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IN THE SUPREME COURT OF FLORIDA

THOMAS DEWEY POPE,

Appellant,

vs.

Case No. 89,084

STATE OF FLORIDA,

Appellee.

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PRELIMINARY STATEMENT

Appellant, THOMAS DEWEY POPE, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, **was** the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s) .

## STATEMENT OF THE CASE AND FACTS

Appellant has a long and complicated history of litigation in both state and federal court. His motion for postconviction relief, which is the subject of this appeal, was not his first and was summarily denied as procedurally barred. It is for this reason that the State will go into great detail regarding the procedural history of this **case**.

Appellant was indicted in 1982 on three counts of first-degree murder and was found guilty of all charges following a trial by jury. The jury recommended, and the trial judge imposed, life sentences for two of the three murders and a death sentence for the third murder. On direct appeal to this Court, the following historical facts were established:

On January 19, 1981, the bodies of Al Doranz and Caesar Di Russo were discovered in an apartment rented to Kristine Walters. Both had been dead several days but Di Russo's body **was** in a more advanced state of decomposition than Doranz's. Both victims had been shot, Doranz three times and Di Russo five times. A spent .22 caliber shell casing was found under Di Russo's body. Three days later, the body of Kristine Walters was found floating in a canal. She had been shot six times with exploding ammunition, her skull was fractured and she had been thrown into the canal while still breathing.

All three victims had been shot with exploding ammunition, so ballistics comparison was impossible. However, parts of an AR-7

rifle were found in the canal near Walter's body and the spent shell casing under Di Russo's body had been fired from an AR-7 weapon.

Investigation led to appellant's girlfriend, Susan Eckard, and ultimately police were able to show that Doranz purchased an AR-7 rifle for Pope shortly before the murder. Eckard and Pope admitted being with Doranz and Walters at Walter's apartment on Friday night, the night Doranz and Di Russo were killed. Eckard later testified that Pope had arranged a drug deal with Doranz and Di Russo. She stated that she and Pope left Walters's apartment to visit Clarence "Buddy" Lagle and to pick up some hamburgers. They then returned to the apartment where Pope and Doranz convinced Walters to go with Eckard to the apartment where Pope had been staying.

Later that same night, Pope arrived at his apartment and told the woman there had been trouble and that Doranz had been injured but that it was best for Walters to stay away from him for a while. Eckard said she knew that Di Russo and Doranz were dead, and that she had known Pope intended to kill them at this point. The next day, Walters checked into a nearby motel, where Pope supplied her with quaaludes and cocaine. On Sunday, Pope told Walters he would take her to see Doranz, Eckard testified that Pope had told her he knew he had to get rid of Walters but that he regretted it because he had become fond of her. According to Eckard, Pope described Walter's murder when he returned and said the gun had broken when he beat Walters over the head with it. The next day Eckard went with Pope to the scene of the crime to collect fragments of the broken stock and to look for the missing trigger assembly and receiver.

Buddy Lagle told the police he had made a silencer for the AR-7 rifle at Pope's request.

Because Lagle planned to leave the jurisdiction to take a job on a ship in the Virgin Islands, he was deposed on a videotape pursuant to an order granting the state's motion to perpetuate testimony. When the state was unable to produce him at trial, the videotape was admitted into evidence.

Pope v. State, 441 So. 2d 1073, 1074-1075 (Fla. 1983).

On direct appeal, the following issues were raised by Appellant:

POINT I

THE TRIAL COURT ERRED IN ALLOWING THE VIDEO-TAPED DEPOSITION OF CLARENCE LAGLE TO BE PRESENTED TO THE JURY.

POINT I

THE EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTION IN THE INSTANT APPEAL.

POINT III

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON THE APPELLANT.

(R 241-98).

As to the first point, this Court found that defense counsel's agreement with the prosecutor that Lagle was unavailable precluded the defendant from complaining about the State's asserted lack of due diligence in searching for Lagle. This Court also found the evidence sufficient to sustain all three convictions. Finally, this Court upheld the trial court's imposition of the death penalty



for the murder of Ms. Walters. The Court affirmed the trial court's rejection of nonstatutory mitigating evidence that Appellant suffered from post-traumatic stress syndrome, and affirmed the trial court's findings that Appellant had been previously convicted of another capital felony, that the murder was committed for the purpose of avoiding or preventing lawful arrest, and that the murder was committed in a cold, calculated and premeditated manner and in a heinous, atrocious or cruel manner. Finally, this Court found harmless the trial court's use of Appellant's lack of remorse to establish the HAC aggravator. 441 So. 2d at 1075-78.

On September 17, 1984, Appellant filed a "Motion for New Trial," pursuant to Rule 3.850, claiming his trial attorney, Scott Eber, was ineffective. In this motion, he alleged the following omissions or overt acts which prejudiced Appellant's case:

A. Defense counsel's waiver of the Defendant's right to confront witness Buddy Lagle by stipulating to the witness' unavailability and agreeing to perpetuate the witness' testimony.

