IN THE SUPREME COURT OF FLORIDA

CASE NO. 79207

McARTHUR BREEDLOVE,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

****

BRIEF OF APPELLEE/CROSS-APPELLANT

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE 1-4

STATEMENT OF THE FACTS 4

ISSUES PRESENTED 5

SUMMARY OF ARGUMENT 6-9

ARGUMENT 10-41

I.
THE TRIAL COURT PROPER FOUND THAT THE DEFENDANT'S BRADY CLAIM WAS PROCEDURALLY BARRED. 10-14

II.
THE TRIAL COURT'S SUMMARY DENIAL OF THE DEFENDANT'S GUILT PHASE INEFFECTIVENESS CLAIM WAS PROPER. 15

III.
ALLEGED FAILURE TO FULLY INVESTIGATE CLAIM OF COERCED CONFESSION. 16-19

IV.
FAILURE TO PRESENT ELIJAH GIBSON AS ALIBI WITNESS. 19-28

V.
INEFFECTIVE ASSISTANCE AT PENALTY PHASE. 29-39

STATE'S CROSS APPEAL

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE DEFENDANT'S INEFFECTIVENESS CLAIMS WERE PROCEDURALLY BARRED. 39-41

CONCLUSION 42

CERTIFICATE OF SERVICE 42

TABLE OF CITATIONS

Cases | Page

Agan v. State,
560 So.2d 222 (Fla. 1990) 11

Alexander v. Dugger,
841 F.2d 371 (11th Cir. 1988) 22

Arango v. State,
437 So.2d 1099 (Fla. 1983) 10

Arango v. State,
437 So.2d 1099 (Fla. 1983) 12

Bertolotti v. State,
534 So.2d 386 (Fla. 1988) 27

Blanco v. Wainwright,
507 So.2d 1377 (Fla. 1987) 10

Breedlove v. State,, 10

Breedlove v. State,
413 So.2d 1 (Fla. 1982) 2

Breedlove v. State,
459 U.S. 882 (1982) 2

Breedlove v. State,
580 So.2d 605 (Fla. 1991) 3

Buenoano v. Dugger,
559 So.2d 1116 (Fla. 1990) 39

Card v. Dugger,
911 F.2d 1494 (11th Cir. 1990) 36

Cave v. State,
529 So.2d 293 (Fla. 1988) 39

Clark v. State,
533 So.2d 1144 (Fla. 1988) 11

Coleman v. Thompson,
___ U.S. ___, 111 S.Ct. 2546 (1991) 41

Combs v. State,
525 So.2d 853 (Fla. 1988) 28

TABLE OF CITATIONS CONT'D.

Cases — Page

Correll v. Dugger,
558 So.2d 422 (Fla. 1990) 39

Demps v. State,
515 So.2d 196 (Fla. 1987) 11

Doyle v. Dugger,
922 F.2d 646 (11th Cir. 1991) 36

Edwards v. State,
556 So.2d 1193 (Fla. 1st DCA 1990) 27

Floyd v. State,
569 So.2d 1225 (Fla. 1990) 38

Francis v. Dugger,
908 F.2d 696 (11th Cir. 1990) 38

Francis v. State,
529 So.2d 670 (Fla. 1988) 30,37

Gardner v. State,
480 So.2d 91 (Fla. 1985) 25

Groover v. State,
489 So.2d 15 (Fla. 1986) 28

Gurganis v. State,
451 So.2d 817 (Fla. 1984) 25

Harich v. State,
484 So.2d 1239 (Fla. 1986) 28

Hester v. State,
503 So.2d 1342 (Fla. 1st DCA 1987) 28

Hill v. Dugger,
556 So.2d 1385 (Fla. 1990) 12,36

Jacobs v. State,
396 So.2d 1113 (Fla. 1981) 25,28

Jennings v. State,
583 So.2d 36 (Fla. 1991) 36

Johnston v. Dugger,
583 So.2d 657 (Fla. 1991) 36

TABLE OF CITATIONS CONT'D.

Cases	Page
Jones v. State, 528 So.2d 1171 (Fla. 1988)	22
Lambrix v. State, 534 So.2d 1151 (Fla. 1988)	27
Medina v. State, 573 So.2d 293 (Fla. 1990)	38
Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990)	36
Rivers v. State, 425 So.2d 101 (Fla. 1st DCA 1982)	25
Roberts v. State, 568 So.2d 1255 (Fla. 1990)	36
Robinson v. State, 520 So.2d 1 (Fla. 1988)	28
Squires v. State, 558 So.2d 401 (Fla. 1990)	21
Tompkins v. Dugger, 549 So.2d 1370 (Fla. 1989)	38
United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985)	12
Valle v. State, 581 So.2d 40 (Fla. 1991)	38
Watkins v. State, 519 So.2d 760 (Fla. 1st DCA 1988)	28
White v. State, 559 So.2d 1097 (Fla. 1990)	26

INTRODUCTION

Appellee/Cross-Appellant, the State of Florida, was the prosecution in the trial court and Appellant/Cross-Appellee, McArthur Breedlove, was the defendant. The parties will be referred to as the State and the Defendant. The symbol "R" will designate the record on direct appeal, Case No. 56,811, and "PR" the post-conviction record in the instant cause.

STATEMENT OF THE CASE

On December 4, 1978, the defendant was charged in Indictment No. 78-17415 with the First Degree Murder of Frank Budnick, the Attempted First Degree Murder of Carol Meoni, Armed Burglary, Grand Theft, and Petit Theft. All crimes were alleged to have been committed on November 6, 1978. (R.1). Jury trial commenced on February 27, 1979, and on March 2, 1979, the Defendant was found guilty as charged except for the count of Attempted First Degree Murder, for which he was acquitted, and the defendant was adjudicated guilty on all counts. (R.159).

On March 5, 1979, the penalty phase commenced before the same jury. On that day the jury recommended by a majority vote that the defendant be sentenced to death for the murder of Frank Budnick. (R.178). On that day, the trial court followed the jury's recommendation and sentenced the defendant to death.

(T.1478-1481). On April 2, 1979, the trial court rendered its written sentencing order. (R.183). The defendant was also sentenced to consecutive sentences of life in prison for the armed burglary, five (5) years in prison for grand theft, and sixty (60) days in jail for petit theft. (R.185).

