**IN THE SUPREME COURT OF FLORIDA**

CASE NO. 85,439



**KRISHNA MAHARAJ,**

Appellant,

-vs-

**THE STATE OF FLORIDA,**

Appellee.

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AN APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

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# BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

This appeal is from the circuit court's denial, without evidentiary hearing, of Defendant's motion for post-conviction relief, filed pursuant to R. 3.850, Fla. R. Crim. P. Portions of the record on Defendant's original direct appeal, filed in *Maharaj v. State*, Florida Supreme Court Case No. 71,646, are relevant to this proceeding, and will be cited as "(D.A.R. ___).". The record generated in the proceedings on Defendant's motion for post-conviction relief, which is the subject of the instant appeal, will be cited as "(R. ___)."

On November 5, 1986, Defendant was charged by indictment in the Eleventh Judicial Circuit Court, Case No. 86-30610, with the first degree murder of Derrick Moo Young; the first degree murder of Duane Moo Young; armed burglary; armed kidnapping of Derrick Moo Young; armed kidnapping of Duane Moo Young; aggravated assault; and possession of a firearm while engaged in a criminal offense.[1] (D. A. R. 1-5a) All crimes were alleged to have been committed on October 16, 1986.

Trial of this cause commenced on October 5, 1987. (D. A. R. 1917). The jury found Defendant guilty of two counts of first degree murder; two counts of armed kidnapping; and one count of unlawful possession of a firearm while engaged in a criminal offense. He was acquitted of the armed burglary and aggravated assault counts. (D. A. R. 1714-20, 4183-87).

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[1]An additional count charging armed kidnapping of Neville Butler was nolle prossed prior to trial.

On November 6, 1987, a sentencing hearing was held before the same jury. (D. A. R. 4220). After the State and defendant presented evidence, the jury, by a seven to five vote, returned a recommendation of death for the murder of Duane Moo Young and by a six to six vote, a recommendation of life imprisonment for the murder of Derrick Moo Young. (D. A. R. 1752-53, 4497-98.).

The trial court sentenced Defendant, on December 1, 1987, to death for the murder of Duane Moo Young; life imprisonment for the murder of Derrick Moo Young; life imprisonment for the armed kidnapping of Duane Moo Young; life imprisonment for the armed kidnapping of Derrick Moo Young; and fifteen years imprisonment for unlawful possession of a firearm while engaged in a criminal offense. All sentences were to run consecutively. (D. A. R. 1755-84, 4566.)

Defendant appealed his convictions and sentences to this court. The following issues were raised, verbatim:

ARGUMENT I.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO INTRODUCE PREJUDICIAL NEWSPAPER ARTICLES ACCUSING DEFENDANT/APPELLANT OF COMMITTING VARIOUS CRIMES FOR THE ALLEGED PURPOSE OF SHOWING "MOTIVE".

ARGUMENT II.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT

TESTIMONY FROM ONE OF ITS WITNESSES ABOUT AN ATTEMPT TO MURDER AN INDIVIDUAL UNRELATED TO THIS ACTION.

ARGUMENT III.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO APPRISE DEFENDANT/APPELLANT IN A LEGALLY ADEQUATE MANNER, OF THE EFFECTS OF A MISTRIAL, WHEN THE ORIGINAL TRIAL JUDGE COULD NOT CONTINUE WITH THE CASE DUE TO HIS ARREST FOR BRIBERY.

ARGUMENT IV.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT FROM POLICE OFFICER WITNESSES THE FACT THAT SEVERAL MONTHS PRIOR TO THE MURDERS, DEFENDANT/APPELLANT HAD A VARIOUS ASSORTMENT OF WEAPONRY IN THE TRUNK OF HIS AUTOMOBILE, NONE OF WHICH WAS ILLEGAL TO POSSESS NOR RELEVANT TO THE CHARGED OFFENSES.

ARGUMENT V.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING DEFENDANT/APPELLANT TO DEATH WHEN, FROM THE STANDPOINT OF PROPORTIONALITY, THE UNINDICTED CO-CONSPIRATOR, NEVILLE BUTLER, TESTIFIED FOR THE STATE AND WAS NEVER CHARGED WITH THE CRIME.

ARGUMENT VI.

WHETHER THE STATE COMMITTED REVERSIBLE ERROR IN FAILING TO CONFINE ITS CROSS-EXAMINATION OF THE DEFENSE WITNESSES IN THE PENALTY PHASE TO MATTERS RELATING TO THE AGGRAVATING/MITIGATING CIRCUMSTANCES SURROUNDING THE OFFENSES.

ARGUMENT VII.

WHETHER THE STATE'S COMMENTS TO THE JURY REGARDING THE MERE "ADVISORY" ROLE OF THE JURY IN THE SENTENCING PHASE DENIGRATED THE JURY'S ROLE IN THESE PROCEEDINGS RESULTING IN REVERSIBLE ERROR.

ARGUMENT VIII.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MANNER.

ARGUMENT IX.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

ARGUMENT X.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

SUPPLEMENTAL ARGUMENT

WHETHER THE TRIAL JUDGE ERRED IN EXCLUDING EVIDENCE OF THE STATE'S WITNESS FAILING HIS POLYGRAPH EXAMINATION WHEN SUCH EVIDENCE DIRECTLY RELATED TO THE CREDIBILITY OF SAID WITNESS WHO TESTIFIED AT TRIAL THAT HIS REVISED TESTIMONY WAS MADE SOLELY FOR THE BENEFIT OF A "CLEAN CONSCIENCE".

On March 26, 1992, the Court affirmed Defendant's convictions and sentences. On May 28, 1992, rehearing was denied. *Maharaj v. State*, 597 So. 2d 786 (Fla. 1992). In affirming Defendant's convictions and sentences, the Court outlined the facts of the case as follows:

> These murders occurred as a result of an ongoing dispute between Derrick Moo Young and Krishna Maharaj. Maharaj was arrested after an accomplice of his, Neville Butler, was questioned by the police and inculpated Maharaj.
>
> During the trial, the primary witness for the State was Neville Butler. Butler testified that in June, 1986, he worked for *The Caribbean Echo*, a weekly newspaper directed to the West Indian community in South Florida. Prior to Butler's employment, the *Echo* had published an article, in May, 1986, accusing Derrick Moo Young of theft. When Butler joined the Echo, he assisted the publisher, Elsee Carberry, in writing an article in July, 1986, which charged Maharaj with illegally taking money out of Trinidad. Butler testified that on October 10, 1986, an article was published in the *Echo* accusing Maharaj of forging a $243,000 check. This article explained that the check was the basis for a lawsuit that Moo Young had filed against Maharaj.
>
> Butler testified that in September, 1986, he was unhappy working for the *Echo* and contacted Maharaj seeking employment with *The Caribbean Times*, Maharaj's newspaper. Butler testified that, at Maharaj's urging, he arranged for a meeting between Derrick Moo Young and Maharaj at the DuPont Plaza Hotel in Miami so that Maharaj could extract a confession from Moo Young regarding his extortion of $160,000 from Maharaj's relatives in Trinidad. Butler arranged this meeting for October 16, 1986, using the pretext of a business meeting with some Bahamian individuals named Dames and Ellis, who were interested in importing and exporting certain products. Butler arranged to use Dames' suite at the hotel. Butler stated that Maharaj made it clear that he should not tell Moo Young that he would be at the meeting.
>
> According to Butler, Maharaj wanted to (1) extract a confession of fraudulent activity from Derrick Moo Young, (2) require Moo Young to issue two checks to repay him for the fraud,

and (3) have Butler go to the bank with the checks to certify them, at which time Maharaj would allow Moo Young to leave upon hearing of the certification. Butler stated that Derrick Moo Young and, unexpectedly, Duane Moo Young, his son, appeared at the hotel room. Once inside, Maharaj appeared from behind a door with a gun and a small pillow. An argument broke out between Maharaj and Moo Young over the money owed. Maharaj shot Derrick Moo Young in the leg. At that time, Derrick Moo Young attempted to leave. Maharaj ordered Butler to tie up Duane Moo Young with immersion cords. Maharaj also ordered Butler to tie up Derrick Moo Young; however, before he could do so, Derrick Moo Young lunged at Maharaj. Maharaj fired three or four shots at Derrick Moo Young.

After shooting Derrick Moo Young, Maharaj questioned Duane Moo Young regarding the money. During this time, Derrick Moo Young crawled out the door and into the hallway. Maharaj shot him and pulled him back into the room. Shortly thereafter, Duane Moo Young broke loose and hurled himself at Maharaj, but Butler held him back. Then Maharaj took Duane Moo Young to the second floor of the suite where he questioned him again. Later, Butler heard one shot. Maharaj came downstairs and both he and Butler left the room. They both waited in the car in front of the hotel for Dames.

Sometime later, Butler met with Dames and Ellis, the two men he used to lure Moo Young to the hotel. They encouraged him to tell the police what he knew of the murders. Later that day, Maharaj called Butler asking that he meet him at Denny's by the airport so they could make sure and get their stories straight. Butler called Detective Burmeister [sic] and told him what had transpired earlier that day in suite 1215 of the DuPont Plaza Hotel. The detective, along with another officer, drove Butler to Denny's to meet Maharaj and, at a prearranged signal, the detectives arrested Maharaj.

The State also presented the testimony of Tino Geddes, a journalist and native of Jamaica. He testified that in December, 1985, he met and began working for Elsee Carberry, the publisher of the *Echo*. Geddes stated that, while working for Carberry, he met Maharaj, and that he and Carberry went to Maharaj's home to discuss an article which Maharaj wanted the *Echo* to publish concerning Derrick Moo Young. Geddes stated that Carberry

agreed to publish the article for $400. The article was published in the May 2, 1986, edition of the *Echo* and detailed the background of a civil suit filed against Derrick Moo Young by Maharaj's wife.

Geddes further testified that, because of the *Echo's* subsequent favorable coverage of Derrick Moo Young, Maharaj became hostile towards Carberry. Geddes stated that Maharaj purchased exotic weapons and camouflage uniforms and that, on several occasions, he and Maharaj had tried to harm Carberry. On one occasion, Maharaj had Geddes meet him at the bar of the DuPont Plaza Hotel; then he took him to a hotel room. Maharaj had a light-colored automatic pistol and a glove on one hand. Maharaj told Geddes to call and lure Carberry and Moo Young to the hotel room. Fortunately, Geddes was unable to get either Carberry or Moo Young to come to the hotel room.

The State also presented Elsee Carberry, the publisher of *The Caribbean Echo*. Carberry testified that he knew both Maharaj and Derrick Moo Young before his paper started publishing the articles. Carberry stated that he was approached by Maharaj's accountant, George Bell, who requested that he publish a front page article about Moo Young. Carberry refused this request until he met with Maharaj. A meeting was arranged and Carberry was provided documentation for the article. Carberry testified that Maharaj told him that Moo Young stole money from him and that he had documents to prove it. They agreed on a center spread and Maharaj paid $400 to have the article published.

Carberry testified that, after the first article, Maharaj wanted him to do a weekly article on Moo Young. Carberry refused and Maharaj attempted to buy *The Caribbean Echo*. When this failed, Carberry learned that Maharaj was starting his own newspaper. Shortly thereafter, Carberry was contacted by Derrick Moo Young, who wanted to present his side of the story. Carberry met with Moo Young, who provided documentation to refute Maharaj's allegations. Carberry then began his own investigation and began publishing articles unfavorable to Maharaj. These articles were printed June 20, June 27, July 18, July 25 and October 10, 1986.

On July 5 an article was published to inform the readership that the *Echo* could not be bribed. This statement was printed in response to Maharaj's attempt to bribe Carberry. The July 18 and 25 articles charged Maharaj with taking money illegally out of

Trinidad. The October 10 article accused Maharaj of forging a $243,000 check and explained that Moo Young was filing a lawsuit against Maharaj based on the forged check. During this period of time, Maharaj severed his relationship with Carberry.

The State presented other corroborating evidence concerning the events that took place at the DuPont Plaza Hotel. The maid assigned to this room testified that she cleaned the room in the early morning of October 16, 1986, and, upon entering it, found that it had not been used the previous evening. She also explained that, when she left the room, it was in perfect order, including the fact that the "Do Not Disturb" sign was on the inside of the door. At 12:15 p.m., she and her boss were asked to check the room. They attempted to enter the room but were unable to do so because it was locked from the inside and, consequently, the master key would not work. She explained that the room could not be locked from the inside unless someone was in the room. Ten minutes later, she returned with a security guard, and they noticed that the "Do Not Disturb" sign was hanging on the doorknob. This time when she tried the master key, it worked; she opened the door and, upon entering the room, noticed that the furniture had been moved and that there were two bodies.

