IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,731

TERRY MELVIN SIMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT AND APPLICATION FOR STAY OF EXECUTION

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INTRODUCTION

This Court's rules establish the procedure for seeking and providing public records after a death warrant is signed. A death warrant was signed scheduling Terry Sims for execution, and he followed the rules for seeking records. The persons he asked to respond to public records requests refused to follow the rules for responding. Counsel for Mr. Sims, following the rules, asked the lower court to compel these persons to follow the rules. The lower court disagreed with this Court's rules, and so denied the request. This decision by the lower court should be reversed, the persons who were asked to provide records should be ordered to follow the rules, and Mr. Sims' execution should be stayed at least until such time as this Court's rules are complied with, and until such time as counsel can complete any investigation that is necessary based upon belated State agency compliance with the rules.[1]

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[1]The State's evidence of Sims's guilt is razor thin. See Sims v. State, 602 So. 2d 1253, 1259 (Fla. 1992)("Indeed, I have not the slightest particle of confidence in the outcome of this trial.")(Kogan & Barkett, JJ., dissenting). Counsel for Sims are duty bound to discover whether the State has ever come into possession of evidence which further undermines the State's case at trial.

Counsel have not, however, simply been pursuing public records. As counsel advised the lower court:

> Other avenues of investigation are being vigorously pursued. Undersigned counsel cannot reveal to opposing counsel confidential information regarding the status of this investigation, however. If the Court's decision-making would benefit from counsel's explanation of the status of the investigation and why Mr. Sims's motion cannot be filed on October 12, 1999, counsel is willing to provide such an explanation ex parte and in

The rules that apply are these. Terry Sims was told by the Legislature and this Court that he should not request public records between the time his initial rule 3.850 motion was denied and the time a warrant was signed for his execution. § 119.19(8)(e), Fla. Stat. (Supp. 1998); Fla.R.Crim.Pro. 3.852(h)(3)(effective from October 1, 1998 until July 1, 1999).[2] His counsel were told that they could not make such a request, *id*.; § 27.708(3), Fla. Stat. (Supp. 1998), or ask anyone else to do so. § 119.19(12), Fla. Stat. (Supp. 1998). Mr. Sims was told in legislation and a rule of procedure promulgated and adopted by this Court that he could make public records requests within ten days of a warrant being signed for his execution. § 119.19(8)(e), Fla. Stat. (Supp. 1998); Fla.R.Crim.Pro. 3.852(h)(3). Mr. Sims was also promised that if he invoked his right to request public records, agencies and persons possessing them would be required to make them available to him, unless they had already done

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camera.

See Notice of Inability to Meet Filing Deadline and Motion to Modify Scheduling Order, n2. R. 410. The lower court completely ignored this suggestion by counsel.

[2]Mr. Sims was *granted* federal habeas corpus relief by the federal district court on August 22, 1997. The Eleventh Circuit Court of Appeals decision reversing that judgment did not become final until rehearing was denied on November 18, 1998, *Sims v. Singletary*, 163 F.3d 1362 (11th Cir. 1998). Thus, the State of Florida told Mr. Sims not to make additional public records requests until a death warrant was signed *while he was still defending the federal district court's judgment vacating his death sentence*.

so, or previously objected to doing so. *Id*.

Furthermore, Mr. Sims was told that he could use the records he had a right to request (and that agencies had a mandatory obligation to produce) as discovery ancillary to a motion for post-conviction relief pursuant to rule 3.850, Florida Rules of Criminal Procedure. § 119.19(14), Fla. Stat. (Supp. 1998); Fla.R.Crim.Pro. 3.852(a)(1); *Amendments to Florida Rules of Criminal Procedure 3.852 (Capital Postconviction Public Records Production) and Rule 3.993 (Related Forms)*, Case No. 93,845, slip op. at 9 (Fla. July 1, 1999) (hereinafter "1999 Amendments to Rule 3.852"). Mr. Sims and agencies holding public records were told that they should work together to resolve disputes and expedite the production of records. *1999 Amendments to Rule 3.852*, slip op. at 8. Finally, Mr. Sims was told that if he complied with Florida statutes and rules and it became necessary to file a motion to compel production of public records, the trial court would be required to conduct a hearing "on an expedited basis," Fla.R.Crim.Pro. 3.852(l)(2).[3]

Mr. Sims relied upon these assurances and complied with both the requirements of Florida law and the stated policies and intentions underlying them. After a death warrant issued, Mr. Sims filed public records requests in half the time

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[3]On October 7, 1999, this Court "directed that any further proceedings in this case be expedited." *Sims v. State*, Case No. 57,510 (Fla. Oct. 7, 1999)(unpublished order).

provided under Florida law. R. 1. Mr. Sims provided the agencies from which he sought public records with the names of persons within those agencies who would be likely to have records responsive to his requests, or to know where such records were. *See, e.g.*, R. 5, 9, 13. A separate request was made of each such person in order to expedite the search process. *Id*. Mr. Sims also provided, to the best of his ability, information such as race, gender, dates of birth, and social security numbers, in order to enable agencies more quickly and accurately to identify the specific individuals about whom he sought records. *See, e.g*., R. 6-8; 202-204. He referred agencies to case numbers, *see, e.g.*, R. 100, and to the names which law enforcement agencies used to identify the group or suspects about which he sought public records. R. 98. He worked with agencies to ease the burden of producing records, R. 418 – 420, and acted to ensure that all records produced would be made available to him on an expedited basis. R. 422–428.

But when Mr. Sims exercised his rights, state actors flouted their statutory and rule-based responsibilities "[h]oping all goes as planned October 26th." Exhibit A attached hereto, Seminole County Sheriff's Office Objection and Response to Defendant's Request for Public Records (Oct. 15, 1999)(handwritten note from John

C. Ross, General Counsel).[4] State actors who should have produced records in a timely manner, instead delayed responding and otherwise obstructed Mr. Sims's access to records. *See* pp. 4-5, *infra*. The state maneuvered the lower court to attempt to require Mr. Sims to seek post-conviction relief *before* he could obtain and review the records to which he was entitled, and *before* he could complete any other investigation. Oct. 5 Hrg. Trans. at 15-18.

