IN THE SUPREME COURT OF FLORIDA

LOUIS B. GASKIN,

Appellant,

vs. Case No. 90,119

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, LOUIS B. GASKIN, 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 postconviction record will be by the symbol "PCR," reference to the trial record will be by the symbol "R," reference to the supplemental trial record will be by the symbol "SR," followed by the volume and page number.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts as reasonably accurate, but adds or disputes the following facts:

1. Gaskin's original 3.850 motion, filed on March 23, 1995, contained 22 issues and was not sworn to by Gaskin. The majority of the claims contained only issue headings and, perhaps, some legal argument. In almost every claim, Gaskin alleged that he could not plead the claim fully because numerous agencies had failed to comply with his public records requests. As a result, Gaskin moved for leave to amend once he had obtained the public records. (PCR I 1-44).

2. As ordered by the trial court, the State responded to the motion, asserting that the claims were either insufficiently pled, procedurally barred, or refuted by the record. (PCR I-II 53-252).

3. Although the trial court never granted Gaskin's motion for leave to amend, Gaskin nevertheless filed an amended 3.850 motion on October 12, 1995. This amendment was filed exactly two years after Gaskin's direct appeal became final. In it, Gaskin raised 26 claims. Once again, he claimed that he could not plead his claims fully because of public records nondisclosure and sought leave to amend once they became available. (PCR III 299-395).

4. Four months later, on February 1, 1996, Gaskin filed a "Motion to Compel," seeking the court's assistance in obtaining public records. (PCR III 397-404).

5. Five days after Gaskin filed this motion, the trial court held a Huff hearing on Gaskin's 3.850 motion. Gaskin suggested that they litigate first Claim II, relating to public records. Gaskin also reiterated his request for leave to amend once the records had been disclosed. (PCR V 33-36). The State objected to Gaskin's addition of any new claims in his amended motion that were not based on newly acquired public records. Otherwise, it agreed that they should litigate Claim I (CCR's claim of underfunding and ineffective assistance of collateral counsel) and Claim II (public records), prior to resolving any other claims. (PCR V 36-48). Thereafter, the trial court directed the parties to schedule a hearing for resolution of those two claims. (PCR V 53-58).

6. Gaskin's counsel sought to continue the public records hearing that the parties jointly set for April 29, 1996, but the trial court denied her motion for lack of good cause. (PCR III 405; VII 61-68).

7. At the April 29 hearing, Gaskin called as witnesses an officer and a detective from the Flagler County Sheriff's Department, the records custodian from the sheriff's department, and the custodian for the Flagler County State Attorney's Office. None of these witnesses had possession of, or knew where to locate, the specific articles sought by Gaskin. (PCR VIII 80-86, 86-100, 105-20, 121-32).

8. Following a recess, the prosecutor indicated that several of the articles Gaskin sought were in his files, which one of CCR's investigator's had previously inspected and made copies from. The remaining items could not be located. (PCR VIII 149-57). As for the state attorney's files, the prosecutor stated that all had been made available, except for notes made by the prosecutor who tried the case. CCR was welcome to look at the notes, but they had been removed from the file. (PCR VIII 155).

9. Ultimately, the trial court found that all of the agencies within the court's jurisdiction had complied with Gaskin's public records requests. It ordered the state attorney, however, to search for the remaining missing items. As for Gaskin's claim that DOC and FDLE had failed to comply fully with his requests, the trial court gave Gaskin 30 days to file a civil action against them, or waive the claim in his 3.850 motion. It also ordered CCR to file a status report every 60 days if it filed civil suits. If CCR obtained records from either of these agencies, it had 30 days from disclosure to amend Gaskin's 3.850 motion. (PCR III 406-09; VIII 194-98). Finally, regarding Claim I, CCR waived the claim without prejudice to re-raise it if necessary. (PCR VIII 175-94, 196).

10. CCR filed a civil action against DOC only. (PCR III 410-18). When it failed to file a status report within 60 days, the trial court issued an order to show cause. (PCR III 424). CCR

responded that it mistakenly calendared the status report for August instead of July. As for the status of the civil suit, CCR indicated that the civil court had just dismissed the case because CCR was specifically forbidden by statute to represent defendants in civil cases. CCR intended to file a motion for rehearing as soon as the civil court issued a written order. (PCR III 425-33).

11. By the date of the hearing on the order to show cause, CCR had filed an appeal in the First District Court of Appeal from the civil court's order. (PCR IX 202-07). As a result, the trial court dismissed the allegation in Claim II of Gaskin's 3.850 motion that asserted noncompliance by DOC. It also set a Huff hearing for Gaskin's remaining claims. (PCR III 438).

12. Following the Huff hearing, during which the parties argued their respective opinions regarding the need for an evidentiary hearing (PCR X 211-68), the trial court summarily denied Gaskin's motion for postconviction relief (PCR III 439-527). It denied many of the claims because they were facially insufficient. As a result, Gaskin filed a "Motion for Rehearing and Proffer of Facts," which the trial court denied. (PCR IV 528-55, 598). This appeal follows.

SUMMARY OF ARGUMENT

Issues I and II - The trial court properly applied a successive motion standard to four claims and allegations in a fifth claim that were wholly unaffected by public records and that were added in a piecemeal fashion by way of amendment. Even were the standard inappropriately applied to these claims, the trial court appropriately denied them on alternative grounds as procedurally barred. Other allegations in the fifth claim were properly denied as legally insufficient on their face, procedurally barred, or insufficiently pled.

Issue III - The trial court properly found that Gaskin waived any right to a written list of exemptions or *in camera* review of handwritten questions prepared by the prosecutor for trial that the state attorney's office withheld from disclosure pursuant to Gaskin's public records request. The questions were not "public records"; thus, the prosecutor did not have to claim an exemption or submit them for *in camera* review. Even if he did, the prosecutor offered to show them to collateral counsel at a hearing, and collateral counsel made no request to see them, made no request for a list of exemptions or *in camera* review.

Issue IV - Gaskin's claims that trial counsel failed to obtain background material requested by Dr. Krop and that Dr. Krop rendered an incompetent mental health evaluation because counsel failed to do so were facially insufficient. Gaskin failed to

alleged what the background material was that counsel failed to discover, the import of the material to Gaskin's defense, whether Dr. Krop would have testified at the penalty phase had trial counsel provided him with the information, what the substance of his testimony would have been, and how his testimony would have affected his ultimate sentence. Gaskin's motion for rehearing, which contained a "Proffer of Facts" was unverified and untimely; thus, the trial court properly denied it. Ultimately, the record refuted Gaskin's ineffectiveness claims.

Issue V - The State's argument is contained in Issue I.

Issue VI - The trial court properly denied Claim VI, relating to the constitutionality of the CCP instruction, as procedurally barred. Regardless, Gaskin committed these murders in a cold, calculated, and premeditated manner under any definition of those terms.

Issue VII - The trial court properly denied Claim VII, relating to the jury's proper role in sentencing, as procedurally barred.

Issue VIII - The trial court properly denied Claim VIII, relating to nonstatutory aggravation, as procedurally barred.

Issue IX - The trial court properly denied Claim X, relating to the original trial court's refusal to change venue, as procedurally barred. Gaskin raised this issue on direct appeal.

Issue X - The trial court properly denied Claim XII, relating to the constitutionality of the death penalty statute, as without merit and could have denied it as procedurally barred.

Issue XI - The trial court properly denied Claim XIII, relating to omissions in the direct appeal record and the alleged ineffectiveness of appellate counsel, as legally insufficient and could have denied it as procedurally barred and insufficiently pled.

Issue XII - The trial court properly denied Claim XIV, relating to the State's alleged overbroad argument of aggravators, as procedurally barred.

Issue XIII - The trial court properly denied Claim XV, relating to alleged juror misconduct, as procedurally barred and insufficiently pled.

Issue XIV - The trial court properly denied Claim XVI, relating to collateral counsel's alleged inability to interview the jurors in his case, as procedurally barred and facially insufficient.

Issue XV - The trial court properly denied Claim XVII, relating to an alleged lack of a fair-cross section of the community among the venire, as procedurally barred.

Issue XVI - The State's argument is contained in Issue IV.

Issue XVII - The trial court properly denied Claim XX, relating to the alleged introduction of irrelevant material at

Gaskin's trial, as procedurally barred. Gaskin raised this issue on direct appeal.

Issue XVIII - The trial court properly denied Claim XXII, relating to alleged cumulative error, as facially insufficient.

Issues XIX-XXI - The State's argument is contained in Issue I.

ARGUMENT

ISSUES I AND II

WHETHER THE TRIAL COURT ERRED IN FINDING CLAIMS XXIII-XXVI AND PARTS OF CLAIM V PROCEDURALLY BARRED BECAUSE THEY WERE NOT RAISED IN GASKIN'S ORIGINAL 3.850 MOTION AND WHETHER THE TRIAL COURT PROPERLY DENIED SEVERAL CLAIMS AS FACIALLY INSUFFICIENT (Restated).