A police fingerprint expert testified that he found Maharaj's prints on: (1) the "Do Not Disturb" sign attached to the exterior doorknob of suite 1215; (2) the exterior surface of the entrance door; (3) the outer surface of the downstairs bathroom; (4) the top surface of the desk; (5) an empty soda can; (6) the telephone receiver; (7) the top of the television set; (8) a glass table top; (9) a plastic cup; (10) the *Miami News* newspaper; (11) a *U.S.A. Today* newspaper; and (12) torn packages that held immersion heaters. Butler's prints were also found on a plastic glass, the telephone, the desk, the front door, and the television set.

The State presented a firearms expert, who examined the spent projectiles and casings. The expert testified that the eight bullets fired were from a pre-1976 Smith & Wesson model 39, a nine-millimeter semiautomatic pistol with a serial number under 270000. Evidence in the record established that Maharaj owned a Smith & Wesson nine-millimeter pistol, having a serial number of A235464.

The State also presented the testimony of the medical

examiner, who stated that Derrick Moo Young had six gunshot wounds, the most serious of which entered the right side of the chest and exited the lower back. There was only one gunshot wound in Duane Moo Young, and it entered the left side of the face and exited the right side of the neck, having been fired at close range within up to six inches between the wound and the barrel. The medical examiner found that this wound was consistent with Moo Young's kneeling or sitting with his head close to and facing the wall of the room.

During the course of the State's case, the chief judge of the criminal division announced that the judge who had been presiding over the trial would not be able to continue. Counsel for Maharaj stated that he would make no motion for mistrial. The newly assigned judge questioned Maharaj as to whether he desired a mistrial, to which Maharaj responded that he wished to proceed. The new trial judge certified that he had read the testimony of the previous witnesses and proceeded with the trial.

The defense did not present any witnesses in the guilt phase of the trial. After deliberations, the jury found Maharaj guilty as to each of the offenses charged except armed burglary and aggravated assault.

In the penalty phase, the State presented the testimony of the medical examiner, who described the nature of the wounds of each victim and explained the pain and effect of such wounds. Maharaj presented character witnesses including: (1) a congressman, who testified concerning Maharaj's character for truthfulness, honesty, and non-violence; (2) his civil lawyer, who testified that he was hired to litigate the claims against Derrick Moo Young and that these claims had a substantial chance of prevailing prior to the victims' deaths; (3) a retired judge from Trinidad, who testified that he had known Maharaj for forty years, that he was not a violent person, and that he was an individual who donated money to charitable causes; and (4) a doctor from Trinidad, who stated that he had known Maharaj for over forty years and knew that he was not prone to violence. Maharaj testified in his own behalf. He spoke about his background and explained how Moo Young's companies cheated him. Maharaj denied that he murdered either Derrick or Duane Moo Young and asked the jury to spare his life so that he could establish his innocence. He also prepared a letter to the jury outlining his numerous charitable gifts over the years.

> After argument by counsel, the jury returned an advisory sentence as to the murder of Derrick Moo Young of life imprisonment by a six-to-six vote, and, as to the murder of Duane Moo Young, the jury voted seven to five in favor of the death penalty.

*Maharaj*, at 787-90.

Thereafter, Defendant petitioned the United States Supreme Court for a writ of certiorari and raised the following issues, verbatim:

> I.
>
> WHETHER DUE PROCESS, FUNDAMENTAL FAIRNESS, AND THE INTEGRITY OF THE COURTS COMPEL THE GRANTING OF A MISTRIAL WHEN THE STATE ARRESTS AND CHARGES A SITTING JUDGE BEFORE WHOM THE STATE IS PROSECUTING A FIRST-DEGREE MURDER CAPITAL PROSECUTION.
>
> II.
>
> WHETHER, BASED ON THIS COURT'S RECENT DECISION IN *ESPINOSA V. FLORIDA*, AND THE TRIAL COURT'S UTTER FAILURE TO DEFINE "HEINOUS, ATROCIOUS AND CRUEL", DEFENDANT'S SENTENCE OF DEATH BASED ON FLORIDA'S UNCONSTITUTIONALLY VAGUE AND OVERBROAD "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR MUST BE VACATED.
>
> III.
>
> WHETHER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AND THE PROSECUTOR'S REPEATED COMMENTS MINIMIZING THE JURY'S ROLE AT DEFENDANT'S ADVISORY SENTENCING PROCEEDINGS DENIED THE PETITIONER DUE PROCESS OF LAW AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The petition for writ of certiorari was denied. *Maharaj v. Florida*, ___ U.S. ___, 113 S. Ct. 1029, 122 L. Ed. 2d 174 (1993).

On December 2, 1993, Defendant filed the Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend, which was the subject of the proceedings below, raising the following claims, verbatim:

CLAIM I

MR. MAHARAJ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. A FULL ADVERSARIAL TESTING DID NOT OCCUR. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT, MR MAHARAJ'S CONVICTION IS UNRELIABLE.

CLAIM II

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT DEFENDANT'S ALIBI DEFENSE WHICH ESTABLISHED THAT HE COULD NOT HAVE BEEN INVOLVED IN THE SHOOTINGS OF THE MOO YOUNGS ON OCTOBER 16, 1986, AS CHARGED.

CLAIM III

THE SYSTEMATIC WITHHOLDING FROM THE DEFENSE PRIOR TO TRIAL OF DISCOVERABLE AND/OR FAVORABLE EVIDENCE DENIED DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM IV

DEFENDANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL BY PERSISTENT PROSECUTORIAL AND POLICE MISCONDUCT IN VIOLATION OF HIS RIGHTS

UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM V

THE STATE KNOWINGLY USED FALSE AND/OR MISLEADING TESTIMONY AND/OR FAILED TO CORRECT FALSE TESTIMONY THEREBY DENYING MR. MAHARAJ DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM VI

MR. MAHARAJ'S WAIVER OF HIS RIGHT TO TESTIFY WAS NEITHER KNOWING, INTELLIGENT, NOR VOLUNTARY, RESULTING IN THE DEPRIVATION OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

CLAIM VII

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. MAHARAJ'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. MAHARAJ CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMENDMENT.

(R. 17-60). After response by the State, (R. 164-191), reply by Defendant, (R. 192-201), and hearing the argument of counsel, the court denied the motion without an evidentiary hearing. (R. 202-203). This appeal followed.

## POINTS INVOLVED ON APPEAL
## (RESTATED)

I.

THE TRIAL COURT PROPERLY DENIED RELIEF WITHOUT AN EVIDENTIARY HEARING WHERE DEFENDANT'S ALLEGATIONS WERE EITHER FACIALLY INSUFFICIENT OR PROCEDURALLY BARRED.

II.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S INEFFECTIVENESS OF COUNSEL CLAIMS.

III.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIMS THAT THE STATE ALLEGEDLY WITHHELD EVIDENCE.

IV.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIMS OF ALLEGED PROSECUTORIAL MISCONDUCT.

V.

THE TRIAL COURT PROPERLY WITHHELD, AFTER AN *IN CAMERA* INSPECTION, PORTIONS OF THE STATE ATTORNEY'S FILE WHICH DID NOT CONSTITUTE PUBLIC RECORDS.

VI.

DEFENDANT'S CLAIM REGARDING THE ALLEGED CONFLICT OF INTEREST OF THE POST-CONVICTION TRIAL JUDGE WAS NOT RAISED BELOW AND IS NOT SUPPORTED BY THE RECORD.

## SUMMARY OF THE ARGUMENT

1. The trial court properly denied Defendant's request for an evidentiary hearing where the claims presented in his post-conviction motion were either facially insufficient or refuted by the record. Furthermore, this court's relinquishment of jurisdiction during the pendency of Defendant's direct appeal for the purpose of filing a coram nobis petition was not dispositive of whether he was entitled to an evidentiary hearing in the post-conviction proceedings.

2. (a) As Defendant's claims of ineffectiveness of counsel wholly failed to set forth any factual basis for his claims of prejudice, the trial court properly rejected these claims. Further, as detailed below, the claims of deficiency were also either insufficient or refuted by the record. Furthermore, to the extent that his brief merely referred to the claims raised below, the claims are waived.

(b)(*i*) Where the record showed that trial counsel had conducted extensive pretrial investigation, and after a recess to discuss that matter at the close of the State's case, Defendant, on the record, waived his right to testify or present evidence, his claim that counsel should have presented an alibi defense was properly denied. Furthermore, the alleged alibi was refuted by State witnesses and extensive physical evidence tying Defendant to the murder scene at the time of the crimes.

(*ii*) Defendant's claim that counsel was ineffective in failing to have Defendant's statement to the police suppressed was wholly without merit where the statement was not

inculpatory.

(*iii*) Defendant's claim that counsel was ineffective for failing to investigate the victims was properly denied where the allegations were wholly conclusory, and where the record reflected that counsel did in fact conduct extensive investigation.

(*iv/v*) Defendant's claims that counsel was ineffective in failing to request a mistrial and to have the jury sequestered after the trial judge was arrested mid-trial was properly denied where the claim was raised on direct appeal and where Defendant was questioned at the time of trial and affirmatively stated on the record that he wished to go forward.

(*vi*) Defendant's claim that counsel was ineffective for failing to preserve numerous, but unspecified, errors for appeal fails to state a valid appellate argument. Further, to the extent such claims were raised in the motion below, they were so conclusory that they were properly denied on their face. Furthermore, these claims were either rejected on direct appeal, refuted by the record, or failed to state a claim of deficiency or prejudice.

(*vii*) As with sub-claim (*vi*), Defendant's contention that counsel failed to challenge the prosecution's case is not sufficiently pled in the brief, and the claims presented below were either facially insufficient, refuted by the record, or both.

(3) Defendant contended that the State withheld various items of *Brady* evidence.

However this claim was not sufficiently pled in the brief, and the claims presented below were either facially insufficient, refuted by the record, or both.

(4) Defendant contended that numerous instances of prosecutorial misconduct and the presentation of false testimony occurred at trial. However this claim was also not sufficiently pled in the brief, and the claims presented below were either facially insufficient, refuted by the record, or both.

(5) The State Attorney's Office allowed the defense full access to its files, with the exception of a small number of documents which it contended were not public records under the statute or this court's interpretation thereof. The withheld documents were presented to the trial court for *in camera* inspection by the trial court, which agreed with the State's conclusions regarding the documents in question. These proceedings were proper and do not present any basis for relief.

(6) Defendant's final claim is that the post-conviction judge should have recused himself due to a conflict of interest. This claim was not raised below, and is not factually supported by either the record or the document appended to Defendant's brief. As such this claim may not now be considered.

## ARGUMENT

### I.

### THE TRIAL COURT PROPERLY DENIED RELIEF WITHOUT AN EVIDENTIARY HEARING WHERE DEFENDANT'S ALLEGATIONS WERE EITHER FACIALLY INSUFFICIENT OR PROCEDURALLY BARRED.

Defendant's first claim on appeal is that the trial court erred in failing to grant an evidentiary hearing on the claims raised in his motion for post conviction relief. As was the bulk of his motion, this claim is presented in a generalized, conclusory fashion. The specific claims raised below were refuted by the record, facially insufficient, or procedurally barred, as the trial court properly found. *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989)(trial court not required to grant evidentiary hearing where motion is facially insufficient or refuted by the record); *Hill v. State*, 556 So. 2d 1385, 1389 (Fla. 1990)(same). The propriety of the denial of the claims will be shown in the portion of the argument, *infra*, addressing the specific claims. The State will address here, however, the suggestion regarding the allegedly conclusive effect of this court's relinquishment of jurisdiction during Defendant's direct appeal for the purpose of pursuing the coram nobis claim.

Defendant seems to suggest that this court's granting of relinquishment of jurisdiction for the purpose of pursuing his alleged *Brady* claims was dispositive of the whether his allegations

were sufficient to warrant an evidentiary hearing.[2] (B. 35). On the contrary, this court's relinquishment of jurisdiction does not pass on the sufficiency of the allegations or the merits of the contentions, but simply cedes jurisdiction to the tribunal with the proper jurisdiction to address the claims. That this court's relinquishment cannot be construed as a finding that the allegations required an evidentiary hearing is borne out by the fact that after Defendant failed to file the petition in a timely matter and jurisdiction was returned to this court, the Court denied Defendant's subsequent motion to again relinquish jurisdiction on the same grounds. In any event, Defendant was not precluded from raising the issue in his post-conviction motion.[3] As will be discussed *infra*, however, his allegations were insufficient to warrant either an evidentiary hearing or relief.