The lower court interposed its own policy considerations,[5] rejected the legislative and judicial rules that had already resolved policy issues in favor of prompt disclosure of public records,[6] and held that Mr. Sims or his counsel had been under a duty to request public records between the time Mr. Sims's initial rule 3.850 motion was denied and the death warrant was signed. R. 542-43. The lower court

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[4]The Seminole County Sheriff's Office contends that no previous request was made of that agency. Exh. A at 3. That is not so. *See* Exhibit B.

[5]*See, e.g.*, R. 542 ("No request or public records was made during the year following the decision of the Eleventh Circuit.") and ("Not surprisingly, on such short notice, many agencies have either not responded to the defendant's demands or have responded in a manner the defendant believes to be incomplete."); *see also* Oct. 8 Hrg. Trans. at 29 ("I'm not going to make the government go search around in the files that are not labeled with one of the names on this list for names . . . .").

[6]*See* Emergency Rule 3.852(h)(3)(no public records requests allowed between denial of rule 3.850 motion and signing of death warrant); § 119.19(8)(e) (Supp. 1998)(same); and Fla.R.Crim.Pro. 3.852(h)(3)(*within 10 days* of request agencies shall copy, index, and deliver to repository); § 119.19(8)(e) (Supp. 1998)(same).

denied Mr. Sims access to records, ruled that agencies did not have to produce them, R. 544, and refused to conduct the hearing which Rule 3.852(l)(2) required and that had already been scheduled. R. 541 ("court waives argument on the motions sua sponte"). *Counsel for Mr. Sims were actually chastised for invoking and relying upon rights created by Florida law.* R. 541.

Mr. Sims was thus faced with the lead law enforcement agencies involved in the investigation of this case–e.g., the Seminole County Sheriff's Office–withholding even an informal response to his public records request. *See* Exh. A.[7] The trial court would entertain no further discussion and entered an order requiring Mr. Sims to file his rule 3.850. Mr. Sims filed this appeal.

[7]The failure of agencies to abide by their statutory obligations and this Court's rules is detailed at pp. 20-21, *infra*.

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STATEMENT OF THE CASE

The events relevant to this appeal began on October 1, 1998 when section 119.19(8)(e) and Florida Rule of Criminal Procedure 3.852 (hereinafter "Emergency Rule 3.852") went into effect.[8] Eight days earlier, on September 22, 1998, the Eleventh Circuit Court of Appeals issued an opinion reversing the judgment of the federal district court which had *granted* habeas corpus relief to Mr. Sims, vacating his death sentence. *Sims v. Singletary*, 155 F.3d 1297 (11th Cir. 1998). Mr. Sims timely filed a petition for rehearing which was denied on November 18, 1999. *Sims v. Singletary*, 163 F.2d 1362 (11th Cir. 1998), *cert. denied sub nom. Sims v. Moore*, 119 S.Ct. 2372 (June 21, 1999).

A. A Death Warrant and Requests for Public Records

On September 23, 1999, Governor Bush signed a warrant for the execution of Mr. Sims's death sentence. *Five* days later, on October 28, 1999, Mr. Sims filed and sent to several state agencies and their personnel, requests for public records. Mr. Sims relied upon the capital post-conviction discovery provided under rule

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[8]Mr. Sims was convicted of first-degree murder and sentenced to death. *Sims v. State*, 444 So.2d 922 (Fla. 1983), *cert. denied* 467 U.S. 1246 (1984). He sought and was denied post-conviction relief pursuant to rule 3.850, Florida Rules of Criminal Procedure. *Sims v. State*, 602 So.2d 1253 (Fla. 1992), *cert. denied* 506 U.S. 1065 (1993). Two Justices dissented from that denial of relief. *Id*. 602 So.2d at 1258-59 (Kogan, J. dissenting, joined by Barkett, J.). Mr. Sims then promptly sought habeas corpus relief from this Court, which was denied. *Sims v. Singletary*, 622 So.2d 980 (Fla. 1993).

3.852(h)(3), Florida Rules of Criminal Procedure. R. 1–197. In his requests, Mr. Sims also invoked his right to public records acquisition pursuant to Article I, section 24, Florida Constitution; Chapter 119, Florida Statutes; Florida Rule of Criminal Procedure 3.852; *Brady v. Maryland*, 373 U.S. 83 (1963); and *Strickler v. Greene*, 119 S.Ct. 1936 (1999). *Id*. These requests were filed with the trial court, R. 1, served on the trial judge, R. 513-516, and opposing counsel, R. 517-520, and Mr. Sims provided proof of service by courier. R. 440–520.[9]

On September 29, 1999, Mr. Sims made additional and supplemental requests for public records based on the same state and federal rights. R. 198–378. All Mr. Sims's requests provided the receiving agencies and persons with as much information by which to identify specific individuals and records related to them as was available to Mr. Sims's counsel. R. 440-520 Mr. Sims also provided agencies with requests to the specific persons whom Mr. Sims's investigation revealed would be likely to have records responsive to his requests, or would know where to find them. *See, e.g.*, R. 97-189.

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[9]Counsel for Mr. Sims believe he is innocent of the murder for which he received his death sentence. The purpose of the public records requests was to uncover previously undisclosed evidence of other suspects known to law enforcement officers, to discover how and why the police focus was directed toward Mr. Sims instead of other suspects, and in general, to discover evidence in support of innocence.

B. The Status Conference

On October 5, 1999, a telephonic status conference was held at the request of the assistant attorney general. Oct. 5 Hrg. Trans. at 5. During the status conference the state asked the trial court for an order requiring Mr. Sims to file any motion he might file seeking post-conviction relief by a date certain. When the trial court mentioned October 12, 1999, as the date for Mr. Sims to file his post-conviction relief motion, *Mr. Sims objected that he would not have an opportunity to make use of any public records he might obtain by that date*. Oct. 5 Hrg. Trans. at 17. The trial court responded, "[Y]ou just go ahead and look at repository records all you want. If you find something, fine; if you don't find something, fine." Oct. 5 Hrg. Trans. at 18.