This case epitomizes the gamesmanship employed by capital defendants seeking postconviction relief. Gaskin filed a bare-bones motion in March 1995, raising 22 claims and alleging that public records nondisclosure prevented him from properly pleading his claims--even those claims based solely on the trial record. Five months later, before the trial court even considered Gaskin's public records claim, Gaskin filed an amended 3.850 motion, raising 4 new claims and substantially enlarging numerous others with allegations clearly not related to public records acquisition. One of the State's major contentions in response to the two motions was that several of the claims, especially the claims of ineffective assistance of counsel, were insufficiently pled. Gaskin maintained, however, that he had no duty to provide anything more than a brief statement of the facts upon which he was relying for relief: "There's no requirement under the rule that I provide affidavits, names, locations, dates, times, or anything else." (PCR X 243). In fact, he believed that doing so would be "contrary

to a defensive pleading, to show [his] defensive strategy in [his] pleading." (PCR X 243).

However, once the trial court denied several of his claims--namely, his ineffectiveness claims--Gaskin filed a 28-page "Motion for Rehearing and Proffer of Facts." (PCR IV 528-55). After playing "hide the ball" and then forfeiting the game, Gaskin disclosed the information he should have provided in the first place--only to find it was too little, too late, when the trial court denied the motion for rehearing. (PCR IV 598). Gaskin's initial brief on the ineffectiveness claims, however, is replete with the facts alleged in the motion for rehearing.

This Court should not consider these facts in assessing the trial court's rulings because they were pled in bad faith. Postconviction should not be a game. Capital defendants should not be allowed to manipulate the system by using "defense tactics" and "strategy." Either they have evidence that will prove their conviction and/or sentence is invalid, or they do not. This Court should not condone Gaskin's behavior in pleading conclusory claims, then waiting until his motion is denied before laying out his cards on rehearing. Too much time and energy are wasted with this type of pleading practice. If it is allowed in this case, it will be repeated in others. This Court should not condone such pleading practice and should affirm the trial court's rulings.

As for Gaskin's allegations that the trial court applied the wrong standard in denying certain claims, the State responds as follows: In Argument I of his initial brief, Gaskin makes a sweeping claim that "[t]he trial court summarily denied Mr. Gaskin's postconviction motion on the erroneous assumption that the amended motion filed on the two-year date was a successive motion under Rule 3.850." **Brief of Appellant** at 10. Appellant's claim, however, is much to broad and, quite typically, much too conclusory. As even a cursory reading of the trial court's order would suggest, it assessed very few of the 26 claims in the amended motion under the successive motion standard. And since Appellant never identified for this Court (or the State) those issues to which the trial court allegedly applied the wrong standard, the State can only assume that Gaskin takes issue with the denial of Claims XXIII-XXVI and parts of Claim V.

1. Claims XXIII-XXVI

Gaskin filed a 44-page motion on March 23, 1995, raising 22 claims for relief. The vast majority of those claims contained nothing more than issue headings and an allegation that public records nondisclosure prevented proper pleading. Most of the claims, however, according to the issue headings, were based solely on the trial record, which would be unaffected by public records. Nevertheless, Gaskin made a "special request for leave to amend" once he had obtained outstanding public records. (PCR I 1-44).

Despite the incomplete nature of the motion, the trial court ordered the State to respond, which it did on May 19, 1995. (PCR I-II 53-252). In its response to Gaskin's "special request for leave to amend," the State argued, inter alia, that Gaskin could "enlarge" previous claims if he could demonstrate a legitimate basis for failing to raise them earlier. But it objected to the addition of "new" claims that could have been raised in the original motion. The State believed that Rule 3.850 envisioned a single pleading, rather than piecemeal litigation. (PCR I 61-62).

Despite the fact that the trial court never ruled on Gaskin's "special request for leave to amend," Gaskin nevertheless "amended" his 3.850 motion on the two-year deadline for filing his postconviction motion.[1] In that "amendment," Gaskin added new allegations to several claims and added four new claims. The four new claims, however, were based solely on the original trial record. More importantly, none were based in any way on public records. For example, Claim XXIII alleged that the "felony murder" aggravating factor is an improper "automatic" aggravator, Claim XXIV alleged that the prosecutor made an improper argument during

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[1] The trial court noted in its order denying relief that "[l]eave to amend . . . was only given to amend claims originally asserted in Defendant's initial 3.850 and did not give the Defendant leave to assert new claims not originally raised in that Motion." (PCR IV 440 n.2). Judge Foxman made such a ruling later in the proceedings, however, after a hearing on public records nondisclosure. (PCR III 409; VIII 195). He did not make such a ruling prior to Gaskin filing his amended 3.850 motion.

the penalty phase closing arguments, Claim XXV alleged that the jury instructions shifted the burden to Gaskin to prove that life was the appropriate penalty, and Claim XXVI alleged that the state argued and the jury considered nonstatutory aggravation, which Gaskin had already alleged in Claim VII of his original motion. (PCR III 382-86, 386-88, 388-92, 392-93; I 18-19).[2]

At a Huff hearing several months later, the State acknowledged that Gaskin had filed his amended motion within the two-year requirement of Rule 3.850; thus, it believed the trial court was free to accept it. Although the State had no objection to Gaskin's amendment of claims affected by the acquisition of public records, it did object to the addition of other claims wholly unaffected by public records. It likened these claims to a successive motion, which would have to meet the standard for successive claims. (PCR V 36-38).

In its order denying relief, the trial court initially made the following findings regarding the four new claims:

> Claims XXIII-XXVI are new claims that were not filed in the Defendant's previous Motion for Post Conviction Relief. These claims are not based on newly discovered evidence, a retroactive constitutional change in the law or a correction of any deficiencies in the prior motion. Issues which could and should have been brought in a prior 3.850 motion are procedurally barred. Marek v.

[2] This amended motion also included a "Special Request for Leave to Amend," once again claiming public records nondisclosure. (PCR III 300-01).

Singletary, 626 So. 2d 160 (Fla. 1993). Thus, Claims XXIII-XXVI are procedurally barred.

(PCR IV 455).

In this appeal, Gaskin claims that he was deprived of due process, equal protection, and a fair hearing on his claims because the trial court applied the wrong standard to these claims. He makes much ado about his necessity to file his motion seven months before the two-year deadline "partly to invoke the jurisdiction of the trial court" for assistance in obtaining public records. He also blames the dilatoriness of certain agencies in providing public records for his need to amend his claims. **Brief of Appellant** at 10-15. What he neglects to mention is that he filed his motion when he did because of a scheduling agreement between CCR and the Governor's Office. And while he may have been waiting on public records, none of the four new claims were affected in any way by public records.

In numerous cases involving public records issues, this Court has remanded for further proceedings and allowed for the amendment of claims. However, this Court authorized amendments only of claims affected by public records acquisition. E.g., Reed v. State, 640 So. 2d 1094, 1098 (Fla. 1994) ("Reed should be allowed a reasonable time to obtain any records to which he is entitled and allowed a reasonable time to amend his petition under rule 3.850 to include any pertinent information obtained from the documents."); Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1993) ("If the

court determines that the sealed documents are not exempt, they will be disclosed to Lopez. If those documents reveal any new claims, i.e., claims other than those raised in the instant motion and petition, Lopez will have thirty days from the date of access to file an amended postconviction motion raising those new claims."); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993) ("Should the trial court determine that Walton is entitled to disclosure of the records at issue, we direct that Walton be granted an additional thirty days from the rendition of that ruling in which to amend his rule 3.850 motion to permit additional claims or facts discovered as a result of the disclosure to be raised before the trial court."); Muehleman v. Dugger, 623 So. 2d 480, 481 (Fla. 1993) ("Muehleman has sixty days from the date he receives the records to which he is entitled or from the date of this opinion, whichever is later, to amend his 3.850 petition to include any facts or claims contained in the sheriff's records."); Mendyk v. State, 592 So. 2d 1076, 1082 (Fla. 1992) (providing Mendyk an opportunity "to file a new motion for post-conviction relief predicated upon any claims arising from the disclosure [of public records]").

Gaskin cites to this Court's opinion in Brown v. State, 596 So. 2d 1026 (Fla. 1992), and several district court opinions, to support his proposition that he was allowed to amend his 3.850 motion as many times as he wanted within the two-year period. The

State submits, however, that Gaskin, and other capital defendants, have used this general principal to abuse the process. To the extent public records nondisclosure prevents a defendant from pleading a claim within the required period, and the nondisclosure is in no way attributable to the defendant, that defendant should be allowed to add or amend those claims affected by the nondisclosure one time. There is no legitimate reason, however, to allow the piecemeal filing of claims such as those made by Gaskin in his amended motion. Were this Court to condone such pleading practice, capital defendants could theoretically file dozens of amendments within the two-year period, even after the trial court has conducted an evidentiary hearing. Such a practice would do nothing but further delay an already burdensome and time-consuming process.

Were it proper, however, for Gaskin to raise these claims in a piecemeal fashion, the trial court alternatively made the following findings relating to the four new claims:

> Further, these claims are also procedurally barred as claims that could have or should have been properly raised on direct appeal. Claim XXIII presents the issue of the "felony murder" aggravating circumstance jury instruction as unconstitutionally vague. A claim about jury instructions is properly raised on direct appeal. White v. Dugger, 565 So. 2d 700 (Fla. 1990). Claim XXIV sets forth the issue of prosecutorial misconduct during closing argument by presenting misleading and improper argument. A claim about closing argument is properly raised on direct appeal. Kelly v. State, 569 So. 2d 754

(Fla. 1990); Medina, 573 So. 2d at 293. Claim XXV presents the issue of the penalty jury instruction shifted the burden to the Defendant. Again, a claim about jury instructions is properly raised on direct appeal. Turner, 614 So. 2d at 1075; White, 565 So. 2d at 700. Claim XXVI sets forth the issue of the improper introduction of nonstatutory aggravating factor evidence. A claim about evidence admissibility is properly raised on direct appeal. Mendyk v. State, 592 So. 2d 1076 (Fla. 1992), overruled on other grounds, 613 So. 2d 406; Engle v. Dugger, 576 So. 2d 696 (Fla. 1991).

