IN THE SUPREME COURT OF FLORIDA

TODD MICHAEL MENDYK,

Appellant,

v. CASE NO. 88,062

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State does not accept the argumentative and incomplete Statement of the Case contained in Mendyk's Initial Brief. The State relies upon the following Statement of the Case and Facts, in addition to such facts as are set out in the Argument section of this brief in connection with the various claims and sub-claims raised in Mendyk's brief.

In affirming Mendyk's convictions and sentence of death on direct appeal, this Court stated the facts as follows:

> Late in the evening of April 8, 1987, appellant and a friend, Philip Frantz, drove to a convenience store so appellant could buy a hamburger. As they approached the store, appellant said to Frantz, "Let's grab this bitch," but Frantz claimed not to have taken him seriously. However, after entering the store, appellant grabbed the clerk, a woman named Lee Ann Larmon, led her out to their truck, forced her inside, and directed Frantz to drive away.
>
> Taking Larmon to a secluded area, appellant led her from the truck and began removing her clothes. Appellant tied each of her legs to the legs of a sawhorse, and sexually tortured her by several means, including inserting a broom handle in her vagina. Appellant then untied Larmon, led her to a new location, gagged her and tied her with wire between two trees with her back arched. Returning to their car, appellant and Frantz then attempted to leave the scene.
>
> While driving along the dirt road, however, appellant steered too far to one side and the truck became stuck. Several attempts to extricate it failed. Appellant then said he was going back to check on the girl. After doing so, appellant returned to the truck and again

attempted to free the truck from the roadside. When further attempts failed, appellant announced, "I'm going to have to kill her," and walked back toward the girl once more. Frantz asked why, but appellant did not answer. Upon his return, appellant told Frantz he had strangled the girl, cut down her body and dragged her into the bushes. Frantz then took all of the girl's clothes, a billy club which had also been used on the victim, and the broomstick, and threw them into the swamp. They then left the truck, returning with Frantz's mother and some tools to tow the truck out of the mud.

In the meantime, police had discovered the disappearance of Larmon. Conducting an aerial search, police observed the blue pickup truck in the woods. Ground units responded to the report, and found appellant, Frantz and Frantz's mother. Appellant and Frantz told the police they had been "mudslinging" in the woods with the truck and had become stuck. Searching the area, police found Larmon's body and arrested appellant and Frantz.

The grand jury indicted appellant for first-degree murder on April 16, 1987. The state subsequently filed an information additionally charging appellant with two counts of sexual battery and one of kidnapping. At trial, the state presented physical evidence tying appellant to the crime, including his fingerprints in the convenience store as well as evidence of Larmon's presence in appellant's truck. In addition, the state presented testimony from several police officers to whom appellant had confessed and the direct and comprehensive testimony of Frantz, who had agreed to testify against appellant as part of his plea bargain. Appellant was tried and the jury found him guilty on all counts.

In the penalty phase, the state introduced into evidence a list of pornographic book and magazine titles seized by police from appellant's residence. In addition to a "Satanic Bible," these titles generally covered themes involving slavery, bondage, sadomasochism, deviant sexual behavior, lesbianism, anal sex, the sexual use of enemas, and "telephone sex." Appellant did not present any

> evidence in the penalty phase, but requested a number of special jury instructions which were denied. The jury recommended death unanimously.
>
> The trial court imposed the death sentence, concluding that the murder **was** committed during a kidnapping and sexual battery; that it was especially wicked, evil, atrocious, and cruel; [footnote omitted] and that it was cold, calculated, and premeditated. The trial court found one mitigating factor, appellant's **age** of twenty-one years.
>
> The court further imposed three consecutive life sentences on the life felonies, departing from the guidelines recommendation of seventeen to twenty-two years.

Mendyk v. State, 545 So.2d 846, 847-8 (Fla. 1989). This Court affirmed, and the United States Supreme Court denied certiorari review on November *27, 1989. Mendyk v. Florida, 498* U.S. 984, 110 S.Ct. 520, 107 L.Ed.2d 521 (1989).

Mendyk then sought post-conviction relief under *Florida Rule of Criminal Procedure 3.850,* and petitioned this Court for a writ of habeas corpus. *Mendyk v. State, 592* So.2d 1076 (Fla. 1992). This Court affirmed the trial court's ruling on the Rule 3.850 motion, denied the writ of habeas corpus, and remanded the case for further proceedings as to Mendyk's claim regarding disclosure of public records under Chapter 119, *Florida Statutes* (1989). *Mendyk,* 592 So.2d at 1081. Specifically, this Court stated:

> We affirm the order denying the motion for post-conviction relief. Having found merit to Mendyk's

> claim under chapter 119, ***Florida Statutes*** (1989), ***we*** extend the two-year time limitation of Florida Rule of Criminal Procedure 3.850 for sixty days from the date of disclosure **solely for the purpose of providing Mendyk the opportunity to file** a **new motion for post-conviction** relief **predicated upon any claims arising from the disclosure.** The petition for habeas corpus is denied.