The defendant appealed his convictions and sentence to this Court. On March 4, 1982 this Court affirmed the defendant's convictions and sentences, including the death sentence. Rehearing was denied on May 19, 1982. Breedlove v. State, 413 So.2d 1 (Fla. 1982). The United States Supreme Court denied certiorari on October 4, 1982. Breedlove v. State, 459 U.S. 882 (1982).

On November 30th, 1982, the defendant filed his first 3.850 motion. He was represented by Elliot Scherker of the Public Defender's office, the same office which represented the defendant at trial and on direct appeal. The motion raised two claims, the first relating to the defendant's absence at a bench conference during jury selection (subsequently abandoned), and the second consisting of alleged Brady violations by the State.

On August 24, 1983, while the first motion for post-conviction relief was pending, the Governor signed a death warrant for the defendant. On August 31, 1983, the trial court issued an order staying the defendant's execution pending the

resolution of the motion. The motion remained in the Circuit Court, during which time the trial court reviewed various confidential police files, and memorandums of law by the parties. In 1989, the defendant subsequently abandoned the first issue regarding his presence. On January 4, 1990, the trial court denied the motion for post-conviction relief without an evidentiary hearing. This denial was affirmed by this Court on appeal. Breedlove v. State, 580 So.2d 605 (Fla. 1991).

On November 18, 1991, the Governor signed a second warrant for the defendant's execution. The warrant set the execution for the week beginning January 21, 1992 and ending at 12:00 p.m. on January 28, 1992. The defendant's execution is currently scheduled for January 22, 1992 at 7:00 a.m.

On December 18, 1991, the defendant filed a sixty-three (63) page motion to vacate judgment of conviction and sentence, with a request for leave to amend, and a motion for stay of execution. (P.R. 52-115a). On January 9th, 1992, Judge Tobin[1] heard oral argument on the motion. He then entered a one page order summarily denying relief (P.R. 324). In the order he rejected the State's argument that the guilt and penalty phase ineffectiveness claims were procedurally barred, and denied these

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[1] Judge Tobin was not the trial judge. Judge Fuller presided over the trial, but after the instant 3.850 motion was filed he sua sponte recused himself.

claims on the merits. The trial court agreed with the State that the defendant's Brady claim was procedurally barred. As of the writing of this brief, January 13, 1992, the defendant has not filed a notice of appeal and hence the State has been unable to file its notice of cross-appeal. This anticipatory brief is being filed this date, January 14, 1991, in compliance with this court's expedited briefing schedule announced January 10, 1992.

STATEMENT OF THE FACTS

The trial court did not conduct an evidentiary hearing. The State will address the allegations in the 3.850 motion, and relevant record materials, in the separate argument segments of this brief.

ISSUES PRESENTED

I.

WHETHER THE TRIAL COURT CORRECTLY FOUND THE DEFENDANT'S BRADY CLAIM TO BE PROCEDURALLY BARRED.

II.

WHETHER THE TRIAL COURT'S SUMMARY DENIAL OF THE DEFENDANT'S GUILT PHASE INEFFECTIVENESS CLAIM IS PROPER.

III.

WHETHER THE TRIAL COURT'S SUMMARY DENIAL OF THE DEFENDANT'S PENALTY PHASE INEFFECTIVENESS CLAIM IS PROPER.

STATE'S CROSS-APPEAL

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE GUILT AND PENALTY PHASE CLAIMS WERE PROCEDURALLY BARRED.

SUMMARY OF ARGUMENT

I.

The defendant's Brady claim is absolutely procedurally barred, as the State's failure to provide Det. McElveen's police report was raised and decided on direct appeal. The claim is also procedurally barred because it could and should have been raised in the defendant's first Rule 3.850 motion.

II.

The trial record establishes that counsel was aware of the defendant's history of alcohol and drug abuse, however there was no information available then nor are there factual allegations in the motion or supporting affidavits which would have provided the basis for a successful intoxication defense, especially where as here the State's theory was felony-murder, and the evidence clearly demonstrated the defendant's specific intent to commit theft within the residence. Defense counsel hence cannot be ineffective for not preparing and presenting an intoxication defense.

Defense counsel was also not ineffective for failing to uncover evidence allegedly supporting his claim that he was beaten and threatened into confessing. Even assuming the ridiculous allegations of Elijah Gibson's affidavit are true, defense counsel cannot be deficient for not uncovering these allegations because Gibson specifically states that he did not

and would not have told anyone about the alleged police coercion prior to trial, because he was afraid of the detectives. (P.R. 286). The other allegations, in the affidavits of John Lane and Charlie Williams, are conclusively refuted by the record.

As to the allegation that counsel should have prepared and presented Elijah Gibson as an alibi witness, this claim is likewise refuted by the record. Gibson gave conflicting accounts of the times he was with the defendant and admitted he was high on drugs during the relevant time period, and additionally counsel had a valid strategic reason for not calling him which is patently established by the record.

The defendant's penalty phase ineffectiveness claim is premised on allegations that counsel failed to investigate and present family background information and failed to present this information to the three defense experts who testified at the hearing. Additionally, counsel is alleged to have inadequately investigated the defendant's history of drug and alcohol abuse, including at the time of the offense, and further failed to provide his experts with this information as well. The penalty phase record establishes that the experts were well aware of the defendant's long history of alcohol and drug abuse. As for counsel not uncovering evidence of intoxication during the offense, the allegations in the 3.850 and supporting affidavits do not establish intoxication during the offense, rather only

that the defendant had used intoxicants the previous day. Additionally, the defendant's actions during and after the murder was inconsistent with a significant degree of impairment.

As for the family background information, assuming deficient conduct, the defendant has failed to establish prejudice given the three strong aggravating factors, and the fact that the defendant was thirty-two years old when he committed the offense.

CROSS-APPEAL

The instant claims are untimely, but even more significantly, they very easily could and absolutely should have been raised in an amendment to the defendant's first 3.850 motion. Initial 3.850 counsel may not have been able, due to conflict, to raise the ineffective claims when he filed the motion in 1982. However, after 1985, when the office of CCR was created, he could and should have withdrawn and let CCR take over. CCR could then have amended the motion with the instant claims (the trial court did not deny the first 3.850 motion until 1990). There is absolutely no valid excuse for the initial 3.850 counsel's actions, which amount to a deliberate withholding of the ineffectiveness claims from the first 3.850 motion. The defendant bears the risk of such attorney error at the 3.850 stage. The defendant did not deserve a second bite at the apple

merely because this is a capital case, as ruled by the trial court. The trial court's refusal to enforce procedural bar was erroneous, and should be rectified by this Court in the instant proceeding.