In addition, Claims XXIII-XXVI present allegations of ineffective assistance of counsel based on trial counsel's failure to object to the above referenced errors. Procedurally barred claims also include direct appeal claims rephrased in the guise of ineffective assistance of counsel. Kight, 574 So. 2d at 1066; Medina, 573 So. 2d at 293. Even an unpreserved issue is procedurally barred because, if preserved, it could have been raised on direct appeal. Williamson, 651 So. 2d at 84. Further, the Defendant does not show any actual prejudice in Claims XIII-XXVI. It would substantially undermine the preservation of error rule in Florida to allow consideration of allegations that trial counsel failed to object or failed to move for a mistrial in a motion for post conviction relief. See Anderson v. State, 467 So. 2d 781 (Fla. 3d DCA 1985), rev.denied, 475 So. 2d 693 (Fla. 1985). Absent a showing of fundamental error, procedural error that could have been and should have been raised by means of objection or on motion at trial and argument on appeal are not proper for consideration in a rule 3.850 motion. Troedel v. State, 479 So. 2d 736 (Fla. 1985). Thus, these claims are also facially insufficient.

(PCR IV 455).

These findings were legally correct. All four of these claims could and should have been raised on direct appeal. To the extent Gaskin made a single-sentence allegation in each claim that trial counsel was ineffective for failing to object to the alleged error, it is clear that Gaskin was merely trying to circumvent the procedural bar. Moreover, as the trial court found, Gaskin made no showing that counsel's failure to object, if constitutionally deficient, prejudiced his defense. Therefore, these claims were properly denied as procedurally barred. See Medina v. State, 573 So. 2d 293 (Fla. 1990).

2. Claim V

Besides the four new claims, Gaskin added factual allegations and legal argument to Claim IV (Claim V in the amended motion).[3] In the amended claim, he alleged that trial counsel rendered ineffective assistance pretrial and during the guilt phase for the following reasons: (1) trial counsel had a conflict of interest and failed to disclose at the time of trial that he was an honorary sheriff; (2) trial counsel failed to make an opening statement or call witnesses during the guilt phase, despite ample evidence that Gaskin suffered from severe mental disorders; (3) trial counsel failed to supply background material to the defense expert in order to explore possible defenses and to adequately assess Gaskin's

[3] His original Claim IV contained only two sentences, one of which alleged his inability to plead the claim because of public records nondisclosure.

competency; (4) trial counsel failed to challenge Gaskin's ability to knowingly waive his rights before confessing; (5) trial counsel failed to question the jury regarding their views on mental health issues, scientific evidence, race, or confessions; (6) trial counsel failed to make a record of the racial composition of the venire; (7) trial counsel failed to request the appointment of experts to challenge the State's scientific evidence; (8) trial counsel failed to show that the crime scene was not properly preserved; (9) trial counsel failed to object to the State's "improper personalizing during closing argument" and the State's argument that both premeditated and felony murder applied; and (10) trial counsel failed to challenge Alphonso Golden's testimony regarding his receipt of stolen goods and the lack of charges against him. (PCR III 330-39).

Regarding these new allegations, the trial court found that the allegations of conflict and trial counsel's failure to make an opening statement could have been raised in the original motion and did not constitute newly discovered evidence. (PCR IV 444-45). It found the allegations relating to the jury, venue, and prosecutorial misconduct procedurally barred. (PCR IV 445 n.4). And it found the claims relating to trial counsel's failure to discover and present mental health evidence insufficiently pled. In doing so, the trial court found that "this claim contains no specific allegations. The Defendant's Motion fails to demonstrate

who would have provided the mitigating evidence and how it would have changed the outcome of the proceedings, and moreover, the conclusory allegations contained within this claim fail to specifically allege and or demonstrate actual prejudice." (PCR IV 442).

a. Allegations of conflict

As with Claims XXIII-XXVI, the trial court found that Gaskin's allegations that his trial attorney was an honorary sheriff should have been raised in Gaskin's original motion, since the underlying facts were known to him then. As a result, it analyzed these allegations under the newly discovered evidence standard, because it believed that this was a successive claim for relief. Since the underlying facts of the allegations were revealed in a 1992 deposition, the trial court found that the allegations were not newly discovered. Thus, it denied the claim as procedurally barred. (PCR IV 444).

To the extent this Court condones piecemeal pleadings and finds that the trial court applied the wrong legal standard, this Court should nevertheless affirm the summary denial of these allegations. Caso v. State, 524 So. 2d 422, 424 (Fla. 1988) ("A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it."). Appellant's own motion reveals that Gaskin's trial attorney, Raymond Cass, did not solicit, but

was given an honorary sheriff's card in the 1960's or early 1970's by then-Sheriff Edward Duff. (PCR III 333). The card was valid until the sheriff's term ended or the appointment was revoked. (PCR III 333). Mr. Cass stopped carrying the card between 1971 and 1973. (PCR III 333). In 1990, when the State tried Gaskin for these murders, Sheriff Duff was no longer in office. Thus, the card was no longer valid. Consequently, Gaskin's allegations of conflict were legally insufficient and could have been denied as such.[4]

b. Failure to make an opening statement or call witnesses in the guilt phase

As with the allegation of conflict, the trial court found that Gaskin's allegations regarding trial counsel's failure to make an opening statement or call witnesses during the guilt phase should have been raised in Gaskin's original motion; thus, it denied the allegations as procedurally barred under the successive motion standard. (PCR IV 444). Again, were this ruling in error, this Court should nevertheless affirm the trial court's denial of this claim. First, Gaskin's allegations were facially insufficient, and thus Gaskin failed to allege, much less prove, deficient conduct. Similarly, he failed to prove prejudice.

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[4] This case is unlike Teffeteller v. State, 676 So. 2d 369 (Fla. 1996), and its companion cases, because Gaskin's motion fails to state facts sufficient to warrant an evidentiary hearing and, in fact, refutes his own claim.

Gaskin made nothing more than conclusory allegations in this claim. At no time did he allege what defense counsel was supposed to say during his opening statement, or how his failure to do so prejudiced Gaskin's defense. After all, Gaskin confessed to committing these murders. Likewise, at no time did Gaskin allege what witnesses defense counsel could have or should have called to testify on Gaskin's behalf. Although he claimed that "there was ample evidence that [Gaskin] suffered from severe mental disorders," (PCR III 334), he did not allege what that evidence was, nor did he allege that counsel should have presented an insanity defense. Therefore, since evidence of diminished capacity less than insanity would not have been admissible, see Chestnut v. State, 538 So. 2d 820 (Fla. 1989), defense counsel could not be deemed deficient for failing to present Gaskin's unspecified "ample evidence" of "severe mental disorders."

Gaskin claimed below, and reiterates on appeal, that he had no obligation to identify witnesses or detail evidence with greater particularity, because to do so would have undermined his defense strategy. Again, the State submits that it was Gaskin's burden to make a prima facie showing of deficient conduct and prejudice. Without such information, neither the State nor the trial court can determine whether the record refutes Gaskin's allegations. Evidentiary hearings should only be granted upon a colorable claim for relief. It cannot be enough to simply conclude that "ample

evidence" was available to counsel and that counsel should have presented it. See Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1st DCA 1993) ("In cases involving claims of ineffective assistance of counsel based on counsel's alleged failure to investigate and to interview witnesses, a facially sufficient motion must include the following allegations: (1) the identity of the prospective witnesses; (2) the substance of the witnesses' testimony; and (3) an explanation as to how the omission of this evidence prejudiced the outcome of the trial."); Williamson v. State, 559 So. 2d 723, 724 (Fla. 1st DCA 1990) ("Williamson's failure to allege the identities of the uncalled witnesses, and his failure to state whether those witnesses were available for trial, rendered the first and second allegations [of ineffective assistance] facially insufficient."); Sorgman v. State, 549 So. 2d 686, 687 (Fla. 1st DCA 1989) ("[A]llegations [of ineffectiveness] must be in sufficient detail to apprise the court of the names of the witnesses, substance of their testimony, and how the omission prejudiced the outcome of the trial."). Gaskin having failed to allege sufficient facts to support a prima facie claim for relief, the trial court could have denied these allegations as facially

insufficient.[5] Cf. Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992).

c. Failure to provide background information to mental health experts and challenge Gaskin's ability to waive rights before confessing

These allegations were raised more fully as a separate claim for relief in Gaskin's amended motion. In assessing them in relation to Claim V, the trial court merely adopted his findings made in relation to Claims III and XVIII. (PCR IV 445 n.4). To avoid duplication of responses, the State likewise adopts its response to Issue IV herein.

d. Failure to question jurors about mental health issues, etc., and to note racial composition of jury

