IN THE SUPREME COURT OF FLORIDA

RAYMOND MICHAEL THOMPSON,

Appellant,

vs. Case No. 81,927

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SARA D. BAGGETT
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0857238
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(561) 688-7759

ATTORNEY FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, RAYMOND MICHAEL THOMPSON, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings and transcripts will be as follows:

R [vol.] [page] = original trial record
PCR [vol.] [page] = original postconviction record
PCSR [vol.] [page] = supplemental postconviction record

STATEMENT OF THE CASE AND FACTS

Appellant was indicted for the first-degree murder and kidnapping of Jimmy Savoy on January 23, 1985. (PCR I 1). The facts surrounding the kidnapping and murder are as follows:

> Savoy, an old friend and associate of Thompson's, allegedly stole approximately $600,000 from Thompson and fled from South Florida to Massachusetts. According to witnesses, Thompson put out an "open contract" on the life of Jimmy Savoy. Bobby Davis, another of Thompson's associates, testified pursuant to a plea agreement that in March 1982, Davis, Thompson, and two other associates located Savoy in South Florida and kidnapped him. They then took Savoy out to sea on Thompson's boat and tortured him by beating. Afterwards Savoy was wrapped in chains, shot by Thompson in the back of the head, and dumped overboard.

Thompson v. State, 553 So. 2d 153, 154-55 (Fla. 1989). Appellant was convicted of first-degree murder, and the jury recommended a life sentence. (R 3161-62, 3163, 3202). The Honorable Stanton Kaplan, however, sentenced Appellant to death, finding the existence of five aggravating factors--"prior violent felony," "felony murder," "pecuniary gain," HAC, and CCP--and nothing in mitigation. (R 3340-50).

On direct appeal from his conviction and sentence, Appellant raised six claims, four relating to the conviction and two relating to the sentence: (1) whether the trial court erred in denying Appellant's motion for a new trial based on the state's failure to produce Brady material (Bobby Davis' sworn affidavit the State used

to request the extradition of codefendant Scott Errico), (2) whether the trial court erred in admitting Williams Rule evidence, (3) whether the trial court erred in denying Appellant's motion to dismiss based on double jeopardy grounds, (4) whether the trial court had subject matter jurisdiction over a murder that was committed at sea, (5) whether the trial court erred in overriding the jury's life recommendation, and (6) whether Florida's death penalty statute is unconstitutional on its face and as applied. This Court affirmed Appellant's conviction and sentence on October 19, 1989. Thompson v. State, 553 So. 2d 153 (Fla. 1989).

Thereafter, Appellant filed a petition for writ of certiorari in the United States Supreme Court raising the following three issues: (1) whether the trial court violated Appellant's constitutional rights by overriding the jury's recommendation of a life sentence, (2) whether the trial court violated Appellant's constitutional rights when it found the existence of the "prior violent felony" aggravating factor which was based on a 36-year-old rape conviction, and (3) whether the State violated Appellant's constitutional rights when it failed to disclose Brady material. On May 14, 1990, the Court denied Appellant's petition. Thompson v. Florida, 495 U.S. 940 (1990).

On September 20, 1991, almost sixteen months later, Appellant filed a motion to vacate his judgment and sentence with special request for leave to amend. (PCR I 20-36). In this motion,

Appellant conceded that the motion was incomplete, citing as reasons therefor "the untenable predicament caused by the failure of various state and federal agencies to disclose public records, the denial of the full two-year period to prepare the motion, and counsel's demanding workload." (PCR I 21). Regarding the public records material, Appellant claimed that he had not received requested information from the Seventeenth Circuit State Attorney's Office, the Florida Department of Law Enforcement, the Federal Bureau of Investigation, and the United States Attorney's Office. According to Appellant, he was entitled to a sixty-day extension of time from the date of the receipt of new materials within which to amend his motion. (PCR I 23, 30). Thus, Appellant sought leave to "supplement his claims with additional facts as they become available." (PCR I 23-24). In the meantime, Appellant did nothing more than list nineteen separate issue headings without any factual or legal basis to support those claims. (PCR I 25-30).

Over a month later,[1] Judge Stanton Kaplan, who had sentenced Thompson to death, denied Appellant's special request for leave to amend, finding as follows:

> 1. The defendant was convicted of the instant offenses in June of 1986, and this

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[1] Appellant claims in his initial brief that the motion was denied three days later. **Initial Brief** at 7 & n.2. In fact, the motion to vacate was filed on September 20, 1991. The order denying Appellant's special request for leave to amend was filed on October 22, 1991, and the order denying Appellant's motion to vacate was filed on October 24, 1991. (PCR I 37-38, 39-40).

> Court entered its sentence of death in August of 1986. The defendant's direct appeal to the Florida Supreme Court resulted in an affirmance of his conviction and sentence in 1989.
>
> 2. Thus, the defendant has had over five years within which to investigate and state his claims for relief, and to provide this Court with sufficient factual documentation to support same.
>
> 3. Instead, the defendant has filed a bare bones Motion pursuant to Florida Rule of Criminal Procedure 3.850 which states nineteen grounds for relief, but gives no supporting data.
>
> 4. According to the defendant's motion, the State Attorney's Office has given him access to six boxes of State Attorney files pursuant to a "public records" request earlier this year. These materials could have been sought at any point in time following the conclusion of the defendant's direct appeal.
>
> 5. The Court finds that this Special Request for Leave to Amend is not well founded, and further that it is merely a delaying tactic employed by the defendant.

(PCR I 37-38). Two days later, Judge Kaplan denied Appellant's motion for post-conviction relief, finding that "the Motion is totally devoid of facts and, while it states nineteen grounds for relief, it contains no legal or factual support upon which to base relief." (PCR I 39).

Two weeks later, on November 5, 1991, Appellant filed a 154-page motion for rehearing, raising eighteen fully pled claims. (PCR I 41-195). On December 26, 1991, the State filed a response to the motion for rehearing, attaching various portions of the

record. (PCR II 207-79). On March 25, 1992, Judge Kaplan requested both parties to submit proposed orders. (PCR II 280-81). Appellant objected to such request, which the trial court noted, but overruled. (PCR II 282-84). On May 10, 1993, Judge Kaplan denied Appellant's motion for rehearing, finding that "[a] hearing in this cause is not necessary," and basing its denial on the state's response that was attached to the order. (PCR II 285).

On appeal to this Court, Thompson claimed, among other things, that the trial court had failed to review *in camera* the documents withheld by the Nineteenth Circuit State Attorney's Office pursuant to Thompson's public records request. **Initial brief** at 6-10. Based on cases from this Court wherein it remanded solely for *in camera* review of withheld material, the State moved to relinquish for the trial court to review the claimed exemptions. This Court granted the motion on March 8, 1994. (PCSR I 1).

At a hearing on June 23, 1994, the State intended to present the testimony of Paul Zacks, the custodian of Thompson's file for the state attorney's office, who was going to testify to his inability to locate the withheld materials, the nature of the materials, and the circumstances surrounding his exclusion of those documents from Thompson's public records request. Before Judge Kaplan could hear testimony, however, Thompson's counsel began questioning the court about its seeking representation from the

Attorney General's Office in another capital postconviction case.[2] Despite the State's objection to counsel questioning the trial court to obtain facts for a motion for disqualification, Judge Kaplan nevertheless indicated that, in fact, his secretary called someone at the Attorney General's Office for representation at the Lewis deposition and received an affirmative response. Based on that concession, Thompson's counsel requested time to file a written motion for disqualification, which the trial court granted. (PCSR VI 1-18).

Almost sixteen months later, the trial court granted Thompson's motion to disqualify, but not on the grounds raised. Rather, Judge Kaplan indicated that, since the trial, he had developed a personal relationship with Thompson's original trial counsel, Roy Black, and that the personal relationship had developed into a "close friendship" with both Black and his wife within the past "year or so." (PCSR I 102-03).

Following Judge Kaplan's recusal, Thompson moved to relinquish his already relinquished case in order to depose Judge Kaplan about the nature of his friendship with Thompson's trial attorney. This Court ultimately denied that motion. Meanwhile, Judge Cohn *sua sponte* recused himself (PCSR I 114-15), the State disqualified

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[2] Judge Kaplan sentenced Lawrence Lewis to death, but had recused himself from Lewis' postconviction case when Lewis served him with a deposition subpoena. The State moved to quash the subpoena, the denial of which became the subject of litigation in this Court. See State v. Lewis, 656 So. 2d 1248 (Fla. 1994).

Judge Shapiro (PCSR I 118-20, 125-28, 129; XI 161-66, 170-79), Judge Carney *sua sponte* recused himself (PCSR I 130; XI 181-85), and Judge Susan Lebow began presiding sometime in February 1996 over Thompson's relinquishment proceedings.

At a status conference on February 23, 1996, the prosecutor mistakenly indicated to Judge Lebow that Thompson was engaged in public records acquisition and that the parties needed a hearing to litigate allegations of nondisclosure. Instead of correcting that misstatement, Thompson's attorney concurred, and the trial court set a hearing for April 2, 1996, to resolve the *in camera* review matter and to litigate claims of public records noncompliance. (PCSR XI 188-91).

When co-counsel for the State learned of the prosecutor's misstatement, she immediately filed a "Motion to Clarify Scope of April 2 Hearing" and set a telephone conference. (PCSR II 144-61). At the telephone conference, the State argued that this case had been relinquished for a very limited purpose and that the prosecutor mistakenly agreed to litigate public records. Thompson's counsel insisted, however, that Judge Kaplan had improperly denied Thompson the right to pursue public records during the original postconviction proceedings and that this Court's order of relinquishment allowed Judge Lebow to expand the scope of relinquishment. When asked what records Thompson had been pursuing, Thompson's attorney could not say because her

investigator had been unavailable, but she agreed to submit a list of agencies in noncompliance by the following week. The State noted, on the other hand, that Thompson's "Motion for Rehearing" and initial brief listed only four agencies in noncompliance, three of which were outside the court's jurisdiction. Ultimately, Judge Lebow took the matter under advisement because she was "not that familiar with this case or the issue" being raised. (PCSR VII 23-40). In an undated written order, Judge Lebow ruled that, "[i]n the interest of judicial economy, all issues regarding Appellant's public records requests, pursuant to Section 119, Florida Statutes (1989), will be heard at the hearing set for April 2, 1996." (PCSR 185).

At the hearing on April 2nd, the State called Assistant State Attorney Paul Zacks as a witness regarding the documents withheld by the State Attorney's Office. Mr. Zacks testified that he was the designated custodian for the Broward State Attorney's Office when Thompson requested records in 1991. Pursuant to the request, he ordered the files from archives, reviewed them for exempt material, then notified CCR's investigator, who came to inspect the files in June 1991. (PCSR VIII 48-54). When the investigator arrived, Mr. Zacks showed him the folder containing all of the documents Zacks withheld from disclosure. (PCSR VIII 55). Normally, Zacks looks for criminal history information and in this case removed rap sheets for Thompson and either codefendants or

witnesses. (PCSR VIII 57). He also looks for exempt biographical information relating to police officers, victims, and confidential informants. (PCSR VIII 57-58). Finally, he removed personal notes made by the prosecutor that were unrelated to the prosecution, and notes made by himself relating to the 3.850 proceeding then ongoing. (PCSR VIII 58-59). In all, he removed a total of 18 to 20 pages of documents. (PCSR VIII 58). Any notes made by the prosecutor relating to the case were provided to CCR. (PCSR VIII 59-60). Zacks kept the folder of withheld documents with the other file boxes, which were eventually sent back to archives. He went through the file boxes looking for the folder of exemptions, but has not been able to find them. (PCSR VIII 61). He did not purposefully lose or destroy the documents. (PCSR VIII 82).

Because CCR's investigator was not available for the hearing, the trial court took the issue under advisement. (PCSR VIII 83). As for the public records issue, Thompson provided his list of noncomplying agencies at the hearing. (PCSR VIII 83-84). The agencies included the Broward County Sheriff's Office, the Ft. Lauderdale Police Department, the Hallendale Police Department, the Florida Department of Law Enforcement, the Federal Bureau of Investigation, and the Drug Enforcement Agency. (PCSR VIII 84). The court noted that it had no jurisdiction over the FBI, the DEA, or FDLE. (PCSR VIII 84, 90-91). Thompson's attorney indicated

that she would subpoena the records custodians of the other agencies for testimony at the continued hearing. (PCSR VIII 90).

Immediately following this April hearing, the State moved in this Court to enforce the order of relinquishment and limit the circuit court proceedings to the issue of the state attorney's withheld documents. This Court ultimately denied the State's motion (PCSR II 205), and the parties continued to litigate the other public records matters.

In mid-May 1996, Thompson moved to depose the records custodians for seven agencies.[3] (PCSR II 209-11). He also moved to hold the proceedings in abeyance pending this Court's adoption of Rule 3.852. (PCSR II 206-08). At a status hearing on May 31, 1996, which was not included in the record on appeal, Judge Lebow denied both motions and set the continued public records hearing for August 23, 1996.

At the August 23rd hearing, Thompson's attorney claimed that several agencies had failed to search for records beyond its central records division. In other words, Thompson complained that the agency head should have circulated the public records request to each and every department within the agency that may have had records, including the individual employees who may have retained

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[3] The agencies included FDLE, Broward County Sheriff's Department, Ft. Lauderdale Police Department, Broward County State Attorney's Office, Hallendale Police Department, Department of Corrections, and Broward County Public Works.

notes about Thompson's case. The State argued that Thompson's attorney had a duty, before claiming noncompliance, to contact the agency, either in person or by phone, and determine what other agencies may have had records and whether, in fact, they did have records relating to Thompson's request. (PCSR IX 98-102).

As his first witness, Thompson called Ruth McDougal, the central records custodian for the Fort Lauderdale Police Department. Ms. McDougal testified that she was the custodian in May 1991, but did not remember receiving the public records request in this case because she gets so many from CCR. (PCSR IX 102-04, 109). Normally, if she believes that another department within the agency has pertinent records, she calls the custodian and sends over a copy of the request. (PCSR IX 106). The letter that was faxed just recently to her indicated that the CCR investigator would be in contact, so she assumed that the other custodians, as she did, relied on this representation. (PCSR IX 106). When she received the subpoena last week, she contacted CCR and they faxed her a copy of the original request. She provided what she could in the limited time prior to the hearing. (PCSR IX 111-12).

Next, Susan Schwartz, legal counsel for the Department of Corrections, objected to being subpoenaed in circuit court because the court did not have jurisdiction. Thompson's attorney complained that it was no longer able to represent defendants in a civil action, so she subpoenaed the agency in the 3.850 action.

Pursuant to Hoffman v. State, 571 So. 2d 449 (Fla. 1990), however, the trial court ruled that it did not have jurisdiction over the agency. (PCSR IX 113-20). Nevertheless, the agency agreed to disclose the records requested by the end of the following week. (PCSR IX 121-22).

Next, Thompson called Joyce Lasselle, the central records custodian for the Broward County Sheriff's Office. Ms. Lasselle testified that Thompson's 1991 records request was handled by someone who has since retired and moved away. (PCSR IX 124). Ms. Lassalle has no idea what, if anything, the former custodian provided. (PCSR IX 124). When Ms. Lasselle receives a request, she does not forward it to any other division custodian unless the request specifically requests documents that would be in that division. (PCSR IX 124). She had no knowledge of Thompson's case prior to last Tuesday. She tried to comply with her subpoena, but it did not provide the race or date of birth of the individual about whom records were requested. For example, she had files on four individuals named Thomas Jackson, but had no way to know which individual for whom they wanted records. (PCSR IX 125-26).

Next, Thompson called Randolph Nagel, the records supervisor for the Hallendale Police Department. Mr. Nagel testified that there are no other divisions within the agency that have separate custodians. (PCSR IX 129). He, however, was not the custodian in 1991 when Thompson sent his records request. (PCSR IX 129). Based

on his conversation with CCR the previous week, he searched his records and found a reference to records predating 1973, but they had been destroyed in 1990. (PCSR IX 130-32). He agreed to send CCR a copy of the destruction notices. (PCSR IX 132).