The trial court made it clear that Mr. Sims's only real (as opposed to "theoretical[]") opportunity to seek post-conviction relief in the circuit court would be by filing a motion by October 12, 1999.[10] The state would then be required to respond in time for a hearing which the trial court planned to hold on October 15, 1999, to be continued to the 16th if necessary. Oct. 5 Hrg. Trans. at 12, 14. The goal of this schedule, as stated in the order rendered by the trial court on October 12, was

[10]The State Attorney's Office in Seminole County was one of only two agencies to send records to the repository by the date required in the Rule. R. 523. Even with this effort at compliance, the records did not become available to Mr. Sims until late in the day on October 12, 1999, the day the trial court initially set for filing Mr. Sims rule 3.850 motion.

to allow "for filing and disposing of defense motions within the time constraints established by the execution date on the Death Warrant issued by the Governor." R. 541.

Also appearing at the October 5 status conference was assistant state attorney Angela Corey. The judge did not know why she was there, Oct. 5 Hrg Trans. at 5, and she could not explain how she came to be noticed for the "hearing." *Id*. at 16. Although the assistant state attorney claims to have filed a response and objection to Mr. Sims's public records request, *id*. at 16, this document is not in the record. It was not served on opposing counsel or the court prior to the status conference. *Id*. at 16, 19. Only the assistant attorney general who initiated the "status conference," *id*. at 5, had been served with an objection to Mr. Sims's public records request.[11] *Id*. at 18. When the assistant attorney general attempted to argue the state attorney's objections, Mr. Sims objected on grounds that he had not been served with them. *Id*. at 18-19. This prompted the trial court to schedule for October 8, 1999, a hearing on objections to Mr. Sims's public records requests. *Id*.

C. Hearing on Objections

[11]The assistant attorney general was in Tallahassee, two blocks from Mr. Sims's counsels' office, just before the status conference. Oct. 5, Hrg. Trans. at 5.

Only three agencies timely filed objections to Mr. Sims's public records requests and noticed those objections for hearing: the Office of the State Attorney for the Seventh Judicial Circuit, R. 392-393 ("supplemental" objection); the Office of the State Attorney for the Eighteenth Judicial Circuit, R. 401–402; and the Florida Department of Corrections. R. 394–400.

On October 8, 1999, a telephonic hearing was held on these three agencies' objections. Early in the hearing it became clear that the trial judge did not have and was unaware of the current version of rule 3.852, as amended by this Court on July 1, 1999. Oct. 8 Hrg. Trans. 8-9, 14, 31, 47. The Duval State Attorney's Office objected to having to search for records and argued that "there would be no way for my office to be able to track this stuff down," Oct. 8 Hrg. Trans. at 23, and the trial court, apparently relying upon this representation, stated its belief that agencies could not comply with Mr. Sims's requests because "they don't have that kind of searchable database that's twenty something years old." Oct. 8 Hrg. Trans. at 26. But when the trial court ordered the Duval State Attorney to search for and produce records, the assistant state attorney acknowledged her agency *could* "do a name search" for records. *Id*. at 44.

The trial court asked Mr. Sims's counsel to explain why he was seeking records on certain individuals. *Id*. at 17. Mr. Sims's counsel explained these individuals were

all identified by the many law enforcement officers and agencies who participated in the investigation of this case as possible suspects, witnesses or members of the "drugstore cowboys," as law enforcement referred to them. *Id*. at 21, 24-25.

Once the trial judge obtained and read the applicable rule, the court stated that it agreed with Mr. Sims's interpretation of rule 3.852(h)(3), *id*. at 43, 47, and ordered the Duval State Attorney's Office to search for and produce records bearing the names of individuals about whom Mr. Sims made requests. *Id*. at 43-44.

The public records hearing ended Friday, October 8, at 4:45 p.m. R. 406. By the following Tuesday, October 12, 1999, at 4:30 p.m., the day on which the trial court ordered Mr. Sims to file his rule 3.850 motion, the records from the state attorney's office were ready to be inspected. Exhibit D appended hereto (tape recording of voice-mail message from Duval State Attorney's Office).

After the Duval State Attorney's objection was overruled the trial court heard the Seminole County State Attorney's objection to the production of records related to Robert Preston. Oct. 8 Hrg. Trans. at 44-45. Mr. Sims's agreed to the State Attorney's suggestion that Mr. Sims's representatives could review the Robert Preston records and eliminate the need for the State Attorney to copy the entire file. *Id*. at 46.

Finally, the trial court heard argument on the objections filed by the Florida

Department of Corrections. Oct. 8 Hrg. Trans. at 47-50. Again, Mr. Sims's counsel agreed to work with the Department to accept, provisionally, partial compliance with his request, and to narrow the scope of his request based on information provided by the Department. *Id*. at 50. All timely filed objections were thus resolved.

D. The Motion to Compel

Although no other agencies filed objections to Mr. Sims's requests, agencies did seek assistance in focusing their records searches on individuals for whom Mr. Sims did not have identifying information. R. 418-420. Mr. Sims agreed to work with these agencies. *See*, *id*. When given the opportunity to inspect records so that an agency would not have to copy records that were not responsive to Mr. Sims's requests, Mr. Sims immediately worked with the agency asking for help, inspected the records, and eliminated unresponsive records. Oct. 8 Hrg. Trans. at 20-21.

Based on Mr. Sims's requests dated September 28 and 29, agencies were required to copy, index, and deliver records to the Department of State's Records Repository (hereinafter "repository") by October 8 and 9, 1999. Fla.R.Crim.Pro. 3.852(h)(3). Mr. Sims searched for records at the repository before they were due there, and initiated the process of obtaining copies before the records were due to arrive at the repository. R. 423-24. No such records were available to Mr. Sims until October 12, 1999, R. 427-28, the day the trial court required that he file whatever

motion for relief he was going to file. R. 388.

On October 11, 1999, having not had an opportunity to review any of the public records on which he might need to rely in support of his motion for relief, and not having completed other aspects of his investigation, R. 410, Mr. Sims prepared, filed and served two motions. The first motion asked the trial court to compel state agencies and persons to produce the public records he requested so that Mr. Sims could use those records in his post-conviction relief motion. R. 429-435. The second motion asked the trial court to modify its scheduling order so that Mr. Sims could make use of the records that would become available to him, and make use of the fruits of his ongoing non-public records based investigation. R. 409-415.

