IN THE SUPREME COURT OF FLORIDA

JAMES FRANKLIN ROSE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 83,623

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
(407) 688-7759

ATTORNEY FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, James Rose, was the movant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the respondent in the trial court below and will be referred to herein as "the State." Reference to the original trial will be by the symbol "TR," reference to the resentencing hearing will be by the symbol "RS" and reference to the record and transcripts from the evidentiary hearing will be by the symbol "PCR2" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Although Appellant's statements of the case and the facts are unduly argumentative and are presented in a light most favorable to support Appellant's arguments, the State accepts them as reasonably accurate. To the extent they are incomplete, the State will provide those omissions in its arguments as necessary.

SUMMARY OF ARGUMENT

Issue I - The record supports the trial court's denial of Appellant's Ground A(1) which alleged ineffective assistance of counsel at the guilt phase of his trial in 1977. Appellant failed to establish either deficient conduct or prejudice.

Issue II - The record supports the trial court's denial of Appellant's Ground A(2) which alleged ineffective assistance of counsel at Appellant's resentencing in 1983. Appellant failed to establish either deficient conduct or prejudice.

Issue III - Appellant had raised Grounds F and G on direct appeal; thus, the trial court properly denied them as procedurally barred. Even if not barred, they were legally insufficient on their face to warrant relief.

Issue IV - The record supports the trial court's denial of Appellant's Ground B which alleged that the State withheld material information and knowingly used false testimony relating to Appellant's statements to the police. Appellant failed to show that the State withheld material information, or that he could not have obtained said information by due diligence. Even if Appellant proved that the State withheld material information that he could not have obtained with due diligence, Appellant failed to show that had the evidence been disclosed to him a reasonable probability exists that the outcome of the proceedings would have been different.

Issue V - The trial court properly refused to rule on Appellant's Ground K which was raised in a supplemental motion after the evidentiary hearing. Appellant had sufficient opportunity to raise this claim prior to the hearing but failed to

do so. Regardless, the claim could have been denied as procedurally barred since Appellant could have and should have raised this claim on direct appeal, or as legally insufficient on its face since the allegations failed to plead a claim for relief.

Issue VI - Appellant was afforded a full and fair evidentiary hearing. The trial court did not abuse its discretion in sustaining several State objections. Moreover, it was not necessary for the trial court to read the entire appellate record in this case before determining which claims should have been litigated at the evidentiary hearing. Finally, as discussed in other issues, the trial court properly denied an evidentiary hearing on Grounds D, I, and J of Appellant's 3.850 motion, and Grounds I and II of Appellant's supplemental motion. Since these claims were procedurally barred, neither an evidentiary hearing nor record attachments were necessary for proper disposition of these claims.

Issue VII - To the extent Ground C was subsumed within Ground B, it was litigated at the evidentiary hearing and properly denied as discussed in Issue IV. To the extent Appellant sought to relitigate that part of the claim that he had raised on direct appeal, the trial court properly found that part of the claim procedurally barred.

Issue VIII - The trial court properly denied Ground D, which was based on an alleged Giglio violation, as procedurally barred since the facts upon which it was based were known to Appellant at the time of trial and resentencing. Even if it were not procedurally barred, it could have been denied as legally insufficient on its face since Dr. Fatteh's testimony was not

misleading. Appellant's experts merely had a different opinion regarding the possible cause of death. Regardless, Appellant failed to show that Dr. Fatteh's inconclusive testimony affected the judgment of the jury.

Issue IX - The trial court properly denied Grounds I and J as procedurally barred since they were raised and denied on their merits in Appellant's state habeas petition.

ISSUE I

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF APPELLANT'S GROUND A(1) THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL (Restated).

In his motion for postconviction relief, Appellant claimed that his court-appointed attorney, Thomas Bush, was ineffective during the guilt phase of his 1977 trial because counsel "unreasonably neglected to introduce available persuasive evidence relevant to the manner of death, the times Jim Rose and Lisa Berry were last sighted and lack of motive, omissions reasonably likely to have affected the outcome of the trial." (PCR2 657).

At the evidentiary hearing, Mr. Bush testified that he was appointed by the court to represent Appellant and had 90 to 100 days to prepare for trial. (PCR2 57, 59). Although co-counsel was not appointed, Robert Makemson, David Murray, a private investigator named Don Carpenter, and a third-year law student helped him to investigate and prepare. (PCR2 58, 156). He and Appellant spoke frequently and got along very well. (PCR2 156). Forty depositions were taken, and he and his team at least interviewed anybody who had any involvement in the case. (PCR2 59, 157).

Appellant's first trial ended in a mistrial because the jury could not reach a verdict. (PCR2 63). Mr. Bush believed that the key reasons the jury hung were because the State forgot to introduce critical blood evidence, and because Judge Futch allowed the jury to travel Appellant's alleged route from the bowling alley to the Pantry Pride, to the canal, to the Highway Bar, and back to the bowling alley. (PCR2 157-58).

At the retrial, Mr. Bush had the benefit of having seen the witnesses testify; thus, he had a better idea of the strengths and weaknesses of the case. The State's case was circumstantial, and the time of death was a critical element, so Mr. Bush "tailored [the] defense to make time critical." (PCR2 70-71). Dr. Fattah estimated the time of death to be between 9:00 and 11:00 p.m. (PCR2 72). Through several witnesses, Mr. Bush was able to narrow the time during which Appellant could have committed the crime to 35 minutes, which, he claimed, was not enough time for Appellant to have disposed of the body and clothing, and made it back to the bowling alley. (PCR2 159, 205-06).

Mr. Bush testified that having first and last closing arguments was "critical, very critical in the second case." (PCR2 157). The prosecutor in the second trial was much more experienced, and he knew that the blood evidence would be admitted. (PCR2 158). He also stated that there was a reason for not calling every person that was not called. (PCR2 157). Mr. Bush stated, "I had to make my decisions based on whether I wanted to lose my closing argument in the second trial because I knew this time the blood was going in. . . . So I wanted to preserve my closing argument as much as I could without jeopardizing the case." (PCR2 162-63). He consulted with Appellant regarding the problems with each potential defense witness, and he communicated with other attorneys constantly regarding strategy. (PCR2 168-69). Ultimately, he decided to elicit the time inconsistencies through his cross-examination of the State's witnesses, and with the State's maps of Appellant's alleged route, and stress the time inconsistencies in his opening and closing arguments. (PCR2 173,

245-47). However, he did not believe that the time inconsistencies were enough, so he also argued that Tommy Vicors was the actual killer. (PCR2 256-57).

A. Manner of death

Regarding the manner of death, Appellant claimed that Dr. Davis' testimony, which disputed Dr. Fattah's opinion that Lisa Berry's death was caused by a hammer or other blunt object, would have rebutted the State's theory and "corroborated the defense argument that two other suspects had killed the victim by hitting her head against [Appellant's] van." (PCR2 658). However, "[t]he jury never heard credible evidence to support the defense theory because trial counsel unreasonably failed to present [Dr. Davis' testimony]." (PCR2 658).

At the evidentiary hearing, Mr. Bush testified that Judge Futch granted his motion to appoint Dr. Davis, the Chief Medical Examiner from Broward County, as a defense expert to rebut Dr. Fattah's testimony. Because the victim was seen following Appellant to his van, Mr. Bush wanted to show that the victim's head injuries occurred from striking a car door and were the result of an accident. (PCR2 134-35). He also wanted to show that a hammer could not have caused the injuries because the State tried to link a hammer found next to Lisa's body to Appellant. However, since no State witness could conclusively testify that the hammer belonged to Appellant, the effect of finding the hammer was minimal. (PCR2 136-37). Moreover, by the retrial, Dr. Davis had backed off his opinion that a hammer could not have caused the victim's injuries. (PCR2 201-03). Mr. Bush considered introducing Dr. Davis' deposition at the retrial, but he did not want to have

to impeach his own witness, and lose first and last closing argument. (PCR2 203-04). Instead, he impeached Dr. Fattah with Fattah's own book, with information from Dr. Davis, and with the fact that Fattah was a state-oriented witness. He also knew from Fattah's book and from his own experience that Dr. Fattah could not pinpoint the time of death. Dr. Fattah ultimately admitted that his estimation was based on what the police told him. (PCR2 206-07). Finally, Mr. Bush testified that Dr. Davis' testimony would have supported only a defense of accidental death, which was inconsistent with the defense of innocence based on the time inconsistencies and Tommy Vicors. (PCR2 261).

The State submits that Mr. Bush's decision not to call Dr. Davis as a witness, after consulting with Appellant and other attorneys, was a reasonable strategic decision. Dr. Davis testified at the first trial, began to waver regarding his opinion before the retrial, and only supported a defense of accidental death, rather than innocence. Moreover, no State expert could link the hammer found near the victim with Appellant, and Mr. Bush was able to impeach Dr. Fattah effectively. Thus, as the trial court found, Appellant failed to show deficient conduct.

Similarly, as the trial court also found, even if Mr. Bush's decision not to call Dr. Davis was unreasonable, Appellant failed to establish prejudice, i.e., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668 (1984). As Mr. Bush described this case, he "needed a motion to change the facts." (PCR2 256). Appellant was the last person to be seen with Lisa at the bowling alley. In

fact, shortly after 9:30 p.m., Lisa's sister saw Lisa and Appellant going out to the parking lot, and Appellant gave her money to go buy sodas, but Appellant and Lisa were gone when she returned. At 10:23 p.m., Appellant called Lisa's mother at the bowling alley and asked her when she would be finished bowling; she told him about 11:30 p.m. Appellant returned to the bowling alley about 11:30 with a large red spot on his lower right pants leg. Shortly thereafter, witnesses saw Appellant attempt to cover up the spot. The spot was later determined to be Type B blood. Lisa had Type B blood, and Appellant had Type A blood. The police also found Type B blood on the outside of the passenger's door of Appellant's white van, on the passenger seat, and on the engine cover. About 11:45 p.m., a white van was seen about a half a mile from the bowling alley behind a Pantry Pride grocery store where some of Lisa's clothes were later found. After his return to the bowling alley at 11:30, Appellant left and returned three times and was seen driving from the direction of the Pantry Pride. Lisa's blouse was found in Appellant's van. Her nude body was found four days later in a canal about ten miles from the bowling alley, and her shoes were found a mile apart along a road between the canal and the bowling alley. A hammer was recovered near Lisa's body. Paint on the hammer was consistent with paint found in Appellant's van. Appellant also made numerous inconsistent statements regarding the blood on his pants and the blood in his van. Rose v. State, 425 So.2d 521, 522-23 (Fla. 1982). Thus, even if Mr. Bush should have called Dr. Davis as a witness, there is no reasonable probability that the outcome of the trial would have been different. Consequently, this Court should affirm the trial court's finding.

B. Time of death

In his motion, Appellant claimed that "available and persuasive evidence supporting the defense theory on the impossibility of guilt based on the times the deceased and the defendant were at the bowling alley was inexplicably omitted from jury consideration by defense counsel." (PCR2 659). Specifically, according to Appellant, defense counsel failed to (1) impeach Walter Isler through the testimony of Detective McLellan, to whom Isler gave a taped statement that he saw Lisa Berry at the bowling alley around 11:00 p.m. (PCR2 659-60); (2) present the testimony of Thomas Dusch, who told Detective Hoffman that he saw a "little blonde girl," wearing a green sweater and pink slacks, come out of the snack bar at 11:45 p.m., look around, and walk out. (PCR2 660); (3) present the testimony of Linda Nieves, who told Detective McLellan that she saw Lisa Berry come into the snack bar at 11:45 p.m., look around, and walk out. (PCR2 661); (4) present the testimony of Fay Grabowski, who told Detective McLellan that she saw Lisa Berry leave her party of bowlers and return about 11:00 p.m. (PCR2 661-62); (5) present the testimony of Robert Autry, who told Detective McLellan that he saw Lisa Berry with her bowling party around 11:20 p.m. (PCR2 662); and (6) present the testimony of John Hass, who told Detective Page that he saw Lisa Berry with her bowling party around 10:30 p.m., after Appellant left. (PCR2 662-63).