Thompson's final witness regarding the nondisclosure of public records was Teresa Feest, the records custodian for the Broward State Attorney's Office. Ms. Feest testified that she was not the records custodian in 1991, but she searched for records upon receiving her subpoena and found several documents, which she brought to court. (PCSR IX 135). She was never contacted by anyone to search for a file that was missing in Thompson's case because she does not get involved in public records requests in capital cases. (PCSR IX 135-37).

Regarding the state attorney's withheld materials, Thompson called as a witness Jeffrey Walsh, an investigator for CCR. Mr. Walsh testified that he drafted the public records requests in this case in May 1991 and sent one specifically to the Broward State Attorney's Office. Paul Zacks responded that the file was being ordered from archives and that Mr. Walsh should make arrangements with the agency's head investigator to inspect the file. (PCSR IX 140-41). Mr. Walsh inspected the files on June 10, 1991, and Mr. Zacks showed him "a brown accordion folder that was quite full." (PCSR IX 142-43). He estimated the folder to contain "[a] couple hundred [pieces of paper] at least." (PCSR IX 147). He asked Mr.

Zacks "to prepare a list of the documents with the authorized exemptions and asked that they be sealed." (PCSR IX 143). Mr. Zacks laughed at his request and responded that he would put a rubber band around it and provide it to the court if ordered to do so. (PCSR IX 143-44). According to Mr. Walsh, there were "[d]efinitely" more than 18 or 20 pages of documents in the folder. (PCSR IX 144). When he reviewed the six boxes of files, he found rap sheets and had them copied. In fact, he had the whole file copied after he spent all day indexing the documents. (PCSR IX 144).

Following the testimony, Thompson's attorney indicated that she intended to file a motion for sanctions against the State for losing or destroying the exemption file. (PCR IX 148-49). Thereafter, the trial court ordered Thompson's counsel to make contact with the various agencies and obtain any requested records within 60 days. If she could not do so, she was to advise the court at the end of the 60 days; otherwise, the court would assume that Thompson had received all records requested. (PCSR II 222-23; IX 150-53).

On the sixtieth day, Thompson filed a "Status Report," indicating that he had not received documents from the Fort Lauderdale Police Department and the Broward County Sheriff's Department. (PCSR III 262-88). As detailed in the report, Thompson had sent letters to each agency requesting an

organizational chart "as it exists today and as it existed in 1985," with the names of the current custodians for each "division, unit, task force and/or other sections" within the department, so that he could make specific requests to each division custodian. (PCSR III 2634-64). According to the report, the legal advisor for the Fort Lauderdale Police Department had called Mr. Walsh, the CCR investigator on Thompson's case, and informed him that no organizational chart existed. Mr. Walsh wrote another letter "[t]o memorialize the conversation," and requested alternative means to determine the appropriate custodians upon whom to serve specific public records requests. The legal advisor provided an apparently newly created organizational chart,[4] but informed Mr. Walsh that Ruth McDougal was the only designated records custodian. As a result, Mr. Walsh sent a public records request to Ms. McDougal, seeking records on 24 individuals. The request, however, was made only 11 days prior to the trial court's cutoff date of October 22. Thus, by the sixtieth day, the police department had not complied with Thompson's request. (PCSR III 264-65).

As for the Broward County Sheriff's Office, Thompson alleged that he sent three requests to the agency for an organizational chart, but did not receive a response until October 18, 1996, when the agency's legal advisor called. According to Thompson, the

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[4] The date at the bottom of the chart reflected a date contemporaneous with the legal advisor's cover letter. (PCSR III 275-76).

legal advisor indicated that the agency did not receive the first two letters, but that an organizational chart would be forthcoming. Thompson had yet to receive the organizational chart. (PCSR III 265-66).

Following Thompson's "Status Report," this Court ordered Judge Lebow on December 2, 1996, "to complete the purpose of the relinquishment . . . and enter its final decision on or before March 3, 1997." (PCSR III 289). On December 10, 1996, Thompson filed a second "Status Report," along with a "Motion to Compel." As to the Fort Lauderdale Police Department, Thompson alleged that Mr. Walsh and Ms. McDougal were "arranging to [sic] a mutually convenient time to view the files after the current death warrants [were] concluded."[5] (PCSR III 291-92). As to the Broward County Sheriff's Department, Thompson alleged that he had sent public records requests on October 31, 1996, to each individual division included on the agency's organizational chart, but that he had gotten no responses. (PCSR III 292-93). Finally, Thompson alleged that DOC and FDLE were now within the circuit court's jurisdiction because of this Court's issuance of Rule 3.852, and thus the trial court should compel these agencies to comply with his public records requests. (PCSR III 294).

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[5] John Mills was executed on December 6, 1996. (PCSR III 292 n.3).

On January 17, 1997, Thompson moved to set a hearing or for an order to show cause against the Ft. Lauderdale Police Department. Thompson alleged that his investigator, Mr. Walsh, went to the police department to review files and was given a box of materials to review. However, the custodian informed him that he could only review certain material in the box, because the other material was not relevant to his public records request. Mr. Walsh demanded to review everything in the box, but was denied access. When he called Thompson's attorney, she instructed him to leave, which he did, without reviewing any of the records. Thompson cited the agency's lack of cooperation for his inability to comply with the trial court's September order. (PCSR III 296-99).

Thompson also cited the agencies' lack of cooperation as a basis for seeking in this Court a 60-day extension of the relinquishment period. Meanwhile, at a hearing on January 28, 1997, on Thompson's "Motion to Set Hearing and/or Motion to Show Cause," Thompson's counsel indicated that the Fort Lauderdale Police Department had just produced 342 pages of documents and was going to produce more later in the week. As a result, Thompson's counsel needed time to review the materials and decide whether to amend the original 3.850 motion. She noted that she had sought a 60-day extension of time from this Court, but she had seen no ruling on it. (PCR XI 194-95). The trial court indicated that it was under a time limitation and that the parties had to work around

it as well. (PCR XI 202). Thus, the court gave Thompson until February 14 to file an amended motion, and it set a hearing for that day. (PCSR XI 204-05).

Also at the January 28 hearing, the State mentioned that the court had yet to rule on the state attorney's withheld documents, so the court issued an order on Thompson's *ore tenus* motion to impose sanctions. In denying the motion, the trial court ruled as follows:

> The Court finds that assessing sanctions against the State for losing the file is inappropriate in the instant case. There is no evidence in the record that the lost file contained anything other than exempt materials. Moreover, the Defendant failed to establish that the information contained in the lost file in any way prevents him from adequately pleading his claims for post-conviction relief. Finally, there is no evidence that the State's loss of the exempt file was purposeful, deliberate or malicious.

(PCSR III 320-21).

On January 29, 1997, this Court granted Thompson's 60-day extension of time for the relinquishment, making May 2, 1997, the day for completion. As a result, the day before the February 14 hearing, Thompson moved to amend his 3.850 motion, seeking 60 days to do so. (PCSR II 421-23). The trial court granted Thompson until March 7, 1997, to file his amended 3.850 motion, and ordered the State to respond by March 21, 1997. (PCSR II 420). Thompson thereafter filed a 157-page amended 3.850 motion, raising 21 claims. (PCSR IV 424-581). The State responded to the motion as

ordered, arguing that the court should summarily deny all of Thompson's claims. (PCSR VI 696-728). Following the Huff hearing held on March 27, 1997, Judge Lebow sought in this Court, and was granted, a two-week extension of time to resolve this case. (See Letter from Judge Lebow to Sid White dated April 28, 1997, and FSC Order dated May 13, 1997). Meanwhile, by written order, she denied Thompson's motion for an evidentiary hearing. (PCSR VI 729). Thereafter, on May 5, 1997, Judge Lebow denied Thompson's amended 3.850 motion. In doing so, she made the following findings:

> After examining Defendant's Amended 3.850, the Court finds that except for three new claims (Claims XIX, XX, and XXI), minor changes to two claims (Claim XIV and XVII) and a complete revision to one claim (Claim I), Defendant's Amended motion is **identical**, in allegation and prayer for relief, to his Motion for Rehearing of the court's order denying his motion to vacate judgments of conviction and sentence filed on November 4, 1991 (Exhibits I and II). Said Motion was denied by the preceding trial court. Accordingly, this Court will not act in an appellate capacity to address those claims previously raised, and rejected on the merits, by the preceding trial judge.

(PCSR VI 731). In addition, she denied the new and amended claims as "entirely without merit." She found Claim XIV (denial of mercy instruction) procedurally barred and Claim XIX (electrocution is cruel and unusual) legally insufficient. She denied Claim I (public records), Claim XVII (newly discovered evidence), and Claim XX (inability to interview jurors) for the reasons asserted in the

State's response.[6] Finally, she denied Claim XXI (Judge Kaplan's bias at trial and in postconviction) based on Judge Kaplan's deposition and the State's response.[7] (PCSR VI 731-32).

Following the rendition of this order, this Court ordered the circuit court clerk to prepare a supplemental record, which required significant correction and supplementation by both parties. Thompson then filed a supplemental brief, raising three additional issues. Because it has never responded to Thompson's original initial brief, the State will respond to Thompson's original and supplemental brief as follows.

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[6] As to Claim I, the State argued that the trial court had given Thompson a reasonable amount of time to pursue public records and file an amended 3.850 motion, especially in light of this Court's order requiring resolution by a date certain. (PCSR VI 700-02). As to Claim XVII, the State argued that Thompson failed to show that he (or trial counsel) could not have discovered with due diligence Scott Errico's "new" testimony at the time of trial, since counsel knew where Errico was and could have perpetuated his testimony. (PCSR VI 722-24). As to Claim XX, the State argued that Thompson had no standing to challenge a rule of professional responsibility and that, had he made a prima facie showing of juror misconduct, he could have motioned the court to conduct juror interviews. (PCSR VI 725-26).

[7] The State argued that neither Judge Kaplan's deposition nor any comments that precipitated the deposition indicated that Judge Kaplan was predisposed to sentence Thompson to death or was biased during Thompson's postconviction proceeding. (PCSR VI 726-27).

SUMMARY OF ARGUMENT

Supplemental Issues I and II - The deposition Thompson used to allege that Judge Kaplan was predisposed to sentence Thompson to death conclusively refuted Thompson's allegations. Since Thompson failed to show that Judge Kaplan was biased against him during his trial, Judge Lebow properly denied Claim XXI as legally insufficient on its face. As for Judge Kaplan's recusal from the relinquished postconviction proceedings because of his (Kaplan's) friendship with Thompson's original trial counsel, Thompson never raised this ground as a claim for relief. By failing to give Judge Lebow an opportunity to determine whether Judge Kaplan's friendship with Roy and Lea Black biased him against Thompson, Thompson failed to preserve this issue for review. Regardless, Judge Kaplan's friendship with Black did not become "close" until a year and a half after he denied Thompson's original 3.850 motion. No reasonable person would fear that Judge Kaplan was biased against him under these circumstances.

Supplemental Issue III - After litigating public records for over a year and a half, during a relinquishment solely to conduct an *in camera* review of the State Attorney's files, Thompson had more than a reasonable amount of time to obtain the records and amend his 3.850 motion. His own dilatoriness in pursuing public records caused his inability to review the records at his leisure. Ultimately, he had 37 days to review them and amend his previously

filed 154-page motion for rehearing. Under the circumstances, he deserved no more.

Original Issue I - The records custodian for the State Attorney's Office testified to the nature of the materials exempted and his attempts to preserve them. Thompson failed to show that something specific was lost, that the specific document was prejudicial to his defense, and that the State Attorney's Office lost or destroyed such document in bad faith. The trial court properly denied Thompson's motion for sanctions. As for records allegedly withheld by FDLE, Thompson had from May 1991 to June 1996 to pursue those records administratively. Having failed to do so, he could not fault the trial court for refusing to reopen public records acquisition after Thompson had filed his amended motion, the State had filed its response, and this Court had set a date certain for resolution of the relinquishment.

Original Issue II - Whether Thompson was improperly denied an evidentiary hearing on his claims depends on the legally sufficiency of those claims. Since Thompson challenges the denial of each claim individually in other issues, the State will not duplicate its response.

Original Issue III - The record rebutted Thompson's claim that Davis and Parrish gave false testimony. The record also revealed that defense counsel was well aware of the existence, nature, and disposition of Bobby Davis' California charges. Finally, Thompson

failed to allege how the transcripts of the tape recorded statements between himself and Davis were inaccurate and what, if any, other tapes existed.

Original Issue IV - Thompson's claims that Roy Black and Mark Seiden were ineffective at the guilt phase of his trial were either procedurally barred, insufficiently pled, or refuted by the record.

Original Issue V - Thompson's claims that Roy Black and Mark Seiden were ineffective at the penalty phase of his trial were either procedurally barred, insufficiently pled, or refuted by the record.

Original Issue VI - To the extent this claim overlapped with Claim VIII (Original Issue V), the State relies on its response thereto. Standing alone, this claim was facially insufficient or refuted by the record.

Original Issue VII - Thompson failed to allege sufficient facts to show that his newly discovered evidence was unavailable at the time of trial. Regardless, the record revealed that defense counsel either knew of Errico's whereabouts prior to trial or could have discovered them with due diligence. Finally, Thompson failed to show that the trial court would probably impose a life sentence on retrial if Thompson were to present Errico's testimony.

Original Issue VIII - Thompson's claim that the trial court improperly restricted his cross-examination of Bobby Davis at trial was properly denied as procedurally barred.

Original Issue IX - Thompson's claim that there were omissions in the original appellate record was properly denied as procedurally barred. It was improper for Thompson to recast this claim as one of ineffectiveness. Regardless, he failed to show deficient conduct or prejudice.

Original Issue X - Thompson's claim that the State made improper arguments during the trial was properly denied as procedurally barred.

Original Issue XI - Thompson's claim that the trial court and defense counsel gave improper instructions and argument to the jury regarding it proper role in sentencing was properly denied as procedurally barred. Counsel cannot be deemed ineffective for failing to raise a nonmeritorious claim.

Original Issue XII - Thompson's claim that the trial court failed to give limiting instructions for the five aggravating factors applicable to his case was properly denied as procedurally barred. To the extent Thompson's conclusory ineffectiveness claim overcomes the bar, Thompson failed to allege the deficiency with the "prior violent felony," "felony murder," and "pecuniary gain" aggravating factors; thus, he failed to prove prejudice. As for the HAC and CCP instructions, these factors would have been found to exist under any definition of their terms.

Original Issue XIII - Thompson's claim that the trial court improperly shifted the burden of proof to him to show that the

mitigation outweighed the aggravation was properly denied as procedurally barred. It was improper for Thompson to recast this claim as one of ineffectiveness. Regardless, he failed to prove prejudice.

Original Issue XIV - Thompson's claim that the trial court rejected mitigation was properly denied as procedurally barred because Thompson raised the issue on direct appeal.

Original Issue XV - Thompson's claim that the State failed to prove the corpus delicti was properly denied as procedurally barred.

Original Issue XVI - Thompson's claim that the trial court failed to allow argument and instruction on sympathy and mercy during the penalty phase was properly denied as procedurally barred. It was improper for Thompson to recast the claim as one of ineffectiveness. Regardless, he failed to show prejudice.

Original Issue XVII - Thompson's claim that new law required reassessment of his jury override was properly denied as procedurally barred.

Original Issue XVIII - There were no errors committed at Thompson's trial; therefore, there was no cumulative effect that rendered his trial unfair.

ARGUMENT

SUPPLEMENTAL ISSUES I AND II

WHETHER JUDGE KAPLAN WAS PREDISPOSED TO SENTENCE THOMPSON TO DEATH AND BIASED AGAINST THOMPSON DURING HIS ORIGINAL POSTCONVICTION PROCEEDINGS (Restated).

Judge Stanton Kaplan presided over Thompson's trial and ultimately sentenced Thompson to death, over the jury's life recommendation. Following this Court's affirmance of Thompson's conviction and sentence, Thompson file a "shell" motion for postconviction relief before Judge Kaplan, seeking leave to amend because of alleged agency noncompliance with his public records requests. (PCR I 20-36). Judge Kaplan denied both the request for leave to amend and the 3.850 motion, believing that Thompson was abusing the process. (PCR I 37-38, 39-40). Thompson then filed a motion for rehearing, fully pleading nineteen claims for relief. (PCR I 41-195). None of the claims challenged Judge Kaplan's fitness to preside over the postconviction proceedings, or his prior fitness to preside over Thompson's trial. Thompson also filed no motion for disqualification during this proceeding.