Appellant alleged in his motion that trial counsel "failed to question the jury as to their views on mental health issues, scientific evidence, race, or their view of a defendant who previously made statements to the police," which "left defense counsel without the necessary information to make his peremptory challenges." He also alleged that trial counsel failed to put on the record "the race of the members of the jury panel," which prevented collateral counsel from determining whether the State exercised race-based challenges. (PCR III 336-37). Although the

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[5] To the extent these allegations are intertwined with the allegations that counsel failed to provide background information to Gaskin's mental health expert and failed to present favorable mental health testimony, the State will rely on its response in Issue IV regarding the latter allegations.

trial court failed to rule on these allegations, he could have found them legally insufficient, given that they are nothing more than baseless conclusions. Once again, Gaskin failed to detail what questions counsel should have asked the jurors and, more importantly, he failed to show that, had counsel raised these questions, there is a reasonable probability that the outcome of Gaskin's trial would have been different. Similarly, Gaskin failed to show that trial counsel, and only trial counsel, had a duty to record the venire's race, and that, had he done so, there is a reasonable probability that the outcome of Gaskin's trial would have been different. Thus, this claim was properly denied without an evidentiary hearing. Cf. Mendyk, 592 So. 2d at 1082.

e. Failure to seek appointment of experts to challenge State's scientific evidence

Gaskin alleged that trial counsel failed to move for the appointment of experts to challenge the State's scientific evidence, but did not allege what experts defense counsel could have and should have sought, what their testimony would have been, and how their omission prejudiced Gaskin's trial. (PCR III 338-39). Given such pleading deficiency, these allegations were properly denied without an evidentiary hearing. See Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1st DCA 1993); Williamson v. State, 559 So. 2d 723, 724 (Fla. 1st DCA 1990); Sorgman v. State, 549 So. 2d 686, 687 (Fla. 1st DCA 1989); cf. Mendyk, 592 So. 2d at 1082.

f. Failure to impeach preservation of crime scene

Gaskin alleged that trial counsel failed to impeach the State's law enforcement witnesses with evidence that Wojo, the dog, law enforcement personnel, and neighbors brought to identify missing items from the victims' home tainted the crime scene. (PCR III 338-39). He did not allege, however, what at the crime scene was "tainted" or how the presence of these people and the dog affected the weight of the testimony presented. In other words, Gaskin failed to allege, much less prove, that the outcome of his trial would have been different if defense counsel had, in fact, impeached the State's witnesses with these allegations. As a result, the trial court properly denied these allegations without an evidentiary hearing. Cf. Mendyk, 592 So. 2d at 1082.

g. Failure to object to State's closing argument

Any claims based on the State's arguments to the jury could have and should have been raised on direct appeal. It was improper for Gaskin to raise these allegations under the guise of ineffective assistance of counsel. See Medina v. State, 573 So. 2d 293 (Fla. 1990). As with allegations of other prosecutorial misconduct raised in Claims IV and VII, the trial court denied this claim as procedurally barred. (PCR IV 445 n.4). This ruling was proper.

h. Failure to impeach Alphonso Golden

In two sentences, Gaskin alleged that counsel failed to impeach Alphonso Golden with the fact that Golden had not been charged with receiving stolen property. (PCR III 339). He did not allege, however, much less show, how this impeachment would have changed the outcome of his trial. According to Golden's own testimony, Gaskin "appeared at Golden's home and asked to leave some 'Christmas presents.' Gaskin told Golden that he had 'jacked' the presents and left the victims 'stiff.'" Gaskin v. State, 591 So. 2d 917 So. 2d 918 (Fla. 1991). Based on this testimony, there is not a reasonable possibility that the verdict would have been different if defense counsel had impeached Golden with the fact that he had not been charged with receiving stolen property. Therefore, the trial court properly denied these allegations without an evidentiary hearing.

In sum, the State submits that the trial court properly treated some of Gaskin's allegations in Claim V as successive claims because they could have and should have been raised in the original motion. To the extent the trial court applied the wrong standard, the State submits that the allegations could have been denied as legally insufficient. This Court should not consider any details in Gaskin's brief that were not provided to the trial court, e.g., who Gaskin would have called at an evidentiary hearing

and what that witness would have said, since those details were not provided, as required, in Gaskin's motion.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY FOUND THAT GASKIN WAIVED ANY PUBLIC RECORDS CLAIM TO THE PROSECUTOR'S NOTES BY FAILING TO ACCEPT THE PROSECUTOR'S OFFER TO REVIEW THEM (Restated).

At the hearing on Gaskin's "Motion to Compel Disclosure [of Public Records]," the prosecutor clarified his previous assertion that his office had provided all of the documents Gaskin had requested:

> Now I do have to amend one statement that I made before, as Mr. Nelson brought it to my attention, that he did remove his notes, that's his written questions, which he doesn't like to give out. He does all his questions before trial because he's such a methodical individual. But those were revealed to CCR for their edification, I guess. But he did hold back his personal notes with reference to the case. So I wanted to amend my statement on that. There's been no indication from counsel that he wants to review them. Mr. Nelson says he's welcome to review them if he wants to. We're not going to claim exemption on his work product. But I wanted to clarify that, because I know I said we gave them everything and Mr. Nelson indicated to me after that that he had withheld his notes.

(PCR VIII 155).

Following that comment, Gaskin's counsel made no indication that she did, in fact, want to review them. Nor did she object at the hearing to their nondisclosure and/or seek *in camera* review by

the court. Rather, Gaskin's counsel waited a month and a half to file a motion for a list of exemptions from the state attorney's office. In that motion, Gaskin sought not only the statutory basis for the withholding of the prosecutor's notes, but a hearing and *in camera* review to determine whether they were, in fact, exempt. (PCR III 419-20). In denying Gaskin's motion, the trial court made the following findings:

> After reviewing the transcript from the April 29, 1996 hearing, this Court finds that the Defendant's request for a written list of exemptions from the State Attorney's file was essentially waived at the April 29, 1996 hearing. At that hearing, Assistant State Attorney Sean Daly described in detail to the Court and defense counsel what material Assistant State Attorney Nelson had withheld from the State Attorney's files prior to disclosure . . . . Defense counsel was clearly advised at that point what material had been withheld and that the State Attorney's Office was not claiming a work product exemption on the withheld material. Yet defense counsel did not object to Assistant State Attorney Daly's representations regarding whether the defense wanted to review Assistant State Attorney Nelson's withheld personal notes. Defense counsel also did not request, at that time, a written list of the material that was withheld or an in camera inspection of that material by the Court. The Court finds, therefore, that defense counsel waived any right the Defendant may have had to a written list of the material withheld from the State Attorney's file by not making such a request at the April 29, 1996 hearing in this case.

(PCR III 421-22).

In this appeal, Gaskin claims that the trial court abused its discretion in finding a waiver and in refusing to order the prosecutor to provide the material for *in camera* review. **Brief of Appellant** at 21-22. This Court has previously held, however, that prosecutor's notes, such as those in this case, are not public records. E.g., Lopez v. Singletary, 696 So. 2d 725, 728 (Fla. 1997) ("[The trial court did not err in finding that the attorney's handwritten notes dealing with trial strategy and cross-examination of witnesses were not public records."). Thus, they are not subject to disclosure, and the custodian does not have to claim an exemption. If they are not public records and the custodian claims no exemption, then there is no need for *in camera* review. See §119.07(2)(a), Fla. Stat. (1995).

In any event, the prosecutor described the withheld documents as the trial prosecutor's personal list of questions he intended to ask the witnesses at trial. (PCR VIII 155). From that description, it is obvious that such documents are not public records. Thus, Gaskin would gain nothing if this Court remanded for an *in camera* review of such documents. It would only tax already limited judicial resources. Moreover, it would reward Gaskin for failing to object to the prosecutor's representations at the April hearing, during which the prosecutor offered to show Gaskin's counsel the withheld notes. The time to resolve the issue was at the April hearing; yet, Gaskin's counsel said nothing.

Given the one-and-a-half-month delay in Gaskin's pursuit of these documents, the trial court properly found that Gaskin had waived any claim to them.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DENIED CLAIMS III, XVIII, AND XIX, ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE AND INCOMPETENT MENTAL HEALTH EVALUATIONS (Restated).

In Claim III of his amended 3.850 motion, Gaskin claimed that his trial counsel rendered ineffective assistance by failing to do the following: (1) investigate and present mitigating evidence and provide such information to Gaskin's mental health expert so that he could perform a competent evaluation, (2) request a doubling instruction for the "felony murder" and "pecuniary gain" aggravating factors, and (3) object to erroneous jury instructions as alleged in other claims. (PCR III 319-28). In Claim XVIII of his amended motion, Gaskin reiterated his allegations from Claim III that trial counsel failed to provide his mental health expert, Dr. Krop, with sufficient background materials. (PCR III 365-69). And in Claim XIX, Gaskin claimed that Dr. Krop performed an incompetent mental health evaluation because trial counsel failed

to provide him with adequate background materials. (PCR III 369-78).[6]

In denying these claims, the trial court found them facially insufficient or refuted by the record. As to Claim III, the trial court made the following findings:

> In Claim III (II-Original), the Defendant alleges that trial counsel was ineffective due to his failure to present adequate mitigation at the penalty phase. In support of this claim, the Defendant claims that the two penalty phase witnesses called to testify only provided limited information regarding the Defendant's background and counsel should have assembled witnesses at penalty phase to give a complete picture of the Defendant's life. The Defendant further contends that Counsel was ineffect [sic] in his failure to provide the mental health expert, Dr. Krop, with sufficient background on the Defendant to make an accurate evaluation of the Defendant's mental health and failed to adequately cross-examine the findings of Dr. Rotstein, who examined the Defendant for possible mitigation.
>
> * * * *
>
> In concurrence with the State's response and argument, the Court finds that this claim contains no specific allegations. The Defendant's Motion fails to demonstrate who would have provided the mitigating evidence and how it would have changed the outcome of the proceedings, and moreover, the conclusory allegations contained within this claim fail to specifically allege and or demonstrate actual prejudice. See, Rose v. State, 617 So. 2d 291, 296 (Fla. 1993) . . . . Mere

[6] Because of the circular and repetitive nature of these three claims, the State has consolidated them to avoid duplicative responses.