At the evidentiary hearing, Mr. Bush testified that each of these witnesses had their own inherent problems. For example, Walter Isler was a key witness for the State. He saw blood on Appellant's pants between 11:15 and 11:30 p.m. He said Appellant

then left for fifteen minutes to look for Lisa. Regarding the time he allegedly saw Lisa, he told the police he "guessed" it was 11:00 p.m. (PCR2 93-95). When Mr. Bush cross-examined him at the retrial, Mr. Isler claimed that he did not recall telling the police that he saw the victim at 11:00 p.m. Mr. Bush believed that he impeached him pretty well and did not want to rely on him as a defense witness after "beating up on him." (PCR2 176-79).

Similarly, Thomas Dusch reported seeing blood on Appellant's pants. (PCR2 163). Moreover, he never specifically stated that he saw Lisa Berry at 11:45 p.m.; rather, he said he saw a "little blonde girl," and then Lisa's mother came looking for her. (PCR2 161-62). There were an average of 10 to 20 children at the bowling alley that night. (PCR2 164).

Mr. Bush did not call Linda Nieves for two reasons, even though Ms. Nieves reported seeing Lisa at 11:45 p.m. First, "Linda Nieves came across as hysterical and [a] bimbo[]." Second, he did not believe that he could control her on the witness stand because she was "very emotional." (PCR2 163-64). Although he had no personal notes of any interview with her, his wife remembered that he talked to her and that Ms. Nieves started crying. (PCR2 241).[1]

Mr. Bush also had no qualms about not calling Fay Grabowski

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[1]Linda Nieves testified at the evidentiary hearing on Appellant's behalf. During her direct examination, she testified that the statement she gave to the police regarding seeing Lisa was still accurate. (PCR2 480-81). However, on cross-examination by the State, Ms. Nieves testified that there were other kids at the bowling alley who were the same age as Lisa Berry. Although she thought that she saw Lisa at 11:45, she stated that there is "always a possibility" that she may have seen someone else: "At the time I assumed it was her. But it could [have been] someone else." When she gave her statement to the police, she was nervous and upset. (PCR2 482-85).

even though Ms. Grabowski had stated that she saw Lisa at 10:15 p.m., she noticed that Lisa and Appellant were gone about 10:30 p.m., then Lisa returned around 11:00 p.m., and Appellant returned about 12:00 p.m. (PCR2 84-87, 167). Mr. Bush testified that she was equivocal about the time in her deposition, she did not like Appellant, she started the "jealous boyfriend" theory, she made statements about Appellant giving "dirty looks" when Lisa asked Isler if he was going to breakfast, she made statements about Appellant being intoxicated, she was very devoted to Lisa's mother, and she had no sympathy for Appellant. According to Mr. Bush, "she was sort of a disaster waiting to happen." (PCR2 164-65).

Similarly, he did not want to call Robert Autry as a witness even though he had stated that he saw Lisa at about 11:20 p.m. Mr. Autry saw Appellant drinking in the bowling alley bar and appeared to be intoxicated while everyone was searching for Lisa, he stated that Appellant acted nervous and was pacing, he saw blood on Appellant's pants and then saw Appellant go into the bathroom and put grease on his pants to try and cover up the blood, he saw blood on Appellant's van and thought it looked like someone had tried to smear it off, and he heard Appellant say that the blood on his pants was from cutting himself while changing a tire even though other witnesses did not believe a tire had been changed. (PCR2 170-72, 191-92).

Finally, Mr. Bush testified that he did not call John Hass as a witness because Mr. Hass saw Lisa for the last time at about 10:30 and did not see Appellant until about 11:30 p.m. (PCR2 90-93, 175-76). In addition, Mr. Hass spotted the blood on Appellant's van and called the police. He may have also been the

one to keep Appellant occupied at the bowling alley until other officers arrived. (PCR2 175-76).

Over the State's objection, Appellant was allowed at the evidentiary hearing to add two more people as potential time witnesses. However, Mr. Bush gave the following reasons for not calling either of these witnesses in Appellant's defense: First, although Joseph Autry had stated that he saw Lisa at 11:30, he saw Appellant driving into the bowling alley from the direction of the Pantry Pride after 12:15 a.m., which is when Mr. Bush wanted to place Appellant at the bowling alley looking for Lisa. (PCR2 99, 181-83). Moreover, since the State only had one witness who saw Appellant at the Pantry Pride, Mr. Bush did not want one of his witnesses to corroborate the State's witness. (PCR2 255). Second, although Denise Schauer stated that she saw Lisa between 10:00 and 10:30 p.m., she was not very sure about the time. Because her testimony was not that helpful, Mr. Bush testified that she was not worth losing first and last closing argument. (PCR2 184-85).

As noted previously, Mr. Bush consulted with Appellant regarding the problems with each witness. He also consulted other attorneys regarding strategy. Ultimately, he decided not to call any of these witnesses who allegedly saw Lisa during the time she was supposed to have been killed because each of them had far more detrimental than helpful testimony, and because Mr. Bush believed that having first and last closing argument was critical. By having the last word, Mr. Bush was also able to argue, without rebuttal by the State, that Tommy Vicors killed Lisa.

Appellant takes comfort in his assertion that "these witnesses would not have given any unfavorable evidence that was not already

admitted through numerous other sources." **Brief of Appellant** at 47. Appellant, however, misses the point. Regarding the State's evidence, Mr. Bush testified, "We had our hands full." (PCR2 198). Regardless of how many other witnesses related the same damaging testimony as these witnesses could have related, Mr. Bush did not want his defense witnesses to bolster the State's case. (PCR2 245-47). Given that all of these witnesses "departed substantially in their depositions from what they said in their brief police reports" (PCR2 242), he made the best decisions he could after conferring with Appellant and after sitting through the first trial. (PCR2 245-47). As the trial court noted,

> "A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

(PCR2 1033) (quoting Remeta v. Dugger, 622 So.2d 452, 454 (Fla. 1993)). The State submits, as the trial court found, that Mr. Bush's strategic decisions were reasonable under the facts of this case and that Appellant has failed to show otherwise. Jones v. State, 528 So.2d 1171, 1173-74 (Fla. 1988) (trial counsel not ineffective for failing to call potential eyewitnesses to the murder because witnesses were unreliable or possessed damaging information). Similarly, given the quality and quantity of the State's evidence as outlined above, and the fact that the State could have seriously impeached all of these witnesses, Appellant has also failed to show that there is a reasonable probability that

the outcome would have been different even if Mr. Bush had called these witnesses in Appellant's behalf. Therefore, this Court should affirm the trial court's finding.

C. Motive

As for the State's "jealous boyfriend" motive, Appellant claimed that several witnesses would have disputed this theory, but were not called to testify. For example, Walter Isler told Detective McLellan that Appellant "didn't get upset or anything" when Lisa Berry asked Isler if he was going to breakfast with them after bowling. (PCR2 663-64). John Hass testified at his deposition that the bowling group usually goes out to breakfast at Denny's after bowling. (PCR2 664). Barbara Berry and Fay Grabowski both testified in their depositions that Lisa's question to Isler clearly referred to breakfast after bowling. (PCR2 665).

At the evidentiary hearing, Mr. Bush testified that he did not concentrate on refuting that theory because his defense was that Tommy Vicors killed Lisa. (PCR2 114-16). Moreover, since the State was also arguing felony murder, showing motive was not necessary. (PCR2 215). Be that as it may, as explained above, Walter Isler, John Hass, and Fay Grabowski each had far more harmful than helpful testimony. Barbara Berry, of course, was the victim's mother; however, defense counsel testified that he specifically objected to questions to Ms. Berry relating to Appellant's alleged "dirty look" when Lisa asked Walt Isler if he was going to breakfast. (PCR2 211-12).

Again, Mr. Bush made tactical decisions not to concentrate on refuting the motive. The State had substantial evidence linking Appellant to the crime, and Mr. Bush believed that concentrating on

Tommy Vicors as the actual killer was far more important. Moreover, the witnesses who could have diffused the State's "jealous boyfriend" theory could also have corroborated other aspects of the State's case. Thus, under the circumstances, Mr. Bush's decisions were reasonable, and Appellant has not shown otherwise. See Smith v. State, 565 So.2d 1293, 1295 (Fla. 1990) (finding that counsel's failure to develop evidence on one issue may have been reasonable strategic decision to concentrate on other matters); Jones, 528 So.2d at 1173-74 (trial counsel not ineffective for failing to call potential eyewitnesses to the murder because witnesses were unreliable or possessed damaging information). Even if they were unreasonable, however, Appellant has failed to show prejudice since the evidence also supported a conviction for felony murder. Therefore, as the trial court found, this part of the claim is without merit.

D. Other evidence of innocence

Appellant also claimed that trial counsel failed to present other evidence to support his theory that two young boys with a similar white van had killed Lisa. For example, counsel failed to impeach Jim Hughes, who testified he saw a white van parked behind the Pantry Pride where Lisa's clothes were later found, with his deposition testimony, wherein he stated that the van did not have "monkey decals" on the windows whereas Appellant's van did have them. (PCR2 665). In addition, counsel failed to present Margaret Cobb's statement that she saw a white van between 11:55 and 12:05 p.m. near where the body was found, even though Appellant was at the bowling alley at that time. (PCR2 665).

At the evidentiary hearing, Mr. Bush testified that Tommy

Vicors and John McMillan were seen leaving the bowling alley in Vicors' white Ford pickup truck with a white camper top sometime after 12:15 a.m. (PCR2 101-02). However, Mr. Bush pursued Tommy Vicors as a suspect as far as he could, but Tommy was only at the bowling alley a few minutes, he was not seen leaving with Lisa, he did not have Lisa's blood or blouse in his van, and he had a solid alibi. Thus, in Mr. Bush's words, "That dog was not going to hunt." (PCR2 259-60). However, he raised it as a defense in his final closing argument so that the State could not rebut it. (PCR2 256-57, 268). Regarding Margaret Cobb's testimony that she saw a white van between 11:50 p.m. and 12:15 a.m. near where Lisa's body was found, he had to weigh the value of her testimony because, although several witnesses testified that Appellant was at the bowling alley at that time, Lisa's blood was all over his van and clothes. Besides, Mr. Bush believed that "nobody testifies accurately as to time." (PCR2 262-63). He clearly made a reasonable tactical decision not to introduce Ms. Cobb's testimony since his theory that Tommy Vicors committed the crime could not be substantiated. Thus, even if he had admitted it, there is no reasonable probability that the outcome would have been different since substantial evidence linked Appellant to the crime and since Tommy Vicors had an alibi. Consequently, this Court should find this part of Appellant's claim without merit as well.

E. Miscellaneous claims of error

Finally, Appellant alleged thirteen other miscellaneous errors committed by trial counsel as evidence of his ineffectiveness. All were alleged in conclusory fashion without any factual or legal support. Some were raised at the evidentiary hearing, and some

were not. Regardless, they were all properly denied. "Many of these claims are exactly the type of hindsight second-guessing that Strickland condemns, and even those matters asserted as significant 'omissions' would have been mere exercises in futility, with no legal basis." Phillips v. State, 608 So.2d 778, 782 (Fla. 1992).

1. Witherspoon

Appellant claimed that trial counsel failed to object to the removal of three death-scrupled jurors and failed to attempt to rehabilitate them. (PCR2 666). However, the dictates of Witherspoon v. Illinois, 391 U.S. 510 (1985), do not apply to the guilt phase of a case. Moreover, any prejudice has been cured since Appellant received a new sentencing hearing. Thus, since Appellant failed to show prejudice, this claim was properly denied.