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[2] The State would also submit that his characterization of what occurred on relinquishment is inaccurate. He was given ample time in which to file his coram nobis petition, but failed to do so. He then, after the time for filing the petition had expired, moved to have counsel appointed, although he was already represented by private counsel for the purposes of his direct appeal. That motion was denied as untimely, and jurisdiction was returned to this court. *See* State's Objection to Renewed Motion to Relinquish Jurisdiction for Filing of Petition for Writ of Error Coram Nobis, filed in *Maharaj v. State*, Case No. 71,646, on July 13, 1990.

[3] To the extent Defendant may be faulting the trial court's conduct of the proceedings on relinquishment, such a claim is procedurally barred, as it could have been raised during the pendency of the direct appeal.

## II.

## THE TRIAL COURT PROPERLY DENIED DEFENDANT'S INEFFECTIVENESS OF COUNSEL CLAIMS.

Defendant's second claim is that the trial court erred in denying Defendant's claims of ineffective assistance of counsel. These issues were presented in Points I and II of the post-conviction motion. (R. 22-37). Point I set forth a conclusory laundry list of 45 alleged deficiencies. Point II was addressed to the alleged failure to present the alleged evidence of an alibi. The trial court, as will be shown, *infra*, properly denied these claims as facially insufficient or procedurally barred. On appeal, Defendant has regrouped these claims into seven categories. For the convenience of the Court, the State will follow this new format.[4] As will be seen, the trial court properly denied relief.

### A. Introduction

A claim of ineffective assistance of counsel must be reviewed under the United States Supreme Court's two-pronged test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 693 (1984), wherein it was stated:

> First, Defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the 'counsel' guaranteed Defendant by the Sixth Amendment. Second, Defendant must show that the deficient performance

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[4] The seven categories are grouped together as IIB1-7 in Defendant's brief. (B. 41-46). These claims correspond with the like-numbered parts of this brief. In part IIA of his brief, (B. 39-41), Defendant challenges the trial court's finding of a waiver as to the alibi claims. The State will address this issue along with the other alibi claims in part IIB1 herein.

> prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive Defendant of a fair trial, a trial whose result is reliable.

In explaining the appropriate test for proving prejudice, the Court held that "Defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. In reviewing counsel's performance, the Court must be highly deferential to counsel, and in assessing the performance "every effort must be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from counsel's perspective a the time." *Id.*

Rule 3.850, Fla. R. Crim. P., specifically requires that a motion for post-conviction relief shall include "a brief statement of the facts (and other conditions) relied on in support of the motion." A claim of ineffective assistance of counsel in a post-conviction motion must be adequately detailed, including a proffer of evidence upon which the claim of deficiency is based. In addition, the factual allegations must demonstrate prejudice. If the motion does not contain the proper allegations, further inquiry by the trial court is not required and the court may summarily deny the motion. *Kight v. Dugger*, 574 So. 2d 1066, 1073 (Fla. 1990)(ineffectiveness claim properly denied where motion failed to allege specific facts to demonstrate deficiency and prejudice); *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989)("a defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect an evidentiary hearing"); *Engle v. Dugger*, 576 So. 2d 696,

699-702 (Fla. 1991)(same); *Steinhorst v. State*, 498 So. 2d 414, 415 (Fla. 1986)(same). Even where there are sufficient facts alleged, the trial court may summarily deny the motion, where a review of the records and files of the case demonstrates that the claimed deficiencies were not so substantial as to probably have affected the outcome of the proceedings. R. 3.850(d), Fla. R. Crim. P. *See, e.g., Swafford v. Dugger*, 569 So. 2d 1264 (Fla. 1990); *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990); *Buenoano v. Dugger*, 559 So. 2d 1116 (Fla. 1990); *Hill v. Dugger*, 556 So. 2d 1385 (Fla. 1990); *Steinhorst*. Nor may the R. 3.850 motion be used as a second appeal for matters which should have been or which were raised on direct appeal. *Kight*, at 1073; *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1323, n. 2 (Fla. 1994). Finally, alleged instances of ineffectiveness which Defendant has attempted to raise by merely directing the court's attention to his motion for post-conviction relief are deemed by this court to be waived. *Kight*, at 1073; *Duest v. Dugger*, 555 So. 2d 846, 852 (Fla. 1990).

**B. Defendant's Claims**

*1. The Alleged Failure to Present Alibi Evidence*

The trial court found that Defendant had waived the presentation of alibi evidence at trial, and thus could not raise the issue as a question of ineffectiveness of counsel in post-conviction proceedings. (R. 202). Furthermore, as the court also found, Defendant failed to set forth any basis for relief, in light of the trial record.

Defendant alleged that trial counsel was ineffective for failing to present his alibi defense. However, the trial court conducted a colloquy with Defendant regarding his decision not to testify

or to present evidence. Defendant explicitly stated that he had discussed the matter with defense counsel and concurred with, as well as independently agreed, the strategic decision not to present evidence. (D. A. R. 3731-33) The record reflects that Defendant was a well-educated, experienced businessman. (D. A. R. 3435-36). It also reflects that counsel undertook substantial discovery and investigation in the development of an alibi defense, and went so far as to list numerous alibi witnesses.[5] Counsel and Defendant took a fifteen-minute break before announcing that the defense was resting without presenting evidence. (D. A. R. 3731). As such the trial court properly found that Defendant and counsel made an informed decision to waive the presentation of witnesses. *Card v. Dugger*, 497 So. 2d 1169, 1176 (Fla. 1986)(counsel not ineffective in failing to present witnesses where he took "and untold number of depositions prior to trial"); *Torres-Arboleda v. State*, 524 So. 2d 403, 411, n. 2 (Fla. 1988)(noting that is advisable to make a record inquiry as to whether the defendant wished to testify which would "avoid post-conviction claims of ineffective assistance of counsel"); *Henry v. State*, 613 So. 2d 429, 433 (Fla. 1992)(no error regarding failure to present defense case where Defendant waived right to testify and present evidence on the record); *cf.*, *Deaton v. Dugger*, 635 So. 2d 4, 8 (Fla. 1993)(denial of right to call witnesses and testify ineffectiveness of counsel *only where* counsel did not investigate beforehand).

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[5] Indeed, the numerous statements that Defendant presented in support of his alibi claims in the appendix to the post-conviction motion were taken by or on behalf of defense counsel, well before trial. (R. 61-163). The record also reflects that more than 40 pre-trial depositions were conducted, in which counsel aggressively pursued both the alibi defense and the related theory that someone other that Defendant had committed the murders. (Counsel's alleged failure to pursue the latter theory is discussed *infra*).

Furthermore, the actions of defense counsel cannot be characterized as unreasonable where both Tino Geddes and Clifton Sagree testified that Defendant's alleged alibi consisted of events that occurred on October 15, 1986 -- not the day of the murders, October 16, 1986. Additionally, Geddes testified that he was responsible for manipulating the testimony of the alleged alibi witnesses to the wrong date at the behest of Defendant. Finally, Sagree testified that he was with Geddes the entire day of October 16, 1986 and never saw Defendant until their arrival at Denny's in the evening, whereupon Defendant asked Sagree to lie for him and indicate that he (Sagree) was with Defendant during the time of the murders. Sagree testified that he refused to perjure himself. (D. A. R. 3601-21, 3676-98). Accordingly, the decision not to present false or perjured testimony was not outside the wide range of what reasonably effective counsel would have done. Moreover, there is no reasonable possibility that presentation of a fabricated alibi would have affected the outcome of the trial where overwhelming evidence of Defendant's guilt was presented. The State presented evidence of Defendant's motive to kill Derrick Moo Young, (D. A. R. 2347-80); prior attempts to kill Derrick Moo Young, (D. A. R. 2752-60); Defendant's ownership of a weapon consistent with the murder weapon, (D. A. R. 3264-69); identification by hotel employees of Defendant registering for the room in which the murders occurred, (D. A. R. 2711-20, 2633-36); and testimony to refute the alleged alibi. (D. A. R. 2187-2227, 3684-3720). In light of the overwhelming evidence of Defendant's guilt, he has failed to establish that he was prejudiced by the absence of the alleged alibi evidence. *See Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992)(no ineffectiveness where defense counsel investigated, but did not present, alibi witness); *Songer v. Wainwright*, 733 F.2d 788, 790 (11th Cir. 1984)(decision to rely on insufficiency of state's case rather than present affirmative defense is type of judgment call

that cannot form basis of ineffectiveness claim); *Jones v. State*, 528 So. 2d 1171, 1173 (Fla. 1988)(not calling unreliable witness not ineffective); *Downs v. State*, 453 So. 2d 1102, 1108-09 (Fla. 1984)(strategic decisions of counsel are virtually unassailable on collateral review). *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324 (Fla. 1994)(no prejudice where proposed defense witness's testimony would have been contradicted by other witnesses);

2. *The Alleged Failure to Seek Suppression of Defendant's Statement*

The second subclaim is that counsel was ineffective for failing to seek the suppression of Defendant's "confession." This claim is wholly refuted by the record. The simple fact is that Defendant never "confessed." On the contrary, as testified to by the detective who interrogated him, Defendant's entire statement consisted of an absolute denial of any participation in the murders or even of ever having been present at the scene. (D. A. R. 3450-65). The last the State heard, the Constitution only protects against compelled *self-incrimination*. Defendant has presented no authority to the contrary. As Defendant's statement was wholly exculpatory,[6] there was plainly no basis to suppress the statement. Counsel is not deficient in failing to pursue non-meritorious claims. *Sims v. State*, 602 So. 2d 1253 (Fla. 1992)(no ineffectiveness in failing to preserve non-meritorious issue); *Mitchell v. Dugger*, 595 So. 2d 942 (Fla. 1992)(same); *Parker*

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[6] Indeed, the statement was consistent with the alleged alibi defense which Defendant now also faults counsel for not pursuing. (Sub-point 1, *supra*). Apparently Defendant feels that counsel should have had his exculpatory statement suppressed, but presented other witnesses to have testified to the same effect. See Point IQQ of the post-conviction motion in which Defendant faulted counsel for failing to have Tino Geddes testify regarding an allegedly exculpatory statement made by Defendant. (R. 34). See also Point **VI** of the post-conviction motion in which Defendant claimed he was denied the right to testify in his own behalf. (R. 52-56).

*v. State*, 611 So. 2d 1224 (Fla. 1992)(same); Furthermore, Defendant has failed to allege how the outcome of the proceedings would have been different had counsel moved to suppress this exculpatory statement. As noted above, the State is unaware of any basis for suppressing a non-incriminating statement. Furthermore, the detective testified extensively regarding the voluntary nature of the statement, including the fact that Defendant was alert, not under the influence, a college graduate, and businessman, spoke only English, was offered food and drink, and executed a written *Miranda* waiver. (D. A. R. 3435-48). At the conclusion of this testimony, a sidebar was held and the trial court specifically found that the statement was made knowingly and voluntarily. (D. A. R. 3449). The court below properly rejected this claim.

3. *The Alleged Failure to Investigate the Victims*

The third sub-claim is that counsel was ineffective for failing to investigate the victims. This claim was both facially insufficient and refuted by the record and was therefore properly denied by the trial court. The entire allegations presented in the post-conviction motion regarding this contention read as follows:

> Y. Failed to investigate illegal conduct of the victims immediately prior to their deaths including money laundering, fraud, and narcotics trafficking.
>
> Z. Failed to show that Derrick Moo Young was in Panama September 26, 1986, either with Shaula Nagel or Duane Moo Young to conduct an illegal business deal with $100,000,000.00 fraudulent banker's letter of credit. [Appendix T][7]

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[7] Appendix T consists solely of several letters of credit; their is no facial indication that they are fraudulent. Nowhere did Defendant state the basis of his claim that they were.

* * *

> BB. Failed to request and obtain the Moo Young's passports to demonstrate their recent travel to Panama consistent with the defense claim of their contemporaneous involvement in fraudulent business deals involving huge amounts of money.

* * *

> NN. Failed to object to the granting of the State's motion in limine re: the "Scott Report" of the Moo Youngs' drug dealing and money laundering in Trindad and the West Indies. [R 1560-1561; Appendix O]

(R. 27, 33)(record and appendix cites in original). These allegations are wholly insufficient to show that counsel was deficient in that they do not indicate what witnesses, if any, could have testified regarding these matters, and do not indicate the source of this information, or whether it could reasonably been discovered by counsel. Additionally, the record reflects that counsel did, without success, pursue this line of defense in the pretrial investigation, and on cross-examination of the State's witnesses at trial. (*See e.g.*, R. 61-163; D. A. R. 233-34, 265, 378, 448, 483, 503, 507, 512, 545, 3495, 3507, 3509). As such these contentions were properly rejected.