ARGUMENT

I.

THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT'S BRADY CLAIM WAS PROCEDURALLY BARRED.

The defendant alleges that the State failed to disclose material, exculpatory evidence at the time of trial. In particular, he asserts that the State failed to disclose the police report of Detective McElveen which contained statements from Elijah Gibson which allegedly would have supported an alibi defense, as well as the names of known burglars and/or persons stopped for loitering and prowling in the immediate neighborhood of the homicide, whose names were submitted to the fingerprint identification section in an attempt to compare them with the unknown fingerprints found at the homicide scene.

Initially, the State submits that this claim is procedurally barred as one which was raised on direct appeal, as found by the trial court. In his first issue on appeal, the defendant specifically complained about not receiving Detective McElveen's police report. This Court discussed whether the defendant was entitled to the report and whether it constituted Brady material. The Court denied the claim. Breedlove v. State, supra, 413 So.2d at 3-4. Thus, this claim is procedurally barred. See Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Arango v. State, 437 So.2d 1099 (Fla. 1983). Secondly, this

claim is procedurally barred as it could have been raised during the first motion to vacate. Mr. Scherker's alleged "conflict" which prevented him from raising the claims of ineffective assistance of counsel, in no way precluded him from raising this particular Brady claim. This evidence was available to counsel prior to the first motion to vacate. In fact, counsel knew about Elijah Gibson's statement to Detective McElveen at the time of the direct appeal and when he appeared with the defendant before the Florida Parole and Probation Commission for clemency, on September 21. 1982 (two months before the initial 3.850 motion was filed). Mr. Scherker informed the commission that the lawyers had not been given a statement by Elijah Gibson which would have put the defendant at home "at a time either shortly before or right at the time that these offenses occurred..." See p. 12 of transcript of Florida Parole and Probation Commission (P.R. 253). It is well-settled that the failure to timely raise a Brady claim, e.g. where the claim could have been presented in an earlier motion to vacate if due diligence had been exercised, precludes the Court from now considering the claim on a successive motion to vacate. See Agan v. State, 560 So.2d 222, 223 (Fla. 1990); Demps v. State, 515 So.2d 196, 198 (Fla. 1987); Clark v. State, 533 So.2d 1144, 1145 (Fla. 1988).

Furthermore, trial counsel was aware of the list of burglars and loitering and prowling suspects prior to and during trial. Trial counsel was given Detective Zatrepalek's report

which mentioned that such a list had been compiled. In addition, depositions were taken of Detective Zatrepalek and Fingerprint Technician George Hertel, during which time the list was again discussed. See deposition of Charles Zatrepalek, January 20, 1979 and February 8, 1979 at pp. 65-69, 94-96 (P.R. 158-165). Deposition of George Hertel, February 15, 1979 at p. 9 (P.R. 277). Technician Hertel testified at trial about the list. (R.850). Counsel's failure to raise this alleged "Brady" claim at trial or on appeal, precludes the defendant from raising it for the first time on a motion to vacate. See Hill v. Dugger, 556 So.2d 1385, 1387-1388 (Fla. 1990); Arango v. State, 437 So.2d 1099, 1102-1103 (Fla. 1983).

Finally, the State would submit that these claims are without merit. For the defendant to prevail under a Brady claim, he must show that the prosecution suppressed evidence, and that the undisclosed evidence was material. Evidence is material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985). First, the jury was made aware through Technician Hertel's testimony that he had compared a number of person's fingerprints to those found at the scene. (R. 850). The defendant presents no new evidence that any such person's fingerprints were found at

the scene. Thus, there is no way that this evidence would have affected the verdict. Secondly, the disclosure of Elijah Gibson's statements to Detective McElveen as set forth in his police report, would not have changed the outcome of the trial. This Court previously rejected the claim on direct appeal and the defendant has proffered no new evidence which would require reconsideration of the claim. The statement by Elijah Gibson which is contained in Detective McElveen's police report is substantially similar to the sworn statement given to Detective McElveen on November 9, 1978, which was provided to defense counsel as part of discovery. See State's Discovery Response, p. 3, dated December 15, 1978. (SR. 41).[2] In his own statement, Elijah Gibson stated that the defendant returned home around 2:30 a.m., had a glass of water and a cigarette, then left around a half an hour later on a yellow ten speed bicycle, returning again around 3:30 or 4:00 a.m. See p. 2 of sworn statement of Elijah Gibson (P.R. 149). Thus, there is no allegedly favorable evidence which was suppressed by the State.

Furthermore, Elijah Gibson did not testify at trial. If he had testified, his testimony as set forth in his statement to Detective McElveen, would not have necessarily established an alibi, as he gave Detective McElveen only "approximate" times

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[2] The symbol "SR" denotes a page in the supplemental record on appeal, Florida Supreme Court, Case No. 56,811.

that he saw the defendant at his house.[3] In addition, his credibility would have been impeached by his inconsistent statement to Detective Zatrepalek, i.e., that the defendant returned with the blue bicycle at approximately 3:00 a.m. See p. 112 of Deposition of Charles Zatrepalek (P.R. 166). Thus, it is clear that there is no reasonable probability that this evidence would have changed the outcome of the proceedings. As such, this claim was properly summarily denied.

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[3] Furthermore, if Elijah Gibson was on heroin as he stated in his new affidavit, then his ability to correctly place the defendant in his home during those times is severely in doubt.

II.

THE TRIAL COURT'S SUMMARY DENIAL OF THE DEFENDANT'S GUILT PHASE INEFFECTIVENESS CLAIM WAS PROPER.

As a preliminary matter, the State must protest the piecemeal way in which the defendant presented his factual allegations to the trial court. The 3.850 motion presented summaries of proffered testimony from numerous unidentified witnesses, relevant to both his guilt and penalty phase ineffectiveness claims.