Id. [emphasis added].

On August 21, 1992, Mendyk filed his 'First Amended Motion to Vacate Judgment and Sentence, With Special Request for Leave to Amend and Supplement." (R1-15) That Motion contained the following two claims, taken verbatim from the motion:

> 1. The continuing failure of the State to disclose public records violates the mandate of the Florida Supreme Court, Chapter 119, Fla. Stat., the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Eighth Amendment of the U.S. Constitution, and the corresponding provisions of the Florida Constitution.
>
> 2. The jury's death recommendation which **was** given great weight by the trial court **was** tainted by consideration of invalid aggravating circumstances, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

(R5; 6) On February 17, 1994, the Circuit Court entered an order (following a hearing) which denied Mendyk's request for public records as the Florida Parole Commission, directed Mendyk to proceed as set out in ***Parole Commission v. Locket, 620*** So.2d 153 (Fla. 1993) as to that agency, **and allowed the** State 30 days in which to file a written response to the public record demands directed to the Pasco and Hernando County Sheriff's Departments.

(R66-7) Various proceedings took place, and, on November 21, 1994, the trial court entered its order finding that the Hernando and Pasco County Sheriff's Departments had complied with Mendyk's Chapter 119 requests. (R165-6) The parties agreed that the demand as to the Parole Commission should not be resolved until the release of this Court's decision in *Agan, et. al. v.* Florida *Board of Executive Clemency,* Case Nos. 83,047, 83,048, and 82,732. (R166) Following the decision in that case, the court entered an order allowing Mendyk 60 days in which to file a new motion for post-conviction relief. (R177)

Mendyk filed his amendment to the second amended motion on February 16, 1995, in which he raised the same two claims as contained in the original motion. (R183-202) The State filed a timely response, and, on November 14, 1995, the trial court entered its order denying relief. (R205-11; 212-14) Mendyk sought rehearing based upon the fact that a *Huff* hearing had not been held (R215-18), and the trial court granted that motion. (R219) Following a *Huff* hearing on April 4, 1996, the trial court entered an amended order denying Mendyk's motion. (R241-87; 288-90) Notice of appeal was given on May 10, 1996 (R291-2), and the record was certified on June 26, 1996. (R305) Mendyk filed his initial brief on November 27, 1996.

SUMMARY OF THE ARGUMENT

The Trial Court decided Mendyk's Chapter 119 claim correctly. Only two public records were at issue, and the evidence before the Trial Court established that the records referred to were not in existence. Mendyk is not entitled to an evidentiary hearing when the evidence before the Court in the form of affidavits from the records custodians established that the records did not exist. Alternatively, any error was harmless beyond a reasonable doubt because there is no possibility that an evidentiary hearing would produce a different result.

The Trial Court also properly found the jury instruction claims to be procedurally barred by the two year limitation of Florida Rule of Criminal Procedure 3.850, as well as because the jury instruction claim is not based upon any materials produced pursuant to Chapter 119. Moreover, the jury instruction claim is procedurally barred because it could have been but **was** not raised at trial or on direct appeal. Moreover, this claim is procedurally barred because it is a successive claim which is an abuse of the 3.850 process. Finally, the ineffective assistance of counsel component of this claim is procedurally barred as a successive claim and, alternatively, is foreclosed as a matter of law.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DECIDED THE PUBLIC RECORDS LAW CLAIM

On pages 4-8 of his brief, Mendyk argues that he is entitled to an evidentiary hearing on his claim that the Pasco and Hernando County Sheriff's Departments have not complied with his requests for public record under Chapter 119 of the Florida Statutes.[1] Despite Mendyk's claims to the contrary, this claim does not establish a basis for any further proceedings.