B. Defense counsel's failure to challenge the admissibility of various statements and recordings attributed to the Defendant.

C. Defense counsel's failure to object or move in limine to exclude information about prior drug deals.

D. Defense counsel's cross-examination of Susan Eckhart that the Defendant owned a pistol with a silencer.

E. Defense counsel's failure to proffer into the record during the cross-examination of **Joan Galazzi** further details regarding violent acts by victim Di Russo.

F. Defense counsel's failure to object and/or move to suppress the photo identification of the Defendant by gun salesman Morganstern.

G. Defense counsel's failure to present a doctor or expert to elaborate on the discrepancy between the times of death of Di Russo and Doranz.

H. Defense counsel's failure to **CROSS-**examine the medical examiner regarding the physical evidence at the scene.

I. Defense counsel's failure to attack the basis of the State's theory of the killings--robbery of the cocaine and money involved.

J. Defense counsel's use of the Vietnam Syndrome (Delayed Stress Syndrome) as the sole defense, against the express desire of the Defendant.

K. Defense counsel's failure to adequately confer with the Defendant, both before and during trial, which prevented the Defendant from being able to actively participate or even understand the proceedings at trial.

L. Defense counsel's failure to ask questions prepared by the Defendant for each of the State's witnesses,

M. Defense counsel's failure to use, despite the court's appointment of, an investigator to find and subpoena witnesses needed for the defense and suggested by the Defendant: Violet Hobbs, Mr. and Mrs. Taylor Shephard, Gordon Inow, Edna Bellini, Rudy Gallegas, Cheryl Montgomery, Douglas Moble, Dennis Scudera, Tony Forentino, and the confidential informant.

N. Defense counsel's failure to locate or produce various corroborating, impeaching, or independently important evidence, despite repeated urgings by the Defendant.

O. Defense counsel's ineffective presentation and mishandling of various witnesses at the trial: Lena Ippolito, Agent Nelson, Susan Eckhart, Sherry Heinrich, Dennis Grey, and Dr. Garvin.

P. Defense counsel's failure to object, request a cautionary instruction, request to close, request to desist, or move for a mistrial because of the daily stream of arraignments and sentencings done by the court in the presence of the Defendant and the jury.

Q. Prior defense counsel's ineffective deposition of Buddy Lagle.

R. Defense counsel's failure to adequately and specifically draw the shortcomings of previous counsel to the trial court's attention when objecting to the content of the video deposition.

S. Defense counsel's failure to inform the trial court that the State could have easily located Buddy Lagle through his live-in girlfriend, Olivia Sain, who received Lagle's monthly V.A. checks.

(R 299-313) .

While this Motion was pending, Appellant filed in May 1985 a Petition for Writ of Habeas Corpus and a supplement thereto in this court, raising the following issues regarding the effectiveness of appellate counsel, Michael Gelety:

POINT ONE

Both the judge and the prosecutor made prejudicial remarks to the jury which, taken as a whole, deprived the petitioner of a fair and impartial jury consideration of his guilt or innocence.

A. Improper comments by the judge

- 1) Comments which undermined the importance of the instructions as to the law and encouraged the jury to return a verdict based on matters outside the record.
- 2) Comments which tended to indicate the judge's view as to the guilt of the accused or otherwise insinuated against the petitioner and/or his counsel.

B. Improper comments by the prosecutor

- 1) Reference to petitioner's expressed preference for the death penalty.
- 2) Reference to petitioner's demeanor while sitting at counsel table.
- 3) Reference to the strength of evidence presented to the grand jury.
- 4) Expression of the prosecutor's personal belief in the case and his

vouching for the credibility of the state's star witness.

- C. These judicial and prosecutorial [sic] comments constitute, in their cumulative effect, fundamental error mandating a new trial.

POINT TWO

The trial court failed to provide the petitioner with a copy of the presentence investigation report within a reasonable time of sentencing.

POINT THREE

The sentencing process improperly encouraged the jury to compare and weigh the circumstances surrounding the deaths of the three victims.

POINT FOUR

Petitioner's conviction must be reversed and the death sentence vacated because the judge and the prosecutor repeatedly trivialized the jury's solemn role in sentencing by urging the jury not to view itself as the final arbiter of punishment and by inviting the jury to recommend death because the judge was there to "correct" that recommendation if necessary.

- A. The Caldwell decision.
- B. Petitioner's Trial Proceedings and the Caldwell-type comments made here.
- C. The Controlling Effect of Caldwell.

(R 314-76, 377-97). This Court found that all of the foregoing points were not objected to at trial, and therefore appellate counsel could not be deemed ineffective unless the errors were

fundamental. As to the first point, this Court found that, if it were error, it was not so fundamental as to require a new trial. Spe v. Wainwright, 496 So. 2d 798, 801, 803 (Fla. 1986). As to the second point, this Court determined that, since the presentence investigation report contained no surprises, the admittedly abbreviated review did not constitute fundamental error, and appellate counsel was therefore not ineffective. Id. at 804. This Court also rejected Appellant's final two points, holding that the record did not support the contention that the death sentence was imposed in a fundamentally unfair manner. Id. at 804-05.