The motion lacked allegations that these anonymous sources of information were available at the time of trial and willing to testify at that time. In its response the State argued that such amorphous allegations are legally insufficient. During oral argument affidavits were for the first time presented, and these were accepted by the Court prior to its ruling. Since the affidavits were accepted, and they identify the sources and contain the necessary "I was available and willing" allegations, the issue of the sufficiency of the four corners of the motion is now moot. Had the affidavits been presented in a timely fashion, or had at least the identities of the witnesses been specified and their availability and willingness alleged in the motion, the State and more importantly the trial court would not have wasted its time and effort considering the facial sufficiency of the allegations.

III.

ALLEGED FAILURE TO FULLY INVESTIGATE CLAIM OF COERCED CONFESSION.

In the State's brief in this Court on the appeal of the denial of the defendant's first 3.850 motion, Florida Supreme Court no. 75,599, the State summarized in detail the testimony presented at the suppression hearing. The State has filed this 26 page summation as an appendix to the instant brief, for the Court's convenience. What the testimony summarized therein establishes beyond any doubt, is that the defendant's claim of a beating and threats is absolute nonsense. In this vein this Court can compare the defendant's testimony at the hearing on the motion to suppress (R. 308-345, summarized in the appendix hereto) with his testimony at his clemency hearing (P.R. 242-267), regarding the alleged police efforts to extract his confession. The phrase "substantial deviation" hardly does justice to the magnitude of the disparity. The transcript of the suppression hearing demonstrates that the defendant confessed on November 21st, 1978, twelve days after his initial statement denying culpability, and did so not because he was threatened but because his fingerprints had been matched to the scene of a burglary/murder of an elderly woman in Broward County (and in which case he subsequently pleaded guilty to second degree murder).

The point of this initial dialogue is that the record establishes that the defendant's coerced confession claim was ludicrous. With that in mind, each of the three factual allegations will now be addressed.

In his affidavit, Elijah Gibson attempts to indirectly support the defendant's coerced confession claim, as he alleges the detectives threatened and intimidated Elijah into telling them the defendant had bloody clothes and a gold watch when he returned home that morning (P.R. 285). He also alleges that the detectives pumped the defendant's mother, Mary Gibson, with wine so that she would tell them the defendant had bloody clothes and arrived home on a blue bicycle that morning. Ignoring the fact that Elijah admits to being whacked out on heroin during this time period, and that he gave a sworn statement and deposition in which he says nothing of the intimidation/wine tactics, and that Mary Gibson testified at the suppression hearing for the defendant and said nothing about these tactics, even ignoring all this counsel could not be ineffective for not uncovering Elijah's recent revelations because in his affidavit, Elijah says he did not tell and would have told anyone about the detectives tactics prior to trial, because he was afraid of the detectives (P.R. 286). If anything, this "claim" concerning Elijah's 1991 revelation would be a claim of newly discovered evidence. Elijah said what he said in 1978/79, and counsel cannot be faulted on that score.

In his affidavit (P.R. 296) John Lane, who was a cellmate, says that he remembers the defendant being called out of his cell, and when he returned he was holding his stomach and moaning, at which time the defendant said he was beat up by the police and forced to confess.[4] This allegation is directly refuted by the testimony of the defendant himself at the suppression hearing. The defendant testified he was beaten on November 9th, but did not confess. (R. 308, 309). When he was questioned again on the 21st, he did confess, <u>but he was not beaten, only threatened with a beating</u>. (R. 314, 315). The affidavit of Lane hence is contradicted by the record.

The affidavit of Charlie Williams (P.R. 291) is likewise inconsistent with the testimony at the suppression hearing. Both the defendant and Detective Zatrepalek testified that on both the 9th and 21st the defendant was taken from the jail to the homicide office next door. There was no other contact between them and no outside excursions. Additionally, the only place the defendant said he was beaten was the stomach and chest (R.308, 309), whereas Williams says he saw bruises on the defendant's head.[5]

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[4] The State notes in passing that what the defendant allegedly told Lane is hearsay because it would have been elicited by the party who sought to benefit from its admission. F.S. 90.803(18).

[5] Of course, the defendant covered all the bodies bases in his clemency hearing testimony, with the number of beatings (every

In short, the defendant's ineffectiveness claims relating to his confession are all refuted by the record and indeed are frivilous.

IV.

FAILURE TO PRESENT ELIJAH GIBSON AS ALIBI WITNESS.

The defendant alleges that counsel was ineffective for not investigating an alibi for the defendant, that is, that he was home with his brother, Elijah Gibson, at the time of the homicide. The State submits that this argument is without merit and refuted by the record and files of this Court.

In Elijah Gibson's affidavit, he alleges that he was threatened by the police into giving an incriminating statement about the defendant, that is, that the defendant showed him specific jewlry, and that he had seen blood on the defendant's clothes. Elijah Gibson also states that when he gave his two prior statements about the defendant, he was high on heroin. Gibson states that on the day of the murder, he was playing pool with the defendant until 7:00-8:00 p.m., when the defendant left, that the defendant was using drugs and drinking beer, that the defendant returned home around 2:00 a.m., that the defendant

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day for over a week) number of officers (whole room full), location (head, neck, stomach, etc.) and use of weapons taking on truly draconian proportion.

continued to drink and take drugs, and then left again for half an hour to get more beer. Gibson also states that he (ELijah) was still very high on drugs at that time (P.R. 285-287).

Gibson's new affidavit does not provide an alibi for the defendant. Although he states the defendant was home at 2:00 a.m., it does not state when he left. Furthermore, it is just one more statement by Elijah which is inconsistent on the times when he said he saw the defendant at home that night. In his sworn statement to Detective McElveen, Elijah Gibson stated that he was awaken by the defendant around 2:30 a.m., that the defendant stayed about a half an hour, left, and returned around 3:30-4:00 a.m. (P.R. 149). Elijah also told Detective Zatrepalek that the defendant had returned to the house at approximately 3:00 a.m. See Deposition of Charles Zatrepalek, (P.C. 166).

In addition, defense counsel took the deposition of Elijah Gibson on February 26, 1979. During that deposition, Gibson was confused about the times that he saw the defendant. Gibson testified in his deposition that he came home that night around 11:00-11:30, took a shower, ate something, then fell asleep. Gibson stated that he was awaken about 1-1½ hours later by the defendant. That was when he saw blood on the defendant's pants (P.C. 179). The defendant stayed for ½ hour and then left, returning around 3:00-3:30 a.m. He and the defendant had a few drinks from a bottle of an old-fashioned liquor (P.C. 183).

