before us as unresolved as ever.") (citing Marbury and Corn v. State, 332 So.2d 4 (Fla. 1976)) (statutory citations omitted). Therefore, there is no logical conclusion other than that this Court should strike down §§ 921.105(3), (4), and (5)[46] as violative of the Florida Constitution.

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[46] One need not look beyond the 2000 special legislative session to understand that the Legislature is herein attempting to circumvent the Savings Clause of the Florida Constitution; their knowledge that said clause is violated by a retrospective change in execution method is betrayed by the concurrently enacted Death Penalty Reform Act of 2000 which prohibits trial courts from any longer specifying a particular method of

**II. The Legislature has attempted to amend the Florida Constitution without following the procedures required for so doing.**

Sections 922.105(3), (4), and (5) state:

> (3) If electrocution or lethal injection is held to be unconstitutional by the Florida Supreme Court under the State Constitution, or held to be unconstitutional by the United States Supreme Court under the United States Constitution, or if the United States Supreme Court declines to review any judgment holding a method of execution to be unconstitutional under the United States Constitution made by the Florida Supreme Court or the United States Court of Appeals that has jurisdiction over Florida, all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution.
>
> (4) The provisions of the opinion and all points of law decided by the United States Supreme Court in Malloy v. South Carolina, 27 U.S. 180 (1915), finding that the Ex Post Facto Clause of the United States Constitution is not violated by a legislatively enacted change in the method of execution for a sentence of death validly imposed for previously committed capital murders, are adopted by the Legislature as the law of this state.
>
> (5) A change in the method of execution does not increase the punishment or modify the penalty of death for capital murder. Any legislative change to the method of execution for the crime of capital murder does not violate s. 10, Art. I or s. 9, Art. X of the State Constitution.

Sections 922.105(3) and (4) attempt to change state constitutional law in violation of the procedures governing such

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execution when imposing a sentence of death.

changes. See Smathers v. Smith, 338 So.2d 825, 831 (Fla. 1976) ("'The people of the state have a right to amend their Constitution, and they also have a right to require proposed amendments to be agreed to and submitted for adoption in the manner prescribed by the existing Constitution, which is the fundamental law....'") (citing Crawford v. Gilchrist, 59 So. 963 (Fla. 1912); see also generally Fla. Const. Art. XI ("Amendment"); cf. Fla. Const. Art. I, § 12. Therefore, §§ 922.105(3) and (4) must be struck down as unconstitutional.

### III. The Legislature violated the Florida Constitutional provisions prohibiting "special laws."

Florida Stat. § 922.105(2) (2000) states in relevant part:

> Execution of death sentence...--A person convicted and sentenced to death for a capital crime shall have one opportunity to elect that his or her death sentence be executed by electrocution.... [I]f mandate issued before the effective date of this act, the election must be made and delivered to the warden within 30 days after the effective date of this act....

This portion of § 922.105(2) applies only to specific individuals who were known to the Legislature at the time the section was passed: death-sentenced inmates whose sentences were final prior to the law's passage. Hence, as the Florida Supreme Court has held for over 60 years--and has in recent years been restated by the District Court of Appeal controlling this circuit--it is a special law. State v. Lewis, 368 So.2d 1298, 1301 (Fla. 1979)

("A statute relating to particular persons or things or other particular subjects of a class is a special law."); State ex rel. Gray v. Stoutamire, 179 So. 730, 733 (Fla. 1938) ("[A] statute relating to particular persons or things or other particular subjects of a class, is a 'special law.'"); State v. Leavins, 599 So.2d 1326, 1331 n.10 (Fla. 1st DCA 1992) (same) (citing State v. Stoutamire).

Florida Const. Art. III, § 11(a)(4) states:

> There shall be no special law or general law of local application pertaining to:...punishment for crime....

As illustrated *supra*, § 922.105(2) is a special law. The only reading to which it is susceptible is that it pertains to punishment for crime. Hence, § 922.105(2) is in clear violation of Fla. Const. Art. III, § 11(a)(4) and must be struck down under precedent governing this Court.

**IV. The Legislature has unlawfully overruled constitutional case law regarding knowing and voluntary waiver of fundamental rights.**

In §§ 922.105(1) and (2), the Legislature purports to create a situation whereby Mr. Bryan was to have "elected" to be executed and disfigured in the electric chair within 48 hours of his execution being scheduled or else be considered to have, by statute, waived such an "election" and be given a potentially lethal injection administered by an untrained, unskilled, unknown DOC death squad who has no written procedures to follow.