Following the State's response to Thompson's 3.850 motion, Judge Kaplan denied the motion without an evidentiary hearing, and Thompson appealed. (PCR II 207-79, 285, 286-87). After this Court remanded Thompson's case back to the trial court for an *in camera* review of the State Attorney's Office's withheld materials, Thompson moved to disqualify Judge Kaplan because Judge Kaplan had

allegedly contacted the Attorney General's Office for legal representation at a deposition in State v. Lawrence Lewis.[8] (PCSR I 27-53, 54-68, 69-70, 87-93). Fifteen and a half months later, Judge Kaplan granted Thompson's motion for disqualification, but not for the grounds set forth in the motion.[9] Rather, Judge Kaplan recused himself because he had developed a personal friendship with Thompson's trial attorney since Thompson's trial that had developed into a "close personal friendship" in the preceding year or so. (PCSR I 102-03).

Ten months later, Lawrence Lewis' collateral counsel deposed Judge Kaplan. (PCSR VI 767-859). That deposition became the source for Claim XXI of Thompson's amended 3.850 motion. Therein,

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[8] Judge Kaplan had recused himself upon Lewis' motion, and Lewis had sought to depose Judge Kaplan. When Lewis issued a deposition subpoena to Judge Kaplan, Judge Kaplan apparently had his judicial assistant call one of the Attorney General's branch offices to obtain representation for the deposition. Apparently, someone informed her that the office would represent him. (PCST 13). Meanwhile, the State moved to quash the deposition subpoena, which Judge Lebow denied, and the State appealed the denial of that motion to this Court; thus, no deposition and no representation were ever had. This Court ultimately established guidelines for engaging in postconviction discovery and remanded for proceedings consistent with those guidelines. See State v. Lewis, 656 So. 2d 1248 (Fla. 1994). Upon remand, Lewis' collateral counsel deposed Judge Kaplan. Private counsel appeared at the deposition on the judge's behalf. (PCSR VI 767-859).

[9] Contrary to Thompson's assertion in his supplemental initial brief at page 43, Thompson did not move to disqualify Judge Kaplan "based on statements Judge Kaplan had made on the CBS television program "Rough Justice." The motion, supplement, and supplemental authority were all based on the alleged representation of Judge Kaplan by the Attorney General's Office.

Thompson alleged that this newly discovered evidence established that Judge Kaplan was predisposed to sentence him to death and was biased against Thompson, and his trial and collateral counsel. (PCSR IV 569-78). The State responded that Thompson's claim was legally insufficient on its face, because the deposition transcripts themselves conclusively rebutted Thompson's allegations. (PCR VI 726-27). Judge Lebow summarily denied this claim "based on Judge Kaplan's deposition (Exhibit V) and for the reasons explained in the State's Response to the Defendant's Motion." (PCSR VI 732).

In his supplemental initial brief, Thompson renewed his claim that Judge Kaplan was biased against him and his counsel during his trial and postconviction proceedings. He based his arguments solely on Judge Kaplan's statements in his deposition (supplemental issue I) and Judge Kaplan's reason for recusing himself from Thompson's relinquishment postconviction proceedings (supplemental issues I and II). He did not allege as a basis for reversal the conflict presented by the Attorney General's alleged representation of Judge Kaplan during the initial relinquishment proceedings. See **supplemental initial brief** at 20-47.

A. Judge Kaplan's alleged predisposition at trial based on his deposition testimony

As noted previously, Thompson did not use Judge Kaplan's deposition testimony as a basis for his motion to disqualify Judge Kaplan. Rather, he used it as newly discovered evidence in a claim

for relief in his amended 3.850 motion. (PCSR IV 569-78). Judge Lebow denied the claim without an evidentiary hearing. (PCSR VI 732). "If a postconviction motion is denied without an evidentiary hearing, the motion and record must show that no relief is warranted." Lopez v. Singletary, 634 So. 2d 1054, 1056 (Fla. 1993). Initially, Thompson complains that the trial court used Judge Kaplan's deposition, which had formed the basis for his allegations, to summarily deny the claim. He asserts that this deposition is "extra-record information [that] required evidentiary development" and does not constitute the "record" in this case, which can be used to rebut the claim. **Supp. init. brief** at 22. The entire deposition, however, which Thompson appended in full to his amended 3.850 motion (PCSR 569 n.21), did not support his allegations. In the deposition, Judge Kaplan explained that CBS interviewed him for 75 minutes in chambers for a show entitled "Rough Justice," then used parts of the interview as voice-overs when showing courtroom scenes. Thus, many of his comments were taken out of context and used to "make [him] look like the Public Defender's nightmare." (PCSR VI 775-77).

Regarding his comment on the show that he wanted to "get rid of these people and keep them off the streets as long as possible," Judge Kaplan explained that he was referring to "convicted violent people." He believed that it was his duty to keep convicted, habitual, violent offenders away from law-abiding citizens by

giving them long prison sentences. (PCSR VI 778-80). He also explained that, at that time, because of prison overcrowding, he gave convicted persons a longer overall sentence so that the person would spend a certain amount of time in prison before being released early because of gain time. (PCSR VI 784-86). As for his jaundiced view of defendants and defense counsel, Judge Kaplan explained that he has had many defendants come before him and try to convince him that they will behave and do what they are supposed to do if he will give them a second chance. Over the years, he has learned to be skeptical of the claims, but "a lot of them do still get [him]," i.e., persuade him to be lenient. (PCSR VI 792-93).

Nothing in Judge Kaplan's deposition even remotely implies that he was predisposed to sentence Thompson to death. Likewise, nothing in the deposition implies that he would automatically reject mitigation or accept aggravation. In fact, Judge Kaplan made no comments in relation to a capital case, much less Thompson's capital case. Everything was said in general about habitual, violent offenders, who were convicted of a crime.

Thompson failed to show that Kaplan was biased against him or his counsel at the time of trial. Thus, Judge Lebow properly denied Claim XXI as legally insufficient on its face. Cf. Keenan v. Watson, 525 So. 2d 476, 477 (Fla. 5th DCA 1988) (finding allegation that judge sentences drug violators more heavily than others legally insufficient to warrant recusal); Quince v. State,

592 So. 2d 669, 670 (Fla. 1992) (finding allegation that judge made disparaging comment in public address about out-of-state attorneys where defendant had an out-of-state attorney legally insufficient to warrant recusal).

B. Judge Kaplan's alleged bias during postconviction proceedings based on his friendship with trial counsel

As noted previously, Judge Kaplan did not recuse himself from the relinquished postconviction proceedings based on the allegations made in Thompson's motion for disqualification. Rather, he recused himself on the following basis:

> 1. Since the conclusion of the trial in this matter this Judge has developed a personal relationship with trial counsel for the Defendant, Roy Black.
>
> 2. Within the last year or so, this Judge's personal relationship has developed in to a close friendship with Attorney Roy Black and Attorney Black's wife, Mrs. Lea Black.

(PCSR 102-03).

At no time did Thompson allege this friendship as a claim for relief. Judge Lebow gave Thompson an opportunity to amend his 3.850 motion, which Judge Kaplan had denied, based on newly obtained public records. Thompson took the opportunity to add an additional claim, alleging that Judge Kaplan was biased at his trial and original postconviction proceedings. His only grounds for this claim, however, were based on Judge Kaplan's deposition and the alleged conflict that developed when Judge Kaplan allegedly sought representation by the Attorney General's Office. Thompson

did not allege Judge Kaplan's friendship with Thompson's trial attorney as a basis for relief. As a result, Judge Lebow was not given an opportunity to determine the effect of such an allegation on the denial of Thompson's original 3.850 motion. Therefore, Thompson failed to preserve this claim for review.[10] See Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

To the extent this Court overlooks Thompson's failure to present this issue to the trial court, the State submits that Thompson has failed to show sufficient bias to require reversal. Judge Kaplan admitted that he had developed a personal friendship with Thompson's trial attorney, Roy Black, following Thompson's trial. According to Judge Kaplan, however, this friendship did not become a "close friendship" until a year or so preceding the recusal order. Thompson's case had been on relinquishment a year and seven months prior to Judge Kaplan's order. Thompson's case had been pending on appeal in this Court nine months prior to relinquishment. Thus, the friendship between Judge Kaplan and the Blacks did not become "close" until a year to a year and a half after Judge Kaplan denied Thompson's original 3.850 motion. Under these circumstances, no reasonable person in Thompson's place would

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[10] To the extent Thompson believed that Judge Lebow would reconsider all of the claims, instead of only the new or amended ones, he still had a week to file a motion for rehearing once Judge Lebow issued her order denying relief.

fear that Judge Kaplan did not give fair and impartial consideration to Thompson's original postconviction motion. Cf. W.I. v. State, 696 So. 2d 457 (Fla. 4th DCA 1997) (finding trial judge's admitted close friendship with juvenile defendant's case worker insufficient by itself to warrant recusal). Therefore, Judge Kaplan's order denying relief remains valid, except to the extent Thompson amended them and Judge Lebow ruled on them.

SUPPLEMENTAL ISSUE III

WHETHER THE TRIAL COURT AFFORDED THOMPSON A REASONABLE TIME WITHIN WHICH TO PURSUE AND REVIEW PUBLIC RECORDS AND TO AMEND HIS 3.850 MOTION (Restated).

On September 20, 1991, sixteen months after the United States Supreme Court denied certiorari, Thompson filed a "shell" 3.850 motion, containing nothing but issue headings. (PCR I 20-36). He alleged that he could not fully plead his claims because (1) the Broward State Attorney's Office had recently produced six boxes of materials, but had withheld certain documents that the trial court needed to review *in camera*; and (2) the Florida Department of Law Enforcement, the Federal Bureau of Investigation, and the Office of the United States Attorney had failed to provide requested records. (PCR I 22).

Of those agencies, the trial court had jurisdiction over only one--the Broward State Attorney's Office. In 1991, the case law was very unclear as to whether the trial court was supposed to stay

the case until the defendant litigated civil suits against outside agencies. It was even more unclear whether the trial court was supposed to wait for the federal government to release records, which in this case took five years.

Be that as it may, a month later, Judge Kaplan, who presided over Thompson's trial, denied Thompson's 3.850 motion because "the Motion [was] totally devoid of facts and, while it state[d] nineteen grounds for relief, it contain[ed] no legal or factual support upon which to base relief." (PCR I 39). He also denied Thompson's "Special Request for Leave to Amend" because he believed that Thompson had had five years from the date of his sentence "to investigate and state his claims for relief," and because he could have sought records from the State Attorney's Office earlier than he did. (PCR I 37-38).

While the trial court was incorrect in believing that Thompson had had five years to obtain public records, Thompson had, in fact, had sixteen months to pursue records. CCR's representation of Thompson began on May 14, 1990, when the United States Supreme Court denied certiorari, or shortly thereafter. Even knowing that his 3.850 motion was due in September 1991, pursuant to CCR's agreement with the Governor, Thompson did not begin requesting public records until May 1991--almost a year later. (PCR I 33-35). Thus, as Judge Kaplan noted, Thompson could have sought records from the State Attorney's Office (and other agencies) "at any point

in time following the conclusion of the defendant's direct appeal." (PCR I 37). Instead, he waited until his motion was almost due.

A mere thirteen days after Judge Kaplan denied his "shell" motion, Thompson miraculously filed a 154-page "Motion for Rehearing." (PCR I 41-195). In reasserting his need for leave to amend, he alleged that (1) the Broward State Attorney's Office had provided 11,000 pages of documents only days before Thompson's 3.850 motion was due, but had withheld certain documents, (2) FDLE had provided 130 pages of materials on October 31, 1991, but Thompson believed there were more, (3) the Illinois and Washington, D.C., offices of the FBI notified Thompson in July 1991 that they would perform the requested searches, but Thompson had yet to receive any records, and (4) Thompson had sent requests to the U.S. Attorney's Office in Ft. Lauderdale in July and to the Washington, D.C., office sometime later, but had yet to receive a response. (PCR I 43-49).

While the State did not oppose an *in camera* review of the state attorney's withheld material, it responded that Thompson had had 52 days to review the state attorney's records prior to the filing of his "Motion for Rehearing." As for FDLE, the State argued that Thompson had failed to allege sufficient facts to show that FDLE had failed to comply. Merely believing that the agency had additional documents was not sufficient to show noncompliance. As for the three federal agencies, Thompson had conceded that

Chapter 119 did not compel these agencies to comply. Therefore, there was no need to grant Thompson additional time to amend his 3.850 motion. (PCR II 209-10).

The State also responded to each of Thompson's eighteen claims and argued that none warranted an evidentiary hearing or relief. (PCR II 207-79). Three months later, on March 25, 1992, the trial court sought proposed orders from both parties, to which Thompson's attorney objected, but which the trial court persisted in obtaining. (PCR II 280-81, 282-83, 284). Fourteen months later, the trial court denied Thompson's "Motion for Rehearing," based on the reasons set forth in the State's response, which the trial court attached to the order. It found a hearing on Thompson's claims unnecessary. (PCR II 285).

On appeal, Thompson abandoned any claim of noncompliance by the federal agencies and any claim that the trial court should have waited for those agencies to comply. He maintained, however, that the trial court had failed to conduct an *in camera* review of the state attorney's withheld material and that FDLE had not made full disclosure. **Orig. init. brief** at 6-10. Inexplicably, he alleged that he had no time to file a "Motion to Compel" because the trial court denied his 3.850 motion three days after he had filed it. Id. at 7 & n.2. In fact, the trial court denied his 3.850 motion thirty-two days after he filed it. Thus, Thompson had more than

enough time to file a "Motion to Compel" and set a hearing to litigate the motion. He simply failed to do so.

Despite Thompson's failure to pursue his public records issue in the trial court, the State moved to relinquish solely for the purpose of an *in camera* review of the state attorney's withheld material.[11] (PCSR I 1). Following this Court's relinquishment, the prosecutor inadvertently and mistakenly informed the trial court that the parties needed to litigate all of Thompson's public records issues. (PCSR XI 188-90). Though the State later tried to correct its mistake (PCSR II 144-61), the trial court refused to limit the scope of Thompson's public records pursuit (PCSR II 185; VII 23-40).[12] At a hearing, Thompson indicated that he had been pursuing public records since the denial of his original 3.850 motion and that numerous agencies had failed to comply. (PCSR VII 28-32, 34). When asked to name the agencies, Thompson's attorney could not do so because her investigator had been busy with other matters. (PCSR VII 35). The trial court then ordered her to submit a list on a date certain prior to the next hearing, but she

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[11] The trial court still did not have jurisdiction over FDLE, and Thompson made no allegation that he was litigating FDLE's noncompliance administratively, so the State did not seek relinquishment for the trial court to wait for Thompson to do so.

[12] Despite his abandonment on appeal of his claim against the federal agencies, Thompson renewed his complaint of nondisclosure against the FBI and the U.S. Attorney's Office. Correctly, the trial court determined that it did not have jurisdiction over these agencies, nor over Florida's Department of Corrections and FDLE. (PCSR VIII 84, 90-91).

failed to do so. (PCSR VII 36). When she did submit the list (on the day of the hearing), she named the Broward County Sheriff's Office, the Ft. Lauderdale Police Department, the Hallendale Police Department, the Florida Department of Law Enforcement, the Federal Bureau of Investigation, and the Drug Enforcement Agency as being in noncompliance.[13] (PCSR VIII 83-84). Clearly, with the exception of the FBI and FDLE, Thompson named none of these agencies as being in noncompliance at the time he filed his original 3.850 motion, motion for rehearing, or initial brief. Yet, Judge Lebow allowed him to pursue them over the State's repeated objections.

On August 23, 1996--two years and five months after this Court relinquished jurisdiction--the trial court heard testimony from the custodians of the Broward County Sheriff's Department, the Ft. Lauderdale Police Department, and the Hallendale Police Department. Thompson's chief complaint was that several agencies had failed to search for records beyond its central records division. In other words, the agency head failed to circulate the public records request to each and every department within the agency that may have had records, including the individual officers or deputies who may have retained notes about Thompson's case. The State argued that Thompson's attorney had a duty, before claiming noncompliance, to contact the agency, either in person or by phone, and determine

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[13] Once again, she claimed that the list was not exhaustive because her investigator had been busy with other matters. (PCSR VIII 83-84).

what other divisions within the agency may have had records and whether, in fact, they did have records relating to Thompson's request. (PCSR IX 98-102).