Gibson also stated that he had seen the defendant with the cutoff checkered pants, that the defendant had said that he had been cut in a fight at the U-Totem, and that the defendant showed him gold watches including one with rhinestones around the face (P.C. 184).

What Elijah Gibson's various statments show is that he was not a particularly credible witness when it came to dates and times and clearly would not have provided a credibile alibi for the defendant. Even in his affidavit, Elijah states he was high at the time. Thus, defense counsel's actions concerning Elijah Gibson were not deficient. He took a deposition of Elijah, he had his prior sworn statement to Detective McElveen, and he was aware of what Detective Zatrepalek would testify that Gibson told him. Thus, defense counsel was clearly not ineffective for failing to discover Gibson's initial statement to Detective McElveen, and for failing to put him on the stand, where Gibson could obviously not clearly establish an alibi for the defendant, and in fact would provide damaging information concerning the bloodstained pants and the rhinestone watch. Instead, it is clear from the record that counsel intended to use Elijah Gibson as another person who could have committed the homicide. (R.1152-1154, 1218-1291). Thus, defense counsel was not ineffective under the standards of Strickland v. Washington in his alleged failure to investigate an alibi defense. See Squires v. State, 558 So.2d 401, 402-403 (Fla. 1990) (counsel not ineffective for failing to

interview potential alibi witness where counsel knew witness would not be able to corroborate defendant's alibi and witness would tell of damaging conversation with defendant); Jones v. State, 528 So.2d 1171, 1174 (Fla. 1988) (counsel not ineffective for failing to call alleged eyewitnesses where testimony would have been somewhat unreliable because of their intoxicated condition at time of incident); Alexander v. Dugger, 841 F.2d 371, 374-375 (11th Cir. 1988) (counsel not ineffective for failing to call alibi witness who had testified at a pretrial deposition in a manner inconsistent with defendant's claim).

V.

FAILURE TO INVESTIGATE AND PRESENT INTOXICATION DEFENSE.

The defendant alleges that counsel was ineffective for failing to investigate and raise a defense of voluntary intoxication. The State submits that the evidence proffered in the defendant's motion to vacate and supporting affidavits falls far short of establishing that counsel's performance was either deficient or prejudicial under the standards of Strickland v. Washington, supra.

The defendant alleges that he has a long history of substance abuse and intoxication beginning when he was a child and continuing throughout his adult life. He alleges that there was evidence of his intoxication through his statements to the

detectives that he was drinking that night, and he has presented an affidavit from a cell mate friend, Butch Johnson, that he observed the defendant's withdrawal from drugs and alcohol after his arrest. The defendant further alleges that counsel failed to present an available mental health expert, Dr. Toomer, who could have explained the effects of alcohol and cocaine on the ability to from specific intent (though the proffer as to Dr. Toomer is cursory in the extreme).

First, the State submits that the record establishes that counsel did investigate an intoxication defense. As pointed out by the defendant, both court-appointed doctors, Dr. Jaslow and Dr. Mutter, referred to the defendant's extensive history of drugs and alcohol abuse. (R. 54-56; 59-61). Both doctors recognized that the defendant had diminished mental capacity as a result of drug and alcohol intoxication, but both felt that the defendant was most likely competent and had the capacity to know right from wrong and the nature and consequences of his actions at the time of the offense. Counsel was clearly aware of the defendant's statements to the police that he had been at the U-totem and brought some MD 20-20 or Thunderbird Wine. (R.925). Counsel also took Elijah Gibson's deposition, and had in his possession Elijah's sworn statement to the police. In his sworn statement to Detective McElveen, Elijah stated that he was home watching television on the day of the homicide (P.C. 148, 149). In his deposition, unlike his recent affidavit, Gibson told how

he went to shoot pool and had some beers with some friends. He definitely did not say in his deposition that he was with the defendant on the evening of the murder (P.C. 172-180). He did state that later in the evening around 3:00-3:30 a.m., after the defendant had come back a second time, he and the defendant had a few drinks together (P.R. 183).

Thus, at the time of trial, counsel was aware of the defendant's long history of alcohol and drug addiction, he was aware that the defendant told the police he had bought a bottle of alcohol at the U-Totem on the night of the incident, and that after the murder, the defendant and Elijah Gibson had a few drinks together at their house. However, there was no information available at that time as to how much alcohol the defendant had drunk or what drug, if any, he had taken prior to the homicide, and what effect these drugs or alcohol had on his ability to form either a specific intent to kill or the specific intent to steal.[6] Without that evidence, the defendant would have not been entitled to even a jury instruction on intoxication.

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[6] Although charged in the alternative, the State preceded at trial solely on the theory of felony murder. Hence the State did not need to prove a specific intent to kill, rather only a specific intent to enter the residence with the intent to commit a theft therein.

It is well-established that jury instructions regarding intoxication need not be given where there is no evidence of the amount of intoxicants consumed during the hours preceding the crime, and no evidence that the defendant was intoxicated. Gardner v. State, 480 So.2d 91, 93 (Fla. 1985); Jacobs v. State, 396 So.2d 1113, 1115 (Fla. 1981). Although a defendant is entitled to a jury instruction on intoxication where the record contains sufficient facts from which the jury could properly infer that the defendant consumed intoxicants and was intoxicated at the time of the crime, Gurganis v. State, 451 So.2d 817, 822 (Fla. 1984), "the defense of voluntary intoxication is limited in scope, and the evidence which may be presented is more confined and restrictive than the defense of insanity." Rivers v. State, 425 So.2d 101, 106 (Fla. 1st DCA 1982).