Further, these allegations are so vague that it cannot even be determined from their face whether this alleged "evidence" would have been admissible at trial, or assuming that it had, whether there would have been any reasonable probablility that the outcome of the trial would have been different.[8] As noted, there was the eyewitness testimony of Neville Butler,[9] as well

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[8] For example, the only record indication as to the contents of the so-called Scott Report is found in the State's motion in limine. There, the allegation is that the report featured allegations of improper activities by *both* Defendant and Moo Young. It can only be concluded that this report would have further entwined Defendant and the victims in the eyes of the jurors,

as numerous fingerprints left by Defendant throughout the hotel suite, including prints left on objects which had not been in the room the day before the murder. These amorphous contentions of international drug conspiracies, particularly in the face of the evidence presented at trial were simply insufficient to allege a cognizable claim of prejudice, and the trial court properly denied this sub-claim. *Mitchell v. State*, 595 So. 2d 936, 941 (Fla. 1992)(no ineffectiveness where presentation of alleged alternate perpetrator would not have overcome other evidence of guilt); *Scott v. State*, 513 So. 2d 653, 655 (Fla. 1987)(no deficiency where physical evidence was inconsistent with proposed defense); *Combs v. State*, 525 So. 2d 853, 855 (Fla. 1988)(no deficiency where much of alleged evidence defendant claimed should have been introduced was inadmissible hearsay).

In his brief Defendant also makes the conclusory claim that if counsel had "conducted the minimally required investigation, the defense would have been in a position to prove a Colombian, Mr. Mejias, and Eddie Dames were involved in the murders, not Krishna Maharaj." (B. 44). This claim, which is also facially insufficient to state a claim of ineffective assistance of counsel, was not even raised with regard to the ineffectiveness claim in the post-conviction motion. *Preston v. State*, 528 So. 2d 896, 898 (Fla. 1988). As such it could not now be considered, even if it were adequately pled.

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rather than suggesting to them that others murdered the Moo Youngs. *James v. State*, 489 So. 2d 737, 739 (Fla. 1986)(no deficiency where proposed evidence would have opened door to negative information about the defendant).

[9] None of the allegation suggest that Butler was involved in this alleged murder theory.

*4. The Alleged Failure to Request a Mistrial*

Defendant's fourth sub-claim is that counsel was ineffective for failing to request a mistrial when the presiding judge was arrested and was unable to complete the trial. This claim is procedurally barred as it was raised, and rejected, by this court on direct appeal. *Maharaj*, at 790. Furthermore, Defendant cannot avoid the procedural bar by couching it in terms of ineffective assistance of counsel. *See Kight*; *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987).

Furthermore, assuming arguendo that this claim could be considered on its merits, it was conclusively refuted by the record where Defendant specifically waived the mistrial offered by the new judge. (D. A. R. 2853-58); *Maharaj*, at 790. Finally, Defendant failed to allege how this alleged deficiency affected the outcome of the proceedings.[10] As such he failed to adequately allege prejudice and the trial court properly rejected this claim.

*5. The Alleged Failure to Seek Jury Sequestration*

Defendant's fifth sub-claim is that counsel was ineffective for waiving sequestration following the substitution of the judge. This claim was likewise directly refuted by Defendant's

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[10] The entire allegation regarding this contention read as follows:

> C. Failed to request, and in fact waived his right to mistrial upon the arrest and removal of the trial judge. *United States v. Jaramillo*, 745 F.2d 1245 (9th Cir. 1984). [TR 2865]

(R. 24).

statements at trial that he agreed with defense counsel's decision to waive sequestration. (D. A. R. 2853-58). Finally, as with the previous sub-claim there was absolutely no allegation of prejudice.[11] As such the claim was properly denied. *Engle*, at 701.

*6. The Alleged Failure to Preserve Errors for Appeal*

Defendant's sixth sub-claim is that counsel failed to preserve various evidentiary issues for appellate review. On appeal, Defendant does not specify what these alleged claims are, but merely cites to a 12-page span of his post-conviction motion. (B. 46). The State would submit, as noted above, that such does not present valid appellate argument. *Kight*, at 1073; *Duest*, at 852.[12]

In any event, the claims below were properly denied. It must be emphasized that Defendant in no way explained his conclusory, one-sentence allegation of prejudice below. Furthermore, in light of the abundant properly admitted evidence of guilt, including Defendant's

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[11] The claim read, in its entirety:

> D. Waived sequestration of the jury after the arrest of the trial judge.

(R. 24).

[12] The State is at a serious disadvantage to respond to this sub-claim in that Defendant has not identified the post-conviction allegations to which he refers other than as "sixteen separate, factually supported instances ... (R 22-34)." Claim I of the post conviction motion includes within the cited pages sub-claims A. through SS, most of which clearly do not relate to the alleged failure of counsel to preserve issues for review. The State, after culling through record pages 22-34, acts under the assumption that Defendant is referring to the following sub-issues of Claim I of the post-conviction motion: G., H. (two issues), I.-S., X. & SS., and will respond accordingly.

fingerprints all over the murder scene and eyewitness testimony, no prejudice could be shown. *See White v. State*, 559 So. 2d 1097, 1100, (Fla. 1990), in which this court, after noting that some of the alleged error that was not preserved had been held, on direct appeal, to be harmless, rejected the remaining claims of ineffectiveness based upon a failure to preserve error for review:

> Although counsel failed to voice appropriate objections at several points in the proceeding, few trials proceed without such error and "[i]t is almost possible to imagine a more thorough job being done than was actually done." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla.), *cert. denied*, 479 U.S. 972, 107 S. Ct. 474, 93 L. Ed. 2d 418 (1986).

*Accord Provenzano v. Dugger*, 561 So. 2d 541, 545 (Fla. 1990). Likewise, Defendant's allegations fail to establish a cognizable claim of deficiency. In rejecting a comparable allegation of ineffective assistance of counsel, for failure to preserve potential error, the Third District has stated as follows:

> First, any different result would substantially undermine, if not utterly destroy, the preservation of error rule in Florida as applied to criminal cases. *Compare Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). If counsel should fail, as here, to preserve for appellate review an otherwise reversible error, it would be of little moment as the conviction would still be subject to being vacated based on an ineffective assistance of counsel claim. The preservation of error rule would have no real consequence as it would apply only when counsel failed to preserve points which would not have merited a reversal in any event. In effect, a "wild card" exception to the preservation of error rule would be created allowing appellate courts to pass on the merits of unpreserved, non-fundamental errors in criminal cases, and to upset criminal convictions based thereon. *See Cox v. State*, 407 So. 2d 633 (Fla. 3d DCA 1981). We cannot accept such a fatal undermining of our preservation of error rule.
>
> Second, we cannot agree that, ipso facto, a failure to preserve an otherwise reversible error for appeal establishes that counsel has made a professional mistake in judgement, much less

> committed the serious type of error which the *Knight-Strickland* standard contemplates.

*Anderson v. State*, 467 So. 2d 781, 787 (Fla. 3d DCA), *pet. for rev. dismissed*, 475 So. 2d 695 (Fla. 1985). As Defendant failed to adequately allege either deficiency *or* prejudice, the trial court properly deined these claims without an evidentiary hearing. *Kennedy*; *Hill*.

(a) *Sub-claim G.* (Failure to object to introduction of newspaper articles published in the Carribean *Echo*). (R. 24).

Defense counsel's failure to renew his pretrial objection was neither deficient nor prejudicial where the newspaper articles were properly admitted, as this court held on direct appeal:

> Even assuming a proper objection had been made, we find that the articles were relevant to show Maharaj's motivation in harming Derrick Moo Young. Section 90.404(2)(a), Fla. Stat. (1987); *Craig v. State*, 510 So. 2d 857 (Fla. 1987), *cert. denied*, 469 U.S. 920, 105 S. Ct. 303, 83 L. Ed. 2d 237 (1984); *Herzog v. State*, 439 So. 2d 1372 (Fla. 1983). Given the circumstances surrounding this cause, the articles were relevant to establish Maharaj's motivation and intent.

*Maharaj*, at 790. As such this claim was properly denied.

(b) *Sub-claim H.* (Failure to object to the testimony of Tino Geddes regarding allegedly unrelated bad acts, and the failure to object to the State's reference to collateral crimes and "other plots" during opening statement and closing argument).

Defendant claims that trial counsel was ineffective for failing to object to the testimony of Tino Geddes. Counsel was not deficient in failing to object to the the evidence because it was

relevant to establish the entire context out of which the criminal action occurred by establishing that the Defendant was consumed by the articles published in the *Echo* and that he was going to take care of the problem himself. This included the killing of not only Derrick Moo Young, but also Carberry since he was publishing the derogatory articles. *Jackson v. State*, 522 So. 2d 802 (Fla. 1988). Counsel was not deficient for failing to object to evidence which was properly admitted. Indeed, on direct appeal, in addition to finding a procedural bar, this court "disagreed" with Defendant's argument that Geddes's testimony was improperly admitted. *Maharaj*, at 790. Defendant likewise has failed to show prejudice. *Sims*.

Even if the testimony were improper collateral crimes evidence, Defendant still failed, as noted above, to allege prejudice *at all*. Furthermore, the evidence amply established the Defendant's guilt and discredited his alibi. There is no reasonable probablity that the suppression of this evidence would have affected the outcome of the trial. This claim was properly rejected by the trial court.

As to the claims regarding the prosecutor's statements, Defendant at no point identified that portions of the State's argument he averred were objectionable. (See R. 24). As such the claim was facially insufficient to present a basis for relief, and was properly denied by the trial court.

(c) *Sub-claim I.* (Failure to object to testimony of *Echo* publisher Elsee Carberry regarding a death threat by Defendant toward him). (R. 25).

As with the evidence discussed above, this testimony was relevant to show the extent to which Defendant was obsessed with the Moo Youngs and the articles in the *Echo* regarding the feud between them and Defendant. These facts were claerly relevant to the issues of Defendant's intent and premeditation. Furthermore, on cross-examination, counsel attempted to impeach this testimony with Carberry's deposition testimony, through which counsel argued that Defendant was merely saying that his new paper, the Carribean *Times* was going to "kill" the *Echo*. (D. A. R. 2389-92). As such, the allegations were insufficient on their face to entitle Defendant to relief. Furthermore, as noted above, although no prejudice was alleged, there is no reasonable probablity, in light of the testimony of Butler and the physical evidence in the room that the suppression of this brief testimony would have altered the outcome of the trial.

(d) *Sub-claim J.* (Failure to object to Carberry's testimony regarding Defendant's alleged forgery of a check). (R. 25).

Contrary to the allegations of the post-conviction motion, this brief testimony was not "unrelated" to the issues at trial. Rather, the check was the subject of a lawsuit filed by the victim Derrick Moo Young against Defendant. Carberry had published, based upon information furnished by Moo Young, an article in the *Echo* regarding the suit. (D. A. R. 2380). Plainly this information was relevant to show Defendant's motive for murdering the Moo Youngs. As this court specifically found on direct appeal, these newspaper articles were properly admitted for this purpose. *Maharaj*, at 790. As such counsel was not deficient in failing to object. Likewise, as the claim would have failed on appeal, Defendant has not shown prejudice.

(e) *Sub-claim K.* (Failure to object to the alleged vouching for Geddes's credibility by Carberry). (R. 25).

The trial court properly rejected this claim. Defendant claimed that counsel was ineffective for failing to object to Carberry's brief testimony, in which he stated that he had warned Geddes not to perjure himself, and that Geddes had said he would not. However, in his cross-examination of Geddes, defense counsel thoroughly explored the fact that that Geddes had given a statement under oath to a defense investigator which was inconsistent with his trial testimony. (D. A. T. 2258-60). Further, nothing surrounding this brief comment affected the substantial physical evidence of guilt or the incriminating testimony of Neville Butler adduced by the State at trial. As such although Defendant wholly failed to allege prejudice, the record refutes any claim he might have made in that regard.

(f) *Sub-claim L.* (Failure to object to the testimony of the truck rental records custodian). (R. 25).

Again the evidence of the truck rental agreement was part of the entire course of conduct that culminated in the killing of the Moo Youngs. The truck was rented, in a prior, unsuccessful, attempt to harm Derrick Moo Young. This evidence was plainly admissible pursuant to § 90.404. Fla. Stat. (1987), to establish motive, premeditation, and heightened planning, which were all relevant issues at trial. Accordingly, counsel cannot be labelled ineffective for failing to raise issues which had no merit.