As his first witness, Thompson called Ruth McDougal, the central records custodian for the Fort Lauderdale Police Department. Ms. McDougal testified that she was the custodian in May 1991, but did not remember receiving the public records request in this case because she gets so many from CCR. (PCSR IX 102-04, 109). Normally, if she believes that another department within the agency has pertinent records, she calls the custodian and sends them a copy of the request. (PCSR IX 106). The letter that was faxed just recently to her indicated that the CCR investigator would be in contact, so she assumed that the other custodians, as she did, relied on this representation. (PCSR IX 106). When she received the subpoena last week, she contacted CCR and they faxed her a copy of the original request. She had provided what she could in the limited time prior to the hearing. (PCSR IX 111-12).

Next, Thompson called Joyce Lasselle, the central records custodian for the Broward County Sheriff's Department. Ms. Lasselle testified that Thompson's 1991 records request was handled by someone who had since retired and moved away. (PCSR IX 124). Ms. Lasselle had no idea what, if anything, the former custodian provided. (PCSR IX 124). When she receives a request, she does not forward it to any other division custodian unless the request

specifically requests documents that would be in that division. (PCSR IX 124). She had no knowledge of Thompson's case prior to last Tuesday. She tried to comply with her subpoena, but it did not provide the race or date of birth of the individual about whom records were requested. For example, she had files on four individuals named Thomas Jackson, but had no way to know which individual they wanted records for. (PCSR IX 125-26).

Next, Thompson called Randolph Nagel, the records supervisor for the Hallendale Police Department. Mr. Nagel testified that there are no other divisions within the agency that have separate custodians. (PCSR IX 129). He, however, was not the custodian in 1991 when Thompson sent his records request. (PCSR IX 129). Based on his conversation with CCR the previous week, he searched his records and found a reference to records predating 1973, but they had been destroyed in 1990. (PCSR IX 130-32). He agreed to send CCR a copy of the destruction notices. (PCSR IX 132).

Thompson's final witness regarding the nondisclosure of public records was Teresa Feest, the records custodian for the Broward State Attorney's Office. Ms. Feest testified that she was not the records custodian in 1991, but she searched for records upon receiving her subpoena and found several documents, which she brought to court. (PCSR IX 135).

Following the testimony, the parties discussed with the trial court the most expeditious way to resolve the public records issue.

The State suggested that the trial court establish a cut-off date and require Thompson to pursue and obtain records within that time period. During this exchange, Thompson's attorney specifically agreed to visit the agencies personally or send a representative to do so within a 60-day period: "I'd be happy to have either myself go out, or have someone go out and talk to these individual agencies within sixty days." (PCSR IX 149-52). The trial court agreed and ordered Thompson's counsel to make contact with the various agencies and obtain any requested records within 60 days: "[W]ithin sixty days someone from CCR will make contact with these various agencies from which they are seeking information." (PCSR IX 153). If counsel could not obtain the records within that time period, she was to advise the court at the end of the 60 days; otherwise, the court would assume that Thompson had received all records requested. (PCSR II 222-23; IX 150-53). In other words, Thompson was to conclude all public records acquisition by October 22, 1996, or show cause why he could not do so.

Despite the trial court's mandate, Thompson's counsel made a feeble attempt to obtain the records within the time allotted. Instead of calling the agency, or appearing personally as agreed to, she had an investigator write a letter to each agency, requesting an organizational chart "as it exists today and as it existed in 1985," with the names of the current custodians for each "division, unit, task force and/or other sections" within the

department, so that she could make specific requests to each division custodian. Then she waited. Three weeks passed before the investigator heard from the Ft. Lauderdale Police Department; they had no such chart. A week later, and a full month into the 60-day period, the police department apparently created an organizational chart[14] and provided it to Thompson, but indicated that the central records custodian was the only designated custodian for the agency. It took Thompson's counsel another three weeks to send a supplemental public records request to the agency, requesting records on 24 individuals from every division. Thus, it took Thompson 49 of the 60 days to file a supplemental request on the same custodian that had testified at the chapter 119 hearing.

Thompson's counsel made a similar half-hearted attempt with the Broward County Sheriff's Department. Her investigator requested an organizational chart the week after the hearing and then waited. Four weeks passed before he wrote a second request to the agency. Another three weeks passed before he sent a third request. Finally, on the fifty-sixth day of the 60-day period, the agency called, vehemently denying that it had received the first two letters. It sent Thompson an organizational chart the following week. However, Thompson did not send out public records

[14] The chart was dated contemporaneously with the agency's cover letter. (PCSR III 275-76).

requests until October 31, 1996--nine days after the trial court's deadline.

Despite his assertions of bad faith by the agencies, Thompson never filed a motion to compel, or otherwise pursued his right to records from these agencies. Rather, he filed his "Status Report" and waited. He set no hearing before the court. Then, when this Court demanded completion of the relinquishment, Thompson filed another "Status Report." Again, he set no hearing. By this time, three months had passed since the trial court's October deadline. When Thompson did finally ask for a hearing, he alleged that the Ft. Lauderdale Police Department was still not cooperating with him. Specifically, he alleged that CCR's investigator, Jeff Walsh, went to the police department to review files, and was given a box of materials to review. However, the custodian informed him that he could only review certain materials in the box, because the other material was not relevant to his public records request. Mr. Walsh demanded to review everything in the box, but was denied access. When he called Thompson's attorney, she instructed him to leave, which he did, without reviewing any of the records. (PCSR III 296-99). Thus, even though the investigator could have reviewed those materials that the agency presented to him for inspection, he left, and then he blamed the agency for his inability to meet the trial court's schedule.

At the hearing in late January, when its due date for resolution was March 3rd, the trial court gave Thompson until February 14th to file an amended 3.850 motion.[15] In February, after this Court granted the trial court a two-month extension, Judge Lebow gave Thompson an extra three weeks within which to file his amendment. Thus, Thompson had 37 days to review his newly acquired public records and file an amended motion. When he objected and demanded 60 days to review the records and file an amended motion, the trial court rejected his pleas. As it was, the State needed time to respond to the motion, the trial court had to hold a Huff hearing, it had to schedule and conduct an evidentiary hearing, if necessary, and it had to make its final decision and prepare an order on Thompson's claims by May 2. If it gave Thompson 60 days to review his records and amend his motion, the court would have had insufficient time to litigate the claims and rule on Thompson's motion.

Three years after relinquishment, the trial court would not allow Thompson any more time to pursue and review public records. Incredibly, Thompson now claims on appeal that he was denied access to public records and a full and fair proceeding. Thompson was allowed, however, more than a reasonable time to pursue public records. He chose to pursue them in the most dilatory manner and

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[15] Thompson's original motion for rehearing was already 154 pages long, raising 18 issues. (PCR I 41-195).

finally ran out of time. He absolutely refused to call an agency or to make a physical appearance. He insisted on writing letters so that he could memorialize his efforts. When he got no response to his letters, he mailed more letters, despite the fact that he had limited time within which to act. In other words, he caused his own problems by refusing to act expeditiously. It is disingenuous, at best, to blame the agencies when he refused to make a diligent effort at obtaining the records.

Moreover, the trial court gave him far more latitude in securing additional records than it should have. In his original 3.850 motion, motion for rehearing, and initial brief, he complained of noncompliance by only four agencies (Broward State Attorney's Office, FDLE, the FBI, and the U.S. Attorney's Office). Of those four agencies, the circuit court had jurisdiction over only one--the Broward State Attorney's Office. On relinquishment, however, Thompson was allowed to pursue records from agencies that he had never before complained about--agencies that he started pursuing after his original 3.850 was denied. And once Judge Lebow granted him permission to pursue these other agencies, he had from March 21, 1996, to October 22, 1997, to do so--**over a year and a half**. It was his own lack of diligence that caused his inability to receive and review the records in a timely manner. And once this Court set a date certain for resolution of the relinquishment, the trial court had to schedule its remaining time so that it could

do everything it had to do to resolve Thompson's motion. Under the circumstances, it was not unreasonable for Thompson to have only 37 days within which to review his records and amend his already expansive 3.850 motion. See Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993) (allowing defendant upon remand only 30 days to amend 3.850 motion after disclosure of documents); Reed v. State, 640 So. 2d 1094, 1098 (Fla. 1994) (allowing defendant on remand reasonable time to obtain records and reasonable time to amend 3.850 motion); Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992) (same). Moreover, should Thompson find evidence in the records to support another claim for relief, he can always file a successive motion. Robinson v. State, 23 Fla. L. Weekly S85, 85 nn.1,2 (Fla. 1998) (affirming denial of request for leave to amend following receipt of public records "since [request] seeks to obviate the available remedy for bringing a claim should a basis therefor appear in any subsequently provided records").

ORIGINAL ISSUE I

WHETHER THOMPSON WAS DENIED ACCESS TO PUBLIC RECORDS POSSESSED BY THE BROWARD STATE ATTORNEY'S OFFICE AND THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT (Restated).

A. Broward State Attorney's Office

In his original 3.850 motion, motion for rehearing, and initial brief on appeal, Thompson alleged that the Broward State Attorney's Office had provided six boxes of public records, but had

withheld certain documents that the trial court needed, but failed, to review *in camera*. (PCR I 22, 25, 43-44; **orig. init. brief** at 6-10). Because of then-recent case law, the State moved to relinquish Thompson's case back to the trial court for the *in camera* review. (PCSR I 1). Upon relinquishment, the State discovered that the file folder containing the withheld documents had been lost, so it presented the testimony of the records custodian who had removed the documents.

Paul Zacks testified that he was the chief of the appellate division at the Broward State Attorney's Office in 1991, and the person responsible for responding to public records requests for the office. Pursuant to Thompson's request, he ordered the files from archives, reviewed them for exempt material, then notified CCR's investigator, who came to inspect the files in June 1991. (PCSR VIII 48-54). When the investigator arrived, Mr. Zacks showed him the folder containing all of the documents Zacks withheld from disclosure. (PCSR VIII 55). Normally, Zacks looks for criminal history information and in this case removed rap sheets for Thompson and either codefendants or witnesses. (PCSR VIII 57-58). He also looks for exempt biographical information relating to police officers, victims, and confidential informants. (PCSR VIII 58). He also removed personal notes made by the prosecutor that were unrelated to the prosecution, and notes made by himself relating to the 3.850 proceeding then ongoing. (PCSR VIII 58-59).

Any notes made by the prosecutor relating to the case were provided to CCR. (PCSR VIII 59-60). In all, Zacks removed about 18 to 20 documents from the file. (PCSR VIII 58). Zacks kept the folder of withheld documents with the other file boxes, which were eventually sent back to archives. He went through the file boxes looking for the folder of exemptions, but has not been able to find them. (PCSR VIII 61). He did not purposefully lose or destroy the exemption file. (PCSR VIII 82).

In response, Thompson called as a witness Jeffrey Walsh, an investigator for CCR. Mr. Walsh testified that he drafted the public records requests in this case in May 1991 and sent one specifically to the Broward State Attorney's Office. Paul Zacks responded that the file was being ordered from archives and that Mr. Walsh should make arrangements with the agency's head investigator to inspect the file. (PCSR IX 140-41). Mr. Walsh inspected the files on June 10, 1991, and Mr. Zacks showed him "a brown accordion folder that was quite full." (PCSR IX 142-43). He estimated the folder to contain "[a] couple hundred [pieces of paper] at least." (PCSR IX 147). He asked Mr. Zacks "to prepare a list of the documents with the authorized exemptions and asked that they be sealed." (PCSR IX 143). Mr. Zacks laughed at his request and responded that he would put a rubber band around it and provide it to the court if ordered to do so. (PCSR IX 143-44). According to Mr. Walsh, there were "[d]efinitely" more than 18 or

20 pages of documents in the folder. (PCSR IX 144). When he reviewed the six boxes of files, he found rap sheets and had them copied. In fact, he had the whole file copied even though he spent all day indexing the documents. (PCSR IX 144).

Following Mr. Walsh's testimony, Thompson's attorney informed the trial court that she would be filing a motion for sanctions against the State for losing or destroying the withheld materials. (PCSR IX 148-49). Although Thompson never filed such a motion, the trial court issued an order five and a half months later denying Thompson's *ore tenus* motion for sanctions. (PCSR III 320-21). Specifically, the trial court ruled as follows:

> The Court finds that assessing sanctions against the State for losing the file is inappropriate in the instant case. There is no evidence in the record that the lost file contained anything other than exempt materials. Moreover, the Defendant failed to establish that the information contained in the lost file in any way prevents him from adequately pleading his claims for post-conviction relief. Finally, there is no evidence that the State's loss of the exempt file was purposeful, deliberate or malicious.

(PCSR III 320-21).

Though given an opportunity to supplement his initial brief following relinquishment, Thompson makes only a single-sentence, conclusory statement about the state attorney's withheld materials. **Supp. init. brief** at 49. In any event, the State submits that Thompson has not been prejudiced by the agency's loss of this folder containing rap sheets, notes made by the prosecutor that had

nothing to do with the case, and notes made by the postconviction prosecutor in anticipation of litigation. As the trial court found, all of the materials were exempt from disclosure. See sec. 119.07(3)(a) & 943.053(2)&(5), Fla. Stat. (1995) (exempting FCIC and NCIC criminal history information from public records disclosure); Valle v. State, 22 Fla. L. Weekly S751, 752 (Fla. Dec. 11, 1997) (affirming trial court's finding that prosecutor's personal notes were not public records and thus not discoverable); sec. 119.07(3)(*l*)1., Fla. Stat. (1995) (exempting all work product until proceeding concluded).

As with evidence destroyed pretrial, Thompson must show that the State Attorney's Office destroyed such evidence in bad faith. See Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."); Kelley v. State, 486 So. 2d 578, 580-82 (Fla. 1986). Mr. Zacks testified that he put the materials in an accordion file folder and left it with the six boxes of files. When Thompson's original 3.850 motion was denied, he sent the files to archives, believing that the exempt file went with the six boxes. In preparation for the hearing on relinquishment, he searched through the six boxes, but did not find the exempt file.

Nothing about the loss of these materials shows bad faith. Zacks took adequate steps to keep the materials intact for *in camera* review; they were merely misplaced when sent to archives. Ultimately, Thompson failed to show that something specific was lost, that the specific document was prejudicial to his defense, and that the State Attorney's Office lost or destroyed such document in bad faith. As a result, this claim has no merit.

B. Florida Department of Law Enforcement

In his original 3.850 motion, motion for rehearing, and initial brief on appeal, Thompson alleged that the Florida Department of Law Enforcement (FDLE) had failed to comply with his May 6, 1991, public records request. (PCR I 22, 25, 44-45; **orig. init. brief** at 6-10). On relinquishment, Thompson realleged that FDLE had failed to comply fully with his request. (PCSR VIII 83-84). In April 1996, Judge Lebow ruled that she did not have jurisdiction over FDLE. (PCSR VIII 84, 90-91). Rule 3.852 issued on October 31, 1996, giving the circuit court jurisdiction over FDLE. Thompson made no attempt to raise this issue, however, until he filed is second "Status Report" on December 10, 1996. (PCSR III 294). By then, this Court had stayed the effective date of the rule until March 3, 1997. By March 3rd, the trial court had concluded public records because of this Court's deadline to resolve the relinquishment, and Thompson filed his amended 3.850 motion three days later (March 6, 1997). (PCSR III 289; IV 424-

581). Although Thompson challenged FDLE's level of compliance in his amended motion (PCSR IV 431-35), the time for litigating such a claim had passed. The trial court had previously ordered the State to respond to Thompson's amended motion by March 21, 1997, had set a Huff hearing for March 27, 1997, and had set a tentative date for an evidentiary hearing, if one were necessary, for April 11, 1997. (PCSR III 420; XI 224).