Although the trial court had already scheduled a hearing on any defense motions, it "waive[d] argument on the motions sua sponte due to time constraints previously set by separate order" and denied both motions. R. 541-544. The trial court characterized Mr. Sims's public records requests as "an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry." R. 542 The court found that "[n]ot surprisingly, on such short notice, many of the agencies have either not responded to the defendant's demands or have responded in a manner the defendant believes to be incomplete." *Id*. Mr. Sims was faulted for filing no public records requests "during the year following the decision

by the Eleventh Circuit [affirming the denial of Mr. Sims's federal habeas corpus petition]," despite there having been a rule in effect that prohibited Mr. Sims's counsel from making such a request previously. R. 543. Because "[t]here [was] insufficient time between October 12, 1999, and October 15, 1999, to order public records to be produced without delaying the scheduled execution [and a]ny substantial delay would hinder last minute review of any order entered by this court by the Supreme Court of Florida," the judge denied the motion to compel. *Id*.

This appeal follows.

SUMMARY OF ARGUMENT

Mr. Sims's rights to public records and to discovery in his pursuit of post-conviction relief were denied by the lower court. Although Mr. Sims did everything Florida law required of him, and made a good faith effort to apprise the lower court of the status of his investigation and the reasons he could not file a complete rule 3.850 motion within the time limits set by the court, his motion to compel and motion to modify the scheduling order were summarily denied. These actions violated Mr. Sims's right of access to public records, access to the courts, to the full and fair exercise of the right to petition for habeas corpus relief, to equal protection of the laws, and to due process of law. Rule 3.852 was simply ignored.

ARGUMENT

TERRY SIMS WAS DENIED HIS RIGHT TO PUBLIC RECORDS, HIS RIGHT TO DISCOVERY AS PART OF POST-CONVICTION PROCEEDINGS, HIS RIGHT TO DUE PROCESS OF LAW, AND EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF RULE 3.852; ARTICLE I, SECTIONS 2, 13, 21, AND 24 OF THE FLORIDA CONSTITUTION; AND THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. The Rules

It is well-settled that capital post-conviction defendants in Florida are entitled to receive public records, and that they must be given an opportunity to make use of them in pursuit of post-conviction remedies, even if it means extending deadlines. *Ventura v. State*, 673 So.2d 479, 481 (Fla. 1996)(this Court "has repeatedly found that capital postconviction defendants are entitled to public records disclosure"); *Reed v. State*, 640 So.2d 1094, 1098 (Fla. 1994); *Muehleman v. Dugger*, 623 So.2d 480 (Fla. 1993)("Muehleman has sixty days from the date he receives the records to which he is entitled or from the date of this opinion, whichever is later, to amend his 3.850 petition to include any facts or claims contained in the sheriff's records"); *Lopez v. Singletary*, 634 So.2d 1054, 1058 (Fla. 1994); *Hoffman v. State*, 613 So.2d 405 (Fla. 1993); *Walton v. Dugger*, 634 So.2d 1059, 1062 (Fla. 1993); *Anderson v. State*, 627 So.2d 1170, 1172 (Fla. 1993); *Mendyck v. State*, 592 So.2d 1076, 1082 (Fla. 1991);

Engle v. Dugger, 576 So.2d 696 (Fla. 1991)("state attorney shall disclose to Engle's attorney those portions of his file covered by chapter 119, Florida Statutes (1987), as interpreted in *State v. Kokal*, 562 So.2d 324 (Fla. 1990)[and t]he two-year time limitation of Florida Rule of Criminal Procedure 3.850 shall be extended for sixty days from the date of such disclosure solely for the purpose of providing Engle with the opportunity to file a new postconviction motion relief predicated upon any claims under *Brady v. Maryland*, 373 U.S. 83 (1963), arising from the disclosure of such files. In this manner, Engle will be placed in the same position as he would have been if such files had been disclosed when they were first requested"); *Provenzano v. State*, 561 So.2d 541, 547 (Fla. 1990); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).

This rule applies with equal force to defendants pursuing successive motions for post-conviction relief. § 119.19(8)(e); Fla.R.Crim.Pro. 3.852(h)(3); *Atkins v. State*, 663 So.2d 624, 626 (Fla. 1995)(public records claim raised in successive rule 3.850 motion not procedurally barred).

It is equally beyond cavil that public records disclosed in successive post-conviction proceedings, and that were previously undisclosed, can constitute newly discovered evidence within the meaning of rule 3.850(f). *Scott (Paul) v. State*, 657 So.2d 1129 (Fla. 1995)(public records produced under warrant gave rise to claim of newly discovered evidence meriting stay of execution and evidentiary hearing on

successive post-conviction challenge); *Buenoano v. State*, 708 So.2d 941, 952 (Fla. 1998)(evidence produced pursuant to successive public records request or request initiated following discovery previously unknown information may constitute newly discovered evidence within meaning of rule 3.850).

Records discoverable pursuant to rule 3.852(h)(3) are, by definition, "newly discovered." *Compare* Fla.R.Crim.Pro. 3.852(h)(3)(A), (B), and (C) *with Jones v. State*, 591 So.2d 911, 916 (Fla. 1992).

Thus, the rights and responsibilities relevant to this issue are clear. Mr. Sims had the right to request public records again within ten days of the signing of his death warrant.[12] § 119.19(8)(e), Fla. Stat. (Supp. 1998); Fla.R.Crim.Pro. 3.852(h)(3). He was required to file his requests with the trial court, and serve copies on the affected persons and agencies, the trial court, and counsel for the state. Fla.R.Crim.Pro. 3.852(c)(1). Mr. Sims was required to provide proof of receipt of his requests. Fla.R.Crim.Pro. 3.852(c)(2).

The persons and agencies who received these requests were required to copy,

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[12]The state maintains in its brief, *for the first time* in this case, that Mr. Sims did not make public records requests before the death warrant was signed. The trial court's order was predicated upon the same erroneous supposition. R. 543. There is no basis for this in the record. If any agency had made a timely objection on this ground, a hearing would have been required. Fla.R.Crim.Pro. 3.852(l)(2). Mr. Sims would have prevailed at such a hearing.

index, and deliver to the post-conviction public records repository any records that had not previously been the subject of an objection, was obtained by the agency since a previous request, or that was, for any reason, not produced previously. § 119.19(8)(e), Fla. Stat. (Supp. 1998); Fla.R.Crim.Pro. 3.852(h)(3). The agencies were required to bear the costs of this production. *Id.* (Because the process of acquiring public records pursuant to rule 3.852(h)(3) is inherently time-consuming, this Court should note, as the state apparently did when it sought the filing dates imposed on Mr. Sims, that by sending records to the repository, an agency has not provided Mr. Sims immediate access to them. They must be processed by the Bureau of Archives before being handed over to the Commission on Capital Cases for copying. Only when this process has been completed can someone in Mr. Sims's position make full use of the records. In Mr. Sims's case, even records that were sent by October 8 were not available to him until October 12. *See* R. 423, 427.)