(g) *Sub-claim M.* (Failure to object to introduction of collateral evidence of unrelated weapons purchased by Defendant three months prior to the murders). (R. 25).

Thie issue of the weapons was raised on direct appeal, (Brief of Appellant at 59-62), and was rejected by this court.[13] Counsel was thus not deficient in failing to raise a non-meritorious issue. Further, this evidence was admissible to show the fact that Defendant had owned a gun of the type that was used to kill the Moo Youngs, which Defendant was unable to produce or account for the whereabouts of after the murders. The evidence as to the other weapons was relevant to establish that the Defendant had the ability to carry out his threat to settle the matters his own way and that he had attempted to use some of these weapons in his first attempt against Derrick Moo Young and against Carberry. *Irizarry v. State*, 496 So. 2d 822 (Fla. 1986)(two machetes, which were connected to the defendant but neither of which was murder weapon, were admissible in the defendant's prosecution for first degree murder where testimony established that the defendant used machetes for tools and weapons).

Even if the evidence had been objected to and was not relevant, Defendant failed to allege or show prejudice, as any purported such error would have been harmless beyond a reasonable doubt. *Jackson v. State*, at 806 (Improper admission into evidence of references to murder defendant's possession of weapons and bulletproof vests was harmless error in light of ample evidence establishing guilt and discrediting his alibi defense). Here the evidence of guilt was more than ample considering the testimony of Geddes, Butler and all of the physical evidence,

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[13] *Maharaj*, at 790 ("We find that the remaining claims are without merit and need no further discussion.").

particularly the Defendant's fingerprints and ballistic evidence, found in room 1215. Additionally, Defendant's alibi was totally discredited by those people he enlisted to provide him with one. Clearly then the error, if any, would have been harmless. Thus even if counsel had objected to the testimony, there is no reasonable probability that the outcome would have been different, and the trial court properly denied this sub-claim.

(h) *Sub-claim N.* (Failure to object to phone records allegedly never linked to Defendant). (R. 25).

The records showed that numerous phone calls were made between Defendant's residence, his business, Neville Butler's residence, the DuPont Plaza Hotel, the Moo Young residence, the Bahamas, and Miami International Airport before and the day of the murders. Although this information did not prove, as defense counsel pointed out on the cross-examination of the records custodian, that Defendant made these calls, they corroborated the testimony of various witnesses who testified to the numerous calls made in the planning of the murders and during the aftermath. As such the records were properly admitted, and counsel was not deficient in failing to object. Furthermore, if the records were in fact, as alleged, irrelevant and not linked to Defendant, there admission could not reasonably affected the outcome of the trial, and Defendant failed to adequately allege prejudice. The trial court properly denied this sub-claim.

(i) *Sub-claim O.* (Failure to "timely" object to the "repetitious and inadmissible testimony" of Neville Butler). (R. 25).

This claim does not indicate what testimony was "inadmissible," and the sole record cite to D. A. R. 3022, (R. 25), does not reveal any "inadmissible" testimony by Butler. As to the

objection to the repetitious nature of the testimony, the court itself noted that it was repetitious, at which point defense counsel concurred, and noted that he had been about to object when the court interrupted the testimony. (D. A. R. 3024). As such, even assuming that the testimony was in fact objectionable, counsel was clearly not deficient under the circumstances. In any event, after the objection was raised, the court accepted the reasons given by the State for the testimony and allowed it over objection. As the trial court ruled the evidence admissible, any "timelier" objection would plainly not have affected the outcome of the proceedings,[14] and as such the no prejudice was shown. This sub-claim was properly denied.

(j) *Sub-claim P.* (Failure to object to the testimony of Detective Rhodes regarding blood evidence). (R. 25).

This claim read, in its entirety:

> Failed to object to testimony of Detective David Rhodes relative to blood evidence.

(R. 25). The claim failed to even provide a record cite.[15] As such this claim, which fails to identify what testimony should have been objected to, the basis for the objection or what effect an objection would have had upon the proceedings was wholly insufficient on its face to state a basis for relief and was properly denied.

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[14] The issue was not pursued on direct appeal. As such the claim is procedurally barred.

[15] Rhodes was a serologist; all his testimony was relative to blood evidence, and consumed 15 pages of transcript. (D. A. R. 3278-92).

(k) *Sub-claims Q., R. & S.* (Failure to object to alleged hearsay testimony). (R. 25-26)

These three sub-claims all complained that counsel failed to object to hearsay but fail to identify the statements that Defendant felt were objectionable. "Q" referred to "copious amounts of prejudicial hearsay" and referred to D. A. R. 2308-10, 2376-77, 2385, 2387, 3413, 3423, 3433, 3477 & 3565. "R" referred to "hearsay linking the alleged murder weapon to Mr. Maharaj's possession," and cited to D. A. R. 3271. "S" referred to "hearsay of a hotel employee purportedly placing Mr. Maharaj at the hotel at the time of the murders," and cited to D. A. R. 3477-91. These references are extremely vague and plainly are insufficient to allege either deficiency or prejudice. As such these sub-claims were properly denied. The State will nevertheless also attempt to address the merits purportedly raised, and will show that they also fail to allege a basis for relief.

D. A. R. 2308-10:

Any hearsay statements on these pages (during the cross-examination of State witness Sueiras) clearly could not have been objected to in that they were elicited by, and responsive to, defense counsel's questions. *Engle*, at 700.

D. A. R. 2376-77:

The only statement elicited on these pages was one made by Defendant to the witness, Carberry. Plainly the Defendant's statements are admissible.

D. A. R. 2385:

On this page Carberry testified, in the course of relating how he heard about the murders, that Butler called him the next day and told him that the Moo Youngs had been shot, and that he knew because he was there when Defendant shot them. The State would submit that this testimony was not hearsay because it was not offered to prove that Defendant shot the Moo Youngs, but rather to verify Butler's testimony as to his actions after the murder. Carberry then reluctantly testified as to his phone number, which was one of those presented by the phone records custodian.

Even if this statement were improper hearsay, counsel's objecting to it would not have affected the outcome of the proceedings in that the statement was harmless beyond a reasonable doubt where Butler (the declarant) himself testified entirely consistent with Carberry's brief statement, and in view of the other overwhelming evidence of guilt as alluded to above.

D. A. R. 2387:

The statement on this page is the same one addressed, *supra*, at (e)/post conviction sub-claim K. The contention is invalid for the same reasons as stated above.

D. A. R. 3413:

On this page, Detective Buhrmaster recounted that Butler had told him that he had arranged to meet with Defendant at the Denny's near the airport. This statement was not hearsay because it was not offered to prove that Butler had arranged to meet Defendant at the restaurant,

but rather was merely offered to explain why Buhrmaster went to the restaurant, where he arrested Defendant.

Even if this statement were improper hearsay, counsel's objecting to it would not have affected the outcome of the proceedings in that the statement was harmless beyond a reasonable doubt where Butler (the declarant) himself testified entirely consistent with Buhrmaster's brief statement, and in view of the other overwhelming evidence of guilt as alluded to above.

D. A. R. 3423:

On this page the sole out-of-court statement was that Defendant's wife had told Buhrmaster that a certain car in the Denny's parking lot, which was searched but revealed nothing, was hers. Assuming, arguendo, that this insignificant statement were hearsay, it is impossible to conceive how the outcome of the proceedings would have differed had counsel objected.

D. A. R. 3433:

When asked regarding Butler's demeanor at the time he gave his statement after the murders, the detective testified that Butler was rather shaken and "indicated that he was very afraid of this individual." This statement was not hearsay, but rather a description of how Butler appeared shortly after the crime. Even assuming that it were hearsay, it was consistent with Butler's testimony, and as such any objection could not have altered the outcome.

D. A. R. 3477:

The statement on this page was not hearsay but a description of a photographic lineup conducted by the witness. In any event, the two persons involved, Vargas and Rivero, testified consistently with the detective. As such any objection could not reasonably have affected the outcome of the proceedings.

D. A. R. 3565:

The only out-of-court statement referred to on this page was Defendant's.

D. A. R. 3271:

The only out-of-court statement referred to on this page was Defendant's.

D. A. R. 3477-91:

The only statements which resemble hearsay on pages 3477-87 are in conjunction with photographic line-up discussed above. This claim was properly denied for the reasons set forth above. There are no statements even remotely resembling hearsay on pages 3488-90. One statement is found on page 3491, but it is in a question posed by defense counsel, and as such could hardly have been objected to by him.

In view of the foregoing, the trial court properly rejected these claims.

(l) *Sub-claim X.* (Failure to object to the HAC jury instruction). (R. 27).

Defendant contended that counsel was ineffective for failing to object to the heinous, atrocious, or cruel jury instruction at the penalty phase of trial, which he alleged violated the dictates of *Espinosa v. Florida*, ___ U.S.___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). However, the instruction given was the standard instruction at the time of the 1987 trial,[16] and at that time, this court had previously rejected this claim on numerous occasions. As such counsel was not deficient for failing to object. *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995)(counsel not ineffective for failing to raise HAC instructional issue where this court had previously upheld the validity of the instructions); Finally, this court struck the use of this aggravating factor on direct appeal and further held that its consideration at trial was harmless beyond a reasonable doubt and "would not make any difference in the sentence imposed, given the other aggravating and mitigating circumstances in the record in this case." *Maharaj*, at 792. *Jackson v. Dugger* 633 So. 2d 1051, 1055 (Fla. 1993) As such Defendant could not have shown prejudice, and the trial court properly rejected this claim.

(m) *Sub-claim SS.* (Failure to object to the alleged vouching for the credibility of Neville Butler by the prosecutor). (R. 34).

The comment of the prosecutor was a proper comment on the evidence where Butler acknowledged that he had lied initially to the police regarding his involvement in the murders, and explained why he ultimately told the truth. Accordingly, defense counsel cannot be labelled

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[16] *See* Fla. Std. Jury Instr. (Crim.)(1988). The 1988 instructions reflect amendments effective as of June 1987; trial took place in October 1987.

ineffective for not objecting to a proper comment. *Mills v. State*, 507 So. 2d 602, 604-05 (Fla. 1987)(counsel not ineffective for failing to object where prosecutor did not vouch for witness, but presented "forceful" argument based upon testimony of witness).

*7. The Alleged Failure to Challenge Prosecution Evidence*

As with the previous claims, Defendant's brief fails to state with any specificity what defense counsel actually failed to do. Defendant claims simply that:

> Counsel was not familiar with the evidence, did not investigate the facts, and could not adequately examine prosecution witnesses. Repeatedly, counsel did not examine witnesses on critical points which would have established favorable evidence.

(B. 46). What facts? Which witnesses? What favorable evidence? This conclusory argument grossly fails to present any basis for the granting of relief. The sole reference in the brief to the allegations of the post-conviction motion was that it "raised a litany of defense counsel's deficiencies." Such is insufficient to raise any issue on appeal.[17] *Kight; Duest*. As with the previous sub-issue, however, the State will attempt to identify, and will refute, the "litany" to which Defendant now refers. As with the previous claims, Defendant also wholly failed to allege prejudice, and the trial court properly rejected these claims on that ground alone. Further, as discussed above, although counsel thoroughly investigated the case pre-trial, Defendant

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[17] The only remotely specific statement in Defendant's brief is that counsel failed to seek the admission of polygraph evidence. Even this statement fails to state which polygraph evidence (Defendant and Butler both took polygraphs), the purpose for which it should have been admitted, the *Florida* authority under which it should have been admitted, or how the admission of such evidence could have influenced the outcome of the proceedings. Such a claim is facially insufficient to entitle Defendant to relief.

affirmatively waived the presentation of evidence, after a recess for the purpose of discussing the issue with cpounsel, and as such may not now raise counsel's failure to present evidence in the guise of an ineffectiveness claim.

(a) *Sub-claim T.* (Failure to refute claim that gunpowder residue disappears).

Defendant alleged that trial counsel was ineffective for failing to refute Buhrmaster's testimony[18] that gunpowder residue disappears within four (4) hours. However, Defendant did not state a legally sufficient basis for relief because he neither stated what evidence should have been presented nor how it would have changed the outcome of the trial.

(b) *Sub-claim U.* (Failure to explain presence of defendant's fingerprints in hotel room).

Defendant contended that trial counsel should have presented evidence that Defendant had previously stayed at the Dupont Plaza Hotel, thus accounting for the presence of his fingerprints at the hotel. However, Defendant did not allege what evidence could have been presented to account for the presence of his fingerprints on the soda can, the immersion heater, the immersion heater wrapper, the plastic cup or the newspapers placed in the room after the morning cleaning on October 16, 1986. (D. A. R. 2411-28, 3175).