2. Hair expert

Appellant claimed that trial counsel failed to obtain an expert in hair analysis to opine that a crushed hair similar to that of the victim's which was found in Appellant's sock was meaningless. (PCR2 666). Mr. Bush testified at the evidentiary hearing that the State's expert tried, but failed, to crush a hair; thus, the State's expert could not explain how that happened. (PCR2 140-41). In addition, the State's expert could only say that the crushed hair was similar, but not identical, to the victim's hair. (PCR2 196-97). Given these facts, Mr. Bush made a reasonable tactical decision not to seek appointment of a hair analyst. Appellant failed to show that such a decision was unreasonable, and failed to show prejudice. See Rose v. State, 617 So.2d 291, 297 (Fla. 1993) (trial counsel's decision not to present evidence on blood samples was reasonable trial tactic).

3. Prosecutorial misconduct during voir dire

Appellant claimed that trial counsel failed to move for a mistrial during voir dire when the prosecutor stated:

> If the Court instructs you that a person's credibility is determined by his prior convictions, is there any of you who would just ignore the law and say "Well, I am not going to consider that?"

(TR 1633; PCR2 666). When taken in context, the question obviously referred to all witnesses, and not just Appellant. Moreover, the trial court gave a curative instruction. A motion for mistrial would not have been granted. See Duest v. State, 462 So.2d 446, 448 (Fla. 1985), sentence vacated on other grounds, 967 F.2d 472 (11th Cir. 1992). Since Appellant failed to show either deficient performance or prejudice, this claim was properly denied. Phillips, supra.

4. Prosecutorial misconduct during closing argument

Appellant claimed that trial counsel failed to object to the State's closing argument when the prosecutor commented that the jurors should "fulfill their obligation." (TR 660; PCR2 666). When taken in context, this was a fair comment on the evidence and the law. See Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). Thus, since Appellant failed to show either deficient performance or prejudice, this claim was properly denied. Phillips, supra.

5. Hammer-blow theory

Appellant claimed that trial counsel failed to renew his objection, once previously sustained, regarding Dr. Fattah's opinion that Lisa's head injuries "could have been" caused by a hammer. (PCR2 666). The record reveals, however, that trial counsel did renew his objection to this testimony. (TR 686, 687).

Moreover, counsel was able to limit Dr. Fattah's testimony regarding the cause of death generally to blunt trauma, rather than specifically to the hammer recovered near her body. Thus, Appellant failed to show either deficiency or prejudice. Phillips, supra.

6. Victim impact

Appellant claimed that trial counsel failed to object to Barbara Berry's testimony that she had three children. (PCR2 667). Appellant's conclusory allegation has failed to show how this testimony affected the jury or how it rendered his trial unfair. Barbara Berry testified to a fact--one of many. This fact was not offered to elicit sympathy and did not produce an emotional outburst. Appellant has failed to show either deficiency or prejudice. Phillips, supra.

7. State's questioning of Tracy Berry

Appellant claimed that trial counsel failed to object to the trial court's questions to Tracy Berry in the jury's presence regarding her ability to tell the truth. (PCR2 667). "To allow a child to testify, a trial judge must find that the child 'has sufficient intelligence to receive a just impression of the facts about which he or she is to testify and has sufficient capacity to relate them correctly, and appreciates the need to tell the truth.'" State v. Ford, 626 So.2d 1338, 1347 (Fla. 1993) (quoting Lloyd v. State, 524 So.2d 396, 400 (Fla. 1988)). Given that Tracy Berry was seven years old, Appellant has failed to establish deficient performance or prejudice. Phillips, supra.

8. Prosecutorial misconduct in closing argument

Appellant claimed that trial counsel failed to object to the

prosecutor's closing argument wherein he improperly buttressed the credibility of the State's case "by non-record and alleged assertions of personal knowledge that the State could have, but did not, manufacture evidence." (PCR2 667). When taken in context, the complained-of remarks were fair comments on the evidence and the law. See Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). Since Appellant failed to show either deficient performance or prejudice, this claim was properly denied. Phillips, supra.

9. Evidence of kidnaping

Appellant claimed that trial counsel failed to object to the State's characterization of the evidence necessary to prove felony murder by kidnaping. (PCR2 667). The State's comments, however, were a correct statement of the law. Fla. Stat. § 797.01 (1975). Regardless, the jury was properly instructed. (TR 1243-44). Finally, this Court found the evidence sufficient to prove kidnaping. Rose v. State, 425 So.2d 521 (Fla. 1983). Since Appellant failed to show either deficient performance or prejudice, this claim was properly denied. Phillips, supra.

10. Jury separation during deliberations

Appellant claimed that trial counsel failed to object on the record to the jury separating during deliberations. (PCR2 667). Appellant has failed to allege any facts, however, to show how he was prejudiced by the jury's separation. Therefore, this conclusory claim was properly denied. Phillips, supra; Engle v. Dugger, 576 So.2d 696, 701 (Fla. 1991).

11. Ivory violation

Appellant claimed that trial counsel failed to object on the record to the trial court's colloquy with the jury outside the

presence of himself and Appellant. (PCR2 667). As this Court noted in its opinion denying Appellant's habeas petition, Appellant has provided no factual basis for his claim that there were improper communications between the judge and jury. Therefore, Appellant failed to establish prejudice. Phillips, supra.

12. Prosecutorial misconduct regarding Appellant testifying

Appellant claimed that trial counsel failed to object to the prosecutor's closing argument alleging that Appellant's testimony was evidence of guilt even though it was only presented as to the voluntariness of his statements to the police. (PCR2 667). When taken in context, the State's comments did not relate to the substance of Appellant's testimony, but rather the inconsistencies between his statements to the police. This was fair comment on the testimony. See Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). Thus, since Appellant failed to show either deficient performance or prejudice, this claim was properly denied. Phillips, supra.

13. Appellant's statements to Detective VanSant

Appellant claimed that trial counsel failed to object to the admissibility of Appellant's statements to Detective VanSant which were the product of a pretextual arrest. (PCR2 667-68). Appellant's conclusory allegation without any factual or legal support warranted denial as it was legally insufficient on its face. Phillips, supra.

ISSUE II

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF APPELLANT'S GROUND A(2) THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING (Restated).

In his 3.850 motion, Appellant claimed that his court-appointed attorney, Michael Entin, was ineffective during his 1983 resentencing proceeding. Specifically, Appellant claimed that Mr. Entin (1) failed to "demonstrate [Appellant's] satisfactory adjustment to prison life, absence of escape attempts, and complete absence of violent conduct" as evidenced by Appellant's prison records (PCR2 670-72); (2) failed to present evidence from "[c]orrections, psychiatric reports and reports introduced at the first penalty phase" which indicated that Appellant was "'mentally ill' (though not insane), and an alcoholic who suffered a schizoid personality disorder," and which showed "substantial deficiencies" in his intelligence (PCR2 672); (3) failed to investigate and present evidence that Appellant was beaten and emotionally abused by his stepfather, that he was sexually abused by an insurance salesman and by his aunt as a young boy, that he suffered head injuries and was emotionally troubled by family circumstances, that he had a medically documented history of blackouts, that he had a history of alcoholism and had received in-patient treatment, and that he was commended by a local state attorney's office for assisting in apprehending an armed robber (PCR2 672-73); (4) failed to have Appellant re-examined by a mental health expert, or at least failed to have the prior psychologists testify in person rather than submitting their reports (PCR2 673-74); (5) failed to object and move for a mistrial when the State commented on

Appellant's right to remain silent in its opening statement (PCR2 674-75); (6) opened the door to questions by the State regarding Appellant's arrest for providing false information to a police officer and his violation of parole which he concealed from his parole officer (PCR2 675); (7) failed to object when the State argued nonstatutory aggravation during its closing argument (PCR2 675-77); (8) failed to recognize and object to "the breakfast remark" as misleading during the State's closing argument (PCR2 676-77); (9) failed to waive the "no significant history" mitigating factor (PCR2 677-78); (10) failed to proffer the testimony of Mr. Templeton regarding Appellant's prior conviction for breaking and entering with intent to commit rape, namely, that Appellant pled guilty and "took a fall for" the victim whom he had been dating, but who "changed her mind" about having sex with him when he went over to see her (PCR2 678-79); (11) failed to elicit from Dr. Wright the reasons why Lisa Berry's injuries "were more likely caused by an accident -- Lisa's fall to the ground after being hit by a moving object" (PCR2 679); (12) failed to challenged the "under sentence of imprisonment" aggravator based on the fact that his sentence had ended before he committed this crime (PCR2 679); and (13) failed to "investigate and produce or proffer the substantial evidence of innocence related to the time, motive, and manner of death detailed in Ground A, Sections (I)-(iv) (PCR2 679-80).

At the evidentiary hearing, Mr. Entin testified that he had been an assistant state attorney from 1978 to 1981, and had been in private practice since 1981 when Judge Futch contacted him regarding representing Appellant for his resentencing. (PCR2 285).

Although he had never handled a capital case, Mr. Entin was appointed on April 18, 1983, and began reviewing the file a week or so later after obtaining it from Tom Bush and Louis Carres. (PCR2 286). While trying to maintain his practice, Mr. Entin reviewed the file everyday, sometimes for only two or three hours and other times for ten to twelve hours a day, depending on his other commitments. In about a month's time, he had reviewed and analyzed the entire file (over eight boxes of material). (PCR2 288-89). Although he took ten days off to get married, he testified that he actually took the file with him on his honeymoon. (PCR2 291). He sought and was granted one continuance until July 5th, but Judge Futch believed that the case was routine and could be tried quickly, and he made it clear that there would be no more continuances. (PCR2 290). In fact, as the trial date approached, Mr. Entin moved for another continuance, but it was denied. (PCR2 306-07).

Shortly after Mr. Entin was appointed, Louis Carres indicated that he would help him with the case since he had been working on it for the last five or six years. Because of Mr. Carres' experience working on this and other capital cases, Mr. Entin accepted his help. (PCR2 293). However, while Mr. Entin wanted to concentrate on seeking a life sentence, Mr. Carres and Appellant wanted to concentrate on getting a new trial. Neither of them were concerned about presenting mitigation. In fact, according to Mr. Entin, Appellant "was more concerned with guilt or innocence than getting life," as was Mr. Carres, so "[t]hey both sidetracked [him] to some degree from mitigation." (PCR2 294-95, 321). Although Appellant's defense had been one of innocence and reasonable doubt,

Mr. Carres had planned out the whole strategy to show that Lisa's death was accidental and that Appellant "freaked out." (PCR2 295). A memo from Mr. Entin's otherwise missing work-product file outlined Mr. Carres' strategy.[2] (PCR2 298-306).

Regarding the logistical aspects of the resentencing, Mr. Entin spent a lot of time with the prosecutor trying to decide whether to present live testimony or merely read back testimony from the original trial and, if read back, which parts of it. Mr. Entin believed that it was more beneficial to Appellant to bore the jury by having the testimony read back. (PCR2 296-97).

Regarding his investigation and preparation for mitigation, Mr. Entin testified that he did not obtain any school or hospital records. (PCR2 308-09). He also did not seek the appointment of a mental health expert, although he admitted the reports from Appellant's two prior evaluations from his first trial. (PCR2 311-12). Regarding Appellant's prison records, Mr. Entin testified that he did not use them because the jury would know that Appellant had been on death row for many years. He also thought that there were some disciplinary reports in them. (PCR2 309). Regarding abuse as a child, Mr. Entin testified that Appellant did not relate any abuse. Although he had no independent recollection whether he asked Appellant about it, Mr. Entin believed that he probably did. (PCR2 314-15, 330).

Mr. Entin agreed that evidence of organic brain damage, low intellectual functioning, and mental deficiency caused by long-term

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[2]Mr. Entin testified that "a lot of things are missing" from Appellant's files, including his entire work product file. (PCR2 300). Consequently, it was difficult for him to testify regarding specific decisions that he made.

alcohol abuse, as well as the fact that Appellant had failed fourth, fifth, and seventh grades, would have been helpful in presenting mitigation. He also agreed that evidence of mental health treatment as a child, depending on the diagnosis, would have been helpful. However, he testified that he saw no indications of illiteracy or low intelligence. In fact, he thought Appellant was "a fairly articulate person." Moreover, he stated that "this type of investigation [was] a change of strategy from what [he] did." (PCR2 315-18).