> conclusory allegations of ineffective assistance of counsel are insufficient upon which to justify relief and should be summarily rejected. See, Jackson v. State, 633 So. 2d 1051, 1054 (Fla. 1993); . . .
>
> In conclusion, in the absence of any demonstration of actual prejudice sufficient to justify relief (the Defendant has not even attempted to demonstrate that the alleged errors would have altered the outcome in this case) Defendant's ineffective assistance of counsel claims raised in Claim III should be rejected without evidentiary hearing due to their legal insufficiency.
>
> Finally, the court finds that the Defendant's allegation within Claim III alleging that trial counsel failed to provide requested background materials to Dr. Krop is likewise legally insufficient by failing to specifically allege what specific background information was not known to Dr. Krop and how that information would have changed his evaluation of the Defendant, not to mention, the fact that Dr. Krop's deposition does reveal that he was given the background information, from the Defendant as well as a three hour interview with two family members (Virginia Brown and Janet Morris), that is alleged to have been unknown to Dr. Krop at the time of evaluation. As such, this claim is equally conclusively refuted by the record. A more thorough disclosure of this claim has been rendered in the Court's discussion of Claim XVIII and is incorporated and adopted herein.

(PCR IV 442-43). As to Claim XVIII, the trial court made the following findings:

> In Claim XVIII, the Defendant alleges that he received ineffective assistance of counsel because his trial counsel failed to provide the mental health experts with adequate background information. He further alleges that trial counsel failed to

adequately investigate his background which caused the mental health experts to render an incomplete diagnosis; and, if the information was provided, a more than reasonable probability exists that the experts would have found the Defendant incompetent to stand trial. He asserts that Dr. Harry Krop repeatedly requested background information, such as school records, medical records, and depositions, and, when Dr. Krop was called to testify, he could not because he could not provide an expert opinion without the requested material. The Defendant, by incorporation of Claim III, contends that if trial counsel performed an adequate investigation, the mental health experts would have known the following: (1) the true extent of his appalling conditions growing up; (2) his suffering from long-standing, severe mental health disorders; (3) his organic brain damage; (4) his suffering from Schizotypal Personality Disorder and Schizophrenia; (5) his mother was an unmarried teenage mom and his father was absent; (6) he was abandoned for hours by his mother until he was found at three months old, alone and eating off the floor, (7) he was raised by his great-grandparents, but still abused and forced to eat off the floor, (8) at 12-13 years old, he hid under the bed and had to be physically pulled out; he was foaming at the mouth; (9) he was involved in incestuous sexual activity at four years old; (10) he engaged in sexual activity with his siblings and cousins; (11) as a teenager, he was suicidal, evidenced by his playing with dangerous snakes and playing Russian Roulette; (12) at age 12, he was placed in juvenile hall for stealing a bicycle; (13) he failed third and sixth grades because of his mental health problems; and (14) at age 15, he was only in the eighth grade and he quit school and found a job.

First, Harry Krop, Ph.D., stated in his deposition that he did request additional information, school records and medical records, if available, in order to corroborate the Defendant's and his family's reported

information. See Deposition of Harry Krop, Ph.D., at pg. 9, June 4, 1990, attached hereto as **Appendix G.** Second, Dr. Krop, prior to his interview with the Defendant, spent three hours interviewing the Defendant's family members, Virginia Brown, aunt, and Janet Morris, cousin. Id. at 8. Third, Dr. Krop stated that he was relying on typical information for a diagnosis in this case, self-report, family report, and testing. Id. at 19. In fact, Dr. Krop, throughout his deposition, stated that he knew the background information that the Defendant is now claiming was not known to the mental health experts. Dr. Krop discussed the following background information of the Defendant: (1) his conditions growing up, Id at 18; (2) his suffering from mental health disorders, including the Defendant hearing voices, having several personalities, bed-wetting and thumb-sucking into his teenage years, and visiting a psychiatrist when a teenager, Id. at 11, 12, 16, 36; (3) his brain injuries and possible damage, Id. at 9; (4) Dr. Krop made a preliminary diagnosis of Schizoid Personality Disorder and the Defendant had tendencies of Schizophrenia, Id. at 29, however, Dr. Krop found that he was competent to stand trial, Id. at 13, and that he did not reach the M'Naughten test for legal insanity, Id. at 31; (5) his father was not involved in his life, Id. at 18 (6) his mother neglected him, Id.; (7) he was raised by his great-grandparents and his aunt, Id.; (8) his sexual deviant behavior, such as pedophilia, bestiality, exhibitionism, and voyeurism, Id. at 16,22; and (9) his suicidal acts, such as Russian Roulette, Id. at 36. Clearly, Dr. Krop was well aware, through the Defendant and the Defendant's family, of the Defendant's background information. Dr. Krop only requested additional information, such as school records and medical records, to corroborate the details of the reported information. Id. at 9, 15, 29.

In addition, Jack Rothstein [sic], M.D., another mental health expert who examined the

Defendant, made a twenty-seven (27) page, detailed report. See Mental Health Examination, Jack Rothstein [sic], M.D., June 9, 1990, attached hereto as **Appendix H**. This report details: (1) the Defendant's sexual deviant behavior, including incestuous activities, Id. 9, 10, 19, 20; (2) his family and how he was raised, including descriptions of his relationships with his mother, father, great-grandparents, and siblings, Id. at 12, 19, 20; (3) he did not exhibit any evidence of organic brain damage, Id. at 15; (4) his suffering from mental health disorders, such as hearing voices, episodes of derealization or depersonalization, and multiple personalities; Id. at 16, 19; and (5) his involvement with juvenile hall for stealing, Id. at 19. Dr. Rothstein [sic] based his report on the Defendant's self-report; the deposition of Janice D. Gilyard, the Defendant's girlfriend; an interview with Virginia Brown, the Defendant's aunt; the deposition of Alphonso Golden, a friend; the deposition of Alfreda Victoria Golden, a friend since childhood; and the deposition of Dr. Harry Krop. Dr. Rothstein [sic] diagnosed the Defendant with Schizotypal Personality Disorder, but, the Defendant was competent to stand trial, he was sane at the time of the crimes and knew what he did was wrong, and he was unable to conform his conduct to normal human behavior at the time of the crimes. Id. at 26, 27. Clearly, Dr. Rothstein [sic] was also well aware of the Defendant's background information. In fact, Dr. Rothstein [sic] diagnosed the Defendant with the same disorder that the Defendant is now claiming was not known by the mental health experts.

Accordingly, based on the deposition of Dr. Harry Krop and the detailed report of Dr. Jack Rothstein [sic], the record conclusively refutes the Defendant's claim that trial counsel was ineffective for not investigating and providing the mental health experts with adequate background information.

(PCR IV 452-54). Although the trial court found Claim XIX procedurally barred, it alternatively found this claim refuted by the record as outlined in its finding as to Claim XVIII. (PCR IV 454).

In this appeal, Gaskin claims that his allegations were, in fact, facially sufficient to support this claim. In addition, Gaskin claims that the trial court "ignored significant factual allegations that were contained in the motion and in the motion for rehearing." **Brief of Appellant** at 23-24. The State reiterates its arguments in Issue I that Gaskin purposely pled vague and conclusory allegations in order to obtain an evidentiary hearing. When his motion was denied, he then filed a lengthy motion for rehearing, raising new factual allegations. As this Court has repeatedly held, conclusory allegations are insufficient to obtain an evidentiary hearing. E.g., Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.").

Here, Gaskin alleged that his mental health expert, Dr. Harry Crop, "had repeatedly requested that Mr. Cass to provide [sic] him background material so that he could performed [sic] competent evaluation of Mr. Gaskin." (PCR III 320). He also alleged that "Mr. Cass never provided Dr. Krop with the requested background materials such as Mr. Gaskin's school records, medical records, the several depositions taken in the case and other background materials." (PCR III 321). At no time did Gaskin detail what school/medical records counsel could have provided, what depositions were taken that Krop could have reviewed, or what "other background materials" existed. Nor did Gaskin allege what those records, depositions, and materials would have revealed. Moreover, Gaskin detailed to some extent what "[t]he judge and jury never knew," but he never alleged who would have presented this evidence to the jury. More importantly, Gaskin never alleged, much less made a prima facie showing, that the jury's recommendation and the trial court's ultimate sentence would have been different had this unknown witness or witnesses related such information.