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[18] In fact, this testimony was presented by Thomas Quirk, (D. A. R. 3356), who was the State's firearms expert. His qualifications were amply set forth in the record, and he was accepted as an expert. (D. A. R. 3303-11).

(c) *Sub-claim* W. (Failed to bring essential material to court).

Defendant claimed that trial counsel was ineffective for not bringing notes for cross-examination of Butler to court. Yet, Defendant neglected to mention that this claim had no merit and he was not prejudiced because defense counsel requested, and was granted, time during the lunch break to retrieve the notes. (D. A. R. 3106-3111).

(d) *Sub-claims CC. & DD.* (Failure to introduce ballistics evidence regarding two weapons).

Defendant contended that defense counsel was deficient for not introducing evidence that the two victims were killed with two different types of bullets. However, Defendant did not proffer any evidence to refute the State's theory of the case that, although two different types of bullets were used to kill the victims, all bullets were fired from the same Smith and Wesson weapon. (D. A. R. 3330). Accordingly, Defendant's claim did not entitle him to relief.

(e). *Sub-claim FF.* (Failure to introduce Defendant's polygraph).

Defendant alleged that trial counsel was ineffective for failing to admit the result of Defendant's polygraph into evidence. It is well settled that, absent a stipulation by the parties, a polygraph is not admissible at trial. *See Sullivan v. State*, 303 So. 2d 632 (Fla. 1974).

(f) *Sub-claim GG.* (Failure to rebut the testimony of Geddes regarding the rental truck incident).

Defendant claimed that counsel was deficient for failing to explain to the jury that he could not possibly have been involved in the plot to run down Moo Young with the Ryder rental truck, because he was at that time being pulled over on the turnpike by a trooper while driving a car. Defendant provides no basis for counsel to have made this argument. The rental agreement reflects that the truck was rented some time in the afternoon of July 25, 1986, in Hallandale, Broward County, Florida, and that it was returned the same date. (R. 130). Defendant was not pulled over until around 2:30 a.m. on July 26, 1986, in Pompano Beach, also in Broward County. As this alleged discrepency plainly did not exist, counsel was clearly not deficient for failing to point it out. Furthermore, Defendant failed to explain how this minor point would have overcome the abundance of incriminating evidence admitted against him, as discussed above.

(g) *Sub-claim HH.* (Failure to rebut the testimony of Geddes regarding a Roopnarine Singh).

Defendant claimed that counsel was deficient for failing to refute testimony by Geddes that Defendant had met with a Roopnarine Singh at the DuPont three weeks before the murder, when Singh allegedly had not seen Defendant since 1960. Defendant provided no record cite, and the State has been unable to locate any reference to any Mr. Singh in Geddes's testimony. There was only one reference by Geddes to the hotel and Defendant within that time period. Geddes *did not* state that Defendant *had* met with anyone at that time. On the contrary, Geddes testified that Defendant had him call Carberry and Derrick Moo Young and *tell them, untruthfully*, that a "Mr.

So-and So" was there, in an effort to lure them to the hotel for Defendant's nefarious purposes. (D. A. R. 2227-35). Thus, assuming arguendo that "Mr. So-and So" were Mr. Singh, the fact that Singh had not seen Defendant in 25 years would not have refuted anything, as Geddes never testified otherwise. Furthermore, Defendant agreed with the defense strategy not to present any evidence and cannot now second-guess the strategy merely because it was unsuccessful. (D. A. R. 3731-32).

(h) *Sub-claim II.* (Failure to rebut evidence that Defendant's gun was the murder weapon).

Defendant alleged that the alleged discrepancy between the gun being "white" versus "shiny" was unreasonably overlooked by defense counsel. However, Butler did not testify inconsistently at trial and, in fact, testified that the gun was "shiny." (D. A. R. 2809). Further, in view of the overwhelming evidence against him, Defendant has failed to explain how this minor discrepency would have affected the outcome of the proceedings.

(i) *Sub-claim KK.* (Failure to argue that Defendant would have also killed Butler if he had killed Duane Moo Young to avoid arrest).

Defendant alleged that trial counsel was ineffective for failing to point out that Defendant did not kill Butler, who also witnessed the murders. However, Butler testified that he was involved in the events that led to the murders and, in fact, arranged the fatal meeting with the Moo Youngs. (D. A. R. 3052-58). Moreover, such an argument would have opened the door for the State to present testimony of Tino Geddes that Defendant had also planned to kill Butler after the Moo Young murders were complete. *Routly v. State*, 590 So. 2d 397, 402 (Fla. 1991).

Defendant failed to demonstrate that the argument regarding "avoid arrest" would have altered the outcome.

(j) *Sub-claim LL.* (Failure to move to suppress photographic lineup).

Defendant alleged that trial counsel acted unreasonably in failing to move to suppress the photographic lineup. However, Defendant failed to demonstrate that the lineup was unnecessarily suggestive and was likely to cause a misidentification and, thereby, subject to suppression. *See Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Accordingly, the decision to move for suppression of the photographic lineup was not unreasonable and did not prejudice Defendant.

(k) *Sub-claim MM.* (Failure to call Detective Rivero).

Defendant alleged that Detective Rivero should have been called by defense counsel to impeach Detective Buhrmaster. However, Defendant waived his right to present any witnesses or evidence and cannot now allege ineffective assistance of counsel where he concurred in the choice of defense strategy.

Furthermore, Detective Rivero would have testified that Detective Buhrmaster told him that Defendant indicated he was at the hotel (but not the room where the murders occurred) the morning of October 16, 1986; this fact was testified to by Detective Buhrmaster at trial. (See R. 129; D. A. R. 3452-53).

(*l*) *Sub-claim OO.* (Failure to rebut Butler's testimony).

Defendant argued that trial counsel was deficient for not showing the jury that Butler's testimony regarding Derrick Moo Young being dragged into the hotel room by his legs, was inconsistent with the photographs, in that they showed his feet facing the door. Defendant does not state sufficient facts to establish that trial counsel was unreasonable in not making this argument. Furthermore, it should be noted that the testimony was not inconsistent with the photos; Butler testified that after shooting Derrick and dragging him back into the room, Defendant "propped him right next to the closet." (D. A. R. 2816). Further, Defendant has not established that he was prejudiced, where Butler's testimony was corroborated by the Medical Examiner, and where this minor alleged inconsistency would not in any way have viriated the extensive physical evidence of Defendant's guilt as previously discussed.

(m) *Sub-claim PP.* (Failed to refute claim that defendant had no blood on his clothes).

Defendant alleged that trial counsel was ineffective for failing to refute Detective Buhrmaster's testimony that he had no blood on his clothes at the time of arrest, and might have changed his clothes. However, Defendant has failed to allege what evidence could have or should have been presented, which would have affected the outcome, where it was uncontested that Defendant's clothes were not bloody.

(n) *Sub-claim QQ*. (Failed to elicit prior inconsistent exculpatory statement of Geddes).

Defendant contended that trial counsel was ineffective for failing to elicit from Tino Geddes, on cross-examination, the original exculpatory statement purportedly establishing an alibi for Defendant on October 16, 1986. The actions of trial counsel were not unreasonable where this statement was elicited by the prosecution on direct examination and was, therefore, placed before the jury. Additionally, Defendant elected not to testify, thus, the decision not to present his corroborating exculpatory alibi testimony was a strategic decision that cannot be second-guessed via a post-conviction motion. Furthermore, Defendant could not establish prejudice where the alibi "evidence" was placed before the jury by the State.

(o) *Sub-claim RR*. (Failure to introduce resignation letter of Tino Geddes).

As previously noted, Defendant expressly agreed with the decision not to introduce any witnesses or evidence and cannot circumvent that decision by couching his claims in terms of ineffective assistance of counsel. Moreover, even if the alleged letter had been introduced, it would not have impeached Geddes on any material issue in dispute at trial, and would not have been reasonably likely to alter the outcome of the proceedings.

In view of the foregoing, the trial court properly denied Defendant's claims of ineffective assistance of counsel without an evidentiary hearing.

## III.

## THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIMS THAT THE STATE ALLEGEDLY WITHHELD EVIDENCE.

Defendant's third claim[19] is that the State withheld or suppressed various items of alleged *Brady* evidence. The trial court properly held that the claims presented in the post-conviction motion were either facially insufficient, procedurally barred, or both.

### A. Introduction

As with the ineffectiveness contentions, Defendant has chosen to address the claims of alleged withholding of evidence by the State in a cursory and conclusory manner, and to refer vaguely to the allegations contained in the motion below. As such the claims must be deemed waived. *Kight v. Dugger*, 574 So. 2d 1066, 1073 (Fla. 1990); *Duest v. Dugger*, 555 So. 2d 846, 852 (Fla. 1990) In any event, as will be shown, Defendant's claims below were insufficient to state a basis for relief or were refuted by the record, and as such were properly denied by the trial court without an evidentiary hearing.

In his brief, Defendant sets forth the test for determining a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), enunciated in *Hedgwood v. State*, 575 So. 2d 170, 171 (Fla. 1991). (B. 48). He then proceeds to focus on the fourth prong of the test

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[19] This was Claim III of the post conviction motion. (R. 38-42).

alone, "materiality," *i.e.*, that had the evidence been disclosed, the outcome of the proceedings would probably have been different. This was, however, the very prong to which Defendant gave the least attention in his post-conviction motion. Indeed, there was no explanation of how the allegedly suppressed evidence would have affected the outcome of the proceedings *at all*, merely the conclusory assertion that Defendant was entitled to a new trial. Because Defendant did not adequately allege this fundamental aspect of any *Brady* claim below, the trial court properly denied this claim without an evidentiary hearing.

Furthermore, in his brief, Defendant failed to address, other than to conclusorily presume the existence of the other three elements of the claim: (1) that the prosecution possessed favorable evidence; (2) that Defendant neither knew or reasonably could have known of the evidence; and (3) that the prosecution suppressed the evidence. *Hedgwood*, at 171. As such, he has failed to present any basis for reversal.

In his brief Defendant appears to present *Brady* claims which fall into the four categories addressed below as sub-points B-E. The thrust of the claims was that information about the Moo Young's life insurance policies and business dealings, about Neville Butler's polygraph examination, about Derrick Moo Young's daughter, Shaula Nagel, was known to the State, but not disclosed. Defendant failed to allege any basis for his contention that the State was privy to this private information about the victims. The State denied any knowledge. Defendant was given full access to the State's file and failed thereafter to present any supplement to his conclusory claims. Finally, he failed to explain how any of the allegedly withheld information in any way

could have affected the outcome of the trial. As such the trial court properly rejected Defendant's *Brady* claims. The State has given its best estimation of which of the 18 sub-claims presented below correspond to these four appellate claims, and will respond accordingly.

### B. Alleged Evidence of the Victims' Criminal Activity and Use of Aliases

This claim presumably corresponds to sub-claims **III** B-C, I-K, M & R of the postconviction motion. None of these claims regarding the victims' allegedly illegal business dealings set forth how the State purportedly knew of the information, whether Defendant could have discovered the evidence on his own through the use of due diligence,[20] in any way countered the State's denial that it possessed the information at the time of trial, or explained how the information would in anyway have changed the outcome of the proceedings. *Hegwood*. As such the claims were properly denied without an evidentiary hearing. *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993).

*Sub-claim B* (R. 39).

Defendant alleged that the Moo Youngs had taken out million-dollar life insurance policies six weeks before they were murdered, which allegedly revealed the victims' "extraordinary wealth," despite Defendant's allegation that Derrick and his wife had never filed tax returns

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[20] Tellingly, none of the allegations below appear to have been based upon information culled from the State's files. On the contrary, Defendant asserted that the information was obtained from private lawyers who represented the life insurance company in a civil lawsuit over the victims' life insurance proceeds. (R. 21). He offered no explanation as to why this alleged information could not have been available to Defendant at the time of his trial.

showing income in excess of $26,000. Defendant alleged that this information was "contrary to the testimony of prosecution witnesses." (R. 39). Defendant failed to identify these witnesses. Further, he failed to allege that the prosecution knew of this information at the time of trial, that there was any impediment to Defendant's discovery of this private-actor information on his own,[21] or that the State suppressed the information. Finally, assuming, arguendo, that the first three prongs of the *Hegwood* test were met, Defendant wholly failed to explain how the outcome of the proceedings would have been affected by this information. Particularly given the substantial evidence of guilt, as detailed previously, including numerous fingerprints at the murder scene and the eyewitness testimony of Butler, Defendant clearly did not present any allegations which would support a finding of materiality. As such the trial court properly rejected this sub-claim without evidentiary hearing.