Mr. Entin believed that he did everything he could do in 65 days to obtain a life sentence and a new trial. However, Appellant refused to testify in his own behalf. He also refused to allow Mr. Entin to present evidence of a certificate of merit signed by a prosecutor from when Appellant thwarted a crime because Appellant feared being classified as a snitch. (PCR2 321). Moreover, since Appellant had been on death row for a long time, he had lost touch with people who could present mitigating evidence. Mr. Entin testified that he called as witnesses anyone who would agree to testify in mitigation. (PCR2 338). On the other hand, Mr. Entin called numerous witnesses to support Mr. Carres' theory that Lisa's death was an accident and that the hammer was not the instrument of death. (PCR2 334). Had Mr. Carres not been involved, Mr. Entin testified that he would not have concentrated on challenging Appellant's guilt, but Mr. Carres had worked a lot of capital cases, so he "relied on the man who had been with this case for five or six years." (PCR2 322). Given Mr. Carres' level of involvement in Appellant's resentencing and Mr. Entin's willingness to follow his advice, Mr. Entin was quite perplexed over Mr.

Carres' opinion of his performance as alleged in Appellant's motion. (PCR2 335).

To support the allegations in his motion, Appellant also presented the testimony of Dr. Jethro Toomer, a licensed psychologist. Dr. Toomer testified that he interviewed Appellant one time for approximately three hours in March of 1993. (PCR2 447, 458). Besides obtaining biographical information, Dr. Toomer performed an IQ test, a personality inventory, and a screening inventory for organicity. (PCR2 458-59). He also interviewed Appellant's ex-wife and live-in girlfriend, and reviewed a packet of material provided by collateral counsel which included school records, a presentence investigation, prior psychological evaluations, and hospital records. (PCR2 384-85).

Dr. Toomer opined that Appellant suffers from a longstanding personality disorder and brain damage, and has an alcohol abuse problem. He was raised in a dysfunctional family environment without nurturing and emotional support which is necessary to establish good social skills. (PCR2 385-86, 394-95). His mother was married three times and his stepfather was abusive. Appellant does not know his natural father. (PCR2 395-97). Although Appellant was 31 years old at the time of the crime, Dr. Toomer believed that his emotional age was much less, but could not say how much less. (PCR2 431, 446).

Appellant's school records indicated that he was immature but had a positive disposition with insufficiently developed work habits. Appellant tried hard, but he was slow. He was retained in the fourth, fifth, and seventh grade, and dropped out of school at the age of seventeen. (PCR2 397-98).

Appellant's hospital records indicated a thirty-foot fall with "some head trauma," recurring dizziness, and blackouts. He was readmitted to the hospital one year later after having a pre-blackout experience with chest pain. His records also indicated a history of headaches. (PCR2 399-401). Appellant self-reported being hit with a baseball bat and losing consciousness, and being involved in a car accident which resulted in head trauma. (PCR2 399).

Appellant's prison records from 1989 to 1991 also showed a history of headaches and depression. (PCR2 401). According to Dr. Toomer, Appellant's behavior in prison was "good," and his adjustment "was for the most part acceptable." (PCR2 403). His prison records showed only one disciplinary report, and an IQ of 84. (PCR2 403, 407).

As for Appellant's prior psychological evaluations, Dr. Toomer disagreed with Dr. Stillman's diagnosis of Appellant as a sociopath. (PCR2 413-18). Rather, Dr. Toomer believed Appellant has a borderline personality disorder. He also believed that Appellant was under the influence of extreme mental or emotional disturbance at the time of the murder and that his ability to appreciate the criminality of his actions or to conform his conduct to the requirements of the law was substantially impaired. (PCR2 418-24). He also believed that alcohol has been a contributing factor in all of Appellant's previous crimes. (PCR2 425).

On cross-examination, Dr. Toomer admitted that he did not know whether the school, hospital, and prison records were complete because they were provided as a package by collateral counsel. (PCR2 390-93). In fact, the school records covered only a six-year

period from 1955 to 1961. (PCR2 391-92). Dr. Toomer also admitted that he had not read the transcripts from either trial. (PCR2 447). Regarding Appellant's prison record, Dr. Toomer maintained his opinion that Appellant's behavior was good "overall," even when confronted with four disciplinary reports from Appellant's term on death row between his original trial and resentencing. (PCR2 448-49, 453-54). Similarly, Dr. Toomer disagreed with a mental health diagnosis rendered in 1986 for Appellant's clemency proceedings that Appellant was antisocial without "any acute distress or mental disorder." (PCR2 451-52).

Regarding Appellant's allegations of ineffectiveness, the State submits that Appellant failed to prove either deficient performance or prejudice. Mr. Entin's decision not to introduce evidence from Appellant's prison records was a reasonable trial strategy given that the jury would know Appellant had been on death row between his original trial and his resentencing, and that Appellant had four disciplinary reports while on death row. As for Mr. Entin's alleged failure to present evidence of Appellant's mental disorder, alcohol abuse, and low intelligence, Mr. Entin testified that he introduced Appellant's prior mental health evaluations, but that Appellant was not interested in presenting mitigation. Rather, Appellant wanted him to concentrate on presenting evidence to disprove his guilt. Given Appellant's lack of cooperation and his strategy to concentrate on lingering doubt, Mr. Entin's conduct was not deficient. Rose v. State, 617 So.2d 291, 294 (Fla. 1993) ("'When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.'").

Similarly, regarding Appellant's claim that counsel failed to present evidence of Appellant's abuse as a child, head injuries, abuse of alcohol, and commendation by the state attorney's office, Appellant failed to produce evidence to support much of the claim. Although Dr. Toomer made a passing reference to abuse by Appellant's stepfather, no one with first-hand knowledge testified to such at the evidentiary hearing. Regardless, Mr. Entin testified that Appellant never mentioned any child abuse. Although Mr. Entin agreed that evidence of head injuries and alcohol abuse would have been helpful, he testified that he was concentrating on other areas, namely, lingering doubt. In fact, Appellant refused to testify himself or allow introduction of his commendation. Thus, again, Mr. Entin's conduct was not deficient.

Regarding evidence of mental mitigation, Mr. Entin testified that he presented two previous reports from Appellant's first sentencing. The fact that Dr. Toomer disagreed with the prior diagnoses and concluded from a three-hour interview seventeen years after the crime that Appellant committed the murder while under the influence of extreme mental or emotional disturbance and that his ability to appreciate the criminality of his actions and to conform his conduct to the requirements of the law was substantially impaired does nothing to support Appellant's claim. Mr. Entin testified that he presented everything Appellant would allow him to present in mitigation. Given that Appellant was not concerned with obtaining a life sentence, Mr. Entin's conduct was not deficient. Rose, 617 So.2d at 295 ("The fact that Rose has now obtained a mental health expert whose diagnosis differs from that of the defense's trial expert does not establish that the original

evaluation was insufficient."); Engle v. Dugger, 576 So.2d 696, 702 (Fla. 1991) (same); Jones v. State, 528 So.2d 1171, 1175 (Fla. 1988) (trial counsel not ineffective for failing to call mental health expert where testimony was contrary to theory of defense).

Appellant presented nothing, either singularly or cumulatively, to establish either deficient performance or prejudice. Even assuming for argument's sake that counsel should have presented the substance of Dr. Toomer's testimony, there is no reasonable probability that the result would have been different. After all, this Court has already found that Appellant's sentence would have survived a jury override. Rose v. Dugger, 508 So.2d 321, 324 (Fla. 1987). Simply put, Appellant's proffered evidence in mitigation pales in comparison to the aggravating factors present in this case. Appellant was out on parole from a prior violent offense when he kidnaped eight-year-old Lisa Berry, killed her, dumped her nude body in a canal, and then took elaborate steps to cover up his crime. Nothing Appellant has presented in these subsequent nineteen years has rendered his sentence unreliable. See Mendyk v. State, 592 So.2d 1076, 1079-80 (Fla. 1992) (evidence of abusive childhood, history of alcohol and drug use, and mental impairment would not have affected outcome); Tompkins v. Dugger, 549 So.2d 1370, 1373 (Fla. 1989) (evidence of child abuse and drug addiction would not have affected the sentence given the crime and the aggravating factors), cert. denied, 493 U.S. 1093 (1989). Therefore, this Court should affirm the trial court's denial of this claim.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED GROUNDS F AND G AS PROCEDURALLY BARRED (Restated).

In Ground F of his motion for postconviction relief, Appellant claimed that "[t]he Florida capital sentencing statute is unconstitutional as applied because it excludes as a matter of law any consideration of 'residual doubts' concerning a capital defendant's innocence or degree of guilt from the determination of the appropriate penalty." (PCR2 700-04). In Ground G of his motion, Appellant claimed that "[the] record does not support a finding of intent to kill. The sentence of death is disproportionate to the crime and is unconstitutional . . . ." (PCR2 705-09). During a status conference to determine which issues would be litigated at the evidentiary hearing, collateral counsel conceded that these two issues had been raised on direct appeal, but claimed that there had been "a substantial amount of case law to those claims that need to be addressed and the claims do need to be considered." (PCR2 21). In a subsequent memorandum of law, collateral counsel again conceded that these issues had been raised on direct appeal from resentencing, but contended that these issues should be reconsidered "in light of United States Supreme Court decisions issued since the direct appeal was decided which emphasize that a Florida capital sentencing jury must be correctly instructed at the penalty phase. See Hitchcock v. Dugger, 481 U.S. 393 (1987); Espinosa v. Florida, 112 S. Ct. 2926 (1992)." (PCR2 791, 792). The trial court, however, found both claims procedurally barred. (PCR2 811).

In this appeal, Appellant once again concedes that these claims were raised on direct appeal, but "urges [this] Court to reconsider the issue[s], as [they go] to the fundamental fairness and proportionality of his death sentence. The claim[s are] cognizable in these proceedings under James v. State, 615 So.2d 668 (Fla. 1993)." **Brief of Appellant** at 57. This Court has repeatedly held, however, that claims which were raised on direct appeal may not be raised again in a motion for postconviction relief. E.g., Harvey v. Dugger, 20 Fla. L. Weekly S269, 270 (Fla. June 8, 1995) ("[P]ostconviction proceedings are not to be used as a second appeal."). Appellant's reliance on James to overcome this procedural bar is misplaced. In James, this Court held that "[c]laims that the instruction on the heinous, atrocious, or cruel aggravator is unconstitutionally vague are procedurally barred unless a specific objection on that ground is made at trial and pursued on appeal." 615 So.2d at 669 (footnote omitted). Appellant is not challenging an instruction on the HAC aggravating factor. Rather, he is using James to apply Hitchcock and Espinosa broadly to cover his claim that his resentencing jury should have been given instructions on premeditated and felony murder, and circumstantial evidence. In Davis v. State, 589 So.2d 896, 898 (Fla. 1991), this Court held that Hitchcock dealt with a single instruction and would not be applied broadly to non-Hitchcock claims. Espinosa should be equally limited.

Were this Court to consider these claims again, however, the State submits that they remain without merit. This Court has consistently held that evidence or argument of lingering or residual doubt during the penalty phase is inadmissible as

mitigating evidence. Preston v. State, 607 So.2d 404, 411 (Fla. 1992); White v. Dugger, 523 So.2d 140 (Fla. 1988); King v. State, 514 So.2d 354, 358 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). Moreover, evidence relating to the facts of the crime is admissible at a resentencing only to provide a factual basis for the sentence and to support the aggravating factors or negate mitigating ones. Again, evidence to negate the defendant's guilt is not admissible. King, 514 So.2d at 357-58. Of course, evidence relating to a defendant's mental state which would arguably reduce his or her culpability is admissible as mitigating evidence, but such evidence does not extend to evidence which would negate the defendant's guilt. Jackson v. State, 575 So.2d 181, 190-91 (Fla. 1991). Finally, the defendant's degree of culpability is only an issue at the penalty phase when there are one or more codefendants. Jackson, 575 So.2d at 190-91; Downs v. State, 572 So.2d 895, 899 (Fla. 1990). Here, there were no codefendants. Thus, the trial court properly denied resentencing counsel's requests to instruct the jury on the definitions of premeditated murder, felony murder, and circumstantial evidence.