Following the denial of his habeas petition, Appellant filed an "Amended Motion for New Trial" on December 30, 1986. In that Amended Motion, the Defendant raised the following claims regarding trial counsel's alleged ineffectiveness:

1. Defense counsel failed to prevent the introduction of Lagle's videotaped deposition.
2. Defense counsel failed to confer properly with the Defendant before or during trial or prepare the Defendant to testify at trial.
3. Defense counsel failed to object to improper comments made at trial by the court and prosecutor.
4. Defense counsel failed to present testimony at trial to prove that others could have killed the three victims.

5. Defense counsel failed to present evidence at trial to prove that Di Russo had a big jewelry deal scheduled.

6. Defense counsel failed to properly impeach Susan Eckhart.

7. Defense counsel failed to impeach Dr. Keene Garvin, the State's medical examiner.

8. Defense counsel failed to object or properly move for a mistrial when sentencing and hearings occurred in the presence of the jury.

9. Defense counsel failed to move to suppress irrelevant evidence or to prevent its introduction into evidence.

10. Defense counsel improperly used the Vietnam Syndrome Defense against Defendant's wishes.

11. Defense counsel failed to present evidence of mitigating circumstances during the penalty phase of the Defendant's trial.

(R 398-417) . Following the State's response thereto (R 418-27), Appellant filed an "Amendment to Amended Motion for New Trial" on August 21, 1987, alleging the following additional ground for relief:

12. Defense counsel failed to request that the jury be sequestered during its deliberations.

(R 428).

After reviewing Appellant's Amended Motion for New Trial, the records, and the State's response, the trial court ruled as follows:

[T]he Court is of the opinion that the allegations maintained by the Defendant in his Amended Motion for New Trial are either insufficiently stated in light of Strickland v. Washington, 466 U.S. 668 (1984), or are specifically refuted by the entirety of the transcript before this court, with two exceptions which are specified below. The Court notes that the abundant evidence against the Defendant, together with the remainder of the transcript which reflects a very effective defense on behalf of the Defendant by his trial counsel, refute both the specific allegations that counsel's conduct **was** below the standard required in Strickland, as well as the "prejudice" necessary to establish such claims.

(R 430). However, the Court ruled that an evidentiary hearing was necessary to determine two claims: that trial counsel was ineffective for (1) failing to prevent the introduction of the Lagle videotape, and (2) for presenting the Vietnam Syndrome Defense against Appellant's wishes. (R 430-31).

As a result, an evidentiary hearing was conducted on May 7, 1987, regarding the first of the two claims. At the conclusion of the hearing, the trial court held that trial counsel was not ineffective for failing to prevent the introduction of Lagle's videotaped deposition based upon the fact that Lagle was, at the time, unavailable. A second evidentiary hearing was conducted on



June 5, 1989, regarding the second issue. The trial court denied this claim as well, finding that Appellant knew, understood, and concurred in his trial counsel's opinion that testimony regarding the syndrome should be used during the guilt phase of the trial. The Court also found that the Defendant was an active participant in his own trial and that his will had not been overborne by trial counsel. (R 435-36).

On appeal to this Court from the denial of the 3.850 motion, Appellant raised the following issues:

POINT ONE

THE JURY'S SEPARATION DURING ITS DELIBERATION ON POPE'S GUILT, AND EBER'S FAILURE TO OBJECT TO THE JURY'S SEPARATION OR TO REQUEST SEQUESTRATION, REQUIRES A NEW TRIAL.

POINT TWO

THE TRIAL COURT IMPROPERLY FAILED TO HOLD A FULL EVIDENTIARY HEARING ON POPE'S MOTION FOR NEW TRIAL.

- A. Eber failed to confer properly with defendant before or during trial and failed to prepare defendant to testify at trial.
- B. Eber failed to object or properly move for a mistrial when sentencing and hearings occurred in the presence of the jury.
- C. Eber failed to object to improper comments made at trial by the prosecutor.
- D. Eber failed to impeach Eckhart.

E. Eber failed to investigate evidence or present testimony at trial to prove that others could have killed the three victims.

F. Eber failed to present evidence of mitigating circumstances during the penalty phase of Pope's trial.

POINT THREE

THE TRIAL COURT IMPROPERLY DENIED POPE'S CLAIM OF INEFFECTIVE ASSISTANCE STEMMING FROM THE LAGLE VIDEOTAPE WITHOUT A FULL HEARING.

POINT FOUR

TRIAL COURT IMPROPERLY DENIED POPE'S MOTION FOR NEW TRIAL REGARDING EBER'S USE OF THE VIETNAM SYNDROME DEFENSE.

This Court affirmed the trial court's rulings. Pope v. State, 569 So. 2d 1241 (Fla. 1990). As to the first issue, this Court held that separation of the jury during deliberations was not fundamental error where no objection to the separation **was** made and the defendant's right to a fair and impartial jury was safeguarded through cautionary instructions provided by the trial court. *Id.* at 1244. In addition, this Court found that Eber's failure to object or otherwise request sequestration of the jury did not constitute ineffectiveness, because even if the Court were to assume that it was not a strategic decision on Eber's part to allow the jury to separate, Appellant failed to allege that the outcome

of his trial was affected by Eber's failure to object. Id. at 1244-45.