*Sub-claim C* (R. 39)

This entire claim read: "Derek Moo Young had and used aliases -- Frank Williamson and Shermette Scott, to perpetuate his various nefarious business dealing." (R. 39). The reader of this claim is compelled to respond, "So what?" Plainly this conclusory contention was wholly insufficent to warrant any evidentiary hearing.

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[21] It must be recalled that Defendant, by his own testimony at the penalty phase of trial established that Defendant and the Moo Youngs were long-time business associates and were next-door neighbors. As such he undoubtedly knew as much or more than the State regarding the Moo Young's personal affairs.

*Sub-claim I* (R. 41).

This contention alleged that either Derrick and his son or Derrick and his daughter were in Panama with a fraudulent letter of credit trying to do a drug deal. Again, Defendant wholly failed to allege that the State knew this information, that the defense could not have discovered it by itself, that the State suppressed the information, or how the information was in any way material. Defendant further failed to state the basis for the claim, or the witnesses that would support the claim. The trial court properly rejected this claim.

*Sub-claim J* (R. 41).

This claim was essentially a repeat of sub-claim I, and merits the same response.

*Sub-claim K* (R. 41).

This claim contended that Detective Buhrmaster lied to the defense investigator regarding his possession of the victims' passports, and then introduced them at trial. This claim obviously should have been raised on direct appeal, and therefore is procedurally barred. Further, Defendant failed to explain how this alleged withholding of evidence was in any way material. As such this contention was properly rejected by the trial court.

*Sub-claim M* (R. 42).

In this sub-claim, Defendant alleged that the Moo Youngs were involved in money laundering with the government of Barbados. As with the previous four claims, Defendant failed to adequately allege any of the four elements of a *Brady* claim under *Hegwood*, and as such the

trial court properly rejected this claim.

*Sub-claim R* (R. 42).

This entire sub claim read, "Bank account records." (R. 42). As such the trial court was obviously correct in rejecting it.

### C. Neville Butler's Failure to Pass a Polygraph

This claim corresponds to sub-claim IIIA of the post-conviction motion. (R. 39) Defendant's claim regarding Butler's failure of a polygraph examination is procedurally barred. This issue was litigated prior to trial via the State's Motion in Limine, litigated on direct appeal, and decided adversely to Defendant. Furthermore, this information was was specifically disclosed in the letter of March 20, 1987. (See R. 114). Based on this disclosure, Butler was subsequently redeposed. Furthermore. Butler's prior inconsistent statements and motives were thoroughly explored on cross-examination. (D. A. R. 3050-3105, 3114-30, 3140-44). As such, this claim was properly rejected by the trial court. *See Routly v. State*, 590 So. 2d 397, 399 (Fla. 1991)(no *Brady* violation where able to effectively cross-examine witness).

### D. Alleged Impeachment Evidence Relating to Shaula Nagel

This contention was presented in sub-claims IIID-H & N of the post-conviction motion. The thrust of these contentions was that Nagel, who did not testify at trial, lied in her pretrial deposition. These claims, like those discussed in Point IIIB, *supra*, wholly failed to present allegation sufficient to state a claim under *Hegwood*, and were properly denied.

*Sub-claim D* (D. 40).

As with sub-claim C discussed, *supra*, this one-sentence claim alleged that Derrick's daughter, Shaula Nagel, also used aliases. The response is the same as above.

*Sub-claim E* (R. 40).

Here Defendant alleged that Nagel lied in her pre-trial deposition, and gave completely different testimony in a subsequent deposition relating to a civil insurance suit. He further alleged that had he been aware of this information, he would have called Nagel and her husband at trial.[22] Defendant further alleged that various members of the Moo Young family were signatories on bank accounts from which funds were transferred several months before the murders, and that these family members would have testified regarding their knowledge of the Moo Youngs' drug dealings.[23] Although this claim was somewhat more detailed than than most in the post-conviction motion, it still failed to allege that the State knew this information, that the defense could not have obtained the information itself, that the State withheld the information, or how the outcome of the proceedings would probably have been different, had the information been provided to the defense. Nor did Defendant state the substance of the allegedly perjured testimony. As such the trial court properly rejected this claim without an evidentiary hearing.

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[22] The claim also alleged that Nagel "not only knew what the Moo Young's were doing, she was part of it." Accepting, arguendo, that allegation as true, and assuming that the "it" of which she was a part were illegal, Defendant failed to explain how he would have gotten her to waive any Fifth Amendment privilege and testify at trial. There was no proffer as to what the husband supposedly would have testified.

[23] See previous note.

*Sub-claim F* (R. 40).

Defendant alleged that Nagel lied in deposition when she testified that she and Derrick had no business dealings with one "Hosein," who allegedly in fact had the power of attorney over one of the Moo Youngs' corporations. Again, there was no allegation of State knowledge or withholding, that the defense did not have equal access to the information, or any explanation of materiality. The claim was properly rejected.

*Sub-claim G* (R. 40-41).

This contention submitted that Nagel knew Derrick had formed a Panama corporation which was the beneficiary of an allegedly fraudulent letter of credit; that Derrick had two other Panamanian corporations, all of which had bank accounts with the Credit Suisse Bank in Panama, and that one Adam Hosein had power of attorney over the corporation. The response is the same as to the previous sub-claims.

*Sub-claim H* (R. 41).

This presented the claim that Nagel withdrew $45,000 from the account of one of the Panamanian corporations after the murders. Same response.

*Sub-claim N* (R. 41).

Defendant alleged, entirely, that "Nagel accompanied the Moo Youngs on at least one of their business deals dealing with import and export. Her signature as well as others accessed the bank accounts at the Credit Swisse [sic] Bank in Panama." (R. 41). See previous responses.

### E. Alleged Presentation of Perjured Testimony

This contention was presented in subclaim **III**Q of the post-conviction motion. This claim alleged, entirely, that "[t]he statements of Barry Neil and Jacques Davis refuted the testimony of Tino Geddes and demonstrated the State's use of perjured testimony. This claim is based upon witness statements which were presented in the appendix to the post-conviction motion. Those statements were taken before trial, and these individuals appeared on the defense's trial witness list. This claim is therefore procedurally barred because it should have been raised at trial[24] and on direct appeal. Furthermore, in that the claim is based upon materials generated by the defense's pretrial investigation, and as such Defendant has failed to meet the crequirement that the information was withheld by the State or unavailable to the defense.[25]

In view of the foregoing, the trial court properly rejected these claims without an evidentiary hearing. Furthermore, to the extent Defendant was claiming relief on the grounds of newly discovered evidence, (See R. 38, B. 48), the claims were also insufficiently pled to afford relief. *See*, *Hegwood*, at 172 & n. 5 (newly discovered evidence will only provide a basis for new trial where the evidence would have been admissible at trial, probably would have changed the verdict, and could not have been discovered by the defense with the exercise of reasonable

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[24] As noted above at Point **II**B(1), Defendant affirmatively waived his rights to testify or present evidence at trial.

[25] Although presented as a *Brady* claim, this subcontention seems more to be attempting to allege a *Giglio* claim. Suffice it to say that the allegations were also insufficient to present a *Giglio* claim, as is discussed with regard to a similar claim involving Geddes at Point **IV**B(F), *infra*.

diligence); *James v. State*, 591 So. 2d 911, 915-16 (Fla. 1991)(same); R. 3.600, Fla. R. Crim. P.

## IV.

## THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIMS OF ALLEGED PROSECUTORIAL MISCONDUCT.

Defendant's fourth claim,[26] that the State presented false testmony and engaged in other acts of misconduct, is again couched in extremely conclusory terms, and fails to set forth any concrete basis for the contentions on appeal. As such these claims are waived and must be rejected. *Kight v. Dugger*, 574 So. 2d 1066, 1073 (Fla. 1990); *Duest v. Dugger*, 555 So. 2d 846, 852 (Fla. 1990). In any event, the trial court properly found that the contentions raised below were either procedurally barred or insufficeintly pled to warrant an evidentiary hearing, as will be shown.

The alleged claims of prosecutorial misconduct all should have been raised at trial or on direct appeal and therefore are procedurally barred. Some of the claims of presentation of perjured testimony were also apparent from the record on appeal, and as such are also procedurally barred. As to the other claims of false testimony, this court set forth the standard by which such claims are judged in *Routly v. State*, 590 So. 2d 397 (Fla. 1991):

> In his second claim Routly asserts that the prosecutor knowingly allowed O'Brien to commit perjury at deposition and trial and failed to correct material false statements in violation of *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), and *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Under those cases, the prosecutor has a duty to

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[26] These contentions were presented in Claims IV and V of the post-conviction motion. (R. 43-52).

> correct testimony he or she knows is false when a witness conceals bias against the defendant through that false testimony. *United States v. Meros*, 866 F.2d at 1309. If there is a reasonable probability that the false evidence may have affected the judgment of the jury, a new trial is required. *Giglio*, 405 U.S. at 154, 92 S. Ct. at766, (quoting *Napue v. Illinois*, 360 U S. 264, 271, 79 S. Ct. 1173, 1178, 3 L. Ed. 2d 1217 (1959)). "The thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury." *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S. Ct. 510, 78 L. Ed. 2d 699 (1983).
>
> To establish a *Giglio* violation, Routly must show: (1) that the testimony was false; (2) that the prosecutor knew that the testimony was false; and (3) that the statement was material. *United States v. Lochmondy*, 890 F.2d817, 822 (6th Cir. 1989).

*Id.*, at 400. Under this standard, Defendant's claims were insufficient to warrant relief and were properly rejected by the court below.

### A. Post-Conviction Claim IV

(A) *(State allegedly used perjured testimony of Butler and Buhrmaster in Grand Jury proceedings)*. (R. 43).

This claim should have been raised on direct appeal and is therefore procedurally barred. Furthermore, Defendant offered no allegations as to what testimony was allegedly false, and therefore there was no basis to determine whether the alleged misconduct was in any way material. *Routly*. As such the claim was properly denied without an evidentiary hearing.

(*B*) (*Allegedly false closing argument by prosecutor regarding checks given to Defendant by Moo Youngs*). (R. 43).

This claim is procedurally barred because it could have been raised on direct appeal. Further, it is entirely without merit. The prosecutor argued, as part of his discussion of Defendant's motive, that Moo Young had filed suit against Defendant alleging he had forged a $243,000 check allegedly signed by Moo Young, and that these allegations appeared on the front page of the *Echo*, enraging Defendant. (D. A. R. 3921). This argument was supported by the record.[27] (D. A. R. 1622-23). Prior to presenting this argument, the prosecutor emphasized several times that the truth of the newspaper allegations was not the issue, but rather that the jury should consider them solely for the effect the articles must have had on Defendant. (D. A. R. 3914, 3919). Furthermore, the allegation failed to even include a record cite or any allegation explaining how the alleged impropriety was material given the overwhelming evidence of guilt presented. As such this claim was properly denied without an evidentiary hearing.

(*C*) (*Allegedly "theatrical and highly prejudicial closing argument by State and screaming by victim's daughter*). (R. 43).

These claims should obviously have been raised on direct appeal and are therefore procedurally barred.

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[27] As noted above, this court held on direct appeal that the articles were properly admitted to show motive. *Maharaj* at 790.

(*D*) (*Alleged harrasment of Defendant while in jail*). (R. 44).

This claim should obviously have been raised on direct appeal. Further, Defendant has failed to allege how the outcome of the proceeding was in any way affected by the alleged incident.

(*E*) (*Alleged withholding by State of information about the Moo Youngs' life insurance proceeds and fraudulent letters of credit*). (R. 44).

Although Defendant was given access to the entire file[28] of the State Attorney's Office, he failed to allege the basis of his contention that the State was aware of this information at the time of trial, or to identify any witness or evidence in support thereof. The State Attorney's Office has denied that it possessed this information. He further fails to identify any witness that could or would testify regarding the truth of the information allegedly possessed and withheld by the State Attorney's Office. Finally, he wholly failed to explain how any of this alleged information would have been admissible at trial or how it would have in any way refuted the eyewitness testimony of Butler or explain the presence of Defendant's fingerprints all over the room, on objects and newspapers (dated the day of the murder) in the room, including the packages that contained the cords used to bind the victims. As such this claim was properly denied. See Point **III**B(B), *supra*.

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[28] With the exception of the minor documents discussed in Claim V, *infra*.

(*F*) (*Ballistics report allegedly based upon evidence received on August 24, 1986, two months before murders*). (R. 44).