As for the proportionality of Appellant's sentence, the fact that the State's case was based primarily on circumstantial evidence, and the fact that the State argued for a conviction based on both a premeditated and felony murder theory, does not reduce Appellant's culpability for this murder. The jury, which was read all of the testimony from the guilt phase and heard additional evidence disputing the State's hammer-blow theory as to the cause of death and other mitigating evidence, recommended death by a vote of eleven to one. In imposing a sentence of death, the trial court

found three aggravating factors--under sentence of imprisonment, prior violent felony conviction, and committed during the course of a kidnaping--and nothing in mitigation. Appellant did not specifically raise proportionality as an issue on appeal. Rose v. State, 461 So.2d 84 (Fla. 1984). Regardless, in discussing the potential prejudice of Appellant's resentencing jury being told that his original sentence was reversed on appeal, this Court noted the aggravating factors and lack of mitigation and stated that, even if the jury had recommended life, "we are satisfied that a death penalty would have been imposed and there is no reasonable possibility that the result would have been different." Rose v. Dugger, 508 So.2d 321, 324 (Fla. 1987). Thus, this Court has already found that Appellant's sentence of death would have survived a jury override.

The evidence supports Appellant's conviction and sentence as much now as it did in 1977 and 1983. Appellant has alleged nothing in either of these issues to question the reliability of his conviction or his sentence. The jury was instructed properly, and Appellant's sentence remains proportionate to other cases under similar facts. Therefore, assuming that this Court does not find these issues procedurally barred, it should find them wholly without merit.

ISSUE IV

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF APPELLANT'S GROUND B THAT THE STATE WITHHELD MATERIAL INFORMATION AND KNOWINGLY USED FALSE TESTIMONY CONCERNING APPELLANT'S STATEMENTS TO THE POLICE (Restated).

In his 3.850 motion, Appellant claimed that the State withheld material information and knowingly used perjured testimony regarding Appellant's request to speak to, and his contact with, an attorney prior to police questioning.[3] (PCR2 680-86). After this Court remanded this case for an evidentiary hearing, the parties and the trial court agreed to litigate this issue at the hearing. (PCR2 16, 18, 619, 811).

During his direct examination by collateral counsel, Tom Bush, Appellant's trial counsel, recalled that Appellant was taken into custody and then

> either asked or [was] given the opportunity to try to call an attorney. He called Bob Fogan at home at night. One police officer said that he thought that the phone call was phony, that he was never called. A second police officer then -- Or detective then, in fact, confirmed that Bob Fogan had been called because he called Bob Fogan.

(PCR2 120). When asked if that "confirmation" was revealed to him, Mr. Bush responded,

> I don't recall it was. Other than what I may have gotten in conversations from my client. But other than that, whether the State

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[3]Although Appellant's issue heading in the 3.850 motion contains an alternative allegation that trial counsel was ineffective for failing to discover information that proved Appellant had contacted an attorney prior to questioning, there were no allegations in the text relating to ineffective assistance of counsel. Such a conclusory reference without factual allegations or legal argument renders such a claim legally insufficient on its face. Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989).

> revealed to me that a conversation had taken place between Jim Rose and Bob Fogan I'm sure they would have revealed it to me, but not probably when I wanted it. I mean it would have come down the road as a result of a motion to produce pursuant to Brady versus Maryland.

(PCR2 120-21). Collateral counsel then showed Mr. Bush the suppression hearing testimony of Detective McLellan wherein McLellan testified that he did not believe Appellant had called an attorney. Counsel also showed Mr. Bush the supplemental report of Detective McLellan dated prior to his hearing testimony wherein McLellan stated that he called Bob Fogan and Fogan confirmed that Appellant had actually called him. (PCR2 121-23). Regarding whether he had this report, Mr. Bush testified as follows:

> [W]hen I filed that motion to suppress, I was also having the general war that goes on between defense counsel and the State Attorney in making sure that I got stuff that they didn't want to give me. So I was constantly -- You need to look in the correspondence file and I was telling Gene Garrett give me the supplemental reports and give me this, give me that.
>
> So, more than likely, and I certainly would be glad to go through all this stuff, more than likely I got that, but it was probably down the road after I had to nag and gripe. And it wouldn't have -- It could have well come after the motion to suppress. That's my guess. I don't know whether it did or did not. But I think I could probably tell you that I got everything that they had, but the timing of when they gave it to me might have been more of the issue.

(PCR2 123-24). When asked whether he would have used the supplemental report to impeach Detective McLellan if he had had it, Mr. Bush responded that he would also have called Detective LaValle to prove that the call had been made. (PCR2 126-27). However, on cross-examination, when asked whether knowledge that Bob Fogan had

been called would have affected the outcome of the suppression hearing, Mr. Bush responded, "Well, no, because I think that I got everything suppressed that they were trying to use as a result of that." (PCR2 220). Mr. Bush explained further that Appellant had never confessed to the police; he merely made inconsistent statements to Detectives Haas, Bukata, and King after waiving his Miranda rights. These were the only statements to the police that were ultimately admitted at trial. (PCR2 221).

In this appeal, Appellant renews his claim that the State committed a Brady violation by withholding the fact that either Detective McLellan or Detective LaValle called Bob Fogan and confirmed that Appellant had, in fact, contacted him.[4] **Brief of Appellant** at 69-77. In order to prove a claim under Brady v. Maryland, 373 U.S. 83 (1963), however, Appellant had 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.'

Melendez v. State, 612 So.2d 1366, 1368 (Fla. 1992) (quoting Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991)), cert. denied,

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[4]Although Appellant's initial brief regarding this issue is virtually identical to his 3.850 motion, in a single sentence imbedded in the argument, Appellant claims, "Alternatively, if the failure to develop this issue was not based on the State's (e.g., LaValle's) deception, then it was based on ineffective assistance of counsel." **Brief of Appellant** at 76. This conclusory statement is the only reference to this alternative basis for relief. Given that Appellant's 3.850 motion did not sufficiently allege a similar claim, the State submits that Appellant cannot raise this issue for the first time on appeal. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

114 S.Ct. 349, 126 L.Ed.2d 313 (1993). See also Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993). Here, Appellant failed to show that the State, in fact, withheld favorable evidence. Trial counsel testified that he was reasonably sure he was provided with everything the State had. The real question was when, not whether, the State disclosed the report.[5] Even if the State did withhold the information found in McLellan's supplemental report, Appellant failed to show that he could not have discovered it with due diligence. See Melendez, 612 So.2d 1368 ("Additional details regarding [witness] Falcon's prior criminal record, his location at the time of the offense, and his history of mental illness and drug addiction was either known by defense counsel or was as accessible to the defense as it was to the State.").

Finally, even if Appellant proved that the State withheld evidence that he could not have obtained with due diligence, Appellant failed to show that had the evidence been disclosed to him, a reasonable probability exists that the outcome of the proceedings would have been different. At most, trial counsel could have impeached Detective McLellan at the suppression hearing

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[5]Curiously, Appellant made the following allegation in his 3.850 motion: "[W]hile defense counsel had some pages of McClellan's [sic] supplemental report, Page 7, reproduced above, was withheld by the State. It is clear the State Attorney's office deliberately pulled the critical page from McClellan's [sic] report after reviewing it and assigning the control numbers, in an effort to deceive trial counsel on the true nature of Mr. Rose's request for counsel." (PCR2 685-86). Although Appellant's brief on this issue is almost verbatim from his 3.850 motion, he has deleted the allegation in his brief that the State withheld page seven of the report. **Brief of Appellant** at 76-77. The logical inference from this deletion is that defense counsel, in fact, had the entire supplemental report, although, as he testified at the evidentiary hearing, he may not have had it in time for the suppression hearing.

with his supplemental report and shown that Appellant, in fact, called an attorney during questioning. The fact that Appellant called the attorney, however, would not have provided sufficient grounds to suppress Appellant's later statements to the other officers.

By calling his former attorney, Appellant did not unequivocally invoke his right to an attorney before questioning. As related by Detective LaValle in his reports, deposition, and testimony, as soon as Appellant was brought to the police station from the bowling alley, he immediately asked to call his attorney. That request was granted, and he made a short phone call. Appellant then volunteered that his attorney suggested that he not take a polygraph examination, and Detective LaValle asked him who his attorney was. Appellant told him Bob Fogan and the detective requested permission to call Mr. Fogan to explain the situation and the need for a polygraph. Appellant responded that Mr. Fogan was not going to represent him because he owed Mr. Fogan some money from past representation. Appellant also volunteered that he never had any intention of submitting to the polygraph examination, and that he asked to call Mr. Fogan in order to stall for time. "Mr. Rose was [then] asked if he had any objections to just talking with the undersigned reference the investigation and he consented to conversation." (PCR2 681-85).

Appellant never unequivocally requested an attorney. He obviously knew that he could have access to one since he requested and was allowed to call Mr. Fogan. When Mr. Fogan refused to represent him, he did not even equivocally indicate that he wanted to contact another one. Rather, when LaValle clarified Appellant's

willingness to cooperate, Appellant agreed to speak to him about the investigation. Nevertheless, all of Appellant's statements to Detective LaValle were suppressed. The statements made to Detectives Bukata, Haas, and King were made later in the day after Appellant again waived his Miranda rights. (PCR2 230-31). Under these facts, Appellant has failed to show that the alleged undisclosed information would have warranted suppression of his statements to these detectives. See Keen v. State, 504 So.2d 396 (Fla. 1987) (defendant's request to an employee, upon his arrest and prior to Miranda warnings, to call an attorney for purpose of bail did not constitute invocation of fifth amendment rights).

Even if it would have, Appellant failed to show that there is a reasonable probability that the outcome of his trial would have been different absent these statements. After all, Mr. Bush testified that the most damaging statements were made by Appellant to civilians at the bowling alley. (PCR2 132-33). When all of those statements are combined with all of the other evidence linking Appellant to the crime, the State's nondisclosure of Detective McLellan's supplemental report did not undermine the reliability of the result in this case. Consequently, this Court should affirm the denial of this claim for relief.[6]

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[6]On the off-chance that Appellant has preserved any claim of ineffective assistance of counsel relating to this issue, the State submits, based on the foregoing arguments, that Appellant failed to show prejudice.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED GROUND K WHICH WAS RAISED IN APPELLANT'S SUPPLEMENTAL MOTION TO VACATE FILED AFTER THE EVIDENTIARY HEARING (Restated).

More than a month after the evidentiary hearing in this case, Appellant filed a supplemental motion to vacate raising two claims for relief, one of which was a totally new claim alleging a conflict of interest based on the county's budgeting for capital improvements and special assistant public defenders. Specifically, Appellant claimed that "[t]he county fund from which Special Assistant Public Defenders and expert witnesses in capital cases are paid is the same fund from which Broward County Circuit Court judges receive funding for capital improvements." (PCR2 922). Thus, according to Appellant, judges "negotiat[e] lesser fees with Special Assistant Public Defenders in order to increase the available funds for their own purposes." (PCR2 922). In turn, the attorneys are "expected to 'shop for the best deal' before the Court will approve an expert or simply go without experts." (PCR2 922). *A fortiori*, "[b]ecause [Appellant] was tried in Broward County, was represented by a Special Assistant Public Defender, and received the assistance of two court-appointed experts, [he] was prejudiced by this conflict." (PCR2 923) (footnote omitted).