"Superadd[ing]" to Mr. Bryan's original sentence the terror this "choice" engenders violates the Eighth Amendment and the Ex Post Facto Clause. In re Medley, 134 U.S. 160, 171, 172 (1890).

As Justice Wells recently noted, "A change to lethal injection for inmates **may be** legally attainable based upon an **express waiver** by the prisoner of **any contest** to the method of execution." Provenzano v. Moore, 744 So.2d 413, 419 (Fla. 1999) (Wells, J., concurring). Mr. Bryan has made no such waiver.

To presume that a person has waived one thing and elected another by being silent is, at best, intellectual dishonesty. Mr, Bryan did not, and still does not, know his options and he has never acted in such a way that would legally allow a valid choice or waiver to be found. If, contrary to Mr. Bryan's position, the new legislation applies to him, he had only 48 hours from sometime on January 26th to make an "election." However, DOC had no lethal injection procedures whatsoever in effect until after that 48-hour period had passed.[47]

Furthermore, by relying on the instant unconstitutional statute, the State cannot meet its burden of establishing a valid waiver because **none** of the procedural requirements for waiving a

[47] It should be noted here that these first "procedures" released by DOC gave Mr. Bryan absolutely no useful information from which to make any "election." Furthermore, what DOC has revealed to date to Mr. Bryan would still fall far short of the quantum of information required for him to make any informed choice.

fundamental right is included in §§ 922.105(1) and (2). A waiver of a fundamental constitutoinal right **must** comport with stringent procedural requirements--a fact that the Legislature is not at liberty to change. Such a right may **only** be deemed waived after a court has determined that the decision to waive the right is knowing and voluntary. See, e.g., Godinez v. Moran, 509 U.S. 389, 400 (1993). Courts are obligated to embark upon this "serious and weighty responsibility" precisely because of the import of the constitutional rights involved. Johnson v. Zerbst, 304 U.S. 458, 465 (1938); see also Schneckloth v. Bustamente, 412 U.S. 218, 237-38 (1973) (fundamental rights include rights to counsel, both at trial and upon a guilty plea; right to confrontation; right to a jury trial; right to a speedy trial; and right to be free from double jeopardy). The waiver **must** appear on the record. Johnson v. Zerbst, 304 U.S. at 465; see also, United States v. Christensen, 18 F.3d 822, 824 (9th Cir. 1994). A waiver can be accepted **only** after the person has had the opportunity to consult with counsel. See, e.g., Brady v. United States, 397 U.S. 742, 748 n.6 (1970).

"The purpose of the 'knowing and voluntary' inquiry...is to determine whether the defendant actually does understand the significance and consequences of a particular decision **and**

**whether the decision is uncoerced**."[48] Godinez, 509 U.S. at 401 n.12; see also Boykin v. Alabama, 395 U.S. 238, 243 (1969) ("Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."). Thus, before a waiver can be found to be "knowing" and "intelligent," a court **must** apprise the person "of the dangers and disadvantages" of waiver and ensure "that the record...establish[es] that 'he knows what he is doing and his choice is made with eyes open'." Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. U.S. ex rel. McCann, 317 U.S. 269, 279 (1942)); Boykin, 395 U.S. at 244. To verify that the waiver is "voluntary," the court **must** consider whether, in the totality of the circumstances, it was obtained "by physical or psychological coercion or by improper inducement so that the [individual's] will was overborne." United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988). The coercive power of the law exceeds well beyond the physical or psychological power discussed in Guerrero, hence, § 922.105(1) and (2) must be found unconstitutional.

**V. The Legislature has unlawfully created a retroactive change in punishment in violation of the Ex**

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[48] There can be absolutely no question that a choice may for one by statute is the **pinnacle** of coercive behavior akin to such constitutionally offensive legislative enactments as a bill of attainder.

**Post Facto Clause of the Federal Constitution and the Savings Clause of the Florida Constitution.**

The substance of the Florida Constitution's prohibition on retroactive application of criminal statutes was clearly established at the time of the crime for which Mr. Bryan was wrongfully convicted and sentenced to die by electrocution. The law was and remains (1) amendment or repeal of a criminal statute could not be applied to a crime committed before a change in the law, Fla. Const. Art. I, § 9, and (2) a change in a method of execution falls within this **constitutional** rule of non-retroactivity. Washington v. Dowling, 109 So. 588, 589 (Fla. 1926) (decided **after** Malloy v. South Carolina, 237 U.S. 180 (1915)) ; Ex parte Browne, 111 So. 518 (Fla. 1927) (same).