Moreover, from March 1991, when Thompson requested public records from FDLE, to October 1996, when Rule 3.852 gave the circuit court jurisdiction over FDLE, Thompson could have litigated FDLE's noncompliance administratively.[16] Nowhere in any of Thompson's pleadings does he allege that he made such an attempt. Rather, he sat on his hands. By the time Rule 3.852 issued and became effective, it was too late, and Thompson should not be allowed to fault the trial court for his failure to diligently pursue those records along the avenues available to him. See Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1993) (stating that "any postconviction movant dissatisfied with the response to any requested access must pursue the issue before the trial judge or that issue will be waived"). By failing to pursue this issue

[16] The statute prohibiting CCR from litigating civil actions did not become effective until May 30, 1996. Ch. 96-290, §1, Laws of Florida. Thus, Thompson had at least from March 1991 to June 1996 to pursue FDLE records administratively, regardless of whether Judge Lebow allowed him to relitigate public records on relinquishment.

administratively, Thompson waived any issue of noncompliance by FDLE. Moreover, Thompson can continue to pursue records against that agency. Should he find evidence in those records to support another claim for relief, he can always file a successive motion. Robinson v. State, 23 Fla. L. Weekly S85, 85 nn.1,2 (Fla. 1998) (affirming denial of request for leave to amend following receipt of public records "since [request] seeks to obviate the available remedy for bringing a claim should a basis therefor appear in any subsequently provided records").

ORIGINAL ISSUE II

WHETHER THOMPSON WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS POSTCONVICTION CLAIMS (Restated).

Thompson contends in his original initial brief that he was entitled to an evidentiary hearing on all of his claims. **Orig. init. brief** at 10-12. He challenges the denial of specific claims, however, in separate issues in that brief. To avoid duplication, the State will respond to those particular claims as they are raised. Engle v. Dugger, 576 So. 2d 696, 698 (Fla. 1991) (whether summary denial of entire motion to vacate was erroneous depends upon sufficiency of individual allegations).

ORIGINAL ISSUE III

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM XI, RELATING TO AN ALLEGED BRADY/ GIGLIO VIOLATION (Restated).

In Claim XI of his original 3.850 motion and motion for rehearing, Thompson alleged that the State withheld material exculpatory information in violation of Brady v. Maryland, 373 U.S. 83 (1963), and presented false testimony at Thompson's trial in violation of Giglio v. United States, 405 U.S. 150 (1972). Specifically, he claimed that (1) Bobby Davis testified falsely, with the State's knowledge, that he did not know on July 30, 1984, that there were outstanding warrants against him in California, (2) Bobby Davis testified falsely, with the State's knowledge, that he did not know whether his plea bargain included his California charges, (3) the State failed to disclose the true nature of the California warrants, i.e., that Davis had been charged specifically with three counts of Forgery, two counts of Grand Theft, and one count of Petit Theft, and not just with renting two video recorders by fraud and failing to return them, (4) FBI agent Parrish testified falsely, with the State's knowledge, as to when he learned of the nature of Davis' California charges, (5) the transcripts of the taped conversations between Bobby Davis and Thompson that the State prepared "were inaccurate and used to mislead the jury," and (6) "there may be more tapes taken during the investigation which have not been provided and deciphered." He

claimed that, by withholding such information and/or presenting such false testimony, the State prevented defense counsel from effectively cross-examining Davis, FBI Agent Parrish and FDLE Agent Brown. According to Thompson, given that Davis was the State's only eyewitness to the murder, such actions materially prejudiced Thompson's defense. (PCR II 120-36).

Citing to portions of the record, the State responded that (1) defense counsel was well aware of Davis' California charges and used them to argue that Davis' motive to cooperate with the police was based on the dismissal of those charges, (2) that Davis admitted to having pending charges in California, and (3) that FBI Agent Parrish testified that the California charges were dropped because of Davis' cooperation in this case. The State also argued that Thompson's allegations regarding the transcripts of the tapes and any additional tapes were insufficiently pled, since they failed to allege how the transcripts were inaccurate and that there were, in fact, tapes withheld. (PCR II 216-19). Judge Kaplan summarily denied this claim based on the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his Brady and Giglio allegations. **Orig. init. brief** at 13-23. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to

consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

This claim was properly denied since the record conclusively rebutted some of Thompson's allegations, and since the other allegations were insufficiently pled. In order to establish a Brady claim, Thompson was required to show:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991). See also Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993). Similarly, in order to establish a Giglio claim, Thompson was required to show "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material." Routly v. State, 590 So. 2d 397, 399-400 (Fla. 1991). According to the United States Supreme Court, "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 a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 973 U.S. 667, 682 (1985).

Here, Thompson failed to make a prima facie showing that Bobby Davis gave false testimony and that the State knew his testimony was false. He made those conclusory statements, but nowhere in the motion did Thompson allege how he knew Davis was, in fact, aware of the outstanding warrants prior to July 30. Nor did he allege how he knew the State knew Davis was aware of the charges prior to July 30. While factual allegations in a 3.850 motion must be taken as true, conclusory statements need not be. As with claims of ineffective assistance of counsel, mere conclusory statements are insufficient to obtain an evidentiary hearing. Cf. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.").

Even were these conclusory statements sufficient to show that Davis' testimony was false and that the State knew it was false, Thompson failed to show that the information was material. Bobby Davis initiated contact with FBI Special Agent Parrish in May 1984. He and Parrish spoke by telephone, and then met in person a few days later. (R 1638-39). At that point, Parrish was not aware of

any criminal charges pending against Davis. (R 1640). Nor was Davis allegedly aware of any pending charges against himself. (R 1029-30). On July 30, 1984, Special Agent Parrish flew with Davis to Ft. Lauderdale to meet with FDLE Special Agent Brown, Assistant State Attorney Hancock, and Assistant U.S. Attorney McCormick. (R 1801-02). Even if Davis (and everyone else) knew at that point that Davis had outstanding warrants from California, such information, if elicited by defense counsel, would have had minimal, if any, effect on Davis' testimony. Defense counsel had already tried to insinuate during his cross-examination of Davis that Davis was motivated to cooperate with the police because of his outstanding warrants. (R 1029-30). Davis maintained, however, that he came forward because he had a young son and wanted to straighten out his life. (R 1029-30). Even if Davis had admitted that he knew in July of outstanding warrants, it would have done little to impeach his testimony that he did not know of any in May when he came forward, and that he came forward to straighten out his life. After all, if he had wanted to exchange his cooperation in Thompson's case with favorable treatment for his California charges, he would have made the deal before confessing his involvement, not months afterwards. Under these facts, there is no reasonable probability that Thompson would have been acquitted given the minimal impact of such an admission. Cf. Phillips v. State, 608 So. 2d 778, 781 (Fla. 1992) (finding key witnesses'

false testimony about their criminal records not material where jury was already aware of convictions and additional information "would have added virtually nothing to further undermine their credibility").

As for Davis' alleged false testimony that he did not know if the California charges were a part of his plea bargain, FBI Special Agent Parrish testified that FDLE Special Agent Brown told him subsequent to his initial meeting with Davis in May 1994 that Davis had an outstanding warrant in Redding, California, for fraudulently renting and failing to return two video recorders. (R 1661-62, 1664, 1674). Parrish contacted the California authorities and told them that Davis was cooperating in a federal investigation and that Parrish would make Davis available to them. The California authorities asked Parrish to question Davis about "activity in Redding, California," which he did, and the video machine charges were later dismissed. (R 1665). Based on this testimony, Thompson has failed to show that dismissal of the California charges were "a part of his plea bargain." (PCR I 123). Even if their dismissal was a reward for cooperating with the police in Thompson's case, the jury was aware of it. Therefore, Davis' ambiguous testimony had no effect, much less a reasonably probable effect, on the outcome of Thompson's trial. Cf. Phillips, 608 So. 2d at 781 ("Ambiguous testimony does not constitute false testimony for the purposes of Giglio."); Routly v. State, 590 So. 2d 397, 399-400

(Fla. 1991) (finding that key witness' equivocal testimony on cross-examination did not constitute false testimony for Giglio purposes).

Thompson next alleged that the State's withholding of the true nature of Davis' California charges prevented defense counsel from effectively impeaching Davis. The record reveals, however, that defense counsel, Roy Black, was well aware of the existence, nature, and disposition of Bobby Davis' California charges. Defense counsel argued during opening statements that Davis' motivation to testify was based, in part, on dismissal of the out-of-state charges. (R 795-97). During Black's cross-examination of Davis, Davis admitted that he had pending charges in Redding, California. He also admitted that the police in Cottonwood, California, executed a search warrant on his home and recovered numerous firearms and weapons. All but two of the weapons were later returned to him. (R 1100-04, 1196-97). Later, at a sidebar conference during Davis' testimony, Roy Black stated, "I understand the case in California was dismissed because of his cooperation here, and we're going into it to show he wasn't prosecuted on any of those because he cooperated in this case." (R 1198). When the State disputed that the charges were dismissed after Davis made contact with the FBI, Thompson's counsel stated, "In the deposition of one of the agents I think they said it was dismissed because of this case. That's my recollection; either [Special Agent] Shomers

or Brown." (R 1198). Defense counsel questioned Special Agent Shomers about Bobby Davis' criminal history and whether he knew of any warrants outstanding in California, but Shomers explained that he was not involved in that aspect of their investigation. (R 1319-22). Defense counsel also questioned FBI Special Agent Parrish about Bobby Davis' criminal history. Parrish testified that FDLE Special Agent Brown told him subsequent to his initial meeting in May 1994 with Bobby Davis that Bobby Davis had an outstanding warrant in Redding, California, for fraudulently renting and failing to return two video recorders. (R 1661-62, 1664, 1674). Parrish contacted the California authorities and told them that Davis was cooperating in a federal investigation and that Parrish would make Davis available to them. The California authorities asked Parrish to question Davis about "activity in Redding, California," which he did, and the video machine charges were later dismissed. (R 1665). Since the defense was well aware of this information and, in fact, used it as impeachment evidence, Thompson failed to prove a Brady violation. Routly v. State, 590 So. 2d 397, 399-400 (Fla. 1991).

Furthermore, even if the defense was somehow deprived of impeachment evidence regarding outstanding charges, Thompson failed to demonstrate materiality. It cannot be said that but for the disclosure of this information there exists a reasonable probability that the outcome of the proceedings would have been

different. United States v. Bagley, 473 U.S. 667 (1985); Duest v. State, 555 So. 2d 849, 851 (Fla. 1990). When faced with an allegation on direct appeal that the State withheld other impeachment evidence relating to Bobby Davis, this Court found that such additional evidence would not have changed the outcome in the instant case. Thompson v. State, 553 So. 2d 153, 155-56 (Fla. 1989. Thompson presented nothing in his 3.850 motion to undermine that determination. Davis was thoroughly impeached on cross-examination with the following information: that Davis participated in the murder of James Savoy (R 931-974), that Davis had been charged with first-degree murder, but had pled guilty to second-degree murder and had received a 10-year sentence (R 1014, 1156-57), that the plea agreement was based on Davis' testimony and that such would be revoked if he did not cooperate with the state (R 1015), that in exchange for his testimony Davis' family received approximately $36,000 (R 1038-45), that he pled guilty to two other murders and received two concurrent ten-year sentences with no fine for his crimes (R 1156-57), that he was allowed to serve his concurrent 10-year sentences in a federal prison rather than a state facility (R 1157-59), and that he had an extensive history of drug use and had a violent nature (R 1152-53, 1206). Testimony that Davis had been charged specifically with Forgery, Grand Theft, and Petit Theft, as opposed to generically with fraudulently renting two video recorders and failing to return them would have

been cumulative, at best, and certainly not material to his defense. Routly, 590 So. 2d at 399-400; Aldridge v. State, 503 So. 2d 1257, 1259 (Fla. 1987).

Next, Thompson alleged that FBI Special Agent Parrish testified falsely, with the State's knowledge, as to when he learned of the nature of Davis' California charges. (PCR I 123-24). Thompson's allegations, however, do not show that Parrish's testimony was false. Parrish testified that he did not know in May 1984, when he first met with Davis, that Davis had outstanding charges. (R 1638-40). He later learned from FDLE Special Agent Brown that Davis had outstanding charges. (R 1661-62). He did not meet Brown, however, until July 1984. (R 1801-02). Thompson's allegedly newly discovered evidence, i.e., the Redding, California, police reports, show that Parrish called the California authorities on July 31, 1984. Neither information in the California reports, nor testimony from Parrish or Brown, shows that Parrish knew before July 1984 that Davis had outstanding charges from California. Thus, his allegation was legally insufficient on its face.

Even if Parrish did know earlier than July that Davis had outstanding charges, and even if the State knew that Parrish knew but failed to correct his testimony, and even if defense counsel had elicited such testimony, there is no reasonable probability that Thompson's verdict would have been different. As outlined previously, the jury was aware that Davis had pending California

charges when he was cooperating in this case, and that those charges were dismissed as a result of his cooperation. Thus, when Parrish knew about them would have had minimal impeachment effect. Routly, 590 So. 2d at 399-400.

Finally, Thompson alleged that the transcripts the State prepared of the taped conversations between Bobby Davis and Thompson "were inaccurate and used to mislead the jury," and that "there may be more tapes taken during the investigation which have not been provided and deciphered." (PCR I 131). Thompson failed to allege, however, how the transcripts of the taped statements were inaccurate and misleading. Thompson not only heard the tape (R 1976, 1964-2015), but he was a party to the taped conversation; thus, he was in the best position to identify inaccuracies, but did not do so. As for his claim that "there may be more tapes taken during the investigation which have not been provided and deciphered," again, he failed to allege facts to support this speculative statement. Mere speculation that other tapes exist does not establish a Brady violation. Therefore, these allegations were properly denied. See Routly, 590 So. 2d at 399-400.

ORIGINAL ISSUE IV

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM V, RELATING TO ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF THOMPSON'S TRIAL (Restated).

In his original 3.850 motion and motion for rehearing, Thompson claimed that his two privately retained trial attorneys, Roy Black and Mark Seiden, rendered ineffective assistance of counsel during the guilt phase of his trial. Specifically, Thompson alleged that (1) defense counsel failed to call as witnesses Gail Stephens and/or Rose Davis to impeach Bobby Davis' testimony with evidence of Bobby Davis' bizarre behavior, violent reputation, drug use, ulterior motive for testifying against Thompson, abuse of Rose Davis, possession of weapons, and marijuana farming in California (PCR I 65-67 ¶¶ 5-10); (2) defense counsel failed to investigate Bobby Davis' criminal history (or the State failed to disclose it) (PCR I 67 ¶11); (3) the trial court rendered defense counsel ineffective by refusing to allow counsel to cross-examine Bobby Davis and Bobby Stephens about Davis' drug use and violent behavior, and improperly interfered in counsel's examination of these witnesses (PCR I 68-69 ¶¶12-14); (4) defense counsel failed to object to Kelly Hancock's prosecution of Thompson's case where Hancock's roommate had previously represented in another case Robert Tippie, whom Hancock had granted immunity in Thompson's case (PCR I 69-70 ¶14); and (5) defense counsel failed

to present a voluntary intoxication defense and seek an instruction thereon (PCR I 70-72 ¶¶15-19).

In response, the State argued that Thompson was improperly trying to challenge the trial court's restriction of defense counsel's impeachment of Bobby Davis by recasting the claim as one of ineffective assistance of counsel. Further, it argued that any impeachment evidence would have been cumulative to that already presented. Finally, it argued that there was no evidence of Thompson's use of alcohol or drugs at the time of the murder; thus, there was no evidence to support a voluntary intoxication defense. (PCR II 211-13). Judge Kaplan summarily denied the claim based on the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his ineffectiveness allegations. **Orig. init. brief** at 24-32. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

This claim was properly denied since part of it was procedurally barred, part of it was insufficiently pled, and the rest was conclusively refuted by the record. In Thompson's initial allegations, he blamed alternatively defense counsel and the trial court for his inability to impeach Bobby Davis with Davis' drug

history and character traits. As Thompson's motion indicated, however, and the record supported, defense counsel made several attempts to impeach Davis' testimony with evidence that Davis used drugs and exhibited bizarre and violent behavior. (PCR I 68-69). Defense counsel argued that Gail Stephens testified in a pretrial deposition to numerous instances of violent and bizarre behavior resulting from excessive drug use. (R 1118-22, 2157). Each time counsel did so, the trial court heard the proffered testimony and ruled most of the evidence irrelevant and inadmissible.[17] (R 1138-49, 2152-83). It did, however, allow defense counsel to question Davis about his drug use at or around the time of the murder. (R 1148-49). Thompson did not challenge the trial court's rulings on direct appeal, although he very well could have. Instead, he challenged them in his 3.850 motion under the guise of ineffective assistance of counsel. However, "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Therefore, the trial court properly denied these allegations, as they were procedurally barred.