This Court also affirmed the trial court's summary denial of the following claims of ineffective assistance: (1) trial counsel failed to confer properly with Pope before and during trial and failed to prepare Pope to testify; (2) trial counsel failed to object and move for a mistrial when hearings and sentencings of other defendants occurred in the jury's presence; (3) trial counsel failed to object to improper comments by the prosecutor; (4) trial counsel failed to impeach state witness Eckhart; (5) trial counsel failed to investigate evidence or present testimony that others could have killed the victims; and (6) trial counsel failed to present evidence of mitigating circumstances during the penalty phase. Id. at 1245. This Court noted that, although other claims were raised in Appellant's Rule 3.850 motion, 'only these claims were urged to this Court as warranting an evidentiary hearing.' Id. The Court went on to hold that, as to these six claims, it had reviewed the motions, files, and records in this case and agreed with the trial court that they conclusively demonstrated that "Pope [was] entitled to no relief." Id.

This Court also affirmed the denial of both claims for which evidentiary hearings were conducted. This Court agreed that trial counsel's use of the Vietnam Syndrome Defense was with the consent

of Appellant, and that its use was a reasonable strategic trial decision. Id. This Court also agreed that Eber could not be considered ineffective for stipulating to an established fact, i.e., that Lagle was, indeed, unavailable. Id. at 1246.

Thereafter, Appellant filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida on September 4, 1991. On March 28, 1994, District Judge James Paine issued an order finding that Appellant had filed a "mixed petition," raising both exhausted and unexhausted claims. The district court thereupon dismissed Appellant's federal habeas petition without prejudice so that Appellant could return to state court to litigate the unexhausted claims.

On April 5, 1995, volunteer counsel, Alan Wagner, filed on Appellant's behalf a 151-page "Motion to Vacate Conviction and Sentence Pursuant to Florida Rule of Criminal Procedure 3.850" in the state circuit court, raising the following claims for relief:

CLAIM I

MR. POPE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF MR. POPE'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

- A. TRIAL COUNSEL FAILED TO SEEK SUPPRESSION OF INADMISSIBLE STATEMENTS AND EVIDENCE.

- B. TRIAL COUNSEL FAILED TO CONDUCT REASONABLY EFFECTIVE VOIR DIRE.
- C. TRIAL COUNSEL FAILED TO OBJECT TO IMPROPER COMMENTS BY THE TRIAL COURT.
- D. TRIAL COUNSEL FAILED TO OBJECT TO GROSSLY IMPROPER COMMENTS BY THE PROSECUTOR.
- E. TRIAL COUNSEL FAILED TO CROSS-EXAMINE STATE WITNESSES AS TO EVIDENCE OF MR. POPE'S INNOCENCE.
- F. TRIAL COUNSEL FAILED TO INTERVIEW AND PREPARE DEFENSE WITNESSES.
- G. TRIAL COUNSEL FAILED TO PRESENT OTHER EVIDENCE OF MR. POPE'S INNOCENCE.
- H. TRIAL COUNSEL FAILED TO PRESENT AN EFFECTIVE CLOSING ARGUMENT.
- I. TRIAL COUNSEL FAILED TO SUBMIT OR TO ARGUE FOR PROPER JURY INSTRUCTIONS.
- J. TRIAL COUNSEL WAS GENERALLY IGNORANT OF CRIMINAL LAW AND DEFENSE PRINCIPLES.

CLAIM II

THE TRIAL COURT'S VAGUE AND OVERBROAD INSTRUCTIONS CONCERNING THE "HEINOUS, ATROCIOUS OR CRUEL" AND "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTORS WERE CONTRARY TO ESPINOSA V. FLORIDA, 112 S. CT. 2926 (1992), AND JACKSON V. STATE, 19 FLW S215 (FLA. APRIL 21, 1994), AND VIOLATED MR. POPE'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM III

MR. POPE WAS DEPRIVED "OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO OBJECT TO INSTRUCTIONS THAT ALLOWED

THE JURY TO WEIGH UNCONSTITUTIONAL AGGRAVATING  
CIRCUMSTANCES.

(R 1-151).

Eight months later, just prior to the State's response, Appellant filed a pro se "Motion to Hold Proceedings in Abeyance Pending Resolution of Status of Representation," and a "Motion for Hearing to Determine Competency of Appointed Collateral Counsel and Consolidated Motion for the Appointment of Capital Collateral Representatives." (R 170-72, 173-75). In these motions, Appellant requested the appointment of CCR because Mr. Wagner **was** no longer able to obtain assistance from the Volunteer Lawyer's Resource Center (VLRC), and because Mr. Wagner was not competent to represent Appellant absent that assistance. (R 170-75). Moreover, Appellant claimed that a conflict existed because Mr. Wagner **was** unable to make the necessary argument that he (Mr. Wagner) rendered ineffective assistance during Appellant's original 3.850 proceeding by failing to raise these new claims in the prior motion. In fact, Appellant was very concerned and upset that Mr. Wagner had made no attempt in his successive motion to excuse his failure to raise the claims in his original 3.850 motion. Thus, Appellant claimed that he needed to have CCR appointed in order to challenge Mr. Wagner's ineffectiveness, so that he could respond to the procedural bar argument the State would likely raise.