Gaskin had an obligation to provide such information in his motion. See Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1st DCA 1993); Williamson v. State, 559 So. 2d 723, 724 (Fla. 1st DCA 1990); Sorgman v. State, 549 So. 2d 686, 687 (Fla. 1st DCA 1989). By failing to do so, the trial court properly denied this claim for relief as facially insufficient. Cf. Jackson v. Dugger, 633 So. 2d

1051, 1054 (Fla. 1993) ("Next, Jackson asserts that defense counsel failed to present mental health defenses at trial and, thus, was ineffective. We find that the record established that Jackson's counsel obtained the services of a mental health expert and that Jackson's pleadings fail to show what that mental health expert would have testified to if called to testify."). As for Gaskin's sudden proffer of facts in his motion for rehearing, that motion was not verified by Gaskin. Therefore, it could have been, and should have been, denied on that basis alone, without regard to its content. Groover v. State, 22 Fla. L. Weekly S70, 71 (Fla. Feb. 13, 1997) (affirming dismissal of unverified amended 3.850 motion because "rule 3.850 requires that *all* motions be verified, even where the motion amends a previously filed verified motion." (emphasis in original)).

Moreover, Gaskin's motion for rehearing, even had it been verified, came too late. Gaskin knew from the State's response to his initial 3.850 motion that it was contesting the facial sufficiency of his motion. Yet he made no attempt to fully plead this claim. Even after his public records issues were resolved, Gaskin made no attempt to fully plead this claim. Rather, at the Huff hearing, Gaskin maintained that he did not have to plead witnesses' names and potential testimony because it would reveal his defense strategy. (PCR X 243). He maintained this position in his motion for rehearing, but nevertheless disclosed witnesses'

names and the substance of their testimony. (PCR IV 533-51). At no time did Gaskin allege in his motion for rehearing that he could not have pled these facts sooner. Rather, Gaskin refused to plead them for strategic reasons. Under these circumstances, the trial court did not abuse its discretion in denying Gaskin's motion for rehearing. See In re Forfeiture of 1986 Ford PU, 619 So. 2d 337, 338 (Fla. 2d DCA 1993) ("A trial court's refusal to consider matters presented for the first time in a motion for rehearing is generally not an abuse of discretion."); cf. James A. Cummings Inc. v. Larson, 588 So. 2d 1066, 1068 (Fla. 1st DCA 1991) ("There is no abuse of discretion in refusing to accept an expert's opinion presented for the first time in a motion for rehearing where the party had more than six weeks to prepare for the summary judgment hearing in the first place.").

Ultimately, with or without the proffered facts, the record supports the trial court's denial of this claim on its merits. As the trial court detailed in its order, Dr. Krop was well aware of most, if not all, of the evidence Gaskin claims defense counsel failed to uncover and Dr. Krop failed to consider. As he testified in his pretrial deposition, which the trial court appended to its order, Dr. Krop was aware of Gaskin's claims of multiple personalities, auditory hallucinations, possible head injuries, possible schizophrenia, possible drug use, cruelty to animals, bestiality, thumb-sucking until fifteen and a half years of age,

bed wetting into his teens, neglect by his mother, absence of his father, being raised by a great-grandmother and aunt, setting fires in younger years, pedophilia, cross dressing, exhibitionism, voyeurism, visiting a psychiatrist at thirteen, refusing psychiatric treatment, suicidal ideation, and playing Russian roulette on a few occasions. (PCR IV 502-16). He had interviewed Gaskin, administered an MMPI on Gaskin, interviewed Gaskin's aunt, "who [was] a very good historian," interviewed Gaskin's cousin, and reviewed "an extensive polygraph examination report," police reports, and witness statements. (PCR IV 504-05). Although he wanted to see depositions in the case (PCR IV 505), school records (PCR IV 509), and "other (unspecified) information" to "corroborate some of the information that [he] got from the family members and Mr. Gaskins [sic]" (PCR IV 505), Dr. Krop initially diagnosed Gaskin with a schizoid personality disorder (PCR IV 514).[7] While slightly more detailed, Gaskin's motion and proffer of facts do not present any facts that are not subsumed within those areas discussed by Dr. Krop in his deposition.

What is telling about Gaskin's postconviction claim, especially from his motion for rehearing, is that he never alleged

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[7] From the tenor of Krop's deposition, Dr. Robert Davis, who was also appointed confidentially to evaluate Gaskin, apparently diagnosed Gaskin with an antisocial personality disorder. (PCR IV 509). The State's expert, Dr. Jack Rotstein, who was appointed to rebut potential mental mitigation, on the other hand, diagnosed Gaskin with a schizotypal personality disorder. (PCR IV 526).

that Dr. Krop would have testified at the trial if provided the missing records, and what his testimony would have been. He contends over and over again that trial counsel failed to provide background material to Dr. Krop, and that Dr. Krop failed to perform an adequate evaluation because trial counsel failed to provide him with such information. But now that collateral counsel has amassed the undiscovered materials, Gaskin has made no argument that Dr. Krop has seen the materials, that his diagnosis has changed, that he would have testified at the trial, and that he would have rendered opinions helpful to Gaskin's defense. Rather, Gaskin has hired a new expert, Dr. Toomer, whom Gaskin claims "would have been available in 1990 . . . and would have been willing to testify" that Gaskin "is a paranoid schizophrenic," has "clear indications of brain damage, has "a history of dysfunctional childhood, abuse, and long-standing aberrant behavior," may have multiple personality disorder, and met the criteria for both mental mitigators. (PCR IV 543-44). While Dr. Toomer may have been available in 1990, and may have testified to such, defense counsel sought and obtained the appointment of two different experts. It cannot be said that either or both performed incompetent mental health examinations simply because Dr. Toomer would have rendered different opinions. Cf. Rose v. State, 617 So. 2d 291, 295 (Fla. 1993 ("The fact that Rose has now obtained a mental health expert whose diagnosis differs from that of the defense's trial expert

does not establish that the original evaluation was insufficient."); Engle v. Dugger, 576 So. 2d 696, 702 (Fla. 1991) ("The fact that a new mental health expert may have reached the opposite conclusion based on an examination ten years later does not warrant relief."); Elledge v. Graham, 432 So. 2d 35, 37 (Fla. 1983) ("The 'facts' on which Dr. Lewis and counsel rely are not new: they were either available or could have been obtained at the time of sentencing. . . . Petitioner has presented no new information--merely a psychiatrist who draws different conclusions.")

Perhaps the greatest refutation of this claim comes from defense counsel's own statements at the penalty phase. Prior to calling Gaskin's aunt and cousin, defense counsel questioned Gaskin in the court's presence regarding his desire to call a mental health expert in his defense. Trial counsel indicated that Dr. Krop "didn't come up with anything that would help . . . that he could mitigate with." (R 967-68). But he indicated that the State's expert, Dr. Rotstein, did believe that the "substantial impairment" mitigator was applicable. (R 968). However, he informed Gaskin that, if he called Dr. Rotstein as a defense witness, the State could and would cross-examine Dr. Rotstein "on the whole examination and there are some matters in there, like sexual deviants, that sort of thing and also information on prior crimes that he [could] bring out." They had been able to keep

those out so far, but he was "kind of hung on the horns of a dilemma." The doctor's report included a lot of information that he really did not want the jury to know, but if Gaskin wanted to call him just to get that mitigator in, he would do so. Ultimately, Gaskin decided that he did not want to call Dr. Rotstein. (R 968-69).

From this colloquy, it is obvious that counsel feared calling a mental health expert, whether Dr. Krop or anyone else, because there was a lot of extremely damaging information that the State could elicit on cross-examination.[8] For example, Gaskin admitted to Dr. Rotstein that he masturbated in his truck before killing the Sturmfels, that he vaginally penetrated Mrs. Sturmfels after she was dead, and that he wanted to keep Mrs. Rector alive because he wanted to rape her. (SR I 21-24). Gaskin had also admitted shooting a woman making a bank deposit and stealing her bank bag containing $900.00. The sight and sound of her in agony did not bother him. He also masturbated before shooting her. (SR I 19-20). Gaskin similarly admitted murdering Charles Miller four years before the Sturmfel murders. Miller's pleas for mercy did not bother him. (SR I 24-25). Both Dr. Krop's deposition and Dr. Rotstein's report are replete with evidence that Gaskin had previously committed incest, bestiality, exhibitionism, voyeurism,

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[8] Dr. Rotstein's entire report can be found in the supplemental volume of Gaskin's direct appeal.

and pedophilia. (PCR IV 513; SR I 25-26). Gaskin was also an "avid fan of pornographic videos." (SR I 20). According to Dr. Rotstein, Gaskin's "feelings towards people can be at times extremely negative." (SR I 28). Gaskin "'think[s] of bad ways of hurting people.'" (SR I 28).

Given this quality and quantity of harmful information that the State could elicit from any mental health expert on cross-examination, defense counsel obviously made a strategic decision not to call either Dr. Krop or Dr. Rotstein, despite any potential for mitigation.[9] Defense counsel would have been faced with this dilemma whether Dr. Krop was the expert or Dr. Toomer. And he would have faced this dilemma no matter how much information he had provided to Dr. Krop. The fact is that Louis Gaskin is a sexually deviant, extremely violent man who admitted killing three people, wounding a lady in a robbery, and attempting to kill Mr. Rector so he could rape Mrs. Rector without interference. Therefore, this Court should affirm the trial court's summary denial of Claims III, XVIII, and XIX. Cf. Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (finding that defense counsel made reasonable strategic decision not to call mental health expert because of negative aspects of expert's testimony); Ferguson v. State, 593 So. 2d 508, 510 (Fla. 1992) (same); Rose v. State, 675 So. 2d 567, 570 (Fla.