This claim should have been raised at trial and on direct appeal, as it is plain from the deposition of the firearms expert Thomas Quirk that counsel had the report at that time. (D. A. R. 388). As such this claim is procedurally barred. Furthermore, assuming the report actually indicated that the evidence was received on August 24,[29] it was plainly a typographical error where Quirk testified several times that he received the evidence on *November 24*, 1986, several weeks after the murders. (D. A. R. 3326, 3328, 3335).

(G) (*"The police failed to analyze the defendant's clothes."*) (R. 44).

This claim, assuming it stated any recognizable basis for relief was properly denied, as it should have been presented on direct appeal. Further, the entire claim appears in quotes above and is grossly insufficient to warrant relief of any kind as pled. Finally, the State has no duty to create evidence or to investigate the Defendant's case for him. *Hansbrough v. State*, 509 So. 2d 1081, 1084 (Fla. 1987).

(*H*) (*"The police failed to analyze the defendant for the presence of gunpowder."*) (R. 44).

Ditto.

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[29] The report was not in the record and not part of the appendix to the post-conviction motion.

(*I*) (*Various alleged assertions regarding Dames's recalcitrance to be deposed, a "mysterious man," and money laundering by the Moo Youngs*). (R. 45).

To the extent this claim addresses any discovery problems regarding Dames, such should have been raised on direct appeal. Further, as noted in Defendant's allegations, Dames was ultimately deposed. As such the claim fails to suggest any basis for relief. The remainder of the claim, regarding the presence of an unidentified individual and a series of unrelated factoids, is too vague to even provide a basis for response, much less have warranted an evidentiary hearing, and as such this sub-claim was properly denied.

(*J*) (*The police's failure to investigate an unnamed suspect*). (R. 45).

This claim wholly fails to explain how the alleged failure of the police to investigate the mystery man in any way affected the outcome of the case.[30] Further, as noted above, the police have no duty to perform Defendant's investigation for him.

(*K*) (*The police conducted an allegedly unfair photographic lineup*). (R. 46).

This claim should have been raised on direct appeal and is therefore procedurally barred. Furthermore, the allegation wholly fails to set forth any basis for the claim.

(*L*) (*Alleged police failure to analyze Butler's clothes*). (R. 46).

See sub-point (*G*), *supra*.

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[30] Presumably the evidence against Defendant has been recited enough times heretofore in this brief that it need not be set forth again.

(*M*) (*Buhrmaster allegedly falsely told the defense that he had returned the victims' passports to their family and then introduced them at trial*). (R. 46).

This claim obviously should have been raised on direct appeal and is therefore procedurally barred.

(*N*) (*The police allegedly denied Defendant access to his attorney and the British consulate after arrest, and allegedly confiscated and never returned his UK driver's license and diary*). (R. 46).

Ditto.

(*O*) (*Buhrmaster allegedly threatened Defendant into giving a statement, and then lied about its content*). (R. 46).

This claim should have been raised on direct appeal and is therefore procedurally barred. Further, this claim is wholly without merit, as was noted in the State's discussion of this same issue framed as an ineffectiveness claim, *supra*, at points IIB(2) & IIB(7)(k).

(*P*) (*Buhrmaster allegedly confessed to lying to the homicide chief and to falsifying confessions*). (R. 47).

This claim as pled was wholly insufficent to require an evidentiary hearing. It failed to set forth any allegation that the purported misdeeds of Buhrmaster were in any way involved in this case, or even identify the witnesses or evidence that would support the claim. As such the trial court properly denied the claim. *See Breedlove v. State*, 580 So. 2d 605, 606-07 (Fla. 1991)(trial court properly denied similar, but far more thoroughly pled, claim without evdentiary hearing where no allegation that State was aware of officers' wrongdoing at the time of trial).

Further, as discussed above, the only statements of Defendant to which Buhrmaster testified were exculpatory, and were corroborated in deposition by Detective Rivero. As such any failure to disclose was not material. *Id.*

(*Q*) (*Officer Amato failed to appear for deposition*). (R. 47).

This point should have been raised on direct appeal and is therefore procedurally barred. Furthermore the charge is plainly without merit where Amato was in fact deposed. (D. A. R. 1217-1242).

(*R*) (*Alleged failure of police to investigate George Abchal*) (R. 47).

See sub-point (*G*), *supra*.

(*S*) (*Alleged failure of police to investigate a Mr. Mejias*). (R. 48).

Ditto. Furthermore, Buhrmaster testified during defense counsel's extensive cross-examination on the subject that the police had investigated Mejias, and determined that he was legitimate and had no connection with the murders. (D. A. R. 3492-3502, 3519).

(*T*) (*Alleged failure to prosecute Butler*). (R. 48).

This claim should have been raised on direct appeal and therefore is procedurally barred. Additionally this fact was pointed out to the jury by counsel's cross-examination if Butler. (D. A. R. 3052-54). Furthermore, the evidence showed that Butler was not aware that the murders were going to take place ahead of time, and further, the decision to prosecute or not, or to grant

immunity is wholly within the discretion of the State Attorney. Her decisions in such matters are questions of executive prerogative not subject to judicial scrutiny, *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986), and as such this claim fails to state any cognizable basis for relief.

### B. Post-Conviction Claim V

(*A*) (*Alleged coercion of Butler and Geddes*). (R. 50).

This one-sentence claim was plainly insufficient to present a claim for relief and was properly denied.

(*B*) (*Alleged misrepresentation by State of Butler's polygraph results*). (R. 50).

This claim was raised on direct appeal and is without merit as discussed at point IIIC, *supra*.

(*C*) (*Alleged coercion of, and presentation of false testimony of Butler*). (R. 50).

This claim should have been raised on direct appeal as as such is procedurally barred. Furthermore, Defendant failed to identify which statements of Butler were allgedly false or coerced, and failed to state what the "true" statements were, or how they would have helped Defendant's case. Nor did Defendant explain how even absent this alleged falsehood, the jury could have ignored the physical proof of Defendant's participation in the murders or the abundant evidence of motive and prior attempts by him to harm the Moo Youngs and Carberry presented by the State at trial. In any event, Butler's prior inconsistent statements and his motivations were thoroughly delved into on cross-examination. (D. A. R. 3050-3105, 3114-30, 3140- 44). As

such, this claim was properly denied. *See*, *Routly*, at 401.

(*D*) (*Allegedly false representation by State to Defense that funds were not available in its budget for Butler's second polygraph*). (R. 50).

This claim should have been raised on direct appeal, and is therefore procedurally barred. Furthermore, the State has no duty to investigate Defendant's case for him, and in any event, the second polygraph was administered. Defendant has thus failed to show that any alleged impropriety was prejudicial or material. The trial court properly rejected this contention.

(*E*) (*Prosecutors' alleged influencing of Geddes by testifying in his behalf in a criminal proceeding in Jamaica, and allegedly lying about said actions*). (R. 50).

This claim could have been raised on direct appeal and is therefore procedurally barred. Furthermore the points alleged below were thoroughly aired before the jury on cross examination of Geddes, (D. A. R. 3646-3663), and the claim thus was properly denied by the trial court. *Routly*, at 401.

(*F*) (*State allegedly presented perjured testimony by Geddes*). (R. 51).

This claim should have been raised on direct appeal and is therefore procedurally barred. The substance of the allegation presumably[31] is based upon the witness's statements given prior to trial to the defense investigator, which differed greatly from Geddes's trial testimony. At trial Geddes explained that he was pressured into making the initial alibi statement by Defendant.

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[31] Again, the pleading below was inadequate, failing entirely to offer any record citation to, or detail of, the statements alleged to have been perjurous.

Further, witness Clifton Sagree, who was allegedly with Defendant and Geddes in Geddes's first statement, never gave any statements contrary to his own trial testimony, which corroborated the trial testimony of Geddes that Defendant was *not* with them at the time of the murders. Finally, these issues were thoughly raised during the cross examination of Geddes. As such this claim was properly denied by the trial court. *Routly*.

(*G*) (*"The prosecutor's complicity in and/or failure to correct Shaula Nagel's perjurious defense deposition testimony."*) (R. 51).

The above quote sets forth the claim raised below in its entirety. As such it was obviously and grossly insufficient to state a basis for relief.

(*H*) (*Prosecutors' alleged conspiracy with Buhrmaster regarding the passports*). (R. 51).

As noted above, the passports were introduced at trial and this claim should therefore have been raised on direct appeal, and as such is procedurally barred. Further. Defendant wholly failed to allege the basis for this allegation or how the claim was in any way material.

(*I*) (*"Prosecutors sought to coerce/mislead Dr. Stillman into giving false testimony*). (R. 52).

This claim is based solely on the doctor's[32] statement, in front of the jury, during cross examination, (D. A. R. 4533), that he had been misled by the prosecutor's question during his previous deposition. This claim should have been raised on direct appeal, and is therefore

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[32] Stillman was a defense witness at the penalty phase.

procedurally barred. Further Defendant wholly failed to allege how this alleged "misconduct" was material or prejudicial and as such the claim was properly denied.

## V.

## THE TRIAL COURT PROPERLY WITHHELD, AFTER AN *IN CAMERA* INSPECTION, PORTIONS OF THE STATE ATTORNEY'S FILE WHICH DID NOT CONSTITUTE PUBLIC RECORDS.

Defendant's fifth claim is that he was denied proper access to the entire file of the State Attorney's Office in contravention of Ch. 119, Fla. Stat. However, the record shows that all of the the State's file was disclosed, with the exception of a few items, which were determined by the trial court, after an *in camera* inspection, to be exempt. This determination was in accordance with this court's precedent and the statute.

This court held in *State v. Kokal*, 562 So. 2d 324 (Fla. 1990), that mere handwritten notes, drafts, and similar materials do not constitute "public records" within the meaning of the statutory language, and are therefore not subject to disclosure:

> We do agree with the state attorney that some of the documents in his files are not public records. In *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980), we pointed out:
>
> > To give content to the public records law which is consistent with the most common understanding of the term "record," we hold that a public record, for the purposes of section 119.011(1), is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. *To be contrasted with "public records" are materials prepared as drafts or notes, which constitute mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded.* ...

Further, not all trial preparation materials are public records. We agree with *Orange County v. Florida Land Co.*, 450 So. 2d 341, 344 (Fla. 5th DCA), *review denied*, 458 So. 2d 273 (Fla. 1984), which described certain documents as not within the term "public records":

> Document No. 2 is a list in rough outline form of items needed for trial. Document No. 9 is a list of questions the county attorney planned to ask a witness. Document No. 10 is a proposed trial outline. Document No. 11 contains handwritten notes .. Document No. 15 contains notes (in rough form) regarding the deposition of an anticipated witness. These documents are merely notes from the attorneys to themselves designed for their own personal use in remembering certain things. ...
>
> ... If the [State Attorney] had a doubt as to whether he was required to disclose a particular document, he should have furnished it *in camera* to the trial judge for determination.

*Kokal*, at 327 (emphasis supplied). The documents in question, and the procedure followed below, were exactly as described in *Kokal*. No error ocurred, and this claim must be rejected.

## VI.

## DEFENDANT'S CLAIM REGARDING THE ALLEGED CONFLICT OF INTEREST OF THE POST-CONVICTION TRIAL JUDGE WAS NOT RAISED BELOW AND IS NOT SUPPORTED BY THE RECORD.

Defendant's final claim is that the trial judge should have recused himself because of an alleged conflict of interest. However, this claim was never raised in the trial court and is not properly before the Court on appeal. *Preston*. Further, the allegations in the brief cite to a non-record transcript excerpt. However, even that excerpt fails to support Defendant's contentions. This claim, raised for the first time on appeal, and lacking record support, should be denied.

## CONCLUSION

For the foregoing reasons, the trial court's denial of post-conviction relief should be affirmed.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
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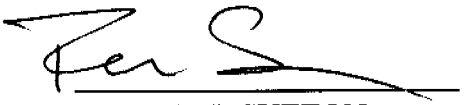

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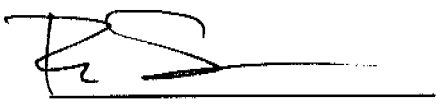
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was mailed to BENEDICT P. KUEHNE, NationsBank Tower, #2100, 100 Southeast 2nd Street, Miami, Florida 33131-2154, and CLIVE A. STAFFORD SMITH, 210 Barone Street, Suite 1347, New Orleans, Louisiana 70112, counsel for Defendant, and JAMES LOMAN, 2017 Atapha Nene, Tallahassee, Florida 32301, local (U.S.) counsel for Amici Curiae, this 16th day of January, 1996.



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