In addition to these two motions, Appellant also filed a 42-page pro se "Amended Motion to Vacate Convictions and Sentence of Death Pursuant to Fla. R. Crim. Proc. 3,850 with Request for Full and Fair Evidentiary Hearing on Claims." (R 176-220). In this amended motion, Appellant claimed as a defense to any procedural bars that his original collateral counsel was ineffective, that review on the merits would prevent a fundamental miscarriage of justice, and that he is actually innocent of the offenses and the death penalty. As such, Appellant sought review of the following claims:

1. Trial counsel failed to conduct a reasonable pretrial investigation to uncover witnesses and evidence readily available to him which could have been used to effectively impeach Susan Eckhart. (R 183).

2. Trial counsel failed to communicate with Appellant about the trial and failed to prepare Appellant for the trial. (R 200).

3. Trial counsel failed to adequately investigate the **case** and his defense. (R 200-01).

4. Trial counsel failed to prepare and present a defense at the penalty phase, including numerous mitigating circumstances. (R 203, 208).

5. Trial counsel failed to challenge the constitutionality and applicability of the four aggravating factors. (R 203-07).

6. Trial counsel failed to use an investigator to prepare for sentencing. (R 207-08).

On the same day that the State filed its response to Mr. Wagner's 3.850 motion, Mr. Wagner moved to withdraw, based on Appellant's allegations. (R 595-96). Two weeks later, on January 10, 1996, CCR filed a "Motion to Hold Proceedings in Abeyance pending Resolution of Designation of Counsel," claiming that it would be unable to designate counsel for Appellant because of its excessive caseload. (R 597-615). That **same** day, the trial court held a hearing on Mr. Wagner's motion to withdraw. Ultimately, the trial court ruled that Mr. Wagner would remain on the case until the court had disposed of the 3.850 motion, then it would allow counsel to withdraw. (SR 4-11; R 621).

As a result of this hearing, the trial court denied on February 1, 1996, both CCR's and Appellant's pro se motion to hold the proceedings in abeyance. (R 616). Three weeks later, Appellant filed a pro se "Motion to Appoint Conflict-Free Counsel," which was essentially a motion for rehearing. (R 618-20). In June, the trial court summarily denied both the 3.850 filed by Mr. Wagner and the amended 3.850 motion filed by Appellant, finding the motions successive and procedurally barred. It also denied Appellant's pro se motion to appoint conflict-free counsel. (R 622-23).



Two weeks later, CCR filed a "Motion to Clarify Status of Counsel, To Reconsider Dismissal of Motion for Postconviction Relief and Motion to Hold Proceedings in Abeyance Pending Resolution of Designation of Counsel." (R 624-26). CCR was concerned that, given the trial court's prior order, Appellant would be unrepresented to file a motion for rehearing. In its order denying the motion, the trial court stated as follows:

On June 4, 1996, the Court filed an Order dismissing both Defendant's Motion and Amended Motion for Postconviction Relief, and denying Defendant's Motion to Appoint Conflict-Free Counsel. Therefore, Attorney Alan Wagner was released as volunteer defense counsel as of that date.

As a result, it appears as though the CCR would be the appropriate counsel to represent Defendant in any further pleadings before this Court. In addition, the Court finds no reason to reconsider its dismissal of either the Motion or Amended Motion for Postconviction Relief, as they were both successive. Finally, since the issue of designation of counsel has been resolved, the Court will not hold any further proceedings in abeyance.

(R 632). This appeal follows.

## SUMMARY OF ARGUMENT

Issue I - Appellant's claims of ineffective assistance of counsel are procedurally barred, since they were raised in a successive motion outside the two-year time limit and were not based on either newly discovered evidence or the retroactive application of fundamental constitutional rights. His excuse for failing to raise these claims in his first 3.850 proceeding--that collateral counsel was ineffective--does not legally overcome the procedural bar.

Issue II - Appellant's claim that trial counsel was ineffective for failing to challenge the constitutionality of the HAC and CCP aggravating factor instructions at trial is procedurally barred, since this claim should have been raised in his first 3.850 proceeding.

Issue III - The trial court did not find a conflict between volunteer counsel and Appellant. Rather, given volunteer counsel's ten years of pro bono service, the trial court decided to allow volunteer counsel to withdraw at the conclusion of the proceedings. That Appellant wanted to claim ineffectiveness of volunteer counsel to excuse his failure to raise his claims in the original 3.850 was not sufficient justification to discharge counsel. Appellant **was** not entitled to collateral counsel, much less effective collateral counsel. Regardless, the trial court considered Appellant's *pro se*

amended 3.850 motion, which alleged volunteer counsel's  
ineffectiveness, and denied the motion.