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[9] While strategy is usually an issue to resolve at an evidentiary hearing, the record in this case fully supports this conclusion without a hearing.

1996) (finding that trial counsel made reasonable strategic decision not to call witnesses in guilt phase "because their testimony would have been more detrimental than helpful.").

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED CLAIM V, RELATING TO THE ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND DURING THE GUILT PHASE (Restated).

The State relies on its arguments made in Issue I relating to this claim.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM VI, RELATING TO THE CONSTITUTIONALITY OF THE CCP INSTRUCTION (Restated).

In Claim VI of his amended 3.850 motion, Gaskin claimed that he deserved to be resentenced because his jury received the unconstitutional CCP instruction that this Court struck down in Jackson v. State, 648 So. 2d 85 (Fla. 1994). (PCR III 340-41). He alleged that he "objected to the vagueness of the instruction" in a pretrial motion, which the trial court denied. (PCR III 340). Enigmatically, he also alleged in a single sentence that trial counsel was "ineffective for failing to object." (PCR III 341).

The trial court found the claim procedurally barred and, in the alternative, harmless beyond a reasonable doubt. (PCR IV 445-

46). The record supports these findings. The original trial record reveals that Gaskin's pretrial motion challenged the CCP aggravating factor, not the instruction. (R 1193-1217). Moreover, Gaskin made no challenge to the CCP instruction on direct appeal. See Gaskin v. State, 591 So. 2d 917 (Fla. 1991). Thus, the trial court properly denied Gaskin's claim as procedurally barred. See Bush v. State, 682 So. 2d 85, 88 (Fla. 1996) (holding that defendant must object to instruction in trial court and challenge instruction on appeal for Jackson to apply on collateral review).

As for Gaskin's claim of ineffective assistance of counsel, it is inappropriate to restyle a barred claim as one of ineffectiveness in order to overcome the procedural bar, especially where the allegation is no more than a one-sentence conclusion. See Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995). Even were such a conclusory sentence adequate, Gaskin failed to show prejudice. And even if he had, the trial court properly found, in the alternative, that the facts support a finding of CCP under any definition of the terms. As the original trial court stated in finding the CCP factor applicable for the murder of Robert Sturmfels:

> The First Degree Murder of ROBERT STURMFELS was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In advance of his trip from Bunnell to Palm Coast the defendant loaded his car with the .22 caliber rifle and cutters for telephone wires if needed. He actually cut the phone line at the

> Rector house prior to his commission of the offenses. In addition, the defendant carried and outfitted himself with gloves, a scarf, goggles, and a camouflage shirt. The victim, ROBERT STURMFELS, did not provoke the defendant nor did he offer any resistance to the defendant. The defendant coldly and calmly thought and thought of the killing as he circled the house of the STURMFELS, finally he shot only to have a misfire. He thought some more and circled the house again and then shot ROBERT STURMFELS three times once in the chest, once in the shoulder area, and a third in the neck. Finally, the defendant entered the house and from close range shot a bullet into ROBERT STURMFELS' head causing the fatal blow.

(PCR IV 474). As for Mrs. Sturmfels, the trial court substituted the following two concluding sentences: "He thought some more and circled the house again and then shot GEORGETTE STURMFELS three times near the den, and once from the other end of the house through the Christmas tree striking her chest. Finally, the defendant entered the house and from close range shot a bullet into GEORGETTE STURMFELS' head causing the fatal blow." (PCR IV 479).

Under these facts, Gaskin clearly committed these murders in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, regardless of how these terms were defined to the jury. Therefore, even if trial counsel's conduct was deficient in failing to challenge the instruction at trial, Gaskin was not prejudiced thereby. Cf. Foster v. State, 654 So. 2d 112 (Fla. 1995) (finding Jackson instruction harmless where facts supported CCP finding under any definition of terms). As a result,

this Court should affirm the trial court's finding that this claim was procedurally barred or, in the alternative, nonprejudicial.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM VII, RELATING TO THE JURY'S PROPER ROLE IN SENTENCING (Restated).

In Claim VII of Gaskin's amended 3.850 motion, he alleged that "[t]he trial court and the prosecutor misled the jury concerning the significance that is attached to its sentencing verdict under the laws of the State of Florida." (PCR III 341-44). The trial court denied the claim as procedurally barred, since trial counsel failed to object to the allegedly erroneous comments and Gaskin failed to raise the issue on appeal. (PCR IV 447). This ruling was proper. See Bryan v. Dugger, 641 So. 2d 61 (Fla. 1994); Medina v. State, 573 So. 2d 293 (Fla. 1990).

To overcome the bar, Gaskin alleged in a single sentence that "counsel's failure to object at trial and to raise this issue on direct appeal is ineffective assistance of counsel . . . ." (PCR III 344). The State submits that such a conclusory claim is insufficient to plead a claim for relief and cannot overcome the procedural bar. See Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995). Even were it sufficient, the record refutes such a claim. As the trial court found, "this alternative attempt to gain relief on this argument is equally without merit because the comments made

regarding the jury's role at sentencing were not improper; therefore, counsel's failure to object was not ineffective." (PCR IV 447). The trial court also noted that the jury was given the following instruction: "Your recommendation is important and will be given great weight by this Judge." (PCR IV 447 (quoting R 998). The trial court's finding was proper. See Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Cave v. State, 529 So. 2d 293 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988). Therefore, this Court should affirm the trial court's finding that this claim was procedurally barred and that defense counsel was not ineffective for failing to object to the comments.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM VIII, RELATING TO NONSTATUTORY AGGRAVATION (Restated).

In Claim VIII of his amended 3.850 motion, Gaskin alleged that there were "many non-statutory aggravating factors presented at trial." The only one identified was the judge and jury's consideration of four counts of first-degree murder, instead of only two that were proper. (PCR III 344-45). The trial court found this claim procedurally barred, because counsel could have and should have raised it on direct appeal. (PCR IV 447-48). This ruling was proper. See Medina v. State, 573 So. 2d 293 (Fla. 1990). After all, Gaskin challenged as a violation of double

jeopardy the trial court's adjudications of guilt for all four counts. Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991).

Alternatively, the trial court found the claim without merit:

> Additionally, in agreement with the State, the Court finds that the fact that the jury found the Defendant guilty of both premeditated and felony murder does not mean that they believed he had committed four murders instead of the actual two. It is quite evident that they were aware that there were only two murders. Such a ministerial error does not show the consideration of nonstatutory aggravation.

(PCR IV 448). This finding is supported by common sense. Therefore, this court should affirm the trial court's finding that this claim was procedurally barred and, in the alternative, without merit.

ISSUE IX

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM X, RELATING TO THE ORIGINAL TRIAL COURT'S REFUSAL TO CHANGE VENUE (Restated).

In Claim X of his amended 3.850 motion, Gaskin alleged that he was "convicted and sentenced to death in a proceeding so fundamentally and irreparably tainted by the all-pervasive pretrial media coverage as to deny him the fair trial and sentencing proceeding guaranteed by the [constitution]." (PCR III 347-51). The trial court denied the claim as procedurally barred because Gaskin challenged on direct appeal the trial court's refusal to

change venue. (PCR IV 449). This ruling was proper. See Gaskin v. State, 591 So. 2d 917, 919-20 (Fla. 1991). Gaskin cannot use postconviction as a second appeal. Medina v. State, 573 So. 2d 293 (Fla. 1990).

ISSUE X

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM XII, RELATING TO THE CONSTITUTIONALITY OF THE DEATH PENALTY STATUTE (Restated).

In Claim XII of his amended 3.850 motion, Gaskin challenged the constitutionality of Florida's death penalty statute. (PCR III 353-55). The trial court denied this claim on the merits based on this Court's numerous opinions rejecting such a challenge. (PCR IV 450). This ruling was proper. See, e.g., Pooler v. State, 22 Fla. L. Weekly S697, 699 (Fla. Nov. 6, 1997). Alternatively, the trial court could have found this claim procedurally barred, since Gaskin raised these claims on direct appeal. See Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991). Either way, this Court should affirm the trial court's denial of this claim.

ISSUE XI

WHETHER THE TRIAL COURT PROPERLY DENIED AS FACIALLY AND LEGALLY INSUFFICIENT CLAIM XIII, RELATING TO OMISSIONS IN THE RECORD AND THE ALLEGED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO ENSURE A COMPLETE RECORD (Restated).

In Claim XIII of his amended 3.850 motion, Gaskin claimed in a mere eight sentences that "crucial Bench Conferences were held off the record, or were not properly transcribed," and that appellate counsel was ineffective for not ensuring "that an accurate and complete record on appeal was filed." (PCR III 355). The trial court denied the claim as legally insufficient because the proper vehicle for a claim of ineffective assistance of appellate counsel is a petition for writ of habeas corpus, not a motion for postconviction relief. (PCR IV 450). That ruling was proper. See Smith v. State, 400 So. 2d 956, 960 (Fla. 1981).

Alternatively, the trial court could have found the claim procedurally barred because Gaskin raised this claim on direct appeal. See Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991). Finally, the trial court could have found Gaskin's claim facially insufficient because Gaskin failed to show any errors that occurred during those proceedings that were omitted from the record on appeal. Cf. Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Turner v. Dugger, 614 So. 2d 1075, 1079-80 (Fla. 1992). For any, or all, of

these reasons, this Court should affirm the trial court's denial of this claim.