There was clearly no evidene at the time of trial which was available to defense counsel which would have established that the defendant was intoxicated at the time of the offense. Counsel cannot be faulted for not discovering Elijah Gibson's recent affidavit, when it is contrary to his previous sworn statements. Besides having no evidence to show that the defendant was intoxicated at the time of the offense, counsel was confronted with clear evidence that even if the defendant did not have the premeditated intent to kill, he was able to formulate the specific intent to steal, all that was necessary for the State to prove first degree felony murder. The evidence at trial

showed that the rear door to the victim's home had been forcibly opened (T. 615, 677), and that the victim's girlfriend, Carol Meoni's purse had been moved from the living room, rummaged through and discarded outside the house, (T. 615) and that jewelry and money were taken. (T. 733). Thus the evidence was overwhelming that the person who killed the victim did so during the course of the burglary, after he entered the home with a clear intent to commit theft. In addition, defense counsel was confronted with other evidence of the defendant's lack of substantial impairment, i.e., the fact that he put socks on his hands to avoid leaving fingerprints, and was able to steal Debbie Layton's bicycle located two houses away and ride it safely home, and then discard his bloody clothes in a dumpster. ((R. 1050-1051). In sum, counsel was not ineffective for failing to raise an intoxication defense.[7] See, e.g., White v. State, 559 So.2d 1097 (Fla. 1990), (trial counsel was not ineffective for failing to raise an intoxication defense where the defense would have been incompatible with the deliberateness of the defendant's actions, in that the evidence showed that the defendant took a loaded gun to the store, both victims were shot in the back of the head, the defendant took money from the store, ran steadily back to his car and drove away capably, changed his clothes and

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[7] The State would also note that the defendant's allegations concerning counsel's failure to have a mental health expert testify as to intoxication are insufficient, as the defendant proffers no affidavit or report from any expert who would have testified that the defendant could not have formed the specific intent to steal.

disposed of his clothes and murder weapon); Lambrix v. State, 534 So.2d 1151 (Fla. 1988) (that counsel was not ineffective in failing to develop additional evidence that would have entitled him to obtain an instruction on voluntary intoxication, that is, a doctor who had examined the defendant prior to trial and concluded that Lambrix suffered from substance abuse disorder, and an expert in addictionology would testify that Lambrix's alcohol dependency rendered him intoxicated to the extent that he was incapable of forming the specific intent necessary for first degree murder, where the proffered evidence would not have established the defense of voluntary intoxication, and that based on the facts of the crime and the testimony of those who saw Lambrix on the night of the crime, there was no reasonable probability that the jury would not have found him guilty of first degree murder even if it had received an instruction on voluntary intoxication); Bertolotti v. State, 534 So.2d 386 (Fla. 1988) (counsel not ineffective for failing to raise the defense of voluntary intoxication to the specific-intent crimes of premeditated murder, robbery and burglary, where the only evidence at trial of intoxication was defendant's statement to the police that at the time of the murder, he was "high" on quallude); Edwards v. State, 556 So.2d 1193 (Fla. 1st DCA 1990) (counsel was not ineffective for failing to pursue an intoxication defense where only evidence of intoxication was defendant's post-arrest statement regarding consumption of alcohol, i.e., that he shared a quart of beer a half an hour

before driving to the victim's home, and where he was able to describe to police the route he had taken from the victim's house after the murder). See also Robinson v. State, 520 So.2d 1, 5 (Fla. 1988) (held that there was no evidence to show that the defendant's consumption of unspecified amounts of cognac, gin and beer on the night of the murder caused him to be intoxicated where the evidence showed that the defendant walked and talked fine, drove the car, and appeared normal); Jacobs v. State, supra; Watkins v. State, 519 So.2d 760, 761 (Fla. 1st DCa 1988); Hester v. State, 503 So.2d 1342, 1344 (Fla. 1st DCa 1987).

Finally, counsel was not ineffective for failing to raise an intoxication defense, where the defendant consistently denied committing the murder. (See Reports of Dr. Mutter, R. 54, and Dr. Jaslow, R. 59), as well as transcript of Florida Parole and Probation Commission for clemency, dated September 24, 1982, P.C. 244). It is not ineffective assistance of counsel to fail to raise an intoxication defense that would be inconsistent with the defendant's claim that he did not commit the crime. See Combs v. State, 525 So.2d 853 (Fla. 1988); Groover v. State, 489 So.2d 15 (Fla. 1986); Harich v. State, 484 So.2d 1239 (Fla. 1986). Thus, the State submits that the defendant's allegations concerning counsel's failure to investigate and raise a defense of voluntary intoxication are conclusively refuted by the record, and thus were properly summarily denied.

INEFFECTIVE ASSISTANCE AT PENALTY PHASE.

The defendant alleges that trial counsel was ineffective for failing to investigate and present various forms of mitigating evidence, both statutory and non-statutory. In particular, the defendant asserts that counsel should have presented evidence of his natural mother's alcoholism and neglect of the family; of his stepfather's beating of his mother, stepmother, and the children, including the defendant, which eventually caused him to leave home; of his stepmother's alcoholism; of the defendant's long history of addiction to drugs and alcohol which caused his problems with the law in California and the defendant's problems with his stepfather and natural mother when he returned from California. In addition, the defendant alleges that counsel was ineffective for not investigating his intoxication at the time of the offense, and for not presenting a mental health expert to testify about how the defendant's substance abuse problems aggravated his already existing mental health problems.

As stated supra, claims of ineffective assistance of counsel are controlled by the standards of Strickland v. Washington, supra. The State submits that the record clearly shows that counsel was not ineffective under Strickland, in that counsel's performance did not fall outside the wide range of reasonable professional assistance, and that even if the performance was inadequate, there is no reasonable probability

that the results of the sentencing proceeding would have been different.

The State recognizes that defense counsel has a duty to investigate, but this duty is limited to a reasonable investigation. Strickland v. Washington, supra, 466 U.S. at 691, 104 S.Ct. at 2066. The defendant alleges through the affidavit of Jay Levine, one of the defendant's trial counsel, that he was asked by co-counsel, Eugene Zenobi, after the verdict was rendered, to conduct the penalty phase. Mr. Levine stated he did not investigate and prepare the mental health experts. He also stated that he gave the mental healt experts no information about the case to help them determine the defendant's mental state at the time of the homicide.

Despite Mr. Levine's attempt to admit his and co-counsel's ineffectiveness, his statements to that effect are not dispositive. See Francis v. State, 529 So.2d 670, 672 n.2 (fla. 1988). Rather, this Court must look to the record and files to see if the defendant's claims of ineffectiveness of counsel can be sustained or refuted. From the record, counsel was clearly aware of the defendant's history of alcohol and drug abuse and introduced evidence of the same at the penalty phase. Dr. Mutter, in his report of February 22, 1979 (R. 54), related that the defendant told him that he used amphetamines, cocaine, speed, quaaludes, methadrine. He related the defendant's statement that

he took drugs to stop voices that told him to kill people. The defendant also told Dr. Mutter that his drug history went back to the age of 16, that he had taken LSD over 50 times, and that he drank large quantities of vodka daily. He further told Dr. Mutter that he was hospitalized in 1977 in California for a "bad trip." Dr. Mutter concluded that the defendant had a diminished mental capacity as a result of drug and alcohol intoxication, but stated that this was voluntry over a prolonged period of time.