Appellant claimed in his supplemental motion that the facts to support this claim had only recently been discovered. He had obtained a copy of a hearing transcript from another Broward County case wherein Judge Tyson discussed the funding issue with an Assistant County Attorney and an attorney seeking partial indigency for his client so that the county would pay costs associated with

his defense. (PCR2 919, 984-1000). The hearing had occurred on February 23, 1993, over nine months prior to the filing of Appellant's supplemental motion, and over seven months prior to Appellant's evidentiary hearing. (PCR2 987).

Two days after filing his supplemental motion to vacate, Appellant also filed a motion to disqualify Judge Ferris from presiding over the 3.850 proceedings because Judge Ferris was a Broward County judge at the time of Appellant's trial and resentencing and would be a material witness relating to this alleged conflict of interest. (PCR2 954-83). In its response to Appellant's motion to disqualify, the State countered that colleagues of Appellant's collateral counsel had filed an identical claim in another case almost five months prior to the evidentiary hearing in this case, and thus the motion to disqualify was untimely. (PCR2 1001-11). Shortly thereafter, the trial court denied the motion to disqualify as legally insufficient and issued its final order denying postconviction relief. (PCR2 1012, 1032-37). Three weeks later, Appellant filed a motion for rehearing, noting, among other things, that the court had not ruled on his supplemental motion to vacate. (PCR2 1038-66). The trial court denied Appellant's motion for rehearing. (PCR2 1067).

In this appeal, Appellant renews his claim that a conflict of interest existed in the Broward County budgeting process. **Brief of Appellant** at 78-84. Initially, the State submits that the trial court properly declined to rule on this issue in its final order denying relief, and properly denied the motion for rehearing without analyzing this claim. In Preston v. State, 528 So.2d 896, 897-98 (Fla. 1988), this Court declined to consider issues which

were predicated on motions filed after the evidentiary hearing, which sought to advance new issues, and which were not addressed by the trial court in its order denying relief. This Court detailed the numerous opportunities Preston had to raise the claims prior to the evidentiary hearing, and held that the trial court "properly declined to rule on these issues." Id. at 898.

As in Preston, Appellant had sufficient opportunity to raise this issue prior to the evidentiary hearing, but instead waited until after the parties had filed their final memoranda of law following the hearing. This case was remanded for an evidentiary hearing in May of 1992. Rose v. State, 601 So.2d 1181 (Fla. 1992).[7] The evidentiary hearing was not held until October of 1993. The hearing upon which Appellant relies to support this claim occurred on February 23, 1993, over seven months prior to Appellant's evidentiary hearing. (PCR2 987). Moreover, as the State noted in its response to Appellant's motion to disqualify Judge Ferris, colleagues of Appellant's collateral counsel had filed an identical claim in another case almost five months prior to the evidentiary hearing in this case. (PCR2 1001-11). Thus, collateral counsel had "discovered" the facts used to support this claim prior to Appellant's evidentiary hearing, but failed to raise it in a timely matter. As a result, the trial court properly refused to consider it. Likewise, this Court should not address it on appeal. Preston, supra.

Even were this Court to address this issue, it should find the issue procedurally barred. Appellant failed to show that he could

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[7]Mandate issued on June 19, 1992.

not have discovered the facts underlying this claim sooner with due diligence. Although Judge Tyson's comments, upon which Appellant relies, were made recently, Appellant did not establish his inability to discover this alleged conflict of interest prior to his trial in 1976 or his resentencing in 1983. Thus, this claim could have been denied as procedurally barred. See Harvey v. Dugger, 20 Fla. L. Weekly S269, 270 (Fla. June 8, 1995).[8]

Likewise, this claim could have been denied because it was legally insufficient on its face. Other than his conclusory statement that he was prejudiced by the alleged conflict of interest, Appellant presented no facts to support his conclusion.[9]

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[8]Although the trial court did not specifically deny this claim based on a procedural bar, this Court should affirm the trial court's ruling where an alternative theory supports it. Caso v. State, 524 So.2d 422, 424 (Fla. 1988) ("A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it."). See also McBride v. State, 524 So.2d 1113 (Fla. 4th DCA 1988) (affirming denial of 3.850 motion as improper, successive request for relief, although denied improperly by trial court as untimely); Rita v. State, 470 So.2d 80, 83 (Fla. 1st DCA 1985) (noting that order denying 3.850 motion "must be affirmed if the record reveals other competent grounds for doing so").

[9]In fact, the transcripts relied upon by Appellant to support this claim refute it. During the colloquy between Judge Tyson and Assistant County Attorney Robert Hone, Judge Tyson expressed concerned that the county would divert money from the capital improvements fund if there were a shortfall in the fund to pay special assistant public defenders and costs associated with the defense. Although Appellant quoted part of the following excerpt from the transcripts, he neglected to provide the part most detrimental to his claim:

> MR. HONE: The County has a statutory obligation to support the Judiciary as far as providing buildings and Courtrooms.
>
> THE COURT: But at the moment, they will deduct it from the budget that has been appropriated for the year onto the administrative side what they appropriated for

(continued...)

He made no allegation that the budgeting process in effect in 1993 was the same, or substantially the same, during his trial in 1977 or during his resentencing in 1983. Moreover, even assuming that the process was substantially similar, he made no allegation that Judge Futch, who presided over his trial and resentencing, and Judge Ferris, who presided over his postconviction proceedings, were even aware of the budgeting process and the alleged conflict of interest. Likewise, he made no allegation that Judge Futch "negotiated lesser fees" with his attorneys.[10] Nor did he allege that Judge Futch refused to appoint certain experts because they were "too expensive" and forced his attorneys to "shop for the best

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[9](...continued)

> the Judiciary, if there are overruns in the special public defender [fund] for costs, they will take it from the Judiciary costs, the administrative side.
>
> MR. HONE: That is not the County's decision. That's the Chief Judge.
>
> THE COURT: Well, he doesn't have the money. We have to pay it from the money there.
>
> MR. HONE: In the past, when there was a deficit, the County injected additional funds, we went in the hole for capital [improvements] last year. The County Commission voted to pump additional monies in the Judicial budget to cover the deficit.

(PCR2 979) (emphasis added).

[10]In fact, Michael Entin testified at the evidentiary hearing that there was a fee cap at the time of Appellant's resentencing. (PCR2 288). At that time, the cap was $3,500 for a capital trial. Fla. Stat. § 925.036 (1983). Only recently has this Court held that trial courts may exceed the cap in capital cases "when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents," Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986).

deal."[11] In other words, Appellant alleged nothing to show that he was, in fact, prejudiced by this alleged conflict of interest. Therefore, assuming that Appellant timely presented this claim, it was properly denied.

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[11]In fact, as Appellant concedes, two mental health experts were appointed to determine his competency/sanity. **Brief of Appellant** at 81 n.16. In addition, Judge Futch appointed Dr. Davis, the Chief Medical Examiner in Broward County, to rebut Dr. Fattah's opinion that the victim's injuries were consistent with multiple hammer blows. (PCR2 134). Mr. Bush testified that he did not need an expert to rebut the State's evidence of a "crushed hair" or to challenge Appellant's ability to voluntarily waive his Miranda rights. (PCR2 128-32, 140-44, 239). Mr. Entin also testified that he did not seek the appointment of a confidential mental health expert for resentencing. (PCR2 311-12, 320). Thus, prejudice cannot be shown when experts are either sought and appointed, or not sought at all.

ISSUE VI

WHETHER APPELLANT WAS ACCORDED A FULL AND FAIR EVIDENTIARY HEARING (Restated).

In this appeal, Appellant claims that he was not accorded a full and fair hearing on his postconviction claims because the trial court (1) sustained the State's objections to several questions and did not permit him to proffer the answers, (2) determined without reviewing the record which claims would be litigated at the evidentiary hearing, and (3) denied an evidentiary hearing on grounds D, I, and J of his 3.850 motion and grounds I and II of his supplemental motion and failed to attach portions of the record to support the denial of these claims. **Brief of Appellant** at 85-89.

A. Restricting testimony and proffers

During the direct examination of Tom Bush, Appellant's guilt-phase trial attorney, collateral counsel engaged in a colloquy with the trial court regarding its preference for proffering answers to questions to which objections were sustained. Ultimately, the trial court decided that counsel should proffer what she believes the witness would answer if permitted to do so. (PCR2 59-63). Shortly thereafter, in questioning Mr. Bush about his inability to obtain the transcripts from the mistrial, collateral counsel asked Mr. Bush, "In fact, would [it] be a common and reasonable practice for any trial attorney in a capital case to want to have a transcript of the prior testimony --." (PCR2 64). The trial court sustained the State's relevancy objection, finding that the trial judge's refusal to provide Mr. Bush with the transcripts was not relevant to Appellant's claim of ineffective assistance of counsel:

"I believe that the form of the question is wrong." (PCR2 64-65). When counsel attempted to proffer the answer, the State again objected because the ruling was based on the form of the question and counsel could rephrase the question. Ultimately, the trial court ruled that the answer essentially had been answered already when Mr. Bush testified that he wanted and sought the transcripts from the mistrial to use at the retrial, but Judge Futch refused his request. When collateral counsel persisted in proffering the answer, the State objected that Mr. Bush's attempt and/or failure in obtaining the transcripts was not alleged as a basis for ineffectiveness. The trial court sustained the objection, denied the offer of proffer, and directed collateral counsel to proceed with questioning. (PCR2 65-67). At that point, collateral counsel conferred with co-counsel and then stated, "Your Honor, I believe I can sufficiently preserve the record by submitting a written statement at the close of the proceedings." (PCR2 68).[12]

Later in Mr. Bush's testimony, collateral counsel asked him if it would have been helpful to have an expert to testify that a crushed hair found in Appellant's sock that was similar to the victim's hair was meaningless or irrelevant. (PCR2 141). At that point, the following colloquy occurred:

> A. [By Mr. Bush] Well, Ms. Dougherty, it would have been helpful if Judge Futch would have given me the money to have ten or fifteen experts and four lawyers backing me

[12]At the close of the evidentiary hearing, collateral counsel again indicated that she would file a written proffer: "Your Honor, I'm also going to be preparing a written proffer of the evidence which Your Honor did not allow to be proffered for the record and I'll be submitting that to the Court at a later date." The trial court responded, "Okay." (PCR2 528). The record contains no such written proffers.

up, but that wasn't the situation I was in. If I could have had my own experts -- You have to remember that Florida is incredibly liberal on discovery and what I get so does the State. And I had to run the danger of these experts coming back with the same thing the State's experts came back with and then they stick it in my ear at trial saying the defense expert also says this and then I really got to watch it.

So you have to understand that you just can't go get an expert. Because if the expert comes back and says John Penny [the State's expert] is right, then I have got two of them to deal with instead of one. So I have to be careful what I do on these things.

Q [By collateral counsel] Is it your understanding of Florida law that you don't have a right to a confidential expert?

[THE PROSECUTOR]: Objection.

* * * *

THE COURT: I'll sustain the objection.

[COLLATERAL COUNSEL]: I would like to proffer --

THE COURT: He's answered the question. You're going to argue with him and you may be right. But he's answered the question as far as his position is concerned.

[COLLATERAL COUNSEL]: So in other words what the Court is telling me is that he's answered that he thinks Florida law does not provide for a confidential expert and that the question has been answered?

THE COURT: He's saying at that time that in Judge Futch's courtroom that was the situation. That's what he said. Now --

[COLLATERAL COUNSEL]: Can I ask him if that was -- If Judge Futch was acting contrary to Florida law that was applicable at that time?

[THE PROSECUTOR]: Objection, Your Honor.

THE COURT: Yeah. As you know the one that controls the law in any courtroom is the Judge. The Judge may be wrong, but the Judge

is the one that gives the law, not the lawyer, not the witness, it's the Judge. The Judge sometimes makes mistakes. I don't -- I'm not passing on Judge Futch's making a mistake or not. But you asked him, he has told you what his situation was. You have put his competence in issue. In very sharp issue. And so he has a right to tell you what his situation was and why he did what he did. And that's all he did do.