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[17] Specifically, defense counsel tried to question Bobby Davis about Davis' alleged attempted rape of Gail Stephens (R 1116), his shooting at imaginary people in Gail Stephens' presence (R 1117), and his bragging to Gail Stephens that he had beaten people to death in Las Vegas (R 1117-22). Defense counsel tried to question Bobby Stephens about Davis' alleged mental instability based on incidents that occurred in 1979 and 1980. (R 2162-68, 2178-82).

Even were they not barred, it was reasonably probable that the trial court would have ruled Rose Davis' and/or Gail Stephens' testimony regarding Bobby Davis' bizarre and violent behavior irrelevant and inadmissible, as it had preempted counsels' previous attempts to introduce similar evidence. Trial counsel cannot be deemed ineffective for failing to present inadmissible evidence. Moreover, any such evidence would have been cumulative to that already presented against Davis, as detailed in footnote 17, supra.

As for Thompson's allegation that defense counsel failed to investigate Davis' criminal history to use as impeachment (PCR I 67 ¶11), Thompson failed to allege the specific criminal history that counsel failed to discover. To that extent, this allegation was insufficiently pled and could have been denied as such. See Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Regardless, the record conclusively showed that defense counsel was well aware of Davis' California charges and believed that Davis had charges pending in Florida as well. See Orig. issue III, supra.

Regarding defense counsel's failure to challenge Kelly Hancock's prosecution of this case, Thompson failed to show the conflict. According to Thompson, Kelly Hancock granted Robert Tippie immunity for his testimony in this case. Hancock's roommate, Dohn Williams, had represented Tippie in a drug case in 1981. Thompson failed to show what about this connection created a conflict of interest. That Hancock may have withdrawn from the

case initially because of a perceived conflict does not a conflict make. Therefore, this allegation was properly denied, as it was insufficiently pled. See Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

Finally, as for Thompson's claim that trial counsel failed to present a defense of voluntary intoxication (PCR II 70-72 ¶¶ 15-17), he failed to sufficiently plead these allegations as well. In a conclusory fashion, he alleged that "[n]umerous witnesses were available and would have testified to Mr. Thompson's extensive drug and alcohol use and the debilitating effects of the drugs and alcohol had [sic] on Mr. Thompson's thought processes." (PCR II 70). The conclusory nature of this claim, however, made it virtually impossible for the State and the trial court to determine whether, in fact, the record refuted this claim. The State submits that it was Thompson's burden to identify specifically the witnesses that were available and the substance of their testimony. Evidentiary hearings should only be granted upon a colorable claim for relief. It cannot be enough to simply conclude that "numerous witnesses were available" to counsel and that counsel should have discovered and presented them. See Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts

that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant."); Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1st DCA 1993) ("In cases involving claims of ineffective assistance of counsel based on counsel's alleged failure to investigate and to interview witnesses, a facially sufficient motion must include the following allegations: (1) the identity of the prospective witnesses; (2) the substance of the witnesses' testimony; and (3) an explanation as to how the omission of this evidence prejudiced the outcome of the trial."); Williamson v. State, 559 So. 2d 723, 724 (Fla. 1st DCA 1990) ("Williamson's failure to allege the identities of the uncalled witnesses, and his failure to state whether those witnesses were available for trial, rendered the first and second allegations [of ineffective assistance] facially insufficient."); Sorgman v. State, 549 So. 2d 686, 687 (Fla. 1st DCA 1989) ("[A]llegations [of ineffectiveness] must be in sufficient detail to apprise the court of the names of the witnesses, substance of their testimony, and how the omission prejudiced the outcome of the trial."). Thompson having failed to allege sufficient facts to support a prima facie claim for relief, the trial court could have denied these allegations as facially insufficient. Cf. Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992).

In any event, there was absolutely no evidence in the record to show that Thompson was under the influence of drugs or alcohol at the time of the crime. Dr. Stillman's testimony in the penalty phase regarding Thompson's history of drug use was based solely on Thompson's own self-serving statements. Had it been a viable defense, counsel would have known about it from his own client and would have investigated it further. Thompson maintained throughout his trial, however, that he was not on the boat and had nothing to do with Savoy's murder. Given that the police never found a body and had no physical evidence to tie Thompson to the murder, the "reasonable doubt" defense was far more reasonable than one in which Thompson had to admit to killing Savoy. See Bertolotti v. State, 534 So. 2d 386, 387 (Fla. 1988) (affirming denial of ineffectiveness claim based on counsel's failure to present voluntary intoxication defense where only evidence of intoxication was defendant's self-serving statement and "reasonable doubt" defense was much more reasonable under circumstances); Rivera v. State, slip op. at 8, case no. 86,528 (Fla. June 11, 1998) (stating that "since a voluntary intoxication defense is, in effect, an admission that you did the crime but lacked the specific intent to be held criminally responsible, Rivera's unwavering professions of innocence short-circuited any credible voluntary intoxication defense during the guilt phase").

ORIGINAL ISSUE V

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM VIII, RELATING TO ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF THOMPSON'S TRIAL (Restated).

In his original 3.850 motion and motion for rehearing, Thompson claimed that his privately retained trial attorneys, Roy Black and Mark Seiden, rendered ineffective assistance of counsel during the penalty phase of his trial. Specifically, Thompson alleged that (1) defense counsel failed to have Dr. Haber evaluate Thompson after procuring Haber's appointment, (2) defense counsel failed to object to the trial court's interference in the presentation of mitigation, (3) defense counsel failed to investigate Thompson's 1950 rape conviction that the State used in aggravation, (4) defense counsel failed to object to comments and instructions on the jury's role in sentencing and on shifting the burden to Thompson to prove that life imprisonment was the appropriate sentence, (5) defense counsel failed to investigate and present evidence of Thompson's "family background" and "substantial substance abuse," (6) defense counsel failed to have Thompson psychologically tested, (7) defense counsel failed to present "substantial evidence" of Thompson's intoxication at the time of the offense, which deprived Thompson of both mental mitigating factors, (8) defense counsel allowed Thompson to be sentenced after his federal trial and sentencing, (9) defense counsel allowed the trial court to base its override, in part, on a letter from the

victim's girlfriend urging Thompson's execution, and (10) defense counsel failed to present "critical evidence" showing that the HAC factor did not apply. (PCR I 91-111).

In response, the State argued that trial counsel did, in fact, present evidence of Thompson's background, intoxication and drug use, and secured a life recommendation; Thompson's presentation of a more detailed account did not establish ineffectiveness. It also argued that counsel was aware of Thompson's rape conviction and made the State prove that it involved force or violence. Further, the State argued that the trial court articulated its findings prior to reading the letter of the victim's girlfriend. Finally, it argued that there was significant evidence to support the HAC finding, and thus defense counsel's reliance on Davis' testimony that the victim was not in fear was not deficient. (PCR II 213-16). Judge Kaplan summarily denied the claim based on the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his ineffectiveness allegations. **Orig. init. brief** at 33-47. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

This claim was properly denied since either Thompson's claim was facially insufficient or the record conclusively showed that Thompson was not entitled to relief. Thompson initially faulted trial counsel for failing to have Dr. Haber, or some other psychologist, evaluate him for mitigation, despite Dr. Stillman's suggestion that such testing be done. (PCR I 94-95 ¶¶8, 32-33). Thompson failed to allege, however, what Dr. Haber, or some other psychologist, would have found, whether Thompson would have presented these opinions, and what effect the lack of such testimony would have had on Thompson's ultimate sentence. By failing to allege these facts, Thompson failed to state a claim for relief. See Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

In any event, the record reveals that Thompson presented the testimony of Dr. Stillman, a psychiatrist, who opined, among other things, that both statutory mental mitigators applied because of Thompson's history of drug and alcohol abuse. (R 2715-19). The trial court rejected this testimony because of Thompson's activities and responsibilities in orchestrating a multi-million dollar drug smuggling operation. Thus, there is no reasonable probability that any testimony from Dr. Haber, or some other psychologist, that would have corroborated Dr. Stillman's testimony would have had any effect on the trial court's override. As with Dr. Stillman's testimony, such cumulative testimony would not have overcome the evidence that Thompson "'had over fifty people working

for him. That the defendant was always in complete control of everyone and able to operate his business which is now known to be a multi-million dollar drug smuggling enterprise. In addition the defendant's own family testified that he was not suffering from any such mental or emotional disturbance.'" Thompson v. State, 553 So. 2d 153, 157 (Fla. 1989) (quoting trial court's sentencing order). Consequently, counsel could not be deemed ineffective for failing to present the testimony of Dr. Haber, or some other psychologist, to corroborate Dr. Stillman's testimony. Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986) ("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorough job being done than was actually done. Moreover, it is highly doubtful that more complete knowledge of appellant's childhood circumstances, mental and emotional problems, school and prison records, etc., would have influenced the . . . the judge to impose a sentence of life imprisonment rather than death.").

Next, referencing Claim IX, the denial of which Thompson does not challenge on appeal, Thompson alleged in two sentences that defense counsel was ineffective for failing to object to the trial court's selection of mitigating factor instructions. (PCR I 95 ¶9). The State submits that this allegation is procedurally barred. Thompson is attempting to challenge the trial court's

actions by recasting the claim as one of ineffective assistance of counsel in order to overcome the procedural bar. This is improper. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) ("Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal.").

Next, Thompson alleged that counsel was ineffective for failing to investigate his 1950 rape conviction. (PCR I 95-96 ¶10). Thompson failed to allege what about his conviction counsel failed to discover and how that prejudiced his defense, thereby making his claim legally insufficient on its face. Be that as it may, the record revealed that defense counsel was well aware of the nature of Thompson's prior conviction. He informed the trial court that the conviction was for statutory rape and argued that it did not constitute a prior violent felony for use as an aggravator unless the State proved actual or threatened violence. (R 2604-05). The State indicated that the out-of-state records were en route and that he would review them and call defense counsel. (R 2605-06). The following day, the trial court commented, "This doesn't look like a consensual act of carnal intercourse," and defense counsel responded, "Not exactly." (R 2671). Later, defense counsel objected to any instruction that defined sexual battery and objected to any evidence other than the certified copy of conviction, repeatedly agreeing not to argue that Thompson's

conviction was not a crime of violence. (R 2681-85, 2688-95). Therefore, this allegation was properly denied.

Referencing Claims VI and XVII respectively, Thompson argued in two sentences that defense counsel failed to "properly challenge" instructions on the role of the jury in sentencing and Thompson's burden of proving that mitigation outweighed the aggravating factors. (PCR I 96 ¶11). As discussed infra regarding Original Issues VII and XI, the State submits that these allegations are procedurally barred. By recasting them as allegations of ineffectiveness, Thompson was blatantly attempting to overcome the procedural bar. This was improper. Therefore, the trial court properly denied these allegations.

Next, Thompson spent several pages narrating his family's history, which he claimed defense counsel failed to adequately portray to the jury. (PCR I 96-105 ¶¶12-31). What Thompson failed to allege, however, were the names of the witnesses who would have testified to these alleged facts, whether these witnesses were available and willing to testify to such facts, and how these facts would have persuaded the trial court to follow the jury's recommendation and impose a life sentence. As a result, Thompson failed to properly plead a claim for relief. See Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989); Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1st DCA 1993); Williamson v. State, 559 So. 2d 723,

724 (Fla. 1st DCA 1990); Sorgman v. State, 549 So. 2d 686, 687 (Fla. 1st DCA 1989).

In any event, most of the alleged facts related to Thompson's family, which would not have been admissible at his trial. See Hill v. State, 515 So. 2d 176, 178 (Fla. 1987). Moreover, given Thompson's age of 52 at the time of the crime, Thompson's early life experiences were significantly remote in time from the murder. See Francis v. State, 529 So. 2d 670, 672-73 (Fla. 1988). Finally, Thompson presented the testimony of six witnesses, which included Dr. Stillman, Thompson's mother, father, adopted son, and two sisters. Dr. Stillman recounted Thompson's alleged life-long history of drug and/or alcohol abuse. (R 2700-77). Thompson's mother testified that Thompson was the oldest of five children, who grew up during the depression. Her husband could find very little work; they rented, as opposed to owned, their home; their food came mostly from their garden, which Thompson and his two brothers tended; their house had no electricity; and they had only a stove to heat their home, which was in Illinois. (R 2796-97). Thompson's mother and father specifically testified that they had no knowledge of Thompson's drug use. (R 2788, 2806-07). Thompson's adopted son testified that he was "[s]omewhat," but "[n]ot really," aware that Thompson had a cocaine habit in March 1982, but he could not relate the number of times he had seen Thompson use cocaine. (R 2817-21). And Thompson's sister, Sandy,

testified that she only "suspected him of using [cocaine]"; she "never saw him with it." (R 2834-35). Regardless, everyone in Thompson's family testified that Thompson was not suffering from any mental or emotional disturbance at the time of the murder. (R 2784-85, 2807-11, 2821-22, 2834, 2843-44). Finally, the trial court rejected Dr. Stillman's testimony that Thompson met the criteria for both statutory mental mitigators, because of Thompson's ability to run a multi-million dollar drug operation, a finding that this Court affirmed on direct appeal. Thompson v. State, 553 So. 2d 153, 156-57 (Fla. 1989). There is no reasonable probability that the trial court's sentence would have been different had defense counsel presented the evidence Thompson claimed they should have presented. See Maxwell, 490 So. 2d 932. Therefore, these allegations were properly denied.

Next, Thompson alleged that "[a] solid penalty defense of intoxication was available but counsel failed to investigate or present this defense." (PCR I 107-09 ¶¶34-36). Once again, Thompson failed to allege what evidence was available that counsel failed to discover and present. The lack of such allegations made Thompson's claim facially insufficient. See Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989); Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1st DCA 1993); Williamson v. State, 559 So. 2d 723, 724 (Fla. 1st DCA 1990); Sorgman v. State, 549 So. 2d 686, 687 (Fla. 1st DCA 1989). Regardless, the record revealed that counsel

presented the testimony of Dr. Stillman, who recounted Thompson's history of drug/alcohol abuse. (R 2708-77). Thompson was the source of that information. (R 2732, 2735). According to Dr. Stillman, Thompson told him that, at the time of the murder, "he was under constant use of cocaine and alcohol." (R 2741). Thompson allegedly consumed a half a gram of cocaine per day. (R 2708). As a result, Dr. Stillman opined that Thompson was under an extreme mental or emotional disturbance at the time of the crime and that Thompson's capacity to appreciate the consequences of his actions or to conform his conduct to the requirements of law was substantially impaired. (R 2715-19). Presumedly this testimony, along with counsel's emotional closing argument, persuaded the jury to recommend a life sentence. The trial court rejected Dr. Stillman's opinions, however, in light of other evidence that showed Thompson's high level of functioning and responsibility. There was no reasonable probability that the trial court would have imposed a life sentence even had counsel presented this additional, unspecified evidence of intoxication at the time of the murder. Therefore, this allegation was properly denied.

Next, Thompson alleged that counsel were ineffective for allowing him to be sentenced after his federal trial and sentencing, the facts of which were used by the trial court in sentencing Thompson in this case. (PCR I 109 ¶37). This issue presupposes that defense counsel had control over the trial court's

docket and could have demanded resolution prior to the federal proceedings. Given the facial absurdity of this allegation, it was properly denied.

Thompson then alleged that counsel were ineffective for allowing the trial court to consider in sentencing a letter written by the victim's girlfriend. (PCR I 109 ¶38). The substance of this allegation could have been raised on direct appeal, but it was not. Thompson merely recast it as ineffective assistance of counsel to overcome the procedural bar, which was improper. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Regardless, the record revealed that the trial court rendered its sentencing decision before reading the letter in open court. (R 2935-51). Moreover, contrary to Thompson's assertion, the letter did not "urge[] that the defendant be executed." (PCR I 109). It merely related the uniqueness of the victim and the effect of his loss on his family and friends. As such, it was not impermissible victim impact evidence, and counsel could not be deemed ineffective for not objecting to its admission.