At the sentencing hearing, Dr. Mutter testified that he felt it was possible that the defendant had a diminshed mental capacity, as a result of drugs and alcohol intoxication, (R. 1407, 1415), but that he felt it was voluntary on the defendant's part as he had this type of problem over a prolonged period of time. (R. 1407). Dr. Mutter also stated that he believed that the defendant's emotional problems, which he had for a prolonged period of time, manifested itself by the defendant's misuse of drugs. (R. 1409). Dr. Mutter further testified that he took the defendant at his word when he told him about his use of drugs. (R. 1413). He stated that the defendant told him that he used all kinds of drugs, had taken heroin intravenously, and LSD over 50 times. Dr. Mutter explained that LSD can cause minor aberrations, distortions, hallucinations, delusions, and could have permanent effects. (R. 1414).

Dr. Jaslow in his report of February 21, 1979 (R. 59), related that the defendant told him that he began drinking and using drugs heavily at the age of 16, that he would experience blackouts and amnesia when involved with alcohol and drugs. The defendant told him that he had had treatment for his alcoholism in California. He stated that alcoholism was a secondary indulgence to drugs. The defendant related that he had used cocaine, acid, stimulants, and had been treated in a California psychiatric hospital in 1977 for an overdose of amphetamines. The defendant told him that he was frightened when he was not under the influence because he did not think he could really handle the responsibilities of a normal reality existence. Dr. Jaslow noted that the defendant did not claim any involvement with toxic substances that would have interfered with his ability to know or recall what had transpired, rather, the defendant denied committing the crimes. Dr. Jaslow did conclude that the defendant's long standing and tremendous involvement with alcohol and drugs, along with his repeated sociopathic problems, indicated that he had extensive psychological problems that were quite deep-rooted. Dr. Jaslow testified at the sentencing hearing that the defendant had problems which related to his prior activities with alcohol and drugs. (R. 1397). However, he stated that the defendant's involvement with drugs or alcohol was not of sufficient power to render him incapable of knowing what he was doing or what was happening to him. (R. 1400).

Furthermore, Dr. Eli Levy, one of the defense experts, testified at trial that the defendant told him of his history of drug use since the age of 16, and that on the night of the crime, the defendant stated that he had been using cocaine and mescaline. (R. 1344). Dr. Levy concluded that the defendant's history of drugs was consistent with the psychological test results. (R. 1344).

In addition, counsel also presented the testimony of Dr. Benjamin Center, who was a neuro-psychologist, psychiatric social worker, and educational psychologist, with a Ph.D. in learning disabilities and mental retardation, who tetified about the psychological tests he gave the defendant and his conclusions that the defendant was in the dull-normal range of intellectual functioning, had difficulty with manipulation of thought patterns, concepts, and remote memory, all of which were indicative of brain dysfunction. (R. 1327-1328). Dr. Center believed that the defendant suffered from an extreme mental or emotional disturbance. (R. 1328-1329).

Dr. Levy, also a psychologist, not only testified about the defendant's problems with substance abuse, but also found the defendant to have an organic deficiency, that is brain damage (R. 1343), to be a paranoid schizophrenic in remission, and to be a person with inadequate self-perception. (R. 1346). He testified that under stress, the defendant would decompensate, and act bizarre or irrational. (R. 1348-1349).

Dr. Lloyd Miller, a psychiatrist, testified that he found that the defendant suffered from chronic paranoid schizophrenia, one which was long-standing, but had improved while the defendant was on medication in the jail. (R. 1369). Dr. Miller described what a paranoid schizophrenic was (R. 1370), and testified tht such a person suffers from an extreme mental condition. (R. 1371). However, he could not say within a reasonable medical certainty that the defendant's mental condition at the time of the offense was the result of an extreme disturbance or substantial impairment, because the defendant denied committing the crime, and thus could not tell him what he was doing for that period of time. (R.1384-1385).

In addition to the doctors who testified at the sentencing hearing, the record indicates that defense counsel had the defendant evaluated for competency to stand trial by Dr. Harry Greff, who recommended that corroborative psychological testing "as to organic conditions" be conducted. (R. 28). See Motion for Psychiatric Examination for Competency. (R. 28). Thus, the record reflects that counsel more than adequately investigated and presented evidence of the defendant's long history of substance abuse, as well as existing mental health problems, i.e., schizophrenia and brain damage.

The defendant alleges that counsel was ineffective for not providing the mental health experts with sufficient background information about the defendant or the crime. The State submits that the record refutes that allegation. The record demonstrates that Drs. Mutter and Jaslow took a history from the defendant which related some of his background problems, i.e., that he was born in Georgia, the oldest of nine children, that he was raised in Florida, that his parents separated when he was thirteen, that his father raised him, that he had difficulty with interpersonal relationships, that he left school during the 8th grade, that he had not held a job for a long time and that he was hospitalized in California for 8 months after being shot in the stomach. (R. 54, Report of Dr. Mutter, R. 59, Report of Dr. Jaslow). Dr. Center testified that he talked to the defendant's mother. (R. 1333). Dr. Levy and Dr. Miller also testified that they took a history from the defendant. (R. 1339, 1366). There is no affidavit from any of these doctors that any other background information or information about the crime was necessary or would have made a difference in their formulation of opinions about the defendant. In fact Dr. Levy testified at trial that anything he was told about the surrounding circumstances of the case would not have made a difference because of the results of the tests that he administered. (R. 1365). The evaluations by all five doctors were clearly adequate, and thus counsel was not ineffective for not providing the doctors with more information. See, e.g., Johnston v.

Dugger, 583 So.2d 657, 660-611 (Fla. 1991); Roberts v. State, 568 So.2d 1255, 1260 (Fla. 1990); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990); Doyle v. Dugger, 922 F.2d 646, 653 (11th Cir. 1991); Card v. Dugger, 911 F.2d 1494, 1511-1514 (11th Cir. 1990). See also Jennings v. State, 583 So.2d 36, 320-321 (Fla. 1991); Hill v. Dugger, 556 So.2d 1385, 1388-1389 (Fla. 1990).