Only two "public records" are at issue in this proceeding: an 'unedited crime scene videotape", and 'notes of interviews" taken by the Pasco County Sheriff's Department. (R50; 54) The State submitted affidavits from the appropriate individuals that established that the videotape could not be located after a diligent search (R69; 70; 72; 73;), and that no notes or tape recordings of interviews with Mendyk by the Pasco County Sheriff's Office have ever existed (R71). Subsequently, the trial court entered its order finding that the 'unedited crime scene videotape

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[1] In its opinion remanding the case for further Chapter 119 proceedings, this Court limited the scope of those proceedings to the Hernando County Sheriff's Office, the Florida Parole Commission, and the Pasco County Sheriff's Office. *Mendyk,* 592 So.2d at 1081.

cannot be located and [the Hernando County Sheriff's Office] has complied with the Chapter 119 request of the Defendant," (R165) The court also found that there "were no tape recordings or hand written notes made by the Pasco County Sheriff's investigator when he interviewed the Defendant concerning the murder of Terry Lynn Matthews and that agency has complied with the Chapter 119 request of the Defendant." (R166) As to both agencies, the trial court found that a deposition or a further hearing was unnecessary. (R165-6) That finding is supported by the record, is not an abuse of discretion, and should be affirmed in all respects.

When stripped of its pretensions, Mendyk's claim is that he is entitled to an evidentiary hearing on his Chapter 119 claim (which only involves two documents) even though there is sworn testimony in the record establishing that the records in question do not exist. It strains credulity to suggest that there is any abuse of discretion in not allowing Mendyk to delay this case to conduct an evidentiary hearing that will produce no new facts beyond those contained in the affidavits of the officials involved. Mendyk is not automatically entitled to an evidentiary hearing on his Chapter 119 claim in the first place, and, under the facts of this case, is not entitled to such a hearing because the only result of that hearing is to delay the disposition of the 3.850 motion. Chapter

119.07(9) of the ***Florida Statutes*** leaves no doubt that Chapter 119 is not a basis of delay of a post-conviction motion. It was not error for the Circuit Court to refuse to convene an evidentiary hearing that would have added nothing to the record beyond that which was contained in the affidavits.

To the extent that Mendyk argues that this Court's prior decision mandated an evidentiary hearing, that claim finds no support in the record. Nothing in the prior decision of this Court directs that an evidentiary hearing be conducted if such a hearing is not necessary. Under the facts of this case, Mendyk is not entitled to an evidentiary hearing, and he is certainly not entitled to the production of files that do not exist.

Alternatively and secondarily, any error in not having a hearing on the Chapter 119 issue was harmless beyond a reasonable doubt. While the State does not concede that a hearing was needed in the first place, there is no possibility of a different result had such a hearing been conducted. There is no reason to presume that the facts stated in the sworn affidavits are not true, and there is every reason to presume that the affiants' live testimony would have been consistent with the affidavits. Because that is the case, it makes no sense to argue, as Mendyk does, that he was entitled to live testimony which repeats the contents of the

previously-filed affidavits. If there **was** error, which the State does not concede, that error was harmless. See, e.g., Groover v. *State, No.* **86,623** (Fla., Feb 13, 1997).

Mendyk's reliance on the law that has developed as to hearings in the Rule 3.850 context is clearly inapposite, especially in light of the recent amendments to Chapter 119 and the adoption of Rule *3.852* of the *Florida Rules* of *Criminal Procedure.* Those recent enactments leave no doubt that requests for public records are not a basis for delay in the disposition of motion for postconviction relief. See, e.g., Rule *3.852* (I), *Fla. R. Crim. P.*[2] The ultimate dispositive fact is that the trial court had before it affidavits which established that the "public records" sought by Mendyk did not exist. By definition, there can be no Chapter **119** issue under those facts, and there is no error in the court's refusal to conduct a hearing that would **be** entirely futile. It was not an abuse of discretion to deny such a hearing, and the trial court's ruling should be affirmed in all respects.

II. THE TRIAL COURT PROPERLY FOTJND MENDYK'S JURY INSTRUCTION CLAIM PROCEDURALLY BARRED

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[2] These amendments are remedial in nature, and, as such, are retroactively applicable to this proceeding. *See, e.g., Roberts v. Singletary,* **668** So.2d 580 (Fla. 1996).

On pages 8 through 21 of his brief, Mendyk argues that the three aggravating circumstances found in his case are 1) unconstitutionally vague; 2) that the jury and judge did not have the benefit of limiting instructions; and 3) counsel was ineffective at trial and on appeal for failing to raise those claims. The trial court denied relief on these claims on procedural bar grounds. That ruling is correct and should be affirmed in all respects.