[COLLATERAL COUNSEL]: Well, I think I have a right to ask him whether he did it because of a special situation with Judge Futch or if that's what he thought the law said.

THE COURT: He told you, he's already answered the question.

[COLLATERAL COUNSEL]: That it was simply because of what Judge Futch said?

THE WITNESS: Yeah.

THE COURT: Yeah. On what the Judge said, yeah. I'm sure that if you had tried the case before Judge Futch, you would have understood what he's saying. But in any event, that's really superfluous. He's answered your question. So let's go on.

[COLLATERAL COUNSEL]: Judge, just to clarify that by one more question.

BY MS. DOUGHERTY:

Q. Is it your understanding that Judge Futch would have required you to give over the results of whatever expert you might have retained?

A. No doubt in my mind. And also at the time there was a reciprocal discovery order in effect that if they showed me theirs, I had to show them mine.

Q. And did you object to that?

A. No, I agreed to it. I wanted to see everything they had. I wanted their work product and I was getting it to some extent. But if I could have had it -- Why, Judy, when I wanted an expert to come in and say the hair couldn't be crushed meant I got the State's

own expert to admit it.

(PCR2 142-44).

Later in the evidentiary hearing, collateral counsel questioned Michael Entin, Appellant's resentencing counsel, about his investigation of nonstatutory mitigating evidence and whether he had discovered evidence of organic brain damage and abuse as a child, among other things. At one point, the following colloquy occurred:

> Q. [By collateral counsel] Is testimony regarding statutory, nonstatutory mitigation the kind of mitigation evidence that juries can rely on to negate the affect of aggravating circumstances?
>
> A. [By Michael Entin] Yeah, all that would have been I believe mitigating factors.
>
> Q. It is the type of thing to your knowledge that juries do use this type of evidence that we have been talking about, the brain damage, the child abuse?
>
> A. The law changes every year but I assume that it probably would have been admissible back then.
>
> Q. Is it the type of thing that a jury could have used to have found a life sentence for Mr. Rose?
>
> [THE PROSECUTOR]: Objection, Judge, that calls for speculation.
>
> THE COURT: I'll sustain the objection. Because it is strictly up to the jury to recommend. I don't know -- I can't foretell what a jury is going to recommend, so I don't know that counsel can either.
>
> [COLLATERAL COUNSEL]: Your Honor, I would like to go ahead and proffer his answer to that.
>
> [THE PROSECUTOR]: Objection.
>
> THE COURT: The proffer is denied and the objection is sustained. Let's go on.

(PCR2 324-25).

In this appeal, Appellant claims that he is entitled to a new evidentiary hearing because the trial court refused to allow his proffers of evidence. **Brief of Appellant** at 85-86. The State submits that Appellant has failed to show an abuse of discretion. From the colloquies between the trial court and collateral counsel, the trial court knew the substance of the testimony sought to be presented and believed that the testimony was irrelevant or that counsel should rephrase the question. Given that the substance of the evidence sought to be proffered was apparent from the nature of the questions and the arguments of collateral counsel, the trial court's refusal to allow the proffers of evidence was harmless beyond a reasonable doubt. See Brown v. State, 431 So.2d 247, 248 (Fla. 1st DCA 1983). See also Garcia v. State, 622 So.2d 1325, 1327 (Fla. 1993) (finding no abuse of discretion in restricting defense questioning at evidentiary hearing); Medina v. State, 573 So.2d 293, 295 (Fla. 1990) (finding no abuse of discretion in way judge conducted evidentiary hearing).

B. Trial court's review of record

Appellant also alleges in this appeal that Judge Ferris "denied [Appellant] relief on some claims and an evidentiary hearing on other claims without having reviewed the record." **Brief of Appellant** at 87. The State submits, however, that a review of the entire appellate record in this case was unnecessary in order for the trial court to make an initial determination regarding which claims should be litigated at an evidentiary hearing.

When this case was remanded for an evidentiary hearing, the State filed a "Motion to Establish Cognizable Issues Requiring an

Evidentiary Hearing Regarding Defendant's Pending Motion for Postconviction Relief." The State argued that Appellant was entitled to an evidentiary hearing only on claims A and B which alleged ineffective assistance of counsel and a Brady claim. All other claims, according to the State, were procedurally barred. Attached to the State's motion were exhibits containing all of Appellant's published opinions, Appellant's 3.850 motion, the State's original response, and Judge Futch's original order summarily denying all relief (specifically finding claims C through J procedurally barred). (PCR2 617-20).

Judge Ferris then held a hearing to discuss the appropriate issues for an evidentiary hearing. At this hearing, everyone agreed that claims A and B would be litigated. (PCR2 16, 18, 31). Because of the parties' differing opinions regarding the propriety of litigating claims C, D, E, F, G, and H, the trial court allowed the parties to submit additional memoranda.[13] (PCR2 21, 24-25, 30-31). As to claims I and J, collateral counsel conceded that this Court's opinion denying habeas relief "definitely discusses these claims," but contended that the opinion "initially says that this claim is better brought in a 3850 motion . . . [a]nd that is why it was put in the 3850 motion because of that statement in the opinion." (PCR2 26). After reading the opinion, Judge Ferris found claims I and J procedurally barred. (PCR2 26-28).

Following the parties' submission of memoranda (PCR2 788-93,

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[13]Collateral counsel conceded that claims E, F, G, and H had been raised on direct appeal, but denied that they were procedurally barred because "there's been a substantial amount of case law to those claims that need to be addressed and the claims do need to be considered." (PCR2 21).

794-803), the trial court ordered an evidentiary hearing on claims A and B (and C to the extent it was subsumed within claim B), found that the facts supporting claim D were known to counsel at the time of trial and thus did not support a Brady or Giglio violation, and found the remaining claims (E through J) procedurally barred. (PCR2 811-12). Based on the nature of the claims, and the trial court's familiarity with Appellant's previous appeals, it was wholly unnecessary for the trial court to read the entire appellate record before determining which issues warranted an evidentiary hearing and which issues were procedurally barred. Thus, the fact that Judge Ferris had not read the record prior to the evidentiary hearing is not grounds for reversal for a new hearing.

C. Denial of evidentiary hearing on certain claims

In this appeal, Appellant claims that the trial court "erroneously denied an evidentiary hearing on some of [his] claims," namely D, I, and J of his 3.850 motion, and claims I and II of his supplemental 3.850 motion.[14] Moreover, Appellant complains that, in denying these claims, the trial court "did not attach portions of the files and records conclusively showing [he] was not entitled to relief on the claims upon which no evidentiary hearing was allowed." **Brief of Appellant** at 87-89.

Regarding the propriety of the trial court's denial of these

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[14]Claim I in Appellant's supplemental motion was labeled "Ground D" and merely supplemented Ground D of the original 3.850 motion with additional factual allegations and legal arguments, which centered around Appellant's inability to obtain autopsy photographs of the victim's head so that he could dispute the State's "hammer blow theory" as the cause of death.

As noted previously in Issue V, claim II in Appellant's supplemental motion was labeled "Ground K" and was a completely new issue relating to the budgeting process for capital improvements and special assistant public defender funds.

claims without an evidentiary hearing, Appellant raises each of these claims separately in his initial brief.[15] Therefore, the State will rely on its arguments made in response to those issues. As for Appellant's claim that the trial court failed to attach portions of the record relating to these claims, it is well-established that attachment of the record is not necessary when claims are denied as procedurally barred. Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992). Therefore, this issue is without merit.

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[15]The substance of claim D (and I of the supplemental motion) was raised in Issue VIII, infra. The substance of claims I and J were raised in Issue IX, infra. The substance of claim II (or K) of the supplemental motion was raised in Issue V, supra.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY DENIED GROUND C AS PROCEDURALLY BARRED (Restated).

In Ground C of his 3.850 motion, Appellant claimed that the facts alleged in Ground B established that Appellant invoked his right to counsel, that he did not waive that right, and that the police did not honor his request. (PCR2 686-87). The State conceded, and the trial court agreed, that the substance of Ground C should be merged into Ground B. (PCR2 18, 811). However, to the extent that Appellant sought to relitigate the Miranda issue that he raised during his first direct appeal, the State argued, and the trial court agreed, that Appellant was procedurally barred from doing so. (PCR2 18, 811). In an attempt to overcome the bar, Appellant claimed that this issue could be relitigated based on new law, i.e., Edwards v. Arizona, 451 U.S. 477 (1981). (PCR2 686-87). Edwards, however, was held to be prospective only in Solem v. Stumes, 465 U.S. 638 (1984). See also State v. LeCroy, 461 So.2d 88, 92 (Fla. 1984). Therefore, as the trial court properly found, to the extent that this issue is not subsumed within Ground B, it is procedurally barred. Regarding the substance of this claim as it relates to Ground B, the State will rely on its arguments made in Issue IV, supra.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY DENIED GROUND D AS PROCEDURALLY BARRED (Restated).

In ground D of his motion for postconviction relief, Appellant alleged that Lisa Berry's cause of death was misrepresented during trial either because of an incompetent medical assessment or by the State's use of false or misleading testimony, or both. Specifically, Appellant claimed that Dr. Fattah, the medical examiner who performed the autopsy on Lisa Berry, was incompetent and/or that the State "fed" the hammer-blow theory to Dr. Fattah before the autopsy and then persuaded Dr. Fattah to testify to it even though the State knew it was false. (PCR2 687-95). To support these allegations, Appellant relied primarily on the deposition testimony of Dr. Joseph Davis, the Chief Medical Examiner in Broward County, who had been appointed as an expert for the defense. In his deposition, taken by the State on March 9, 1977, Dr. Davis disagreed with Dr. Fattah's opinion that Lisa Berry's death was caused by blunt force trauma, either from a hammer, foot, or hand.[16] (PCR2 689-94).

As further evidence of State misconduct, Appellant quoted a partial excerpt from another case wherein a different prosecutor attacked the credibility of Dr. Fattah, who had resigned from the medical examiner's office sometime after Appellant's trial and gone into private practice. Such comments, Appellant claimed, showed that "[t]he State thought the same at the time of [Appellant's]

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[16]Appellant also alleged that "Dr. Wright, another competent pathologist [would] also so testify at an evidentiary hearing." (PCR2 694).

trial, but used Dr. Fattah's misleading testimony anyway." (PCR2 694-95). Appellant then attacked the State for using Dr. Fattah at his resentencing even though it "knew his testimony was unreliable and untruthful then, as well." (PCR2 695). In denying the claim, the trial court found that "it is predicated on facts that were already known and in the possession of the Defendant as of the date of trial." (PCR2 811).

In this appeal, Appellant renews his claim that the State knowingly and intentionally presented misleading testimony at his original trial and at his resentencing in violation of Giglio v. United States, 405 U.S. 150 (1972). As the State has consistently argued (PCR2 18-19, 23, 619, 735-36, 796-97), and as the trial court properly found (PCR2 811), this claim is procedurally barred. Appellant knew Dr. Fattah's opinion regarding the cause of death before his original trial. He even provided to his own expert Dr. Fattah's deposition testimony and all of the materials used by Dr. Fattah to render his opinion. (PCR2 689-92). Appellant relied on his own expert's opinion to refute Dr. Fattah's testimony. Moreover, the differing opinions of Drs. Fattah, Davis, and Wright were explored at Appellant's resentencing. (RS 279, 290, 741-803). Thus, since the bases for this claim have been known to Appellant long before now, he could have, and should have, raised this claim on direct appeal from his original trial, or from his resentencing, or in his state habeas petition. Because he failed to do so, he was procedurally barred from raising this claim in his 3.850 motion. See Harvey v. Dugger, 20 Fla. L. Weekly S269, 270 (Fla. June 8, 1995).