Finally, Thompson alleged that counsel were ineffective for failing to challenge the applicability of the HAC factor with Bobby Davis' sworn statement that the victim was not in fear or under emotional strain at the time of the murder. (PCR I 109-10 ¶39). First, Thompson does not explain the basis under which Davis' opinion of the victim's mental state would have been admitted.

Although the rules of evidence are relaxed in a penalty phase proceeding, they are not totally disregarded. Davis' opinion of Savoy's state of mind was speculative, at best, and could have been rejected on that basis. Second, the record revealed that Thompson's counsel tried desperately to impeach Bobby Davis' testimony. (R 1028-1173). It was unreasonable for the trial court to believe that defense counsel would then turn around and use Bobby Davis' testimony to support its argument that the HAC aggravating factor was inapplicable. Regardless, there was other, significant evidence to show that Thompson committed this murder in a heinous, atrocious, or cruel manner. As the trial court stated in its written sentencing order,

> [t]he evidence indicates that the victim, James Savoy, was kidnapped on or about March 7, 1982. He was taken to the home of the defendants' employee where he was tied up, gagged and questioned at gunpoint. The Defendant came to the sight where the victim was being held and questioned the victim. The defendant told the victim that he was going to die and that "he could die easy or he could die hard." The defendant told his people to bring the victim to his residence and put him on the defendant's boat. The victim was transported to the defendant's home in Hallandale and was imprisoned on the defendant's boat over night. Early the next morning the Defendant gave the orders to take the victim out in [the] ocean. On the way out to the ocean the defendant again told the victim that he was going to die and he was questioned repeatedly about the whereabouts of the money. The defendant instructed Bobby Davis to hit the victim with a stick every time the victim didn't answer his questions properly. Davis testified that he struck the

> victim several times and in fact did so with such severity that he cracked his ribs. When they arrived at the ocean the victim was tied with chains and weights around his body. The defendant then told the victim "So long mother fucker" and shot him point blank in the head. Savoy's body was then thrown in the ocean never to be found. It is unknown if the victim died instantly or if he was alive as the weights carried him to the bottom of the ocean. In any event, the victim knew his fate and had been running and hiding for over eight months from the Defendant. He knew the Defendant would kill him if he was ever found. The victim went to the FBI in order to get protection for his life. The fear and emotional strain that the victim must have had during the kidnapping and events which led up to his death (knowledge that he would be killed and the torture itself), in this Court's opinion are grounds to substantiate that this killing was especially heinous, atrocious and cruel.

(R 3342-43). Based on this evidence, there is no reasonable probability that the jury or the trial court would have rejected this aggravating factor even had defense counsel used Bobby Davis' sworn statement. Therefore, the trial court properly denied Thompson's allegation that defense counsel were ineffective.

ORIGINAL ISSUE VI

> WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM III, RELATING TO ALLEGED INCOMPETENT MENTAL HEALTH EXAMINATIONS (Restated).

In Claim III of his original 3.850 motion and motion for rehearing, Thompson claimed that he was denied the right to a competent mental health evaluation because Dr. Stillman, a

psychiatrist, was appointed only nine days before the penalty phase; Dr. Haber, a psychologist, was never asked to evaluate Thompson, although he was appointed as well; and Dr. Stillman was not provided (unspecified) background material or access to Thompson's (unspecified) family/friends. Finally, Thompson alleged that he had provided an unnamed, "new" expert "adequate background information, sufficient time and access to Mr. Thompson, and proper expert psychological testing." As a result, the "new" expert could "fully substantial Dr. Stillman's findings," and could present a "wealth" of (unspecified) mitigating evidence. (PCR I 26, 52-57). Since these allegations overlapped Thompson's allegations in Claim VIII, relating to counsels' alleged ineffective assistance during the penalty phase, the State responded to Claim VIII that these allegations were insufficiently pled and if sufficiently pled were conclusively rebutted by the record. (PCR II 214-16). Judge Kaplan summarily denied the claim based on the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his allegations that he received an incompetent mental health evaluation. **Orig. init. brief** at 47-50. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it

and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

This claim was properly denied since either Thompson's claim was facially insufficient or the record conclusively showed that Thompson was not entitled to relief. To the extent the substance of this claim is intertwined with Claim VIII, the State will rely on its response supra to Original Issue V. Standing alone, however, this issue was facially insufficient because it failed to allege sufficient facts to support a prima facie case for relief. For example, Thompson failed to allege what Dr. Stillman would have discovered had defense counsel sought and obtained his appointment prior to the guilt phase, as opposed to prior to the penalty phase. He failed to alleged what Dr. Haber would have testified to had defense counsel engaged his services. He failed to allege what background material counsel failed to provide to Stillman, what family members or friends were available at the time of trial, and what those family members/friends would have told Dr. Stillman. Finally, he failed to allege the name of the "new" expert witness and what the expert would testify to if presented at an evidentiary hearing. A motion is legally insufficient if it does not include identification of the prospective witness, the substance of the testimony, and an explanation of how this omission was prejudicial. See Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1993); Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations); see

also Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) ("The second and third claims are devoid of adequate factual allegations and therefore are insufficient on their face. As we noted in Kennedy, mere conclusory allegations that trial counsel was ineffective do not warrant an evidentiary hearing."); Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990) (finding summary denial of ineffective assistance claims relating to the failure to present mitigating evidence, the failure to adequately develop and employ expert mental health assistance, and the failure of the retained experts to conduct professionally adequate mental health evaluations was proper because "Kight failed to allege specific facts which demonstrate a deficiency in performance that prejudiced the defendant and which are not conclusively rebutted by the record."). Therefore, this claim was properly denied as legally insufficient on its face.

Even were it not, Thompson failed to establish that counsel were ineffective or that Dr. Stillman's evaluation was incompetent. Thompson claimed that the trial court rejected Stillman's findings based on Stillman's lack of credibility, but the record did not support that allegation. The trial court rejected Dr. Stillman's findings based on the facts of the case:

> During the trial Bobby Stephens, Bobby Davis and many other witnesses testified that the defendant had over fifty people working for him. That the defendant was always in complete control of everyone and able to operate his business which is now known to be a multi-million dollar drug smuggling enterprise. In addition the defendant's own family testified that he was not suffering from any such mental or emotional disturbance. All the facts and evidence point to a contrary conclusion given by Dr. Stillman and this court finds that no reasonable juror could have found that this mitigating circumstance could have applied based upon the evidence presented.

Thompson v. State, 553 So. 2d 153, 157 (Fla. 1989). Also relying on the facts as presented by the state, the majority opinion of this Court stated:

> In the final analysis, this was a contract killing conducted in a professional manner by an underworld crime boss. With five valid aggravating circumstances, no statutory mitigating circumstances, and very little nonstatutory mitigating evidence, the trial judge's override was legally sound.

Id. at 158. Based on the evidence presented at trial, there was no reasonable probability that additional evidence corroborating Dr. Stillman's testimony would have convinced the trial court to impose a life sentence. Therefore, this claim was properly denied.

ORIGINAL ISSUE VII

WHETHER THE RECORD SUPPORTS JUDGE LEBOW'S SUMMARY DENIAL OF CLAIM XVII, RELATING TO ALLEGED NEWLY DISCOVERED EVIDENCE (Restated).

In Claim XVIII of his original 3.850 motion and Claim XVII of his motion for rehearing, Thompson alleged that newly discovered evidence established that he was wrongly sentenced to death. Specifically, Thompson alleged that his codefendant, Scott Errico, was in England awaiting extradition at the time of Thompson's trial, that Mr. Errico revealed to collateral counsel evidence that would have corroborated Dr. Stillman's testimony regarding statutory and nonstatutory mitigation, and that the lack of such testimony rendered Thompson's sentencing proceeding unreliable. (PCR I 29, 184-87). In response, the State inadvertently failed to respond to this specific claim. The trial court denied Thompson's motion for rehearing without specifically addressing this claim. (PCR II 285).

In his original initial brief, Thompson renewed all of his allegations regarding Scott Errico's newly discovered testimony. **Initial brief** at 50-53. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. Thompson renewed all of his previous allegations and alleged that Judge Kaplan was biased against him and his attorney, and was predisposed to sentence him to death. (PCSR IV 554-58). The State responded that Thompson had failed to establish that

Scott Errico's testimony constituted newly discovered evidence because defense counsel could have obtained it with due diligence prior to trial. Thompson also failed to show that such evidence probably would have produced an acquittal on retrial. (PCSR VI 722-24). Judge Lebow denied this claim for the reasons stated in the State's response. (PCSR VI 730-31).

This ruling was proper. In order to establish a claim of newly discovered evidence, two requirements must be met. First, the trial court, the defendant, and defense counsel must not have known of the asserted facts and could not have known them by the use of diligence. Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992) (quoting Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)). Thompson made nothing but a conclusory allegation that "Mr. Errico's evidence . . . [was] unavailable at the time of trial." (PCR II 186). The record, however, refutes that allegation. Thompson's attorney appended to a post-trial motion for new trial a newspaper article predating Thompson's trial. This newspaper article indicated that Scott Errico had been arrested in England, and that the State was attempting to extradite him to the United States. "Meanwhile, Thompson ha[d] requested a continuance in his

trial . . . scheduled for [the following] Monday." (R 3311).[18] Given the publicity of Scott Errico's capture and its potential effect on Thompson's trial,[19] either defense counsel, Thompson, or the trial court knew or could have known of Errico's whereabouts prior to Thompson's trial so that Thompson could have made some attempt to perpetuate Errico's testimony or secure his presence at trial. At the very least, defense counsel's motion for new trial indicates that he was aware in time to include these allegations in his motion for new trial of Errico's capture and the State's attempt to extradite. Therefore, the trial court properly denied this claim on this ground. Cf. White v. State, 664 So. 2d 242, 244 (Fla. 1995) (rejecting claim of newly discovered evidence where information was in possession of trial counsel at the time of trial and could have been discovered with due diligence).

Additionally, Thompson failed to show that Errico's testimony would *probably* result in a life sentence on retrial. Errico's testimony regarding Thompson's alleged drug use would have been cumulative to that related by Dr. Stillman. Contrary to Thompson's assertion, Judge Kaplan did not reject Dr. Stillman's testimony as uncorroborated and incredible. Rather, Judge Kaplan found that

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[18] This request for continuance, if written, does not appear in the direct appeal record. No court proceedings prior to the mistrial appear in the record either.

[19] Thompson's other two codefendants had pled guilty and had agreed to testify against Thompson.

other evidence refuted Dr. Stillman's opinion that Thompson suffered from organic brain damage due to drug/alcohol abuse:

> During the trial Bobby Stephens, Bobby Davis and many other witnesses testified that the defendant had over fifty people working for him. That the defendant was always in complete control of everyone and able to operate his business which is now known to be a multi-million dollar drug smuggling enterprise. In addition the defendant's own family testified that he was not suffering from any such mental or emotional disturbance. All the facts and evidence point to a contrary conclusion given by Dr. Stillman . . . .

Thompson, 553 So. 2d at 157. Given the other evidence that was presented to rebut Thompson's claim that he was a chronic drug/alcohol abuser, there is no reasonable probability that the trial court would sentence Thompson to life if Scott Errico testified on retrial to Thompson's alleged drug use habits. Therefore, this claim was properly denied on this basis as well.

ORIGINAL ISSUE VIII

> WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM VII, RELATING TO THE TRIAL COURT'S ALLEGED LIMITATION OF CROSS-EXAMINATION AT TRIAL REGARDING BOBBY DAVIS' MENTAL INSTABILITY AND VIOLENT BEHAVIOR (Restated).

In Claim VII of his original 3.850 motion and motion for rehearing, Thompson alleged that the trial court improperly limited defense counsel's ability to impeach Bobby Davis with evidence of his mental instability and violent behavior. In addition, he alleged that defense counsel was ineffective for failing to cite

relevant case law to support his position of admissibility.[20] (PCR I 27, 84-90). The State responded that Claim VII was procedurally barred, since Thompson could have and should have raised this issue on direct appeal. (PCR II 207). Judge Kaplan summarily denied the claim based on the grounds set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his allegations that the trial court's rulings prevented him from presenting a complete defense, and thereby rendered counsel ineffective. He concluded that an evidentiary hearing was warranted "to develop the testimony that was improperly excluded at trial." **Orig. init. brief** at 53-56. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

The State submits that the trial court properly denied Claim VII, since Thompson could have raised it on direct appeal. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Moreover, "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." Id. Therefore, the trial court properly denied

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[20] Thompson raised these identical allegations as ineffective assistance of counsel in Claim V of his original 3.850 and motion for rehearing. (PCR I 65-67).

Thompson's alternative allegations that the trial court's rulings rendered counsel ineffective.

To the extent this Court considers Thompson's ineffectiveness allegations, they are without merit as discussed supra in Original Issue IV, relating to Claim V in Thompson's 3.850 motion. To avoid duplication, the State relies on its response made therein.

ORIGINAL ISSUE IX

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM II, RELATING TO ALLEGED OMISSIONS IN THE DIRECT APPEAL RECORD (Restated).

In Claim II of his original 3.850 motion and motion for rehearing, Thompson alleged that his direct appeal record was missing orders appointing mental health experts, the State's answers to demand for discovery, warrants and their supporting affidavits, witness statements attached to the State's answers to demands for discovery, defense motions for continuance, and exhibits to Thompson's sentencing memorandum. He blamed these omissions on the trial judge, the chief circuit judge, the circuit court clerk, and defense counsel. (PCR I 49-52). The State responded that this claim was procedurally barred because it could have and should have been raised on direct appeal. (PCR II 207). Judge Kaplan denied the claim on the ground set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his claim that his direct appeal record was incomplete, which prevented his appellate counsel from perfecting his appeal. **Orig. init. brief** at 57-58. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

The State submits that the trial court properly denied Claim VII, since Thompson could have raised it on direct appeal. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Moreover, "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." Id. Therefore, the trial court properly denied Thompson's alternative allegations that the trial court's rulings rendered counsel ineffective.

To the extent this Court considers Thompson's ineffectiveness allegations, they are without merit. Thompson failed to establish any error that occurred in those missing pages. Cf. Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Turner v. Dugger, 614 So. 2d 1075, 1079-80 (Fla. 1992). Therefore, he failed to establish deficient conduct or prejudice.

ORIGINAL ISSUE X

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM IV, RELATING TO ALLEGED PROSECUTORIAL MISCONDUCT DURING THE STATE'S GUILT AND PENALTY PHASE ARGUMENTS TO THE JURY (Restated).

In Claim IV of his original 3.850 and motion for rehearing, Thompson alleged that the State made improper arguments in both the guilt and penalty phases of his trial. Although his issue heading alleged ineffective assistance of counsel, he made no such allegations in the body of his motion. (PCR I 26, 58-62). The State argued that this claim was procedurally barred because Thompson could have and should have raised it on direct appeal. (PCR II 207). The trial court denied the claim on the ground set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his claim that the State made improper argument. He made no allegation of ineffectiveness. **Orig. init. brief** at 59. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

The State submits that the trial court properly denied Claim IV, since Thompson could have raised it on direct appeal. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). As this Court

has repeatedly stated, defendants may not use the postconviction process as a second appeal. Id. Therefore, this Court should affirm the denial of this claim.

ORIGINAL ISSUE XI

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM VI, RELATING TO ALLEGED COMMENTS AND INSTRUCTION THAT DIMINISHED THE JURY'S ROLE IN SENTENCING (Restated).

In Claim VI of his original 3.850 motion and motion for rehearing, Thompson alleged that the trial court gave instructions and defense counsel made comments that diminished the jury's role in sentencing in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), and Strickland v. Washington, 466 U.S. 668 (1984). (PCR I 27, 73-84). The State argued that this claim was procedurally barred because Thompson could have and should have raised it on direct appeal. (PCR II 207). The trial court denied the claim on the ground set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his Caldwell and ineffectiveness claim. **Orig. init. brief** at 60-61. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

The State submits that the trial court properly denied Claim VI, since Thompson could have raised it on direct appeal. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). As for Thompson's claim that defense counsel failed to object and failed to "attempt to educate the judge to the proper standards," Thompson has failed to establish either deficient performance or prejudice. This Court has repeatedly rejected Thompson's Caldwell claim. E.g., Sochor v. State, 619 So. 2d 285, 291-92 (Fla. 1993) ("Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate Caldwell."). Therefore, counsel cannot be ineffective for failing to raise a nonmeritorious claim. See Chandler v. Dugger, 634 So. 2d 1066, 1067 (Fla. 1994).