## ARGUMENT

### ISSUE I

WHETHER APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHICH WERE RAISED IN A SUCCESSIVE MOTION, WERE PROPERLY DENIED AS PROCEDURALLY BARRED (Restated).

This Court affirmed Appellant's conviction and sentence on October 27, 1983, and mandate issued on February 15, 1984. Since Appellant did not seek certiorari review in the United States Supreme Court, his direct appeal became final on the day of this Court's mandate. According to Florida Rule of Criminal Procedure 3.850 in effect at the time, Appellant had until January 1, 1987, to file a motion for postconviction relief in state court, unless

(1) the facts upon which the claim is predicted were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence, or, (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Appellant's 3.850 motion and amendment, filed on April 5, 1995, and December 19, 1995, respectively, were well outside the time provision for filing such a motion. Moreover, none of the claims were based on newly discovered evidence or retroactively applied fundamental constitutional rights. Thus, Appellant's motion was untimely and was properly denied as procedurally barred. Foster v. State, 614 So. 2d 455, 458-59 & n.4 (Fla. 1992) .

Besides the fact that Appellant's motion and amendment were untimely, they were also successive. Appellant filed a timely motion to vacate on September 17, 1984, an amended motion to vacate on December 30, 1986, and an amendment to the amended motion to vacate on August 21, 1987. The trial court denied the motions and amendments after an evidentiary hearing on two claims, and this Court affirmed the denial. Pope v. State, 569 So. 2d 1241 (Fla. 1990). Thus, Appellant's 1995 motion and amendment constituted a second and successive motion for postconviction relief.

Rule 3.850 provides that

[a] second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Although Appellant raised new and different grounds, i.e., additional acts of deficient conduct by trial counsel, Appellant could have, and should have, raised these grounds in his original 3.850 motion. As noted previously, none of the allegations were based on newly discovered evidence or the retroactive application of a fundamental change in the law. Thus, the trial court properly denied the motion as an abuse of the process. Lambrix v. State, 21 Fla. L. Weekly S365, 366 & n.2 (Fla. Sept. 12, 1996) ("Successive

claims of ineffective assistance of counsel on different grounds are not permitted."); Jones v. State, 591 So. 2d 911, 913 (Fla. 1991) ("A defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions.").

To overcome the procedural bars, Appellant attempted to excuse his failure to raise the new claims in his original 3.850 motion by claiming that collateral counsel was ineffective. He also attempted to gain review on the merits by applying the federal concepts of 'fundamental miscarriage of justice' and 'actual innocence.' None of these excuses, however, are availing. First, the federal concepts of "miscarriage of justice" and "actual innocence" relate exclusively to federal habeas corpus proceedings and are not applicable to state postconviction proceedings. Even if they were, Appellant has failed to show "that the grounds asserted were not known and could not have been known to him at the time of the earlier motion." Foster, 614 So. 2d at 458. Second, pursuant to this Court's recent opinion in Lambrix v. State, 21 Fla. L. Weekly S365, 366 & n.2 (Fla. Sept. 12, 1996), 'claims of ineffective assistance of postconviction counsel do not present a valid basis for relief.' See also Murray v. Giarratano, 492 U.S. 1 (1989) (finding no constitutional right to postconviction counsel).

Appellant cites to the statute authorizing representation of death row inmates by CCR and several cases for the proposition that Appellant is entitled to effective collateral representation, but they do not support his position, especially in light of Lambrix. Capital defendants are not constitutionally entitled to postconviction counsel. *A fortiori*, they are not constitutionally entitled to effective postconviction counsel. That counsel is often appointed statutorily, though it **was** not in this case, does not create a constitutional right to effective assistance of collateral counsel. Lambrix, 21 Fla. L. Weekly at 366; Giarratano, 492 U.S. at 9-13; Troedel v. State, 479 So. 2d 736, 737 (Fla. 1985) ("While chapter [27, Fla. Stat. (1985)] represents a state policy of providing legal assistance for collateral representation on behalf of indigent persons under sentence of death, it did not add anything to the substantive stat-law or constitutional rights of such persons.").

Citing to Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992), Appellant further contends that "unique circumstances" compel consideration of his claims on the merits. **Initial brief** at 9-10. Appellant's "unique circumstances," however, relate back to Appellant's claim that collateral counsel **was** ineffective. In Breedlove, this Court overlooked a successive-petition procedural bar because original collateral counsel had been trial counsel and

did not raise claims of ineffectiveness in the original 3.850. Here, collateral counsel was not trial counsel, and collateral counsel did challenge trial counsel's effectiveness in the original 3.850 motion. Although collateral counsel on Appellant's second 3.850 motion was the same person who litigated Appellant's first 3.850 motion, Breedlove is inapplicable because Appellant cannot raise collateral counsel's ineffective as a "unique circumstance" warranting review on the merits.