Even were it properly raised in his 3.850 motion, however, it

was legally insufficient on its face. In order to establish a Giglio claim, Appellant had 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, 400 (Fla. 1991). As Appellant related in his motion, Dr. Fattah testified that Lisa Berry died from severe head injuries caused by blunt force trauma. Regarding the type of instrument that could have caused the injuries, Dr. Fattah testified that the object "could [have been] a hammer." He also testified that the injuries could have been caused by falling against a blunt object, by kicking, or by a "man's hand." (PCR2 688). In other words, Dr. Fattah testified that the injuries were consistent with any of these methods; he never conclusively opined that the injuries were caused by any specific instrument. The fact that Dr. Davis did not agree with Dr. Fattah's testimony does not prove that Dr. Fattah's testimony was false. Rather, it shows a difference of professional opinion. "Equivocal testimony such as this does not constitute false testimony for purposes of Giglio." Routly, 590 So.2d at 400. See also Phillips v. State, 608 So.2d 778, 781 (Fla. 1992). In any event, there is no reasonable probability that Dr. Fattah's inconclusive testimony affected the judgment of the jury. As Appellant noted in his motion, the State linked the hammer found next to the victim's body to Appellant by other means. (PCR2 688). Regardless of Dr. Fattah's testimony, the State could have argued by inference that the hammer was the instrument of death. Therefore, if not procedurally barred, this claim could have been denied as legally insufficient on its fact. See Rivera v. Dugger, 629 So.2d 105, 107 (Fla. 1993); Spaziano v. State, 570 So.2d 289,

290-91 (Fla. 1990).

To support his contention to the contrary, Appellant relies on Troedel v. Wainwright, 667 F. Supp. 1456 (S.D. Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987). **Brief of Appellant** at 92. Troedel, however, is easily distinguishable. In that case, a state expert on gunpowder residue testified in a codefendant's case that the codefendant could have fired the weapon. In the defendant's later trial, the expert testified that Troedel fired the weapon. At a deposition just prior to a federal evidentiary hearing, the expert testified that he could not determine to a scientific certainty who had fired the murder weapon. Given that the expert's unequivocal testimony at the two trials was not based on a reasonable degree of scientific certainty, that the State pursued inconsistent positions at each defendant's trial based on the expert's testimony, and that there was no other evidence to prove that Troedel fired the murder weapon, the federal district court granted habeas relief. Id. at 1458-60. In Appellant's case, however, Dr. Fattah's testimony regarding the murder weapon was not unequivocal; rather, he testified that the murder weapon could have been a hammer, shoe, hand, or other blunt object. Moreover, unlike in Troedel, Dr. Fattah never wavered in his testimony. Finally, Dr. Fattah's testimony regarding the potential causes of the victim's injuries was not critical to proving Appellant's guilt. Thus, there is no reasonable probability that his testimony affected the verdict. Consequently, Troedel is totally inapposite.

As for Appellant's claim that "current counsel could not properly challenge Dr. Fattah's trial testimony because of evidence that remains undisclosed--critical photographs of the victim's

skull," **brief of Appellant** at 94, the State submits that Appellant has waived any argument relating to nondisclosure of public records. Appellant's direct appeal became final on June 3, 1985--over ten years ago. By his own admission, he waited until August 31, 1992, after this case was remanded for an evidentiary hearing, to request documents and photographs from the medical examiner's office. (PCR2 756). When the medical examiner's office disclosed its file, minus any photographs, Appellant filed a motion with the trial court to compel compliance with Chapter 119. (PCR2 754-58). Said motion was granted on November 16, 1992. (PCR2 761-64). At a status hearing held on November 23, 1992, collateral counsel indicated that she would call the medical examiner's office "and find out what the problem is." Thereafter, she would inform the court and the State of her results. (PCR2 45). Eight months later, on July 20, 1993, collateral counsel moved to continue the evidentiary hearing, one basis for which was their failure to obtain the photographs. (PCR2 824-28). That motion was granted. (PCR2 829).

On October 5th, the second day of the evidentiary hearing, collateral counsel raised the issue of chapter 119 compliance. Although collateral counsel had filed an emergency motion for chapter 119 compliance on September 21st, they had not called the motion up for a hearing or mentioned it before the hearing began. (PCR2 276-84, 871-75). Later that day, the parties had an extended discussion regarding the photographs. The State noted that the transcripts from Appellant's resentencing indicated that the prosecutor gave thirteen color and nine black-and-white photos to Alex Carres, who in turn gave them to Dr. Wright. Believing that

Appellant was entitled to the photos, the trial court offered to subpoena the medical examiner or take any other measure requested. Finally, the trial court directed the State to contact the medical examiner's office. (PCR2 269-73). After a short recess, the State reported that the medical examiner's office had the photos and was awaiting prepayment. (PCR2 378-79).

The following day, at the conclusion of the evidentiary hearing, collateral counsel indicated that she had to get approval to pay for the photos. Regardless, according to counsel, the medical examiner only had twenty two of the original thirty-four photographs; the missing twelve photos were critical to show the cause of death. Collateral counsel believed that the original trial prosecutor had the photos last, but she admitted that she had not contacted him. After a lengthy discussion by the parties, the trial court directed collateral counsel to follow up on the issue and file a motion for sanctions if necessary. (PCR2 515-27).

Collateral counsel agreed to go to the medical examiner's office right then and, after a short recess, indicated that the medical examiner's office, in fact, did not have any photographs because they had been checked out to prosecutor Ralph Ray. They were, however, looking for negatives. Collateral counsel also noted that, in Mr. Entin's motion for continuance in 1983, he indicated that there were a total of sixty-seven photos, but that only twenty-two could be located. (PCR2 534-37). Again, the State mentioned the resentencing transcripts where Mr. Ray gave the photos to Mr. Carres. (PCR2 538-39). The trial court then ordered the trial exhibits from archives, but the parties found only two autopsy photographs. (PCR2 541-42, 556-57). In discussing other

avenues, collateral counsel indicated that they had contacted Mr. Carres and Dr. Fattah, but neither one had any photos. Nor were there any photos in trial counsels' files. (PCR2 558). At that point, the State argued that it had done all that it could do to locate the photographs, and the trial court agreed. (PCR2 560-61). Collateral counsel indicated that they would continue to look and inform the court of any developments, and the trial court agreed to help in any way possible. (PCR2 562). At that point, the hearing was adjourned. (PCR2 564).

Two months later, Appellant filed a final memorandum of law as directed by the trial court, but also filed a motion to compel disclosure of the medical examiner photographs, a supplemental motion to vacate alleging his inability to plead claim D because of the nondisclosure of the photographs, and a request for oral argument. (PCR2 929-45, 949-53, 913-28, 947-48). In his motions, Appellant indicated that the medical examiner's office had turned over twenty-three photographs after the evidentiary hearing. However, according to Appellant, "none of [these] were the critical photographs regarding the head injury and the blood spatter." (PCR2 916, 951). After the trial court entered its final order denying Appellant's 3.850 motion, Appellant filed a motion for rehearing, noting, among other things, that the trial court had not ruled on his supplemental motion and his motion to compel. (PCR2 1038-66). Appellant's motion for rehearing was denied. (PCR2 1067).

The foregoing chronology conclusively shows that any public records issue relating to the autopsy photographs has been waived or resolved. In Hoffman v. State, 613 So.2d 405, 406 (Fla. 1992),

this Court held that, "with respect to agencies . . . within the circuit which have no connection with the state attorney, requests for public records should be pursued under the procedure outlined in chapter 119, Florida Statutes." Hoffman issued well before the evidentiary hearing in this case. Since Hoffman, this Court has issued Reed v. State, 640 So.2d 1094 (Fla. 1994), and Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993). In Reed, this Court reaffirmed Hoffman and noted that Reed should be given "a reasonable time to obtain any records" through outside agencies. 640 So.2d at 1098. In Reed, this Court held 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." 634 So.2d at 1058.

Appellant waited over seven years from the date that his direct appeal became final to seek the medical examiner's photographs. He had already filed his 3.850 motion and appealed its denial. Although he obtained a court order directing the medical examiner's office to comply with his public records request, Appellant apparently made no attempt to secure them. Rather, he waited until the second day of the evidentiary hearing to actively pursue them. Even then, he declined the court's offer to serve the medical examiner with a subpoena duces tecum. After much hand-wringing, Appellant left the hearing indicating that he would follow up on the photos. By some manner, he managed to obtain twenty-three photographs after the hearing. Even after resentencing counsel diligently searched and could only find twenty-two photos in 1983, Appellant nevertheless maintains that either the State or the medical examiner is withholding critical

photographs. As noted at the hearing, the State did all that it could do to secure the photographs even though the public records request was made to a county agency that had no connection to it. Given Appellant's dilatory and meager efforts to locate the missing photographs, and given the court's and the State's attempts to locate them, the State submits that the public records issue has either been waived or resolved.

ISSUE IX

WHETHER THE TRIAL COURT PROPERLY DENIED GROUNDS I AND J AS PROCEDURALLY BARRED (Restated).

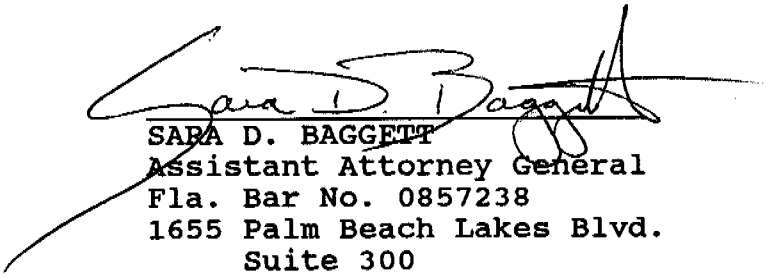
In grounds I and J of his motion for postconviction relief, Appellant claimed that, "[w]hile the jury was deliberating guilt, several jury proceedings occurred which were not recorded and were outside the presence of Mr. Rose and his counsel." (PCR2 710). Consequently, Appellant sought an evidentiary hearing to reconstruct the record because the factual basis for this claim was "not sufficient to prove the violation of Ivory[v. State, 351 So.2d 26 (Fla. 1977)." (PCR2 714). As argued by the State, the trial court ruled that Appellant had already raised these issues in his petition for writ of habeas corpus; thus, they were procedurally barred. (PCR2 811). Indeed, in Rose v. Dugger, 508 So.2d 321, 325 (Fla. 1987), this Court rejected identical claims raised by Appellant in his habeas petition, finding that "[i]n the absence of any factual basis for Rose's claim that there were improper communications between the judge and jury, we reject Rose's arguments on this point." Thus, since this Court had already denied the claims on their merits, the trial court properly denied the claims as procedurally barred. See Harvey v. Dugger, 20 Fla. L. Weekly S269, 270 (Fla. June 8, 1995).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's denial of Appellant's motion for postconviction relief.

Respectfully submitted,

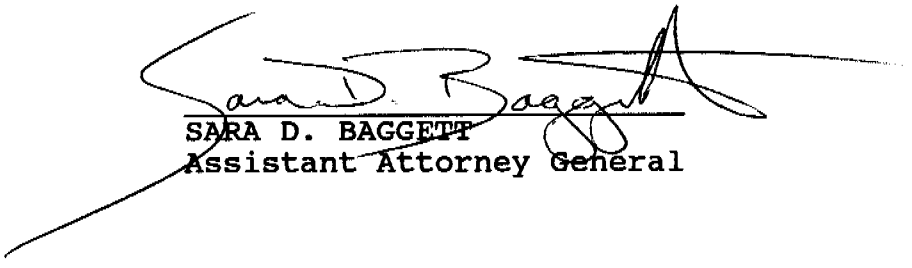
ROBERT A. BUTTERWORTH
Attorney General



SARA D. BAGGETT
Assistant Attorney General
Fla. Bar No. 0857238
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the above document was sent by Federal Express next-day airmail to Gail E. Anderson and Daren L. Shippy, Assistant CCRs, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 27th day of June, 1995.



SARA D. BAGGETT
Assistant Attorney General