Under these consitutional rules of Florida law, the recent adoption of lethal injection as a method of execution **cannot** be applied to Mr. Bryan. These rules have remained in place for three-quarters of a century. If this Court were to now change this stalwart principle of Florida constitutional law and apply the unconstitutional statute at issue here to Mr. Bryan, such an action would violate his federal constitutional right to due process and the prohibition on ex post facto laws.[49]

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[49] Though in the Febraury 16, 2000, opinion in Sims v. State, this Court held that the change from electrocution to a retroactive "election" statute was not "the type of legislative change[] at issue" in Washington v. Dowling, Mr. Bryan respectfully submits that the Court should reconsider this opinion.

**VI. The Legislature has unlawfully delegated its authority in violation of Article II, § 3 of the Florida Constitution.**

The recent amendments to Fla. Stat. §§ 922.10 and 922.105 purport to change Florida's method of execution to "lethal injection." These statues vest in the Department of Corrections ("DOC") the authority to determine exactly what the lethal mixture will be and how it will be administered. Furthermore, DOC is granted the authority to determine whether a method of execution has been properly elected or "defaulted" by an inmate.

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Contrary to the Sims opinion, in Washington, this Court's reasoning **in no way relied upon the *type* of change** at issue; the analysis was simply a two-step process: (1) asking the question, "is the statute a criminal statute?" and then, if the answer was, "yes," (2) finding that any change thereto was a violation of the Florida Consitution. This fact seems to have been overlooked by the Court in Sims, as this analysis would have produced an identical result: that the lethal injection statutes cannot, under the Florida Constitution, be applied to Mr. Sims or Mr. Bryan.

Furthermore, this Court and the District Courts of Appeal have relied upon Washington in subsequent cases, some of which preclude a defendant from receiving the **benefit** of a criminal statutory change. As the Court seems to imply in Sims that the lethal injection legislation somehow provides Mr. Bryan a "benefit," the holdings of Washington and its progeny dictate, using the **exact same** logic as the Sims opinion, that the statute at issue here cannot be applied retroactively unless this Court explicitly overrules Washington and its progeny *in toto*. See, e.g., Castle v. State, 330 So.2d 10 (Fla. 1976) (defendant was not to be sentenced in conformity with an amendment to a criminal statute adopted after the date of the offense); Pizarro v. State, 383 So.2d 762 (Fla. 4th DCA 1980) (on rehearing) (trial court was precluded from imposing sentence under an act that did not exist when the crime occurred); Bradley v. State, 385 So.2d 1122 (Fla. 1st DCA), rev. denied, 392 So.2d 1372 (Fla. 1980) (same). Anything less is patently illogical.

These broad concessions of agency discretion constitute unlawful delegations of legislative authority to an executive agency.

"The prohibition contained in the second sentence of Article II, section 3 of the Florida Constitution could not be plainer, as [the Florida Supreme Court's] cases clearly have held. [The Florida Supreme Court] has stated repeatedly and without exception that Florida's Constitution absolutely requires a `strict' separation of powers." B.H. v. State, supra, at 991. This "strict separation" means "the legislature is not free to redelegate to an administrative agency so much of its lawmaking power as it may deem expedient." Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978). In the statutes at issue, the Legislature has granted DOC the authority to put people to death by a "lethal injection" without further explanation, has exempted from the definition of the practice of medicine the person who will administer the "lethal injection," and has divested the executive agency responsible for regulating the practice of medicine and all affected parties of any informational or adversarial process for developing and challenging the procedure under Fla. Stat. Ch. 120. (Subsection (7)). Under case law governing this Court, these standardless statutes must be found unconstitutional as unlawful delegations of legislative authority.

The Florida Supreme Court has held that:

> under the [nondelegation] doctrine fundamental and primary police decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.

Cross Key Waterways, 372 So.2d at 925. While the standard has been variously articulated, "one clear principle emerges from the case law outlined above: the Legislature may not delegate open-ended authority such that 'no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law.'" B.H., 645 So.2d at 993 (quoting Conner v. Joe Hatton, Inc., 216 So.2d 209, 211 (Fla. 1968)). In B.H., the Court found that the Legislature had unlawfully given standardless discretion to HRS to determine which commitment facilities were sufficiently restrictive such that leaving the facility constituted the crime of escape. As in the instant case, B.H. involved the intersection of the nondelegation doctrine and the criminal law; and where there is a challenge to agency delegation in the criminal context, both separation of powers and due process considerations apply:

> The nondelegation doctrine arising from article II, section 3 is directly at issue because 'the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch.' Perkind v. State, 576 So.2d 1310, 1312 (Fla. 1991). Likewise, due process is implicated because article I, section 9 requires that a criminal statute

> reasonably apprise persons of those acts that are prohibited; and the failure to do so constitutes a due process violation.