In sum, Appellant filed an untimely, successive motion which raised claims that could have been, and should have been, raised in his original 3.850 motion. Because none of the claims were based on newly discovered evidence or the retroactive application of fundamental changes in the law, his claims were procedurally barred. Allegations that collateral counsel was ineffective for failing to raise these claims in Appellant's first 3.850 motion do not overcome the procedural bars because Appellant has no constitutional right to collateral counsel, much less effective collateral counsel. Therefore, this Court should affirm the trial court's order denying relief.



## ISSUE II

**WHETHER APPELLANT'S CHALLENGES TO THE CCP AND  
HAC AGGRAVATING FACTOR JURY INSTRUCTIONS WERE  
PROPERLY DENIED AS PROCEDURALLY BARRED  
(Restated).**

In his successive motion, Appellant complained that the trial court failed to give a limiting instruction on the "cold, calculated, and premeditated" and "heinous, atrocious, or cruel" aggravating factors. (R 126-44). He conceded, however, that trial counsel failed to object to these instructions, and thus failed to preserve the issue for review. (R 145-46). As this Court is well-aware, this failure to object renders the claim procedurally barred. *James*, 615 So. 2d 668 (Fla. 1993); *Melendez v. State*, 612 So. 2d 1366 (Fla. 1992).

To overcome this bar, Appellant claimed that trial counsel was ineffective for failing to challenge these instructions, thereby prejudicing Appellant's right to adequate appellate review and ultimately relief. (R 147-48). An allegation of ineffective assistance of counsel, however, cannot be used to circumvent a procedural bar. *Lopez v. Sinsletary*, 634 So. 2d 1054, 1057 (Fla. 1993); *Deaton v. Dugger*, 635 So. 2d 4, 7 (Fla. 1994). Furthermore, failure to raise a claim that would have been rejected does not constitute ineffective assistance of counsel. *Salmon v. Dugger*, 636 So. 2d 16 (Fla. 1994). Finally, and most importantly, since

Appellant could have, and should have, raised this issue in his first 3.850, it is untimely, and was properly denied **as** procedurally barred. Lambrix v. State, 21 Fla. L. Weekly S365, 366 & n.2 (Fla. Sept. 12, 1996) ("Successive claims of ineffective assistance of counsel on different grounds are not permitted."). Therefore, this Court should affirm the trial court's order denying relief.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION  
IN DENYING APPELLANT'S PRO SE MOTION TO  
APPOINT CONFLICT-FREE COUNSEL AND AMENDED  
MOTION FOR POSTCONVICTION RELIEF (Restated).

Alan Wagner began representing Appellant during Appellant's state habeas proceedings in 1985, and remained Appellant's counsel throughout Appellant's state and federal postconviction proceedings. Upon return from federal district court to exhaust certain claims, Mr. Wagner filed a 151-page 3.850 motion on Appellant's behalf on April 6, 1995. (R 1-151). Eight months later, just prior to the State's response, Appellant filed a *pro se* "Motion to Hold Proceedings in Abeyance Pending Resolution of Status of Representation," a "Motion for Hearing to Determine Competency of Appointed Collateral Counsel and Consolidated Motion for the Appointment of Capital Collateral Representatives," and an amended 3.850 motion.<sup>1</sup> (R 170-72, 173-75, 176-220). In these motions, Appellant requested the appointment of CCR because Mr. Wagner was no longer able to obtain assistance from the Volunteer Lawyer's Resource Center (VLRC), and because Mr. Wagner was not competent to represent Appellant absent that assistance. (R 170-75). Moreover, Appellant claimed that a conflict existed because Mr. Wagner was unable to make the necessary argument that he

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<sup>1</sup> These pleadings were prepared on Appellant's behalf by Michael Lambrix, a fellow death row inmate. (R 217-18).

(Wagner) rendered ineffective assistance during Appellant's original 3.850 proceeding by failing to raise these new claims in the prior motion. In fact, Appellant was very concerned and upset that Mr. Wagner had made no attempt in the successive motion to excuse his failure to raise the claims in the original 3.850 motion. Thus, Appellant claimed that he needed to have CCR appointed in order to challenge Mr. Wagner's ineffectiveness and overcome the procedural bar the State would likely raise.<sup>2</sup>

On the same day that the State filed its response to Mr. Wagner's 3.850 motion, Mr. Wagner moved to withdraw, based on Appellant's allegations. (R 595-96). Two weeks later, on January 10, 1996, CCR filed a 'Motion to Hold Proceedings in Abeyance pending Resolution of Designation of Counsel,' claiming that it would be unable to designate counsel for Appellant because of its excessive caseload. (R 597-615). That same day, the trial court held a hearing on Mr. Wagner's motion to withdraw. Ultimately, the trial court ruled that Mr. Wagner would remain on the case until the court had disposed of the 3.850 motion, then it would allow counsel to withdraw. (SR 4-11; R 621).