If it was necessary for Mr. Sims to file a motion to compel the production of records, the trial court was required to conduct a hearing on an expedited basis. Fla.R.Crim.Pro. 3.852(l)(2). The trial court had already entered an order affording Mr. Sims a hearing "on *any motion* that the defendant may file by the close of business October 12, 1999." R. 543 (emphasis added).

B. Mr. Sims Followed the Law, the State and the Lower Court Did Not

1. Mr. Sims's Reliance Upon and Compliance with Florida Law

The police investigation in this case focused on a group of people referred to as "drugstore cowboys" or the "Dixie mafia." According to Det. Ralph Salerno, the Seminole County Sheriff's officer who lead the investigation, the individuals involved in this "loose organization," Salerno Depo. at 50, of drugstore robbers were "all from the Jacksonville area. They['d] all been involved in several, you know, several other robberies." *Id*. at 49. Individuals identified from law enforcement in Jacksonville and elsewhere as members of this group or as people who were known to commit drugstore robberies included, among others, Marvin Johnson, Robert Charles Sliker, Harley Woods, William Lawley, Clarence Eugene Robinson, Melvin McCullom, Terry Wayne Gayle, Harley Bryan, Moltrie Boatwright, Larry Ronald Gayle, Frankie Charles Brown. *Id*. at 80-81, 105.

Mr. Sims made many public records requests, because many suspects and many law enforcement officers were involved in this investigation which spanned two-thirds of the state. As Det. Salerno, noted prior to trial, "the more people you got [working on a case] the more cumbersome things become." Salerno Depo. at 46.

Terry Sims did what Florida law said he was supposed to do, when he was supposed to do it, in order to gain access to public records after his death warrant was

signed. The Governor signed a warrant for Mr. Sims's death on September 23, 1999, and Mr. Sims made his requests on the fifth and sixth days after the death warrant was signed.[13] R. 1, 198. He filed and served them as required under the Rule, R. 513-516, 517-520, and he provided proof of service. R. 440–520.

The requests which Mr. Sims made were of agencies from which the law presupposes capital post-conviction defendants will want records. *See* Fla.R.Crim.Pro. 3.852(d)(1)(initiating duty to produce records by "each law enforcement agency involved in the investigation of the capital offense" and the Department of Corrections) & (d)(2)(initiating duty to produce records by "any additional person or agency"). Mr. Sims made requests of the law enforcement agencies involved in the investigation of the crime for which he was convicted, and those that participated in the search for, and arrest or prosecution of, suspects and their known associates. The Seminole County Sheriff's Office, which was the lead law enforcement agency, sought and received assistance from other agencies that were investigating drugstore burglaries and robberies. Salerno Depo. at 39. These

[13]As part of his initial rule 3.850 proceedings, Mr. Sims requested public records from the agencies he had reason to know were involved in the investigation his case, the search for his co-defendants and their confederates. It is misleading for the state to use of the one public records request that was *filed* in that proceeding to suggest that was the only request Mr. Sims made. Answer Brief at 5. At the time of his initial rule 3.850 proceeding there was no requirement that public records requests be filed in the trial court.

agencies included the following, from which Mr. Sims made requests:

< Longwood Police Department (first on the scene);

< Sanford Police Department (assisted in investigation);

< Altamonte Springs Police Department (assisted in hunt for suspects and interviewed witnesses);

< Jacksonville Police Department (assisted in investigating and arresting B.B. Halsell and Curtis Baldree, Mr. Sims's co-defendants);[14]

< Volusia County Sheriff's Office (assisted with composite sketches of the suspects and provided photographs of possible suspects);

< Escambia County Sheriff's Office (assisted in the investigation, arrest, prosecution and incarceration of suspects and witnesses);[15]

< Gainesville Police Department (provided intelligence, worked with informant);

< St. Johns County Sheriff's Office and State Attorney's Office;

< Florida Department of Law Enforcement and its central Florida regional lab.

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[14]Halsell and Baldree were arrested together by the Jacksonville Sheriff's Office between the time of the crime in this case and their eventual arrest on charges stemming therefrom. Their initial cases were nolle prosequi by the Duval County State Attorney's Office.

[15]*See* Notice of Compliance by Law Enforcement Agency, from Escambia County Sheriff's Office to Timothy P. Schardl (October 13, 1999), a true copy of which is appended hereto as Exhibit C.

Knowing that state agencies want requests that identify with particularity individuals about whom information is being sought. *See* R. 419-420, Mr. Sims provided agencies with as much identifying information as he had. *Id*. When agencies had records on a number of individuals with the same name, Mr. Sims responded by helping to identify the correct individual, *see, e.g.*, Oct. 8 Hrg. Trans. at 20-21, by attempting to provide more identifying information, R. 420, and by asking the agency to provide the records on the known individuals. R. 419-20.

When agencies either did not respond in any way to Mr. Sims's requests, or failed to produce records within the time provided in the rule, Mr. Sims immediately filed a motion to compel. R. 429. He filed his motion within the time ordered by the trial court. R. 388 ("Defense counsel shall file motions not later than October 12, 1999 . . . ."); R. 429.

2. The State and Lower Court's Flouting of Florida Law and Procedure

In its opinion adopting rule 3.852 this Court stated its "strong intent that there be efficient and diligent production of all of the records without objection and without conflict, and it is further our intent to discourage the abuse of the production process and the trial court with public records production issues which should be able to be resolved by good faith discussion by the producing agencies and counsel for the postconviction defendant." *1999 Amendments to Rule 3.852*, slip op. at 8.