ORIGINAL ISSUE XII

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM X, RELATING TO THE TRIAL COURT'S ALLEGED MISAPPLICATION OF AGGRAVATING CIRCUMSTANCES (Restated).

In Claim X of his original 3.850 motion and motion for rehearing, Thompson alleged that the trial court "failed to narrow and properly construe" the five aggravating factors that it instructed the jury on. In a single sentence, he also alleged that defense counsel's failure to object to the instructions was deficient performance that prejudiced his defense. (PCR I 26, 115-19). The State argued that this claim was procedurally barred because Thompson could have and should have raised it on direct

appeal. (PCR II 207). The trial court denied the claim on the ground set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his challenge to the jury instructions and counsel's ineffectiveness. **Orig. init. brief** at 61-63. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

The State submits that the trial court properly denied Claim X, since Thompson could have raised it on direct appeal. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). As for Thompson's claim that defense counsel failed to object to the instructions, it is inappropriate to recast a barred argument as one of ineffectiveness simply to escape the bar. Id. Moreover, the State submits that Thompson's single-sentence, conclusory allegation was legally insufficient to plead such a claim, as he failed to make a prima facie showing of prejudice. He alleges that the trial court failed to give limiting instructions on the five aggravating factors, but he fails to detail what those limiting instructions should have been. The "prior violent felony," "felony murder," and "pecuniary gain" aggravators have no limiting instructions, even today; thus, it is impossible to respond to Thompson's conclusory claim.

In any event, at the time of Thompson's trial in 1986, the instructions for Thompson's five aggravating factors ("prior violent felony," "felony murder," "pecuniary gain," HAC and CCP) had either not been challenged or had withstood constitutional attack. Counsel cannot be deemed ineffective for failing to anticipate changes in the law or to raise nonmeritorious issues. See Lambrix v. Singletary, 641 So. 2d 847, 849-50 & n.1 (Fla. 1994) (finding appellate counsel not ineffective for failing to challenge aggravator instructions where trial court read standard instructions and Espinosa had yet to issue).

To the extent defense counsel failed to challenge the instructions in order to preserve Thompson's ability to apply new law to his case, Thompson has failed to show prejudice. As mentioned earlier, the "prior violent felony," "felony murder," and "pecuniary gain" aggravating factor instructions have no limiting instruction to define their "elements." As for the HAC and CCP instructions, which have since been found unconstitutionally vague, the State submits that these factors would have been found under any definition of the terms. In its written sentencing order, the trial court made the following findings regarding these two aggravating factors:

> 4. The Court finds that the crime for which the Defendant is to be sentenced is especially heinous, atrocious or cruel. The evidence indicates that the victim, James Savoy, was kidnapped on or about March 7, 1982. He was taken to the home of the

defendants' employee where he was tied up, gagged and questioned at gunpoint. The Defendant came to the sight where the victim was being held and questioned the victim. The defendant told the victim that he was going to die and that "he could die easy or he could die hard." The defendant told his people to bring the victim to his residence and put him on the defendant's boat. The victim was transported to the defendant's home in Hallandale and was imprisoned on the defendant's boat over night. Early the next morning the Defendant gave the orders to take the victim out in [the] ocean. On the way out to the ocean the defendant again told the victim that he was going to die and he was questioned repeatedly about the whereabouts of the money. The defendant instructed Bobby Davis to hit the victim with a stick every time the victim didn't answer his questions properly. Davis testified that he struck the victim several times and in fact did so with such severity that he cracked his ribs. When they arrived at the ocean the victim was tied with chains and weights around his body. The defendant then told the victim "So long mother fucker" and shot him point blank in the head. Savoy's body was then thrown in the ocean never to be found. It is unknown if the victim died instantly or if he was alive as the weights carried him to the bottom of the ocean. In any event, the victim knew his fate and had been running and hiding for over eight months from the Defendant. He knew the Defendant would kill him if he was ever found. The victim went to the FBI in order to get protection for his life. The fear and emotional strain that the victim must have had during the kidnaping and events which led up to his death (knowledge that he would be killed and the torture itself), in this Court's opinion are grounds to substantiate that this killing was especially heinous, atrocious and cruel.

5. The Court finds that the crime for which the Defendant is to be sentenced was committed in a cold, calculated and

> premeditated manner without any presentence of moral or legal justification. This aggravating circumstance applies when the crime exhibits a heightened premeditation beyond that which is required for a conviction at the trial on First Degree Murder, Jent v. State, 408 So. 2d 1024 (Fla. 1981). The elements of cold and calculated premeditated murder has been established beyond a reasonable doubt. The evidence indicated that the Defendant told Bobby Davis over six months before the victim was killed that they were going to the New England area to find the victim and kill him. Defendant told Robert Tippie that he was going to kill the victim and while he was at the race track with Tippie indicated that he had offered someone at the track a $100,000.00 to find Savoy and kill him. The defendant told Bobby Davis that the police authorities knew that he had a contract out to kill the victim. The defendant found this out when the FBI contacted him in the Fall of 1981, and left a message that they knew he had put a contract out to kill Savoy. The evidence indicated that the defendant was incensed about killing the victim and all of the defendant's close associates were on the look out for Savoy. When they finally found him they kidnaped him and waited for instructions by the defendant. During the next day or two the defendant planned the cold-blooded, execution style, premeditated murder without any pretense of moral or legal justification.

(R 3342-44).[21] Based on these facts, these aggravating factors would have been found even had Thompson's jury been given the limiting instructions. Therefore, Thompson failed to show that Roy Black's failure to object to the instructions prejudiced his

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[21] Thompson did not challenge the findings of these two factors on direct appeal. See Thompson v. State, 553 So. 2d 153 (Fla. 1989).

defense. See State v. Salmon, 636 So. 2d 16, 17 (Fla. 1994) (reaffirming that "deficient performance of trial counsel is not a basis for relief when that deficiency is not likely to affect the outcome of the case").

ORIGINAL ISSUE XIII

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM XVI, RELATING TO ARGUMENT AND INSTRUCTION THAT ALLEGEDLY SHIFTED THE BURDEN TO THOMPSON TO PROVE THAT LIFE IMPRISONMENT WAS THE PROPERLY SENTENCE (Restated).

In Claim XVII of his original 3.850 motion and Claim XVI of his motion for rehearing,[22] Thompson alleged that the State's arguments and the trial court's instructions shifted the burden to him to prove that life imprisonment was the appropriate sentence. He also alleged in a conclusory manner that Roy Black was ineffective for failing to object. (PCR I 29, 179-84). The State argued that this claim was procedurally barred because Thompson could have and should have raised it on direct appeal. (PCR II 207). The trial court denied the claim on the ground set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his challenge to the jury instructions and counsel's ineffectiveness. **Orig. init. brief** at 61-63. On relinquishment, Thompson was allowed to

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[22] Thompson deleted his original Claim XVII (Gardner error) in his motion for rehearing.

pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

The State submits that the trial court properly denied Claim XVI, since Thompson could have raised it on direct appeal. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). As for Thompson's claim that defense counsel failed to object to the instructions, it is inappropriate to recast a barred argument as one of ineffectiveness simply to escape the bar. Id. Moreover, the State submits that Thompson's conclusory allegation was legally insufficient to plead such a claim, as he failed to make a prima facie showing of prejudice.

In any event, counsel cannot be ineffective for failing to raise a nonmeritorious claim. See Chandler v. Dugger, 634 So. 2d 1066, 1067 (Fla. 1994). This Court has repeatedly rejected similar claims by other defendants. E.g., Brown v. State, 565 So. 2d 304, 308 (Fla. 1990) ("Contrary to Brown's contention, we do not find that, on their totality, the standard instructions impermissibly put any particular burden of proof on capital defendants."). Therefore, the trial court properly denied this claim.

ORIGINAL ISSUE XIV

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM XII, RELATING TO THE TRIAL COURT'S ALLEGED FAILURE TO FIND AND/OR CONSIDER ESTABLISHED MITIGATION (Restated).

In Claim XII of his original 3.850 motion and his motion for rehearing, Thompson alleged that the trial court failed to find and/or consider mitigation established by the evidence at trial, thereby skewing this Court's proportionality review. (PCR I 28, 137-49). The State argued that this claim was procedurally barred because Thompson raised it on direct appeal. (PCR II 207). The trial court denied the claim on the ground set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his challenge to the trial court's rejection of mitigation. **Orig. init. brief** at 64-67. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

The State submits that the trial court properly denied Claim XII, since Thompson raised it on direct appeal. See Thompson v. State, 553 So. 2d 153, 156-58 (Fla. 1989). Thompson may not use his postconviction proceedings to relitigate this claim. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Therefore, the trial court properly denied this claim.

ORIGINAL ISSUE XV

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM XIII, RELATING TO THE STATE'S ALLEGED FAILURE TO PROVE THE CORPUS DELICTI AT TRIAL (Restated).

In Claim XIII of his original 3.850 and motion for rehearing, Thompson alleged that the State had failed to prove at trial the corpus delicti. (PCR I 28, 149-53). The State argued that this claim was procedurally barred because Thompson could have and should have raised it on direct appeal. (PCR II 207). The trial court denied the claim on the ground set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his challenge to the State's failure to prove the corpus delicti. **Orig. init. brief** at 67-68. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

The State submits that the trial court properly denied Claim XIII, since Thompson could have and should have raised it on direct appeal. Thompson may not use his postconviction proceedings to relitigate this claim. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Therefore, the trial court properly denied this claim.

ORIGINAL ISSUE XVI

WHETHER THE RECORD SUPPORTS JUDGE LEBOW'S SUMMARY DENIAL OF CLAIM XIV, RELATING TO ALLEGED ARGUMENT AND INSTRUCTION THAT IMPROPERLY RESTRICTED THE JURY FROM CONSIDERING MERCY AND SYMPATHY IN RECOMMENDING A SENTENCE (Restated).

In Claim XIV of his original 3.850 motion and motion for rehearing, Thompson alleged that the trial court improperly refused at trial to allow him to argue, and refused his instructions, that the jury could consider mercy and sympathy in recommending a sentence. Thompson also alleged in a conclusory manner that defense counsel's failure to object to the trial court's instructions and failure to educate the trial court on the law rendered his representation constitutionally deficient. (PCR I 28, 153-58). The State argued that this claim was procedurally barred because Thompson could have and should have raised it on direct appeal. (PCR II 207). The trial court denied the claim on the ground set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his challenge to the court's restriction of mercy arguments and instructions, and counsel's ineffectiveness. **Orig. init. brief** at 69. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. In his amended motion, Thompson renewed his previously made allegations and alleged that newly discovered evidence established that Judge Kaplan was biased against him and his attorney during his trial, and that Judge

Kaplan was predisposed to sentence him to death. (PCSR IV 526-31). The State responded that this claim was procedurally barred because it could have and should have been raised on direct appeal. As for Thompson's conclusory ineffectiveness allegation, the State argued that it was inappropriate for Thompson to recast the claim as one of ineffective assistance of counsel in order to escape the bar. (PCSR VI 699). Judge Lebow denied the claim as procedurally barred. (PCSR VI 730-31).

This ruling was proper. With the exception of Thompson's allegations of bias by Judge Kaplan, which had no effect on the substance of his claim, his claim was based solely on the trial record. As such, he could have and should have raised the issue on direct appeal. He cannot raise it for the first time on postconviction review. See Kight v. Dugger, 574 So. 2d 1066, 1072 (Fla. 1994). Nor was it appropriate for Thompson to recast the claim as one if ineffectiveness in order to escape the bar. Id. To the extent Thompson's conclusory claim of ineffectiveness was sufficient, Thompson failed to show either deficient performance or prejudice since counsel cannot be ineffective for failing to raise a nonmeritorious claim. See Chandler v. Dugger, 634 So. 2d 1066, 1067 (Fla. 1994). This Court has repeatedly rejected similar claims by other defendants. E.g., Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1992); Correll v. Dugger, 558 So. 2d 422, 425

(Fla. 1990). Therefore, the trial court properly denied this claim.

ORIGINAL ISSUE XVII

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM XV, RELATING TO THE TRIAL COURT'S AND THIS COURT'S ALLEGED IMPROPER CONSIDERATION OF THOMPSON'S MITIGATION WHEN ASSESSING THE PROPRIETY OF A JURY OVERRIDE (Restated).

In Claim XV of his original 3.850 motion and motion for rehearing, Thompson alleged that Parker v. Dugger, 498 S.Ct. 308 (1991), was new law that required the trial court and this Court to reassess the propriety of his death sentence in light of the standards set forth therein. (PCR I 29, 158-78). The State argued that this claim was procedurally barred because Thompson challenged the propriety of his jury override on direct appeal. (PCR II 207). The trial court denied the claim on the ground set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his challenge to the trial court's and this Court's assessment of his sentence in light of Parker. **Orig. init. brief** at 69-73. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

The State submits that the trial court properly denied Claim XV, since Thompson challenged the propriety of his sentence on direct appeal. See Thompson v. State, 553 So. 2d 153, 156-58 (Fla. 1989). Thompson may not use his postconviction proceedings to relitigate this claim. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Nor may Thompson use Parker to overcome the bar, since Parker did not create a fundamental change in the law. Mills v. Singletary, 606 So. 2d 622, 623 (Fla. 1992) (reaffirming that Parker did not meet the Witt requirements). Therefore, the trial court properly denied this claim.

ORIGINAL ISSUE XVIII

WHETHER THE RECORD SUPPORTS THE SUMMARY DENIAL OF CLAIM XVIII, RELATING TO THE ALLEGED CUMULATIVE EFFECT OF ERROR ON THOMPSON'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL (Restated).

In Claim XIX of his original 3.850 motion and Claim XVIII of his motion for rehearing, Thompson alleged that, even if the claims he raised in his motion did not singularly prejudice his trial, they did so cumulatively. (PCR I 30, 187-93). The State argued that this claim was procedurally barred because Thompson could have and should have raised it on direct appeal. (PCR II 207). The trial court denied the claim on the ground set forth in the State's response. (PCR II 285).

In his original initial brief, Thompson renewed his challenge to the cumulative effect of the errors rendered his trial

fundamentally unfair. **Orig. init. brief** at 74. On relinquishment, Thompson was allowed to pursue additional public records and submit an amended 3.850 motion. He did not, however, amend this particular claim. Therefore, Judge Lebow refused to consider it and merely relied on Judge Kaplan's previous ruling. (PCSR VI 730-31).

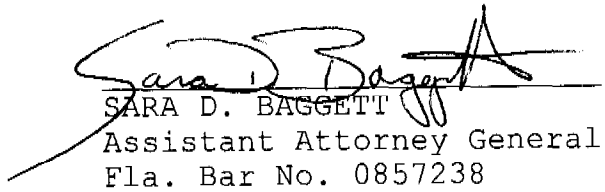
The State submits that the trial court properly denied Claim XVIII, since Thompson failed to show that any errors, singularly or cumulatively, prejudiced his defense. The alleged errors consist of procedurally barred claims, facially insufficient claims, and claims conclusively refuted by the record. These 'errors' provide no basis for relief. Therefore, a cumulative effect of errors is not present in this case and no reversible error has been demonstrated. See Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) ("In spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not be seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So. 2d 419 (Fla. 1988). Thompson may not use his postconviction proceedings to relitigate the individually barred claims in an attempt to avoid the bar. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's summary denial of Thompson's motion to vacate judgment and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



SARA D. BAGGETT
Assistant Attorney General
Fla. Bar No. 0857238
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Martin J. McClain, Litigation Director, Office of the Capital Collateral Regional Counsel, 1444 Biscayne Boulevard, Suite 202, Miami, Florida 33132-1422, this 18th day of June, 1998.

SARA D. BAGGETT
Assistant Attorney General