As a result of this hearing, the trial court denied on February 1, 1996, both CCR's and Appellant's pro se motion to hold

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<sup>2</sup> At no time, however, did Appellant seek to represent himself.

the proceedings in abeyance. (R 616). Three weeks later, Appellant filed a pro se "Motion to Appoint Conflict-Free Counsel," which was essentially a motion for rehearing. (R 618-20). In June, the trial court summarily denied both the 3.850 filed by Mr. Wagner and the amended 3.850 motion filed by Appellant, finding the motions successive and procedurally barred. It also denied Appellant's pro se motion to appoint conflict-free counsel. (R 622-23).

Two weeks later, CCR filed a "Motion to Clarify Status of Counsel, To Reconsider Dismissal of Motion for Postconviction Relief and Motion to Hold Proceedings in Abeyance Pending Resolution of Designation of Counsel." (R 624-26). CCR was concerned that, given the trial court's prior order, Appellant would be unrepresented to file a motion for rehearing. In its order denying the motion, the trial court stated as follows:

On June 4, 1996, the Court filed an Order dismissing both Defendant's Motion and Amended Motion for Postconviction Relief, and denying Defendant's Motion to Appoint Conflict-Free Counsel. Therefore, Attorney Alan Wagner was released as volunteer defense counsel as of that date.

As a result, it appears as though the CCR would be the appropriate counsel to represent Defendant in any further pleadings before this Court. In addition, the Court finds no reason to reconsider its dismissal of either the Motion or Amended Motion for Postconviction Relief, as they were both successive.

Finally, since the issue of designation of counsel has been resolved, the Court will not hold any further proceedings in abeyance.

(R 632).

In this appeal, Appellant now claims that the trial court erred in denying "the request for the appointment of conflict-free counsel." **Initial brief** at 40. According to Appellant, "[t]he lower court found that volunteer counsel had a conflict and could withdraw," id. at 40, but **the record does not support that claim.** At the hearing on Mr. Wagner's motion to withdraw, Mr. Wagner explained that he had been representing Appellant free of charge for the last ten years, but had been assisted by VLRC, which was no longer in existence. (SR 3-4, 9-10). The State responded that any change in counsel so late in the proceedings would delay it considerably and would thwart the orderly administration of justice. (SR 5-10). In ruling on the motion, the trial court stated,

Well, I don't want to force Mr. Wagner to stay. I mean, the man has done this voluntarily, hasn't even gotten a fee. If he wants to get off after ten years -- my, God, I wish there were others willing to undertake to represent somebody ten years for nothing.

All right, this is going to be my position. What I'm going to do, I'm going to leave you on until I make a ruling on the 3.850. . . . Thereafter, I'll allow you to withdraw.

(SR 10-11).

The trial court did not find a conflict; rather, it appreciated the fact that Mr. Wagner had represented Appellant for ten years pro bono, and allowed him to withdraw after the conclusion of these proceedings. The so-called "conflict" was of Appellant's making. He wanted to allege that Mr. Wagner was ineffective so that he could excuse his failure to raise his procedurally barred claims earlier. Such a "conflict," however, did not warrant substituting counsel seven months into the proceedings.

More importantly, the trial court considered Appellant's *pro se* amended 3.850 motion, which alleged Mr. Wagner's ineffectiveness as an excuse for the untimeliness of his claims. The trial court did not find Appellant's allegations sufficient to overcome the procedural bar. Thus, even if the trial court had discharged Mr. Wagner and appointed CCR to allege Wagner's ineffectiveness, the outcome of the proceedings would have been the same.

As for the trial court's denial of Appellant's *pro se* amended 3.850 motion, all of the claims raised by Appellant were procedurally barred since they could have been and should have been raised in his first 3.850 motion. Lambrix v. State, 21 Fla. L. Weekly S365, 366 & n.2 (Fla. Sept. 12, 1996) ("Successive claims of ineffective assistance of counsel on different grounds are not

permitted."). Appellant failed to show "that the grounds asserted were not known and could not have been known to him at the time of the earlier motion." Foster v. State, 614 So. 2d 455, 458 (Fla. 1992). Appellant's claim that collateral counsel rendered ineffective assistance during the first 3.850 proceeding for failing to raise these successive claims in that motion is unavailing since he was not constitutionally entitled to collateral counsel, much less to constitutionally effective collateral counsel. Id. ("[C]laims of ineffective assistance of postconviction counsel do not present a valid basis for relief."); Murray v. Giarratano, 492 U.S. 1 (1989) (finding no constitutional right to postconviction counsel). Therefore, Appellant's pro se motion **was** properly denied. As a result, this Court should affirm the trial court's order denying relief.




CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's denial of Appellant's successive 3.850 motions and his pro se motion for conflict-free counsel.

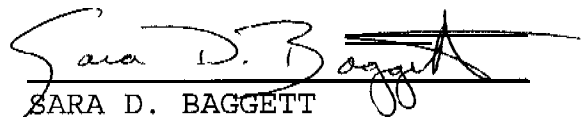
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Todd G. Scher, Chief Assistant CCR, 1444 Biscayne Boulevard, Suite 202, Miami, Florida 33132-1422, this 12th day of February, 1997.

  
SARA D. BAGGETT  
/Assistant Attorney General