In direct contravention of the rule and this Court's intent, some agencies, such as the Seminole County Sheriff's Office, the lead investigative agency in this case, simply ignored Mr. Sims's request, "[h]oping all goes as planned October 26th," the date set for Mr. Sims's execution.[16] *See* Exh. A. The State Attorney's Office in Jacksonville could have searched for and provided Mr. Sims access to records within a few days of his request. Compare October 8 Hrg. Trans. 44 (can and will search) with Exhibit D, hereto (records ready for inspection). But they chose not to. Instead they claimed to have filed an unresponsive objection which was served on counsel for the state, but not defense counsel.[17] At the public records hearing the Duval State Attorney told the trial court that "there would be no way for [the State Attorney's] office to track this stuff down," Oct. 8 Trans. at 23, only to later tell the court they could "do a name search" and produce the records. *Id*. at 44.

Had these and other state agencies responded to Mr. Sims's requests in the manner intended by this Court in its opinion adopting rule 3.852, we would not be here now. Only three agencies filed timely objections.[18] They were either overruled,

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[16]Other law enforcement agencies who participated in the investigation have said they gave all their records to the Seminole County Sheriff's Office.

[17]The Duval State Attorney's Office claimed to have filed a response and objections to Mr. Sims's public records request, but it is not in the record.

[18]The state in its Answer Brief makes a great deal out of whether Mr. Sims could make requests of agencies of which they suggest he did not made requests of

as in the case of the Duval State Attorney's Office, Oct. 8 Hrg. Trans. at 43-44, or were worked out at the hearing between Mr. Sims's counsel and counsel for the agencies. Oct. 8 Hrg. Trans. at 45-46; 50-52.

The following chart further identifies the state agencies who have failed to comply with rule 3.852(h)(3); section 119.19(8)(e), Florida Statutes; and Article I, section 24(a), Florida Constitution:

AGENCY	ROLE IN CASE	COMPLIANCE
Seminole County Sheriff's Office	Lead investigative agency to which other agencies gave information and records	None
Sanford Police Department	Officers assisted in investigation	None
Florida Department of Law Enforcement	Processed and analyzed evidence	Partial
Longwood Police Department	Participated in investigation, preparation	Partial

earlier. This point is largely moot, and in any case is not before this Court. The trial court agreed with Mr. Sims's argument that the rule as amended does not prohibit such requests, Oct. 8 Hrg. Trans. at 47-48, and ordered the only agency that objected on this ground to produce records. *Id*. at 43-44. The state did not cross-appeal on this point, and it is therefore procedurally barred. *Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993)(state waived right to assert issue as grounds for remand); *State v. Wells*, 539 So.2d 464, 468 n.4 (Fla. 1989)(by failing to raise on appeal issue of defendant's privacy interest in borrowed car, state waived right to argue issue). Even if this issue were before the Court, any objection on those grounds has been waived by the dilatory tactics of agencies who filed nothing. Lastly, because Mr. Sims was denied the hearing to which he was entitled, he was not given an opportunity to show what requests he previously made.

AGENCY	ROLE IN CASE	COMPLIANCE
Volusia County Sheriff's Office	Provided sketches of suspects, interviewed witnesses	None
Gainesville Police Department	Participated in interrogation and development of witnesses	Records copied by Commission on October 16, 1999
St. Johns County Sheriff's Office	Participated in investigation, hunt for suspects	Partial
Jacksonville Sheriff's Office	Participated in investigation, apprehension of suspects	None
Panama City Police Department	Provided information, investigated informant	None
Escambia County Sheriff's Office	Participated in investigation, apprehension of suspects	Records copied by Commission on October 16, 1999
Office of the State Attorney (Seminole County)	Prosecuting agency	Records received from Commission on October 12, 1999
Office of the State Attorney (Duval County)	Prosecuted co-defendants, suspects, informants	Partial
Altamonte Springs Police Department	Participated in investigation, interviewed witnesses	None
Florida Department of Corrections –Union Correctional Institution –Florida State Prison	Incarcerated defendant and witnesses	Partial
Seminole County Jail	Incarcerated co-defendants	None
St. Johns County Jail	Held witnesses/informants	Partial
Orange County Jail	Held witnesses/informants	None
Escambia County Jail	Held witnesses/informants	Partial

The state supports the lower court's ruling on the basis of *Buenoano v. State*,

708 So.2d 941 (Fla. 1998), although the trial court did not mention that case. The state contend that *Buenoano* "resolved the identical issue" to the one raised by Mr. Sims, and argues that this case "is no different" from *Buenoano*. Answer Brief at 5, 7. It is difficult to see how a case decided before section 119.19 and the current Rule 3.852 became law (or were even written down) could have resolved issues governed by those provisions. *Buenoano* did not involve a rule that explicitly gave post-conviction movants a right to request public records following the signing of a death warrant. That is the case here, however.

To the extent *Buenoano* announced a rule requiring someone who has never before requested public records to allege that her requests will lead to the production of newly discovered evidence, that rule does not apply to this case.[19] First, rule 3.852(h)(3) supersedes the prior case law and statute. *In re Florida Rules of Criminal Procedure*, 196 So.2d 124 (Fla. 1967). Neither the statute not the rule require that Mr. Sims allege that his requests will produce newly discovered evidence. This Court was certainly aware of the *Buenoano* decision when it modified the rule prior to

[19]This "requirement" that Buenoano demonstrate that the records she was seeking would produce newly discovered evidence referred to Buenoano's request for a stay of execution *after* she had been afforded a hearing in the circuit and an appeal to this Court on her public records issues. *Buenoano*, 708 So.2d at 947. Moreover, this Court gave notice to Buenoano of what she would have to show, before she returned to this Court after a previous remand. *Id*.

adoption, but did not include a requirement that requests contain such an allegation. Likewise, this Court must presume, as courts always do, that the Legislature acted with knowledge of existing case law affecting an area about which it was drafting new rules. *Wood v. Fraser*, 677 So.2d 15, 18 (Fla. 2d DCA 1996)("Florida's well-settled rule of statutory construction that the legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute.'" *quoting Collins Inv. Co. v. Metropolitan Dade County*, 164 So.2d 806, 809 (Fla.1964)); *Schwartz v. Geico General Ins. Co.*, 712 So.2d 773, 775 (Fla. 1998)("the legislature is 'presumed to know the existing law when it enacts a statute.'" *quoting Williams v. Jones*, 326 So.2d 425, 437 (Fla.1976)).