ISSUE XII

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM XIV, RELATING TO THE STATE'S ALLEGED OVERBROAD ARGUMENT OF AGGRAVATORS (Restated).

In Claim XIV of his amended 3.850 motion, Gaskin alleged that the State made improper comments during its penalty phase closing argument. Specifically, he claimed that the State (1) failed to inform the jury of the limiting instruction relative to the HAC aggravating factor, (2) argued the applicability of the CCP factor when the facts did not support it, and (3) failed to inform the jury that it could not double the "pecuniary gain" and "felony murder" aggravating factors. (PCR III 356-57). The trial court denied this claim as procedurally barred because Gaskin could have and should have raised this issue on appeal. (PCR IV 450). This ruling was proper. See Medina v. State, 573 So. 2d 293 (Fla. 1990).

To overcome the bar, Gaskin alleged in a single sentence that, "[t]o the extent Mr. Gaskin's trial counsel did not properly preserve this claim, Mr. Gaskin received ineffective assistance of counsel." (PCR III 357). The trial court found this allegation barred as well, since "a Defendant may not circumvent the rule that postconviction proceedings cannot serve as a second appeal" by

raising the issue under the guise of ineffective assistance of counsel. (PCR IV 450). This ruling was proper as well. See Medina, 573 So. 2d at 295. Therefore, this Court should affirm the trial court's denial of this claim.

ISSUE XIII

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM XV, RELATING TO ALLEGED JUROR MISCONDUCT (Restated).

In Claim XV of his amended 3.850 motion, Gaskin claimed that juror misconduct occurred in his trial. Citing pretrial publicity, Gaskin found it "unlikely" and "hard to believe" that the jurors were honest when they stated that they could be impartial. Gaskin also believed that the jury could not have properly considered and recommended death for both murders after less than 40 minutes of deliberation. (PCR III 358-59). The trial court denied the claim as procedurally barred since the grounds were based solely on the trial record and Gaskin could have raised the claim on direct appeal. Alternatively, the trial court denied the claim because Gaskin "[did] not provide any evidence of misconduct other than conclusory allegations; therefore, this claim is likewise legally insufficient." (PCR IV 451). These rulings were proper. See Lambrix v. State, 559 So. 2d 1137, 1138 (Fla. 1990).

ISSUE XIV

WHETHER THE TRIAL COURT PROPERLY DENIED AS LEGALLY INSUFFICIENT CLAIM XVI, RELATING TO GASKIN'S ALLEGED INABILITY TO INTERVIEW THE JURORS IN HIS CASE (Restated).

In Claim XVI of his amended 3.850 motion, Gaskin claimed that Florida Rule of Professional Responsibility 4-3.5(d)(4) unconstitutionally prevented his collateral counsel from "investigating any claims of jury misconduct that may be inherent in the jury's verdict." (PCR III 360-62). The trial court denied the claim as procedurally barred and facially insufficient since Gaskin relied solely on the trial record to make conclusory allegations of potential misconduct. (PCR IV 451). That ruling was proper. See Lambrix v. State, 559 So. 2d 1137 (Fla. 1990).

Alternatively, the trial court could have ruled that Gaskin had no standing to raise this issue since the rule of professional conduct did not apply to him. Moreover, the law allows juror interviews under certain circumstances. See Roland v. State, 584 So. 2d 68, 70 (Fla. 1st DCA 1991) (finding no criminal rule allowing for postverdict juror interviews, but noting application for such by motion "as a matter of practice"); Sconyers v. State, 513 So. 2d 1113, 1115 (Fla. 2d DCA 1987) (construing criminal rules to allow postverdict juror interviews upon motion which makes a prima facie showing of juror misconduct); cf. Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991) (affirming denial of defendant's motion to conduct postverdict interview of jurors where defendant failed

to make prima facie showing of misconduct); Shere v. State, 579 So. 2d 86, 94 (Fla. 1991) (affirming denial of defendant's motion to conduct postverdict interview of jurors); Fla. R. Civ. P. 1.431(h) ("A party who believes that grounds for legal challenge to a verdict exists may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to challenge."). If Gaskin had made a prima facie showing of misconduct, he could have obtained juror interviews. His inability to meet the requirements, however, did not affect the constitutionality of his conviction and sentence. Therefore, this claim was properly denied and should be affirmed.

ISSUE XV

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM XVII, RELATING TO AN ALLEGED LACK OF A FAIR CROSS-SECTION OF THE COMMUNITY AMONG THE VENIRE (Restated).

Gaskin alleged in Claim XVII of his amended motion that he was denied equal protection because he was tried "before an all white jury from which citizens had been purposely excluded based on race." He also alleged that his attorney was ineffective for failing to object to the "systematic discrimination" and for failing to ensure that bench conferences that occurred during jury selection were recorded. (PCR III 363-64). The trial court found this claim procedurally barred because it should have been raised on direct appeal. (PCR IV 451). This ruling was proper. See

Rivera v. Dugger, 629 So. 2d 105 (Fla. 1993); Nelms v. State, 596 So. 2d 441 (Fla. 1992). As for Gaskin's ineffectiveness claim, the trial court found that Gaskin was merely rephrasing the issue as an ineffectiveness claim in order to escape the procedural bar, which is inappropriate. This ruling was likewise proper. See Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994); Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990); Medina v. State, 573 So. 2d 293 (Fla. 1990).

ISSUE XVI

WHETHER THE TRIAL COURT PROPERLY DENIED CLAIMS XVIII AND XIX RELATING TO THE ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL AND INCOMPETENT MENTAL HEALTH EVALUATIONS (Restated).

The State relies on its arguments made in Issue IV relating to this claim.

ISSUE XVII

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM XX, RELATING TO THE ALLEGED INTRODUCTION OF IRRELEVANT MATERIAL AT GASKIN'S TRIAL (Restated).

Gaskin alleged in Claim XX of his amended 3.850 motion that the trial court improperly allowed the State to introduce into evidence at his trial a camera seized from his home, a partially smoke cigar found outside the Rectors' home, and a pair of Gaskin's boots. (PCR III 378-79). The trial court found this claim procedurally barred since Gaskin raised the identical claim in his

direct appeal. (PCR IV 454). This ruling was proper. See Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992).

ISSUE XVIII

WHETHER THE TRIAL COURT PROPERLY DENIED AS LEGALLY INSUFFICIENT CLAIM XXII, RELATING TO ALLEGED CUMULATIVE ERROR (Restated).

In Claim XXII of his amended 3.850 motion, Gaskin alleged that "the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive." (PCR III 381-82). In denying this claim, the trial court found that Gaskin raised some of the alleged errors on appeal, and thus those "have already been addressed and remedied, if necessary." As for the other alleged errors, the trial court found that "the alleged errors, in the instant motion, consist of procedurally barred claims, facially insufficient claims, and claims conclusively refuted by the record. These 'errors' provide no basis for relief. Therefore, a cumulative effect of errors is not present in this case and no reversible error has been demonstrated." (PCR IV 454). These rulings were proper. See Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) ("In spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not be seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct

appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So. 2d 419 (Fla. 1988).

ISSUES XIX, XX AND XXI

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIMS XXIII, XXIV AND XXV, ALLEGING RESPECTIVELY THAT THE "FELONY MURDER" AGGRAVATOR IS AN "AUTOMATIC" AGGRAVATOR, PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT AND INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT, AND THAT THE JURY INSTRUCTIONS SHIFTED THE BURDEN TO GASKIN TO PROVE THAT LIFE WAS THE APPROPRIATE PENALTY (Restated).

To avoid duplicative responses, the State relies on its arguments made in Issue I, supra, regarding these claims.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's order denying Appellant's motion for postconviction relief without an evidentiary hearing.

Respectfully submitted,

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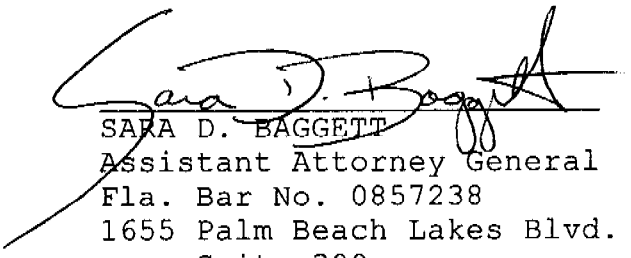
Attorney General



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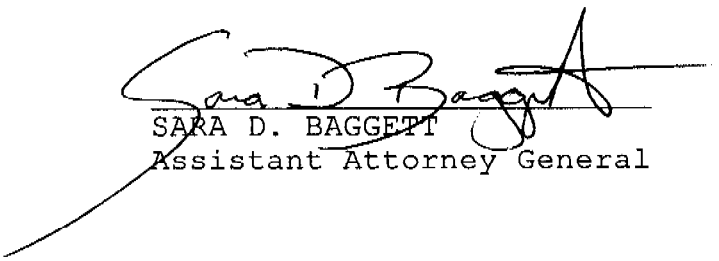
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Terri L. Backhus, Chief Assistant CCRC, Office of the Capital Collateral Regional Counsel, 405 N. Reo Street, Suite 150, Tampa, Florida 33609, this 12th day of February, 1998.



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