B.H., 645 So.2d at 992. The authorizing legislation in B.H. did not meet the constitutional command of "strict separation" because "while these [statutory] restrictions may create a minimum standard, they completely fail to create a maximum point beyond which HRS cannot go." The court continued:

> At the very least, all challenged delegations in the criminal context must expressly or tacitly rest on a legislatively determined fundamental policy; and the delegations must also expressly articulate reasonably definite standards of implementation that do not merely grant open-ended authority, but that impose an actual limit--both minimum and maximum--on what the agency may do. Art. II, Sec. 3, Fla. Const. The statute here fails because it made an open-ended delegation of the kind condemned in Conner.

B.H., 645 So.2d at 994.

The lethal injection bill set no standards at all--minimum or maximum--it simply informs DOC to carry out "lethal injection." Furthermore, while the bill requires a person authorized by state law to dispense and mix the lethal "medication," it does not require the person who administers it to be authorized by state law to do so--or require any training whatsoever for that person.

An element courts consider in determining whether an attempted delegation is constitutional is whether the legislation involves fluid and complex issues: "As we recognized in Askew and

Brown, the sufficiency of adequate standards depends upon the complexity of the subject matter and the 'degree of difficulty involved in articulating finite standards.'" Avatar Development Corp. v. State, 723 So.2d 199, 207 (Fla. 1998) (citations omitted). Execution by lethal injection is by no stretch of the imagination a fluid and complex scenario like land use or environmental regulation. The Legislature, had they not acted in unconscionable haste, had the ability to determine the specifics themselves. If they held hearings and took expert testimony on lethal injection procedures, they could easily have set forth "minimum and maximum" standards to be followed by DOC. They did not, so this Court must declare the statute to be an unconstitutional delegation of legislative authority.

In exempting the development of lethal injection procedures from Chapter 120, Florida's Administrative Procedures Act, the Legislature deprived interested parties of any voice in the development of the lethal injection procedures. Had they not done so, they might otherwise have made such procedures "amenable to articulation and refinement by policy statements adopted as rules under the 1974 Administative Procedures Act." Cross Key Waterways, 372 So.2d at 919. The total lack of any process for input upon and challenge of the lethal injection procedures exacerbates the already overbroad delegation of legislative authority and is further support for this Court to follow

governing precedent and declare the lethal injection bill unconstitutional.

## CONCLUSION

This is an extraordinary case, with unique circumstances. The 1991 postconviction hearing was an unreliable farce because Ted Stokes lied. Under normal circumstances and established rules, Mr. Bryan would have one year from October 21, 1999, within which to investigate and present his claims of ineffective assistance of counsel based upon his trial attorney's tardy disclosure that he lied and was alcoholic at the time of trial and appeal. While Mr. Bryan does not ask for a year to investigate, he does request that this Court insist upon fairness and due process of law in evaluating this newly discovered evidence.

The lower court denied Mr. Bryan due process of law and deprived him of the opportunity to present claims. This must be remedied through remand and further proceedings. This requires a stay of execution for a reasonable period of time. Mr. Bryan urges each Justice of this Court to inspect Ted Stokes' treatment records, which according to copying invoices should include 212 pages. Mr. Bryan asserts they cannot be wholly irrelevant to the present inquiry. Once inspected, Mr. Bryan asks this Court to order their release for use at an evidentiary hearing.

Mr. Bryan asks that the Department of Corrections be required to follow established public records law. Once

compliance occurs, Mr. Bryan must be allowed to file any challenges to the lethal injection process.

Finally, under the unique circumstances of this case, this Court must reconsider and reverse prior opinions regarding the effectiveness of Mr. Bryan's trial and direct appeal attorney. Mr. Bryan submits this reconsideration can only occur after release of records, investigation, a reasonable period within which to plead claims, and a full evidentiary hearing into this matter.

The State of Florida must do better. Providing and paying an alcoholic and polysubstance-abusing lawyer for defense of an indigent accused of a capital murder is the equivalent of sentencing a man to death without counsel. Ted Stokes has tainted the trial, appeal, and postconviction process in this case. Prior determinations are rendered unreliable. Executing Tony Bryan now would amount to condoning Stokes' deception.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Brief, Application for Stay of Execution and Petition for Extraordinary Relief has been furnished by first class mail, postage prepaid and/or hand-delivery to all counsel of record on February 21, 2000.

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