Second, Mr. Sims's case is factually distinct from *Buenoano* in a number of respects. Whereas this Court found that Ms. Buenoano had not made public records requests of agencies which she should have through the exercise of due diligence until she was in a successive post-conviction posture, *Buenoano*, 708 So.2d at 952-53, Mr. Sims made all the public records requests in the course of his initial post-conviction proceedings that he should have. In fact, the state has argued that Mr.

Sims could *only* request records from the same agencies he made requests of before.[20] (The state's argument was rejected by the trial court.)

Further, Ms. Buenoano was given a long warrant period during which she had *hearings* on her public records issues, after which *this Court ordered the production of public records for her to use in preparing her post-conviction motion*. *Buenoano*, 708 So.2d at 946 (orders attached to Appellant's Response in Opposition to Appellee's Motion to Dismiss).

Finally, a requirement that a movant under rule 3.852(h)(3) allege that his request will produce newly discovered evidence would have been superfluous. Records subject to production under rule 3.852(h)(3) are, by definition, "newly discovered." Agencies are only required to disclose things which should have been disclosed previously, i.e., that were not previously the subject of an objection, rule 3.852(h)(3)(A), or that were obtained by the agency since a previous request, rule 3.852(h)(3)(B), or that were for any other reason not produced before. Rule 3.852(h)(3)(C). Anything produced pursuant to this rule is, by definition, newly discovered evidence, and any request made pursuant to it is, therefore, a request for the same.

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[20]They have also argued that rule 3.852(a)(2) *prohibits* Mr. Sims from making requests of those agencies. Answer Brief at 9-10.

Mr. Sims made his requests, and made them when he did, in good-faith reliance on the rule. Whether the basis for a particular request is a prior request or information that was previously not available to collateral counsel, Mr. Sims had a right make the requests he made the way he made them. Mr. Sims may know that he should seek additional records from an agency or person, but until he gets the records, he cannot know what they are (i.e., what form they are in, hence the need to request all records regardless of form), or what they contain (hence counsel's inability to tell Judge Eaton precisely what he is looking for). Rule 3.852(h)(3) presumes that records either constituting newly discovered evidence in their own right, or that may lead to newly discovered evidence, may be in the possession of government agencies or agents. The rule affords Mr. Sims the right to request them, and the statute and rule require that agencies produce them within ten days of the request.

Contrary to these policy determinations, the lower court held that Mr. Sims is not entitled to seek public records now that a death warrant has been signed because he did not seek public records "from October 20, 1992 [presumably when this Court's mandate issued following Mr. Sims's initial post-conviction proceeding] until after the death warrant was signed." R. 543. The lower court also faulted Mr. Sims because it found "[n]o request for public records was made during the year following the decision of the Eleventh Circuit," R. 542, which became final on November 18,

1998. *Sims v. Singletary*, 163 F.3d 1361 (11th Cir. 1998). According to the trial court and the state, Mr. Sims was required, by what rule they do not say, "to request relief from [Emergency Rule 3.852(h)(3)] if in fact the rule prevented production of relevant public records during that time."[21] R. 543; Answer Brief at 8.

These policy issues were resolved by the Legislature and this Court. Emergency Rule 3.852(h)(3) could not have been clearer:

> If on October 1, 1998, the defendant has had a rule 3.850 or rule 3.851 motion denied and no rule 3.850 or rule 3.851 motion is pending, **no additional public records *request*** under this rule **is permitted until after a death warrant is signed**.

Even if the Legislature lacked the authority to prohibit counsel from making such a request, section 119.19(8)(e) sent a perfectly clear message that the Legislature did not want such requests to be made. Mr. Sims did what the authorities in this state told him he should do: forego public records requests until a death warrant is signed.[22] The state cannot induce Mr. Sims to this forbearance, then fault him for complying

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[21]Emergency Rule 3.852(h)(3) did not prevent the *production* of public records. It prohibited collateral counsel from *requesting* production of public records.

[22]Had Mr. Sims's counsel violated the rule, they would certainly have faced sanctions. The collateral bar rule, which holds that once an injunction issues, those subject to it may not violate its provisions then defend against contempt sanctions on grounds that the injunction was unconstitutional. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

with its rules. *See Ford v. Georgia*, 508 U.S. 411, 423-24 (1991)("'novelty in procedural requirements cannot be permitted to thwart review applied for by those who, in justified reliance upon [existing rules], seek vindication in state courts of their federal constitutional rights,'" *quoting NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958)); *New York Life Ins. Co. v. Oats*, 192 So.2d 637, 642 (Fla. 1939)(equitable estoppel bars party who willfully or negligently induces acquiescence from another party from later relying upon that acquiescence as a claim or defense).

To hold now that Mr. Sims was required to do something that Florida law told him should not and could not do, or that in order to exercise his right to acquire public records in his post-conviction proceedings he had to take actions of which he had no prior notice, would violate Mr. Sims's due process rights to "fair notice and repose." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

The lower court refused to order agencies to respond to Mr. Sims's public records requests in part because it thought ten days was an insufficient time in which to respond. R. 542. Although the court was aware of the provisions of rule 3.852(k)(3) which allow trial courts to expand the time for responding to requests under such circumstances, the trial court would not consider extending the time because "[t]here is insufficient time between October 12, 999, and October 15, 1999,

to order public records to be produced without delaying the scheduled execution." R. 543. The trial court was driven to "dispos[e] of defense motions within the time constraints established by the execution date on the Death Warrant issued by the Governor." R. 541. As was the case recently with the trial court in *Provenzano v. State*, Case No. 96,453, slip op. at 3 (Fla. Sept. 23, 1999), the court below was guided by the concern that "substantial delay would hinder last minute review of any order entered by this Court by the Supreme Court of Florida." R. 543.

The result of this appeal should be the same as Provenzano's and for much the same reasons. "If on appeal of the order [denying Mr. Sims's motion to compel or motion for post-conviction relief] this Court determined that it could not review the order within the time previously established, then we could . . . stay[] the execution at that time." *Provenzano*, slip op. at 6. This Court afforded Mr. Provenzano the opportunity to present evidence relevant to his competency to be executed. *Provenzano*, slip op. at 1, 6-7. Likewise, this Court and the Legislature have afforded Mr. Sims the right to request, obtain, and review records that may constitute, lead to, or corroborate newly discovered evidence of Mr. Sims's innocence. § 119.19(8)(e), Fla. Stat. (Supp. 1998); Fla.R.Crim.Pro. 3.852(h)(3). Contrary to this Court's precedent, the trial court allowed expediency to triumph over full and fair review of what may be the courts' final opportunity to ensure that an innocent man is not

executed. *See Swafford v. State*, 679 So.2d 736, 740 (Fla. 1996)(Harding, J., joined by Kogan, C.J., Shaw and Anstead, JJ., concurring)(majority "would not permit doctrine of finality to trump the opportunity of a death-sentenced defendant to have a claim of newly discovered evidence reviewed by a court . . . .").