The defendant also alleges that counsel was provided ineffective assistance by not investigating and presenting evidence of the defendant's troubled childhood, i.e., alcoholic mother and stepmother, abusive father. The State submits that even if counsel was deficient in not presenting such evidence, there is no reasonable probability that the result of the sentencing proceedings would have been different. The trial court found three aggravating factors, all of which were upheld by this Court on appeal. They were that the defendant had been convicted of prior violent felonies, i.e., two counts of assault with intent to commit rape;[8] that the homicide was committed during the course of a burglary;[9] and that the homicide was especially heinous, atrocious and cruel. The Court found that the victim was stabbed in the upper chest while in bed, causing

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8 The defendant had also been convicted of burglary with the intent to commit rape. (R. 165). The defendant was subsequently convicted of second degree murder in Broward County.

9 The trial court also found that the murder was committed for pecuniary gain, but did not consider it as a separate aggravating factor.

him great pain as he drowned in his own blood. There was also evidence of five defensive wounds on the victim's right hand, indicating that he was aware of the attack. (R. 183).

The trial court also considered the evidence of the defendant's mental state at the time of the offense. The Court found the evidence to be contradictory, but concluded that the defendant was a sociopath, whose actions showed that he was rational and not under the influence of an extreme mental or emotional disturbance, and that he was able to appreciate the criminality of his conduct.

The defendant was thirty-two years old when he entered the Meoni home and stabbed Frank Budnick through the chest. Evidence of a deprived and abusive childhood would thus have been entitled to little, if any, mitigating weight. In Francis v. State, 529 So.2d 670 (Fla. 1988), this Court stated:

> Francis' mother died when he was six and her sister (his aunt) raised him and his sisters in a poor, black community. His aunt, youngest sister, and the ex-wife of his aunt's son testified at the evidentiary hearing. Although the ex-wife testified that the aunt's common law husband mistreated Francis, neither his aunt nor his sister said that. Not only is the testimony of these witness' inconsistent, it deals with events remote in time from the the instant homicide. Francis was thirty-one when he committed this murder; that this evidence would be found to establish mitigating circumstances is merely speculative. *Bolender; Lusk.*

Id. at 673.

See also Francis v. Dugger, 908 F.2d 696 (11th Cir. 1990):

> Given the particular circumstances of this case including, among other things the fact that Francis was thirty-one years old when he murdered Titus Walters, evidence of a deprived and abusive childhood is entitled to little, if any mitigating weight. *See Francois v. Wainwright,*763 F.2d 118, 1191 (11th Cir. 1985).

Id. at 703.

In addition, if the mental health experts or family or frineds testified about the defendant's background or character, evidence of his long criminal history which did not come out at the sentencing hearing, may have been then brought to the jury's attention. See, e.g., Valle v. State, 581 So.2d 40 (Fla. 1991); Floyd v. State, 569 So.2d 1225 (Fla. 1990); Medina v. State, 573 So.2d 293 (Fla. 1990).

Overall, it is clear that even if the evidence of the defendant's background had been introduced, in light of the aggravating factors and the defendant's age, there is no reasonable probability that the results of the sentencing proceeding would have been different. In Tompkins v. Dugger, 549 So.2d 1370, 1373 (Fla. 1989), this Court found:

> The trial judge, when imposing the death penalty, found three aggravating circumstances: previous conviction of a violent felony; murder committed during

> an attempt to commit a sexual battery; and that the murder was especially heinous, atrocious, or cruel. The previous felony convictions consisted of two prior rapes at knife point. Tompkins alleges that there were extenuating circumstances which would mitigate this aggravating factor. He further submits that additional mitigating evidence existed and should have been presented at trial. This mitigation included an abused childhood and an addiction to drugs and alcohol. The trial court found that this evidence would not have affected the penalty in light of the crime and the nature of the aggravating circumstances. We affirm the trial court's finding that the second prong of the *Strickland* test has not been satisfied.

See also Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990); Correll v. Dugger, 558 So.2d 422 (Fla. 1990); Cave v. State, 529 So.2d 293 (Fla. 1988). Thus, the State submits that the trial court's summary denial was proper.

STATE'S CROSS APPEAL

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE DEFENDANT'S INEFFECTIVENESS CLAIMS WERE PROCEDURALLY BARRED.

In its response in the trial court (P.R. 125-128), the State set forth at length the factual and legal basis for its assertion that the ineffective claims were procedurally barred as well as time barred. The trial court in its order stated "that the second motion is untimely, but because the instant case involves the death penalty, the court will consider the motion on its merits" (P.C. 324). The court did *not* specifically address the State's successive petition/procedural bar argument, though oviously the court applied the same "involves the death penalty" logic. Obviously the trial court's rational is improper, as capital cases are not immune from the dictates of Rule 3.850. The State respectfully submits that the result reached by the trial court, i.e., its decision to reach the merits, is also incorrect, and the State hereby incorporates and adopts its argument before the trial court, as outlined in its response (P.R. 125-128).

Essentially, the State's argument boils down to the fact that the ineffectiveness claims could and should have been raised in the first 3.850 motion. The conflict which prevented the inclusion of the ineffectiveness claims in the initial 3.850 motion, in November 1982, did not prevent the Public Defenders

Office from withdrawing after the creation of CCR in 1985, so that CCR could amend the initial motion with these claims, claims which the Public Defenders' representative knew were the standard crux of 3.850 litigation. The reason the Public Defenders Office did not withdraw is because it wanted these claim to form the basis of a second petition down the road, with new counsel who could always rely on the Public Defenders Office's alleged conflict.

As stated in Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546 (1991), the defendant bears the risk of attorney error at the collateral stage. Initial 3.850 counsel made a strategic error, an error which had nothing whatever to do with conflict of interest. It is certainly unfortunate for the defendant that he loses an opportunity to litigate his ineffective claims, however, that is what the law of Florida mandates, and hence the trial court erred in not finding these claims procedurally barred, as well as time barred.

CONCLUSION

The trial court's summary denial was proper, and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE/CROSS-APPELLANT** was furnished by mail to **THOMAS DUNN,** Office of CCR, 1533 South Monroe Street, Tallahassee, Florida 32301 on this 14th day of January, 1992.

RALPH BARREIRA
Assistant Attorney General

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