The three jury instruction claims contained in Mendyk's brief are time-barred by the two-year limitation of Florida Rule of Criminal Procedure 3.850. Those claims are clearly not one of the claims included within the Florida Supreme Court's sixty-day extension of time for filing an amended petition because that extension was "solely for the purpose of providing Mendyk the opportunity to file a new motion for post-conviction relief predicated upon any claims arising from the [Chapter 1191 disclosure." *Mendyk v. State,* 592 So.2d at 1082. The jury instruction claim is not predicated upon any chapter 119 materials and is, therefore, time-barred. Fla.R.Crim.P. 3.850(b); *Tafero v.* State, 524 So.2d 987, 988 (Fla. 1987). Moreover, this claim is procedurally barred because it is filed outside of the two-year limitation on the filing of "new law" claims established in *Adams*

v. *State,* 543 So.2d 1244 (Fla. 1989). To the extent that Mendyk asserts that the jury instruction claims are based on "new law", and the **law** is clear that it is not, *Marek v. Singlelary, 626* So.2d 160, 162 (Fla. 1993), that claim does not avoid the time-bar either. Even if *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), and *Stringer v. Black,* 112 S.Ct. 1130 (1992) announced "new law", Mendyk is still time-barred because, by his own admission, Mendyk waited more than two years after the release of those decisions to plead this claim. See, R 190-191; see *also, Adams* v. State, *supra.* To the extent that Mendyk attempts to link his 'new law" claim to *Arave* v. *Creech,* 113 S.Ct. 1534 (1992), that case also does not avoid the two-year time-bar. By the express language of *Arave,* "[t]his case is governed by the standards we articulated in Walton *v. Arizona, 497 U.S.* 639 (1990), and *Lewis v. Jeffers, 497* U.S. 764 (1990)." *Arave,* 113 S.Ct. at 1540. This is not a 'new law" claim, despite Mendyk's attempts to disguise it as such. The trial court properly found this claim time-barred, and that finding should be affirmed.

This claim is also procedurally barred because it could have been but was not raised at trial or on direct appeal. That is a procedural bar under settled Florida law. *See, e.g., Medina v. State, 573* So.2d *293* (Fla. 1990); *Correll v. State, 558* So.2d 422

(Fla. 1990); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990). Florida law is settled that jury instruction claims, such as the one contained in Mendyk's brief, are not exempt from Florida's settled procedural bar rules. See, e.g., Marek ***v. Singletary, 626*** So.2d at 162; ***Roberts v. Singletary, supra; Henderson v. Singletary, 617*** So.2d 313, 315 (Fla. ***1993);*** *Correll,* ***supra;*** *Eutzy* ***v. State,*** 541 So.2d 1143 (Fla. 1989); Harvey ***v. Dugger,*** 656 So.2d 1253 (Fla. 1995). This claim is procedurally barred because it is a successive claim which is an abuse of the 3.850 process. The claims contained in Mendyk's brief could have been raised in his first 3.850 motion, and his failure to do so is an abuse of process which is a procedural bar. See, *e.g.,* ***Christopher*** v. State, 489 So.2d 22 (Fla. ***1986); Bundy v. State, 538*** So.2d ***445*** (Fla. ***1989); Songer v. State, 463*** So.2d 299 (Fla. 1985).

To the extent that Mendyk attempts to argue an ineffective assistance of counsel component as to this claim, ***Harvey v. Dugger, supra,*** is dispositive of the merits of that issue. Counsel cannot be deemed ineffective for not objecting to jury instructions that this Court had previously upheld. ***Harvey, supra,*** at 1258. However, the ineffective assistance of counsel claim is itself procedurally because it is contained in a successive petition, and

because the ineffective assistance of counsel component was insufficiently pleaded in the trial court proceedings. See, e.g., ***Medina, supra.*** This claim is procedurally barred under settled Florida law, and the trial court's imposition of the procedural bar should be affirmed in all respects. See, e.g., ***Foster v. State, 18*** Fla. L. Weekly S215 (Fla. April 1, 1993); Squires *v.* State, 565 So.2d 318 (Fla. 1990); ***Tafero*** v. State, 561 So.2d 557 (Fla. 1990); ***Spaziano*** *v.* State, 545 So.2d a43 (Fla. 1989). The trial court's denial of relief on claim II on procedural bar grounds is correct in all respects, and should be affirmed.

CONCLUSION

Wherefore, for the reasons set out above, the trial court's denial of Mendyk's successive motion for post-conviction should be affirmed in all respects.

Respectfully submitted,

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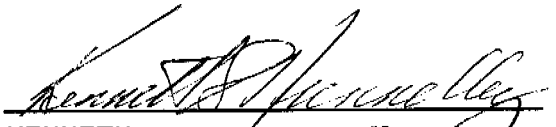
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Stephen Kissinger, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498 on this 3d day of March, 1997.

Kenneth S. Nunnelley
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