C. Mr. Sims Must be Given an Opportunity to Obtain, Review and Use, the Records to Which he is Entitled

The lower court turned Mr. Sims's right to obtain public records discovery ancillary to rule 3.850 proceedings after a death warrant is signed into an illusory fiction. Rules 3.852(h)(3) and (l)(2), with their mandatory language requiring the production of previously undisclosed public records and a hearing on any motion to compel, endowed Mr. Sims due process rights in his post-conviction proceedings. *See In re Amendments to the Rules of the Supreme Court Relating to Admissions to the Bar*, 695 So.2d 312, 313 (Fla. 1997) (adopted rules afford applicants due process rights); *Knorr v. Knorr*, 1999 WL 776214, Slip op at 2 (Fla. 2d DCA, Oct. 1, 1999) (language of civil procedure rule is mandatory because rule is derived from due process concerns); *D.A.B. Constructors, Inc. v. Department of Transportation*, 656 So.2d 940, 943 (Fla. 1sy DCA 1995) (rules afford due process rights); *Benarroch v. Crawford*, 516 So.2d 28, 29 (Fla. 3d DCA 1987) ("petitioner was denied procedural due process because [rule of procedure] was not followed . . . by the trial court

below"). Mr. Sims seeks to do what other similarly situated people have been granted the opportunity to do: obtain public records and use them in successive post-conviction proceedings after a death warrant has been signed. *See, e.g.*, *Scott (Paul) v. State*, 657 So.2d 1129 (Fla. 1995); *Atkins v. State*, 663 So.2d 624 (Fla. 1995).

Any motion Mr. Sims filed pursuant to the trial court's scheduling order would necessarily have been incomplete, and Mr. Sims told the court so on two occasions. Oct. 5 Hrg. Trans. at 17; R. 409. But the lower court was driven to "dispos[e] of defense motions within the time constraints established by the execution date on the Death Warrant issued by the Governor," R. 541, regardless of what rights Mr. Sims possessed under Florida statutes, rule 3.852, rule 3.850, or the state or federal constitutions.[23] Oct. 5 Hrg. Trans. at 18 ("[Y]ou just go ahead and look at repository records all you want. If you find something, fine; if you don't find something, fine.") Because Mr. Sims made his public records requests in half the time allowed under the rule, he might have been able to review records prior to the October 12, 1999 filing date, had agencies not delayed submitting them, and had the Commission on Capital Cases been able to copy them faster. But they could not. R. 427. If Mr. Sims had

[23]The trial court's statement that Mr. Sims "was given notice of the [filing] schedule and elected to file a voluminous demand for public records . . ." misleadingly suggests that Mr. Sims had notice of the filing schedule *before* he filed his public records request. The filing schedule was entered after Mr. Sims filed his public records requests.

waited until the day his requests were due under the rule (October 4, 1999), agencies would not even have been required to deliver records covered by rule 3.852(h)(3) to the repository until October 14, 1999, after the trial court's cutoff date.

As a consequence of trial court's scheduling order and the dilatory tactics of state agencies "the judgment of [the trial] court [was] theoretically subject to collateral attack until the defendant has been executed," R. 543, but only theoretically. The policy determinations already made by the Legislature and this Court require that relief under rule 3.850 be more than a vague theoretical possibility.

> A basic guarantee of Florida law is that the right to relief through the writ of habeas corpus must be 'grantable of right, freely and without cost.' Art. I, § 13, Fla. Const. * * * [Because] rule 3.850 is a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus. . ., in approaching the present case, we must be mindful that the right to habeas corpus relief protected by article I, section 13 of the Florida Constitution is implicated here.

Haag v. State, 591 So.2d 614, 616 (Fla. 1992)(internal quotation marks and citation omitted). This fundamental right permits of only "reasonable limitations consistent with the full and fair exercise of the right." *Id*. It does not allow for timetables to be determined by "time constraints established by the . . . Governor," R. 541, where the petitioner's ability to fully and fairly meet those timetables is being blocked by other state actors.

The trial court's scheduling order, by precluding Mr. Sims from obtaining and using in his rule 3.850 motion records which he had every right to request and use, was not a "reasonable limitation" on Mr. Sims's right to seek post-conviction relief. It was a complete abrogation of this Court's carefully constructed rules, and the sound legislative policy underlying them.

D. A Stay of Execution is Required

The actions of the lower court and state agencies have placed Mr. Sims in an extremely dangerous position. His execution is scheduled to take place in eight days. Agencies have said they have records subject to disclosure under rule 3.852(h)(3), but Mr. Sims has not had an opportunity to review them. Other avenues of investigation are ongoing and have produced positive results. Counsel believes the records he has yet to see will either constitute newly discovered evidence of Mr. Sims's innocence, will lead to the discovery of such evidence, or will corroborate evidence he has already or will soon obtain. As Mr. Sims informed the trial court, he wants to and will file a motion for post-conviction relief, if permitted to do so.

Had agencies and the trial court not interfered with Mr. Sims rights to pubic records acquisition and discovery, and his right to meaningful post-conviction review, he would have been in a position to plead his claims. A stay of execution is necessary in order to place Mr. Sims in the position he would have been in had this unlawful

obstruction not occurred. *See Engle*, *supra*, 576 So.2d at 704 (Fla. 1991) (extending by 60 days time for filing post-conviction motion due to state's withholding of public records so that "Engle will be placed in the same position he would have been if such files had been disclosed when they were first requested").

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the trial court, issue a stay of execution, and remand with instructions to hold a hearing on Mr. Sims's motion to compel and allow Mr. Sims to file a rule 3.850 motion after he has had an opportunity to review all records to which he is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief is being sent via facsimile transmission, copy to follow by United States mail, first class postage prepaid, Kenneth S. Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., Daytona Beach, Florida 32118-3958, this 18st day of October, 1999.

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